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Larry Norton, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: MUR 5440 Respondents The Media Fund and Harold Ickes

Dear Mr. Norton:

On behalf of The Media Fund, ("TMF") and Harold Ickes this letter is submitted in response to a complaint filed with the Federal Election Commission by Bush-Cheney '04, Inc.("Bush/Cheney") and the Republican National Committee ("RNC") ("Complainants").

Bush/Cheney and the RNC misstate the law and invent novel legal theories relying exclusively on an advisory opinion that does not apply to TMF or Mr. Ickes to support their otherwise baseless complaint. They fail to provide facts or other information in support of their claims. For the reasons set forth below, the Commission should find no reason to believe that TMF or Mr. Ickes violated the Federal Election Campaign Act of 1971, as amended, ("FECA") or the Commission's regulations.

1. TMF is not a political committee.

TMF is a §527 political organization registered with the Internal Revenue Service. TMF is not a political committee required to register with the FEC. The statutory test for whether an entity is a Federal "political committee" is whether it receives "contributions" or makes "expenditures" as those terms are defined in FECA. In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Supreme Court narrowly construed the definition of "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 79-80. Similarly, the Court construed "contributions" as those donations that would be used to make contributions to candidates, to make express advocacy communications, or to make expenditures coordinated with candidates. *Buckley*, 424 U.S. at 77-78, 80.

These terms were not redefined by Congress in the Bipartisan Campaign Reform Act of 2002 (BCRA) and the Supreme Court did not reinterpret them in *McConnell v. FEC,* 124 S.Ct. 619 (2003). Congress enacted BCRA to carefully draw a second bright line for non-party, non-

candidate organizations – targeted broadcast ads that run within 30 days of a primary election or 60 days of a primary election that refer to a clearly identified candidate for federal office may not be paid for by or with funds from a national bank, corporation, or labor organization. 2 U.S.C. §§434(f)(3); 441b(b)(2). Congress further required that the names and addresses of contributors who contributed $1,000 or more to the account used to pay for electioneering communications are disclosed within 24 hours. 2 U.S.C. § 434(f). In *McConnell,* the Supreme Court held that this new bright line was constitutional, even if the ads did not contain express advocacy, because the electioneering communication "components are both easily understood and objectively determinable. Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy" does not apply to electioneering communications. *McConnell* at 689. BCRA did not amend FECA to require organizations that run electioneering communications to register as political committees nor did the *McConnell* Court impose such a requirement.

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Thus, under FECA, 527 organizations such as The Media Fund, operating independently of any Federal candidate or political party that do not make contributions to Federal candidates and do not use any funds for communications that expressly advocate the election or defeat of a clearly identified Federal candidate are not Federal political committees.[1] This has been the law for thirty years and it remains so, today. There is no basis for the FEC to change these rules in its enforcement process.

Recent Congressional action and the *McConnell* decision illustrate that there has not been fundamental change in the definition of "political committee" in FECA.

a. Congress Did Not Change the Definition of Political Committee

Congress has not changed the fundamental legal definitions of "expenditure" and "political committee" since the inception of FECA and the Supreme Court's review of its constitutionality in *Buckley.* The basic definitions provided by Congress in the 1974 FECA amendments have remained unchanged in the statute for thirty years covering seven presidential elections. A review of the history of amendments to FECA confirms this.

(1). 1997 – 1999 History of Legislative Proposals

In 1997, Senators McCain and Feingold first introduced legislation to block the use of corporate and union general treasury funds for "unregulated electioneering disguised as 'issue ads.' *See* 143 Cong. Rec. S159 (Jan. 21, 1999); 143 Cong. Rec. S10106-12 (Sep. 29, 1997)." Brief for Defendants at 50, *McConnell v. FEC*, 251 F.Supp. 2d 176 (D.D.C. 2003). This early version of the McCain-Feingold bill "addressed electioneering issue advocacy by redefining 'expenditures' subject to FECA's strictures to include public communications at any time of year, and in any medium, whether broadcast, print, direct mail, or otherwise, that a reasonable person would understand as advocating the election or defeat of a candidate for federal office." *See* 143 Cong. Rec. S10107, 10108. Brief for Defendants at 50, *McConnell*, 251 F.Supp. 2d 176.

[1] Contrary to complainants' claims and regardless of the express or implied purpose of an organization, registration is not automatically triggered. Only after the contribution or express advocacy thresholds are met is registration triggered. Further, participation in joint fundraising, as more fully explained later, does not alter this conclusion.

BCRA's sponsors abandoned their effort to redefine "expenditure" and instead proposed the "narrow[er]" regulation of "electioneering communications," "in contrast to the earlier provisions of the ... bill." Brief for Defendants at 50, *McConnell*, 251 F.Supp. 2d 176 *quoting* 144 Cong. Rec. H3801, H3802 (June 28, 2001). The Commission explained in its brief to the District Court:

> In part to respond to concerns raised by the bill's opponents about its constitutionality, Senators Snowe and Jeffords proposed an amendment to McCain-Feingold to draw a bright line between genuine issue advocacy and a narrowly defined category of television and radio advertisements, broadcast in proximity to federal elections, 'that constitute the most blatant form of [unregulated] electioneering.' 144 Cong. Rec. S906, S912 (Feb. 12, 1998). Senator Snowe explained that this approach had been developed in consultation with constitutional experts, to come up with 'clear and narrowing wording' which, in contrast to the earlier provisions of the McCain-Feingold bill, supra, strictly limited the reach of the legislation to TV and radio advertisements that mention a candidate within 60 days of a general election, or 30 days of a primary, so as specifically to avoid the pitfalls of vagueness identified in *Buckley*. Snowe-Jeffords was adopted as an amendment to both the Shays-Meehan and McCain-Feingold bill, 144 Cong. Rec. H3801, H3802 (June 28, 2001). Brief for Defendants at 50, *McConnell v. FEC*, 251 F.Supp. 2d 176.

As the sponsors explained, "Congress self-consciously evaluated ways to limit the reach of the law without sacrificing its purpose, so as to leave unregulated as many avenues of speech as possible." Opposition Brief for Defendants at I-84, *McConnell v. FEC,* 251 F. Supp. 2d 176 (D.D.C. 2003).

(2). 2000 Legislation Regarding 527 Political Organizations

In 2000, Congress considered the growing number of political organizations that were not subject to the reporting requirements of FECA and passed legislation addressing 527s that are not Federal political committees. This law requires them to register with the IRS and file disclosure reports with the IRS listing their donors and disbursements -- precisely because they are not required to register at the FEC or report to the FEC. H.R. 4762, 106th Cong. (2000) (enacted).

The 527 disclosure law did not change the definition of "expenditure" or require these organizations to register as political committees with the FEC even though at the time this legislation was debated and enacted it was understood by Congress that 527 organizations that were engaging in non-express advocacy communications impacting Federal elections and were spending millions of dollars to do so. In his testimony before the House Ways and Means Committee on June 20, 2000, Senator McCain identified the lack-of disclosure as the problem

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that Congress needed to narrowly address. Quoting from a newspaper article Senator McCain stated that special interests "can donate unlimited sums to entities known as 'section 527 committees,' beyond the reach of the campaign-reporting laws designed to curb such abuses." *Disclosure of Political Activities of Tax Exempt Organizations: Hearing on H.R.4717 Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 106th Cong. (June 20, 2000) (statement of Sen. John McCain).

The Committee and Dissenting Views presented in the House Report shared the same reasons for changing the law to only require disclosure. Neither suggested that the solution to the problem was for 501(c) or 527 organizations engaged in the exempt purpose of "influencing or attempting to influence" a federal election to register as a political committee with the FEC or file disclosure reports with the FEC. The Committee was clear about its goal: "[T]he bill does not regulate political activities, but instead merely requires the disclosure of such activities..." H.R. Rep. No. 106-702, at 15 (2000).

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Pro-reform Members argued for an even narrower disclosure bill than H.R. 4717 that did not cover 501(c) organizations -- one that was more likely to pass in 2000. H.R. 4672 was a solution adopted by the House and Senate and approved by the President that only required 527 organizations to register and file periodic disclosure reports with the IRS – not the FEC. In the summer of 2000, Congress did not limit in any way a 527's ability to continue to legally engage in non-express advocacy communications for the exempt function of "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office." Congress did not require any additional 527s to register as political committees with the FEC and it did not change the FECA definition of political committee when it passed this legislation.

(3). 2002 BCRA History

In 2002, BCRA was passed to address two primary issues of concern related to soft money. First, it prohibits federal candidates and national party committees from raising and spending non-federal funds. Second, it prohibits the use of corporate and labor funds to pay for electioneering communications during a limited period of time shortly before a Federal primary or general election. In BCRA, rather than amend the general definition of "expenditure," Congress tacked the new term "electioneering communications" to FECA's prohibition on corporate and labor union contributions. 2 U.S.C. § 441b(b)(2). The FEC explained to the Supreme Court that BCRA was "a refinement of pre-existing campaign-finance rules" rather than a "repudiation of the prior legal regime" because BCRA merely extended the reach of Federal election law from express advocacy to "electioneering communications" paid for with corporate or labor union general treasury funds within a short time period before Federal elections. Brief for Appellees at 27, *McConnell v. FEC*, 124 S. Ct. 619 (2003).

BCRA's Congressional sponsors supported the limited purpose of BCRA in their arguments to the Supreme Court in *McConnell*, contending that "[Congress] made another 'cautious advance' in the long history of 'careful legislative adjustment of the federal electoral laws' to reflect ongoing experience ... It drew new lines that respond directly to the demonstrated problem, in a way that honors First Amendment values of clarity and objectivity,

and does not 'unnecessarily circumscribe protected expression.'" Brief for Defendants at 43, *McConnell v. FEC*, 124 S.Ct. 619 (2003). They argued that the express advocacy meaning developed over the years by the Court provided a guide for Congress into which they said the electioneering communication restriction was narrowly applied: "It was, after all, principally a concern for clarity that first led this Court to adopt the 'express advocacy' test as a gloss on FECA's language." Brief for Intervenor-Defendants at 59, *McConnell v. FEC,* 251 F. Supp. 2d 176 (D.D.C. 2003) (Civ. No. 02-582) (citing *Buckley*, 424 U.S. at 40-44, 79-80).

The Congressional sponsors explained that BCRA was crafted by using the express advocacy analysis developed by the Court as a roadmap with two principle concerns: (1) eliminating vagueness and (2) assuring that restrictions were not overbroad since they were "directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.'" Brief for Intervenor-Defendants at 62, *McConnell*, 251 F.Supp. 2d 176, (quoting *Buckley*, 424 U.S. at 80). "Those are precisely the precepts to which Congress adhered to in framing (the electioneering communication provisions)." Brief for Intervenor-Defendants at 62, *McConnell*, 251 F.Supp. 2d 176.

In its argument to the Court, the FEC, too, was explicit that BCRA left unregulated all public communications other than express advocacy and "electioneering communications." "[B]ecause of the exceptional clarity of the lines drawn by BCRA's primary definition, any entity truly interested in airing electioneering communications may easily avoid the source limitation on such communications by simply ... running the advertisement outside the 30- or 60-day window..." Brief for Appellees at 92, *McConnell,* 124 S.Ct. 619. The FEC explained that interest groups could continue to "run print advertisements, send direct mail, or use phone banks to target a particular candidate in the days before an election in his district without even having to take the minimal step of using a separate segregated fund." Brief for Appellees at 95 n. 40, *McConnell,* 124 S.Ct. 619. BCRA's sponsors agreed: "[T]he electioneering communications definition only applies to TV and radio broadcasts, leaving similar communications in alternative media unregulated. Newspaper and magazine advertising, mass mailings, internet mail, public speeches, billboards, yard signs, phone banks, and door-to-door campaigns all fall outside its narrow scope..." Brief for Intervenor-Defendants at 158, *McConnell,* 251 F.Supp. 2d 176.

When Congress revises a statute, its decision to leave certain sections unamended constitutes at least acceptance, if not explicit endorsement, of the preexisting construction and application of the unamended terms. *Cottage Sav. Ass'n v. Comm'r,* 499 U.S. 554, 562 (1991). The administrative agency that interprets and enforces the law has no authority to effectuate "amendments" that Congress considered but abandoned. Post-*McConnell*, only Congress may seek to expand government regulation beyond express advocacy and "electioneering communications," and in order to do so it would have to craft the statute in a manner that demonstrates that the additional restriction is not unconstitutionally vague and is narrowly tailored to serve the requisite governmental interest, as McConnell so found regarding "electioneering communications." *See Anderson v. Separ,* No. 02-5529, slip op. at 22 (6th Cir. Jan 16, 2004).

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Thus, existing law remains unchanged in this area, as it has for thirty years. The Commission has no reason or Congressional authority to unsettle this area of the law in an enforcement action.

b. No Judicial Precedent from Buckley v. Valeo through McConnell v. FEC Changed the Definition of Political Committee

The FEC acknowledges in a recent Notice of Proposed Rulemaking (NPRM) that since *Buckley,* neither Congress nor the FEC has amended the FECA to change the definition of "political committee." NPRM, 69 Fed. Reg. 11736-37.

In *Buckley*, the Court was concerned that the term "political committee...could be interpreted to reach groups engaged purely in issue discussion," noting that lower courts had interpreted the term "more narrowly" to include only those groups whose major purpose is the nomination or election of Federal candidates. *Buckley*, 424 U.S. at 79-80. In addition, the Court construed the definition of "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Similarly, the Court construed "contributions" as only those donations that would be used to make contributions to candidates, to make express advocacy communications, or to make expenditures coordinated with candidates. *Buckley*, 424 U.S. at 77-78, 80.

The Supreme Court construed the "political committee" reporting requirements to apply only to those groups controlled by Federal candidates or to those groups that receive "contributions" or make "expenditures" in excess of $1,000 and whose major purpose is the nomination or election of a federal candidate. *Buckley,* 424 U.S. at 663. Thus, the major purpose test in *Buckley* was a limitation on the number of groups that might otherwise qualify as political committees because they received "contributions" or made "expenditures" in excess of $1,000.

In *FEC v. GOPAC,* 917 F. Supp. 851 (D.D.C. 1996), the District Court specifically rejected the Commission's attempt to treat GOPAC as a Federal political committee. GOPAC's avowed purpose was to support Republican candidates for State legislatures, so that ultimately Republicans could "capture the U.S. House of Representatives." *GOPAC,* 917 F. Supp. at 854. The District Court rejected the FEC's position and concluded that under *Buckley*, an organization is a "political committee" only "if it receives contributions and/or makes expenditures of $1,000 or more **and** its major purpose is the nomination or election of a particular candidate or candidates for federal office." *GOPAC,* 917 F. Supp. at 859 (emphasis added). The FEC declined to appeal this decision. This interpretation was reaffirmed, post-*McConnell*, in *FEC v. Malenick*, Civ. No. 02-1237, slip. op. at 8, (D.D.C. Mar. 30, 2004) (order granting summary judgment).

In December 2003, the Supreme Court in *McConnell* upheld the constitutionality of BCRA, but did not reinterpret the definitions of "political committee" or "expenditure," contrary to the assertions made by some "born again" campaign finance reformers such as Bush/Cheney.[2]

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[2] In laying out the history of the Courts' rulings interpreting these key statutory terms, the *McConnell* Court said: In *Buckley* we began by examining 11 U.S.C. § 608(e)(1) (1970 ed. Supp. IV), which restricted expenditures "'relative to a clearly identified candidate,'" and we found that the phrase "'relative to' was impermissibly vague."

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While the Court seems to suggest in *McConnell* that it may be constitutional for **Congress** to re-write the definitions of "political committee" or "expenditure" in the future to cover more than just express advocacy, the Court specifically re-affirmed that under current law, 527 groups "remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)." 124 S.Ct. at 686 (emphasis added). Thus, the *McConnell* Court – like Congress – did not change the definitions of expenditure or political committee.

2. AO 2003-37 does not Apply to The Media Fund

The complaint relies upon an advisory opinion issued to a sham organization, Americans for a Better Country ("ABC"), to support its legal theory against TMF. Interestingly, between September 2, 2003 (the date ABC registered as a political committee with the FEC) through the April 15, 2004 quarterly report, ABC reported no activity. Zero contributions received. Zero expenditures made. Zero debt. Given the publicity and notoriety this putative organization has received, it seems very odd that it has not received at least one contribution (direct or in-kind), made at least one expenditure, or incurred some debt over the past seven months! They apparently did not even incur any costs or make any expenditures related to their request for an advisory opinion.

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Nevertheless, the Complainants repeatedly reference AO 2003-37 throughout their complaint against TMF and often as the sole support for their novel legal theory. One wonders if the Complainants were behind ABC's request given that the only apparent use for this non-existent political committee is that the advisory opinion it received has subsequently been used as support for complaints against other organizations such as TMF.[3]

However contrary to their assertations, AO 2003-37 does not apply to TMF. The only relevant part of this advisory opinion in this matter is found in the first paragraph. "The fact that ABC is a political committee is particularly relevant. This opinion does not set forth general

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424 U.S., at 40-42, 96 S.Ct. 612. We concluded that the vagueness deficiencies could "be avoided only by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Id.* At 43, 96 S.Ct. 612. We provided examples of words of express advocacy, such as "'vote for,' 'elect,' 'support,' ... 'defeat,' [and] 'reject,'" *Id.* At 44 n. 52, 96 S.Ct. 612, and those examples eventually gave rise to what is now known as the "magic words" requirement.

We then considered FECA's disclosure provisions, including 2 U.S.C. §431([9]) (1979 ed. Supp. IV), which defined "'expenditur[e]' to include the use of money or other assets 'for the purpose of ... influencing' a federal election.'" *Buckley*, 424 U.S., at 77, 96 S.Ct. 612. Finding the 'ambiguity of this phrase" posed "constitutional problems," *ibid*, we noted our "obligation to construe the statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness," *id.* At 77-78, 96 S.Ct. 612 (citations omitted). "To insure that the reach" of the disclosure requirement was "not impermissibly broad, we construe[d] 'expenditure' for the purpose of that section in the same way we construed the terms of § 608(e) – to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* At 80, 96 S.Ct. 612 (footnote omitted). *McConnell*, 124 S.Ct. at 688 (footnote omitted).

MCFL applied the same construction to the ban, at 2 U.S.C. § 441b, on any corporate or labor union "' expenditure in connection with any [federal] election.'" 479 U.S. at 249. See *McConnell,* 124 S.Ct. at 688 n. 76.

[3] The Commission has frequently declined to answer requests for advisory opinions when the questions were largely speculative or theoretical. See 2 U.S.C. §437f.

standards that might be applicable to other tax-exempt entities." AO 2003-37, at 1. TMF is not a political committee. Thus, AO 2003-37 does not apply in this matter.

The general standards set forth in AO 2003-37 do not apply to TMF. Specifically, the "promotes, supports, attacks or opposes" standard for communications does not apply to tax-exempt organizations like TMF. AO 2003-37, at 1, 9-10. The alleged prohibition against soliciting non-federal funds in fundraising communications that use "the names of specific Federal candidates in a manner that will convey [its] plan to use those funds to support or oppose specific federal candidates..." does not apply to tax-exempt organizations like TMF. AO 2003-37, at 1, 19-20.

The FEC should not pursue this matter against TMF in an enforcement process when the legal theory supporting the complaint, issued to a sham organization, specifically states that it does not apply to tax-exempt organizations like TMF. Because TMF has and will continue to act in compliance with well-established law regarding specifically defined terms, such as "political committee," "expenditure," and "contribution" the Commission should find that there is no reason-to-believe that TMF violated FECA or the Commission's regulations.

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3. There has been no coordination with Kerry for President or the Democratic National Committee by TMF or Harold Ickes.

TMF has not made any expenditures coordinated with John Kerry for President, Inc. ("KFP") or the Democratic National Committee ("DNC"). The FEC established a three-prong test for determining if a communication is coordinated: (1) the communication must be paid for by someone other than a candidate or party committee; (2) the communication must meet a "content standard"; and (3) the interactions between the person paying for the communication and the candidate or political party committee must satisfy a "conduct standard." 11 C.F.R. §109.21. The facts in this matter do not meet the required conduct standard, therefore, the TMF television ads were not coordinated with KFP or the DNC.

a. TMF may run ads in media markets where Kerry for President and Bush/Cheney '04 also run ads without violating FEC coordination regulations.

First, Complainants assert that coordination resulted when TMF and KFP ran television ads during March 10 – 19, 2004 in overlapping media markets. Simply running ads in overlapping media markets, however, is not one of the six conduct standards carefully established by the FEC in 11 C.F.R. §104.9(21)(d)(1)-(6). For there to be coordination, there needs to be much more than an overlapping media buy. There is no evidence that any of the actual conduct elements established by the Commission were met.

The mere observation that an independent organization ran television ads in markets that overlap with a candidate or party's media buy is not a sufficient basis upon which the Commission could find a reason to believe that a violation of FECA occurred. The observation of publicly available information is not "self-evident truth" that coordination occurred or that an FEC investigation should be undertaken. There are a finite number of media markets in the United States. There are even smaller number of media markets when considering the states that

are expected to be battleground states in the 2004 elections – a conclusion that is neither novel nor vague to even the casual observer of presidential elections. At any given time there will certainly be overlap between an independent organization's non-express advocacy ads, candidate ads, or party committee ads during every two- or four-year election cycle. Before a reason to believe finding can be made, much more than a chart of overlapping media buys should serve as the basis for a complaint that merits further investigation.

TMF did not in fact coordinate with KFP either on the content, placement, timing or any other aspect of its advertising. TMF has its own polling and media consultants who determine what and where its ads will run.

No specific information has been provided indicating that any of the prongs of the conduct standards, as contained in the Commissioner's regulations, has been violated. Under the conduct standards set forth in the FEC regulations, there was no coordination resulting from TMF running ads in media markets where KFP and Bush/Cheney were also running ads.

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b. TMF may hire a former employee as a consultant without violating FEC coordination regulations.

The assertion that TMF's employment of Jim Jordan was a *per se* violation of the "former employee" conduct standard is a misstatement of the regulation at 11 C.F.R. §109.21(d)(5). Under this section, coordination results when the former employee or independent contractor uses or conveys to the person paying for the communication information the former employee acquired in providing services for the candidate about the clearly identified candidate's campaign plans, projects, activities, or needs, or his opponent's plans, projects, activities, or needs **and** that information is material to the creation, production or distribution of the communication. 11 C.F.R. §109.21(d)(5)(ii)(A) and (B). The Commission considered and rejected a *per se* rule or even a "cooling off period" concluding that "the final rule focuses on the use or conveyance of information that is material to a subsequent communication and does not in any way prohibit or discourage the subsequent employment of those who have previously worked for a candidate's campaign or a political party committee." Explanation and Justification, 68 Fed. Reg. 438 (Jan. 3, 2003).

Mr. Jordan left KFP on November 9, 2003, two months before the first Democratic Party caucus in Iowa. At that time, there was little expectation that Mr. Kerry was going to win his party's nomination. His opponents included former Governor Howard Dean, who in November 2003 was viewed as the likely nominee, Congressman Dick Gephardt, Senator Bob Graham, General Wesley Clark, Sen. John Edwards, Cong. Dennis Kucinich, Ambassador Carol Moseley Braun, and Rev. Al Sharpton. KFP apparently decided to change its plans and replaced Mr. Jordan in an effort to take the primary campaign in another direction.

After leaving KFP, Mr. Jordan set up his own company, The Thunder Road Group, L.L.C., that has as one of its clients, TMF. His company provides public communication consulting services and he is often quoted in the press as a spokesperson for TMF and other clients. TMF has clearly defined the scope of Mr. Jordan's responsibilities and instituted practices to ensure that he adheres to the scope of those expectations. In the course of his

consulting for TMF, Mr. Jordan has not used or conveyed to TMF information about Mr. Kerry's campaign plans, projects, activities, or needs, or his opponent's plans, projects, activities, or needs that was material to the creation, production or distribution of any TMF television ads.

The mere observation that an independent organization hired a former employee of a candidate's campaign is not a sufficient basis upon which the Commission could find a reason to believe that a violation of FECA occurred. The Commission's regulation narrowly focuses only on the use or conveyance of information by a former employee that is material to the communication. "[F]or the purposes of this final rule the Commission is only concerned with whether the information is material to the communication, not to the services previously provided to the candidate." Explanation and Justification, 68 Fed. Reg. 438 (Jan. 3, 2003). The specific assertions made to support the Complainants' former-employee coordination claims do not even fall within the focus of the regulation and do not support a reason to believe finding by the Commission. TMF's specific response to each Bush/Cheney and RNC baseless conclusion is set forth below:

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(1). "As Kerry's campaign manager until November 2003, Jordan knew that the Kerry campaign would need financial assistance after the primaries and knew exactly the markets where that help would be needed." Complaint at 54.

The decision to run issue ads in March, April and May of 2004 was made prior to the hiring of Mr. Jordan as a consultant to TMF and it was made independently of any information that Mr. Jordan possessed in November 2003 when he left KFP. Moreover, the huge financial advantage that an incumbent president holds over an opponent coming out of a seven-way contested primary is self-evident and not material to an independent organization's decision to run ads.

(2). "...if Jordan ...used any information [he] learned while working for Kerry ... in any way for the soft money groups the [former employee] conduct standard is met." Complaint at 55.

This conclusion is a misstatement of the law and cannot serve as the basis for a reason to believe finding. "[T]he final rule focuses on the use or conveyance of information that is material to a subsequent communication and does not in any way prohibit or discourage the subsequent employment of those who have previously worked for a candidate's campaign or a political party committee." Explanation and Justification, 68 Fed. Reg. 438 (Jan. 3, 2003). The use of "any information" is not the conduct standard set forth in 11 C.F.R. §109.21(d)(5).

(3). "[T]he Kerry campaign, while Jordan was manager knew it would be out of money after the primaries and would need help with an anti-Bush message in key battleground states..." Complaint at 56.

In fact, the Kerry campaign was not out of money after the primaries. In the first quarter of 2004, KFP became the first non-incumbent presidential

campaign to raise more than $50 million in a quarter.[4] Moreover, the mere possession of this incorrect information was not material to the decision made by TMF to run independent issue ads in 17 or 20 targeted states in March, April and May 2004. Those decisions were made by TMF prior to Mr. Jordan's even being hired as a consultant.

(4). "As Kerry's campaign manager until only four months before the Media Fund aired ads that benefited Kerry ..., Jordan's activities and employment are a per se violation." Complaint at 57.

This conclusion is a misstatement of the law and cannot serve as the basis for a reason to believe finding. The Commission considered and rejected a *per se* rule or even a "cooling off period" concluding that "the final rule focuses on the use or conveyance of information that is material to a subsequent communication and does not in any way prohibit or discourage the subsequent employment of those who have previously worked for a candidate's campaign or a political party committee." Explanation and Justification, 68 Fed. Reg. 438 (Jan. 3, 2003).

(5). "Jordan's employment as Kerry's campaign manager until November 2003 amounts to a clear violation of the conduct standard. By definition, he certainly knew, and likely formulated, the Kerry campaign's "plans, needs and strategies" for this period after the nomination." Complaint at 58.

Once again, this conclusion is a misstatement of the law and cannot serve as the basis for a reason to believe finding. Former employment by a campaign does not amount to a "clear violation of the conduct standard." By what definition does a campaign manager who is let go two months before the first primary caucus, at a time when the candidate is running at best a distant second in a field of seven primary opponents, "know" the campaign's "plans, needs and strategies" for a time period four- to six-months in the future? The conduct standard is met only if information is used or conveyed to an independent organization that is material to the creation, production or distribution of the communication. 11 C.F.R. §109.21(d)(5)(ii)(A) and (B). Complainants do not even make the assertion that this incorrect, outdated information was used or conveyed to TMF. It certainly wasn't material to TMF's decisions regarding the creation, production or distribution of its communications.

(6). "Even if Kerry's ultimate victory in the primary period was not clear, the campaign certainly gave consideration to the time period between securing the nomination and the nominating convention because the Kerry campaign eventually rejected taking matching funds." Complaint at 58.

Again, the possession of knowledge is not a sufficient basis for a reason to believe finding, particularly when that knowledge was not material to, or even

[4] See *Democrats, Kerry camp report robust fund raising,* CNN.com, Apr. 2, 2004, *available in* LEXIS, Nexis Library, All News File.

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relevant to, the independent organization's communication creation, production, and distribution decisions. Information must be used or conveyed, it is not enough to just posses it for there to be a violation of Commission regulations. Moreover, the decision by the Kerry campaign to reject matching funds enabling them to raise record sums of money was made **after** Mr. Jordan left the campaign.[5] Furthermore, TMF's decision to run issue ad communications in targeted states in March, April and May was made **before** Sen. Kerry's decision to not take matching funds. This decision by the Kerry campaign is irrelevant to the coordination conduct standard analysis in this matter.

In sum, Complainants fail to provide a sufficient basis for finding a reason to believe that Mr. Jordan's status as a former employee of KFP resulted in impermissible coordinated communications by TMF.

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c. TMF's President may be a member of the DNC's Executive Committee without violating the FEC's coordination regulations.

As the Commission itself has recognized, the regulations permit individuals to wear multiple hats during an election cycle. It is permissible for a person to be president of an independent organization and to serve as a member of a political party committee's executive committee, provided that he is not acting as the agent of the party. "It is clear that individuals, such as State party chairmen and chairwomen, who also serve as members of their national party committees, can, consistent with BCRA, wear multiple hats, and can raise non-federal funds for their State party organizations without violating the prohibition against non-Federal fundraising by national parties." Explanation and Justification, 67 Fed. Reg. 49083, (July 29, 2002).[6]

A person acts as an agent of a national political party only if he has actual authority, express or implied, to engage in any of the itemized activities in 11 C.F.R. 109.3(a)(1) – (5). The Commission limited the scope of the definition of "agent," as follows:

> For the purposes of a coordination analysis under 11 CFR part 109, a person would only qualify as an 'agent' when he or she: (1) Receives actual authorization, either express or implied, from a specific principal to engage in the specific activities listed in 109.3; (2) engages in those activities on behalf of that specific principal; and (3) those activities would result in a coordinated communication if carried out directly by the candidate, authorized committee staff, or a political party official." Explanation and Justification, 68 Fed. Reg. 424 (Jan. 3, 2003).

---

[5] See Nick Anderson and Ronald Brownstein, *Kerry Throws His Wallet Into the Campaign Finance Ring,* L.A. Times, Nov. 15, 2003, at A22.

[6] The Commission's definition of agent in 109.3 "is based on the same concept that the Commission used in framing the definition of 'agent' in the revised 'soft money' rules." See Final Rules and Explanation and Justification on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed Reg. 49081 (July 29, 2003)

The agency standard established by the Commission makes clear that "[a] principal can only be held liable for the actions of an agent when the agent is acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals. Specifically, it is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal." Explanation and Justification, 67 Fed. Reg. 49083 (July 29, 2002).

The beginning and end of an agent-coordination analysis can be established if a person does not have actual authority to act on behalf of the principal or when a person is acting on behalf of another organization. Harold Ickes does not have actual authority to act as an agent on behalf of the Democratic National Committee's Executive Committee. Mr. Ickes is a member of the Executive Committee. He has not received actual authority to act on their behalf or the DNC on any matters.

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The DNC Executive Committee consists of 63 members. They meet less than four times per year, always in public sessions. Some meetings are even televised by C-SPAN. DNC Executive committee members are not considered "officers" of the DNC for any purpose, including under the DNC Bylaws and Charter. The Executive Committee does not make decisions or recommendations on any specific communications made by the DNC. It does not request, make, create, or authorize electioneering communications, public communications, express advocacy communications or communications republishing candidate materials. It is not materially involved in decisions regarding content, timing, means or mode, specific media outlets, timing or frequency, or size or duration of any communication. Moreover, The DNC Executive Committee has not acted in any manner, express or implied, to grant actual authority to Mr. Ickes to act on behalf of the DNC for any reason, including with respect to his independent role at TMF.

Specific responses to each Bush/Cheney and RNC baseless conclusion are set forth below:

> (1). "[Harold Ickes] is a member of the Democratic National Committee's Executive Committee, which, by definition, coordinates with the Presidential campaign and therefore is an agent of the Kerry campaign who learns of the plans and needs of the campaign." Complaint at 29.
>
> This conclusion is a misstatement of the law and cannot serve as the basis for a reason to believe finding. The Commission made clear that a person can wear multiple hats. "[a] principal can only be held liable for the actions of an agent when the agent is acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals. Specifically, it is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal." Explanation and Justification, 67 Fed. Reg. 49083 (July 29, 2002).

Mr. Ickes is acting on behalf of TMF, not the DNC or its Executive Committee. He has not received actual authority from the DNC to act as their agent to lead an organization that runs independent issue advertisements. He is simply wearing a different hat and acting on behalf of another organization when serving as President of TMF.

(2). "Harold Ickes, the head of the Media Fund and a member of the Democrat National Committee Executive Committee, knows or should know [the Kerry campaign would need financial assistance after the primaries and exactly what markets where that help would be needed] based on his active participation in the activities of the DNC, which is researching and preparing its own campaign efforts on behalf of and in coordination with the Kerry campaign." Complaint at 54.

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A communication is coordinated with a campaign or a political party committee if an agent of the campaign or party engages in specific conduct listed in 11 C.F.R. §109.21(d). The threshold issue is whether a person is acting as an agent of the party committee before there is any analysis of the conduct standard. If a person is not acting as an agent of the party committee, then no further analysis is required. Mr. Ickes does not have actual authority to act on behalf of the DNC or its Executive Committee.

With regard to the specific conduct standards set forth in 109.21, no person acting as an agent of a candidate or the DNC requested or suggested that a TMF communication be created, produced, or distributed and no person acting as an agent of the DNC or a candidate assented to such a suggestion. 11 C.F.R. §109.21(d)(1). No agent of a candidate or political party committee was materially involved in decisions regarding the content, intended audience, the means or mode of communication, specific media outlets used for the communication, the timing or frequency of the communication, or the duration of a broadcast communication. 11 C.F.R. §109.21(d)(2). TMF did not create, produce, or distribute any communications after a substantial discussion about the communication between TMF and a candidate, party committee, or their agents. 11 C.F.R. §109.21(d)(3).

Decisions to run issue ads beginning in March 2004 were made by TMF independently of any candidate or party committee or their agents. TMF conducted its own research, relied upon the advice of its own consultants, and did not coordinate in any manner with federal candidates or party committees when it made decisions regarding the content, timing audience, means of communication, specific media outlets used and the duration of each ad.

(3). "[I]f ... Ickes ... used any information [he] learned while working for ... the Democratic party in any way for the soft money groups the conduct standard is met." Complaint at 55.

This conclusion is a misstatement of the law and cannot be the basis for a reason to believe finding. As described in detail above, Mr. Ickes did not act as an agent for the party or any candidate committee and none of their agents were involved in the creation, distribution, or production of TMF ads.

(4). "[A]nd Ickes from his role at the Democratic National Committee knew it would not have sufficient funds for issue ads or voter mobilization so an outside group would need to attack the President and register voters in key states." Complaint at 56.

Actually, when BCRA passed banning soft money contributions to national party committees, every political observer, Democrat and Republican alike, probably reached the conclusion that Bush/Cheney and the RNC would have two or three times the amount of money that the Democratic nominee and the DNC could raise in the 2004 election cycle. Moreover, as described in more detail in the legislative history section, several members of Congress correctly predicted that the soft money would move from the party committees to independent outside groups.

(5). "It defies credibility that the plans [Harold Ickes] is now executing with soft dollars from the Media Fund were not discussed as a 'need' or a 'project' by the DNC's executive committee during this election cycle, or that he is not 'using' information he learned from his DNC position as part of his soft money Section 527 political committee activities." Complaint at 59.

Actually, it defies credibility to suggest that Harold Ickes, the former-deputy White House chief of staff who was instrumental in the re-election effort of President Clinton (some Republicans give him all the credit/blame) and, perhaps, the single most knowledgeable political tactician in America today, would need someone to tell him how to run an independent political organization. With his personal history of predictable politically motivated baseless Republican whining about Democrats playing unfairly, it defies credibility that he would not rely on legal counsel to ensure that he is operating to the fullest extent permissible within the limits of Federal election law.

Bush/Cheney and the RNC fail to provide sufficient support for their assertion that Mr. Ickes' membership in the DNC's 63 member Executive Committee resulted in impermissible coordination with the DNC or KFP.

d. TMF may coordinate with other non-candidate, non-party committee organizations.

Throughout the complaint, Bush/Cheney and the RNC suggest that TMF impermissibly coordinated with MoveOn.org and other similar independent, non-candidate, non-party committee organizations. "Ickes and Jordan have made no secret of the fact they believe they can coordinate activities with other members of the shadow web such as MoveOn.org."

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Complaint at 54. There is no prohibition under the Act against independent organizations coordinating. The innuendo that such coordination is somehow impermissible cannot serve as the basis for a finding that there is a reason to believe a violation of the Act occurred when such action is not prohibited by the Act. It is even permissible for the TMF and MoveOn.org to coordinate their media buys in overlapping markets, independently of any campaign or party committee.

4. TMF's participation in joint fundraising with a federal political committee is permissible.

Victory Campaign 2004 ("VC 2004") is a joint fundraising committee registered with the FEC and is acting in full compliance with the Commission's joint fundraising regulations. America Coming Together ("ACT"), a Federal political committee with federal and non-federal accounts, and TMF, a 527 political organization registered with the Internal Revenue Service that is not a Federal political committee, are the two participants in the joint fundraising effort. The Commission's regulations specifically provide that political committees, such as ACT, "may engage in joint fundraising ... with unregistered committees or organizations," such as TMF. 11 C.F.R. §102.17(a)(1)(i). VC 2004 has no other purpose other than to serve as a joint fundraising committee for ACT and TMF.

Complainants misstate the law and rely upon an advisory opinion (AO 2003-37) issued to a sham organization that specifically does not apply in this matter to support their otherwise baseless complaint. They assert that "the Commission said that a section 527 committee could not solicit non-federal funds in fundraising communications that conveyed ABC's support or opposition to a specific federal candidate." Complaint at 44 quoting FEC AO 2003-37 at 19-20. They further conclude that AO 2003-37 permits TMF to only raise funds subject to the prohibitions and limitations of the Act. Complaint at 44

AO 2003-37, the foundation of the Bush/Cheney and RNC legal theory, however, does not apply to TMF. The only relevant part of this advisory opinion in this matter is found in the first paragraph: "[t]he fact that ABC is a political committee is particularly relevant. This opinion does not set forth general standards that might be applicable to other tax-exempt entities." AO 2003-37, at 1. TMF is not a political committee.[7] Thus, AO 2003-37 does not apply in this matter.

TMF may raise funds through a joint fundraising committee that solicits federal and non-federal funds in compliance with the Commission's joint fundraising regulations. The federal and non-federal funds are properly allocated to the participants. AO 2003-37 does not apply to TMF.

5. TMF's solicitations are permissible.

Complainants suggest that TMF's solicitations violate FECA by naming specific federal candidates in a way that conveys a plan to use the funds to support or oppose those candidates.

[7] Nothing in the Commission's regulations makes participation in a joint fundraiser alone a trigger of political committee status.

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This is a blatant misstatement of the law, and nothing in FECA or the regulations supports such a novel legal theory. Complainants point to no provision as support but, instead, again cite AO 2003-37. As stated above, AO 2003-37 is simply inapplicable.

In addition, complainants misstate the facts to support their erroneous conclusion. The Joint Victory Campaign did not "donate" to TMF, as complainants claim. Rather, it transferred joint fundraising proceeds pursuant to a bona fide joint fundraising agreement. Nothing about this transfer makes TMF's solicitations improper or illegal, and the complaint is devoid of any other information lending support to such a theory.

6. TMF has never run an ad containing express advocacy of the election or defeat of any candidate.

Complainant's argument that TMF has run an express advocacy ad is false. The ad misquoted on page 43 attacks the policies of the Bush administration but it does not expressly advocate the President's defeat. The phrase "It's time to take our country back" is the beginning of a sentence. It does not reference the November elections. It does not say take our country back from George Bush. It says "It's time to take our country back from corporate greed. This is not an electoral reference, rather it is a reference to the failed policies of the Bush administration that favor wealthy corporate executives and interests at the expense of working families. Other than complainant's bold and erroneous assertion, no information has been provided indicating that any TMF ad contained express advocacy.

7. TMF ran economic issue ad independently of Kerry Campaign.

In late March 2004, TMF ran an issue ad addressing the issue of middle class tax cuts. This ad ran independently of KFP. Bush/Cheney and the RNC assert that "either the Media Fund knew in advance the substance of Senator Kerry's economic plans or knew that the Kerry campaign would not be advertising and therefore, of the need to fill the advertising void." Complaint at 43. They then misstate the law by concluding that "either way, this constitutes a clear violation of the coordination rules." Complaint at 43.

TMF conducted research independently to support its middle class tax cut advertisement. A copy of the research that is publicly available on TMF's website www.mediafund04.org, for the Middle Class Tax Cuts ad is attached as Exhibit A. The research supporting the ad includes publicly available press stories and press releases published over the past few years. Senator Kerry's support of middle class tax cuts was well known and publicly available. The details of the plan were announced in a March 10, 2004 press release. TMF's ad first aired on or about March 26, 2004 – more than two weeks **after** the details became public. The assertion that TMF coordinated with KFP on the content or timing of the Middle Class Tax Cuts ad are false. These facts do not support a reason to believe that a violation of the Act occurred when TMF aired its independent issue advertisements.

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8. This complaint provides no factual basis for finding reason to believe.

Finally, in addition to incorrect legal theories, this complaint is devoid of any facts that would give rise to a violation of FECA. We respectfully request that the Commission close this matter as it pertains to TMF and Harold Ickes.

Sincerely,

Lyn Utrecht
James Lamb
Counsel, The Media Fund and
Harold Ickes

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Exhibit A

27044180657

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Middle Class Tax Cuts

Watch The Ad:
Real Player
Windows Media
Quicktime

John Kerry voted to eliminate the marriage penalty.
Get the facts >>

John Kerry voted for a child tax credit.
Get the facts >>

Kerry's plan will roll back tax cuts for the wealthiest one percent.
Get the facts >>

Kerry's plan will help pay for a middle class tax cut.
Get the facts >>

Kerry's plan doesn't reward corporations that export jobs overseas.
Get the facts >>

George Bush supported tax breaks for exporting jobs.

Get the facts >>

Bush raided Social Security to pay for a tax cut for millionaires.
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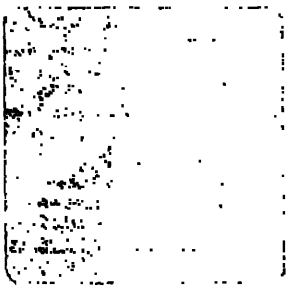

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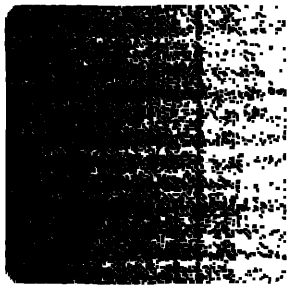

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John Kerry voted to eliminate the marriage penalty.

The Facts:

On May 17, 2001, John Kerry voted for an amendment by Sen. Kent Conrad, which is described as a vote "to accelerate the elimination of the marriage penalty in the standard deduction and 15-percent bracket and to modify the reduction in the marginal rate of tax." The amendment failed by a vote of 44 to 56.
[Source: S.Amdt. 654 to H.R. 1836, Vote #112 on 5/17/2001]

Additionally, Kerry has consistently advocated for elimination of the marriage penalty. Kerry's plan:

> "We will fight to repeal the Bush tax cuts for the wealthiest Americans so that we can invest in education and health care. We will also protect middle class tax cuts, such as the child credit and the elimination of the marriage penalty and propose additional tax credits to help middle class families make ends meet."
> [Source: John Kerry.com, "The First 100 Days: Create a Middle Class Economy and End the Privileged Class Economy]

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John Kerry voted for a child tax credit.

The Facts:

Kerry voted to create the per child tax credit in 1997. Kerry voted for the "Taxpayer Relief Act of 1997," which amended the Internal Revenue Code to allow a tax credit of up to $500 dollars for each child of a taxpayer, beginning in Jan. 1998. The legislation was signed by President Clinton. [Source: HR 2014, Vote #211 on 7/31/97.]

In 2001, Kerry voted for Sen. Daschle's amendment, to substitute a different tax package in place of the one supported by Bush. That package included raising the per child tax credit to $600 in 2002, and gradually increasing it to $1000 in 2011 and thereafter. Daschle's amendment failed by a vote of 41 to 58.
[Source: S.Amdt. 722 to H.R. 1836, Vote #144 on 5/22/01. Text of amdt. published in congressional record, 5/21/01]

In 2003, Kerry voted for Sen. Conrad's amendment, to make a child tax credit increase available in 2002. This went further than Bush's proposal. As Sen. Conrad explained on the Senate floor, "The amendment increases the child tax credit from $600 to $1,000 and makes it retroactive to the beginning of 2002 instead of 2003, as called for in the bill. To offset the cost, the amendment would delay the rate reduction for the 1 percent of taxpayers in the top income tax bracket from this year [2003] to 2005."
[Source: S. Amdt. 611 to S. 1054, Vote #166 on 5/15/03. Text of amdt. and Sen. Conrad's explanation published in Congressional Record, 5/14/03.]

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Kerry's plan will roll back tax cuts for the wealthiest one percent.

The Facts:

Kerry has proposed rolling back the tax cuts for those earning more than $200,000. These taxpayers are in the top 1 to 2% of the wealthiest Americans.

> Unlike many of his Democratic Party rivals, Kerry also understands that hiking taxes on the already burdened middle class is no way to win votes or to run a country. He insists he'll keep the Bush tax cuts in place for middle income Americans, while rolling them back only for those earning more than $ 200,000 a year. And beyond that rollback he pledges, 'I will never raise income taxes.'
> [Source: editorial, Boston Herald, 1/22/04]

> Here is how he [Kerry] matches up against Mr. Bush: Positions. The president likes to say that all of his rivals want to raise taxes. Mr. Kerry will counter that he would keep most of the recent middle-class and business cuts but repeal the Bush tax cut for the richest Americans.
> [Source: Dallas Morning News, 1/29/04]

The Center on Budget and Policy Priorities noted that those tax filers with adjusted gross income of more than $200,000 make up the top 1.7% of income tax filers.
[Source: Center on Budget and Policy Priorities, 9/26/01]

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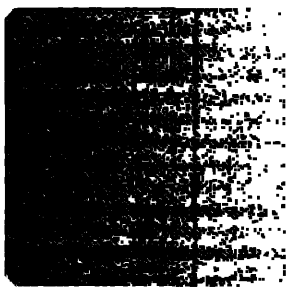

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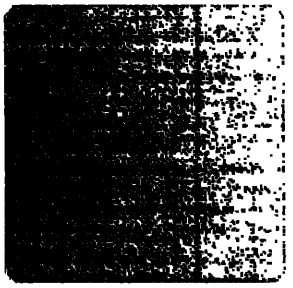

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Kerry's plan will roll back tax cuts for the wealthiest one percent.

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> Unlike many of his Democratic Party rivals, Kerry also understands that hiking taxes on the already burdened middle class is no way to win votes or to run a country. He insists he'll keep the Bush tax cuts in place for middle income Americans, while rolling them back only for those earning more than $ 200,000 a year. And beyond that rollback he pledges, 'I will never raise income taxes.'
> [Source: editorial, Boston Herald, 1/22/04]

> Here is how he [Kerry] matches up against Mr. Bush: Positions. The president likes to say that all of his rivals want to raise taxes. Mr. Kerry will counter that he would keep most of the recent middle-class and business cuts but repeal the Bush tax cut for the richest Americans.
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The Center on Budget and Policy Priorities noted that those tax filers with adjusted gross income of more than $200,000 make up the top 1.7% of income tax filers.
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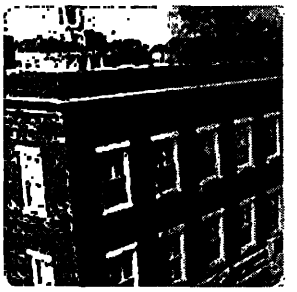

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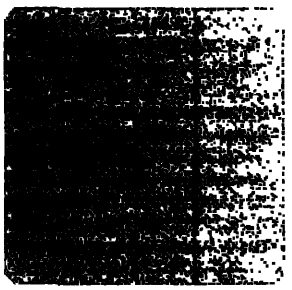

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Kerry's plan will help pay for a middle class tax cut.

The Facts:

Kerry has described his plans for a middle class tax cut that includes a college tax credit and an average $1,000 reduction in health care costs for the typical family:

In a press release from 3/10/04, "[John Kerry's] middle class tax cut will help working people afford college and pay for health care and make ends meet... John Kerry will repeal the Bush tax cuts for the wealthiest Americans and use that money to invest in health care and education. Kerry's plan is targeted to middle class and working families who are working hard to cover the mortgage, pay rising health care costs, child care and tuition, or just trying to get ahead."
[Source: Kerry press release, 3/10/04]

Kerry has proposed a "College Opportunity Tax Credit:"

Kerry's website states, "John Kerry's "College Opportunity Tax Credit" will make four years of college affordable for all Americans. He will provide a credit for each and every year of college on the first $4,000 paid in tuition - the typical tuition and fees at a public college or university. Kerry's tax credit will be refundable for our most economically vulnerable students and for those who receive other credits."
[Source: www.johnkerry.com, "Making College Affordable for All Americans."]

This serves as a centerpiece of Kerry's middle-class tax plan: "John Kerry visited Benedict College today where he announced the centerpiece of his middle class tax plan-a new College Opportunity Tax Credit that would make four years of college affordable for hardworking families struggling with skyrocketing tuition costs."
[Source: Kerry speech, 9/12/03]

Kerry's health care plan results in savings of roughly $1,000 per family:

"The average health care cost per person in Iowa is about $4,000. Under my plan, you'll see real savings of up to $1,000 on that bill. That's $1,000 that can help buy groceries, pay the bills, and give your family a break."
[Source: Kerry speech, 12/14/03]

Kerry's fund to help states and localities will help families see cuts in their state and local taxes too:

"In fact, John Kerry wants to give more tax breaks to the middle class including new tax credits to pay for health care and college tuition. He has also proposed a $50 billion State Education and Tax Relief Fund that is designed to help states provide tax relief for state, local and property taxes for working families. These tax cuts are part of his plan to restore the economy and cut the budget deficit in half in four years."
[Source: Kerry press release, 3/10/04]

Bush talks about tax cuts, but as Tom Oliphant of the Boston Globe points out, it is Kerry who supports middle-class tax cuts: "As usual, Bush made his point by trotting out "examples" of the wonders the tax cuts have produced. Unfortunately, they were once again examples of the kind of tax cuts John Kerry supports and Democrats made happen in the first place - increases in the child

tax credit, the 10 percent rate on low incomes, and the relief from the marriage penalty."
[Source: Thomas Oliphant, The Boston Globe 3/7/04]

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Kerry's plan doesn't reward corporations that export jobs overseas.

The Facts:

Kerry's plan says, "We will work to reward companies that create jobs by helping with health care costs, a new manufacturing jobs tax credit and new assistance for small businesses. We will also close every single loophole for companies that take jobs offshore."
[Source: www.johnkerry.com, "The First 100 Days: Reward Companies that Create Jobs not Phony Corporate Profits]

In a story titled, "Kerry to Propose Eliminating a Tax on U.S. Companies' Overseas Profits," the New York Times reports that, "Senator John Kerry plans to propose on Friday a sweeping revision of international corporate taxes... Mr. Kerry is to propose eliminating a major tax break on profits earned by American companies overseas and using that money to reduce the tax rate for all corporations."
[Source: NY Times, 3/26/04]

"Kerry has also promised to 'close every single loophole that gives companies incentives to move jobs abroad.'" And "after his primary victory in New Hampshire last month, U.S. Sen. John Kerry, the frontrunner to be the Democratic presidential nominee, told supporters he would work toward 'a prosperity where we create jobs here at home and where we shut down every tax loophole, every benefit, and every reward for any Benedict Arnold CEO or company that sends jobs and profits overseas."
[Source: BusinessWest, 2/1/04]

Kerry said he "would provide tax credits to companies that maintain U.S. factories and "close every single loophole that gives companies incentives to move jobs abroad."
[Source: AP, 1/26/04]

"Kerry hit on the issue again. 'We will provide new incentives, important new incentives, for manufacturing that reward the good companies that create the jobs and keep them here in the United States,' he said."
[Source: Times-Picayune (New Orleans, LA) 3/7/2004]

"Democratic candidate Sen. John Kerry says he will come down hard on 'Benedict Arnold companies that ship American jobs overseas' if he's elected president."
[Source: "Kerry rips shipping of jobs abroad," Capital Times (WI), 2/14/04]

"...the Kerry campaign is airing a TV ad in Ohio and upstate New York that touts his plans to 'end tax breaks that reward companies for shipping jobs overseas" and says he will offer "new incentives to create and keep good jobs here.'"
[Source: Boston Globe, 2/26/04]

"His [Kerry's] plan: End tax breaks that reward companies for shipping jobs overseas. New incentives to create and keep good jobs here."
[Source: Kerry ad, text published in AP, 2/24/04]

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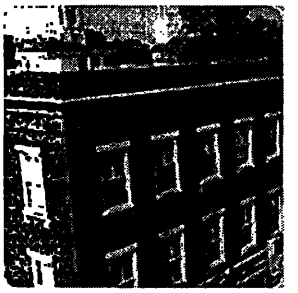

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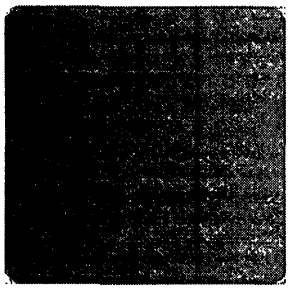

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George Bush supported tax breaks for exporting jobs.

The Facts:

The Bush Administration's fiscal year 2004 budget, released in Feb. 2003, called for ending a tax benefit for U.S. companies that make goods in the U.S. and export them. The Bush budget suggested this should be replaced with tax benefits that help companies that *operate overseas*.

Specifically, the administration called for repealing the "foreign sales corporation/extraterritorial income" (FSC/ETI) provisions of the law. The FSC/ETI has long helped domestic manufacturers that manufacture goods in the U.S., and export them.

The Bush fiscal year 2004 budget suggested that in place of the FSC/ETI, several other, different tax breaks could be enacted - ones that "preserve the competitiveness of U.S. businesses operating in the global marketplace."
[Source: see Treasury Department's "General Explanations of the Administration's Fiscal Year 2004 Revenue Proposals," p. 147 through 149]

Rep. Sander Levin explained the proposal in the Bush budget well, when he said that the Bush administration wanted to "advance a proposal... to pay for reduced taxes on offshore activities of U.S. firms."
[Source: National Journal, 2/26/03]

For the period from Feb. 2003 through Feb. 2004, the Bush administration continued to push for these tax breaks. The Bush approach mirrored that of House Ways & Means Committee Chairman Rep. Bill Thomas.

> "The Bush administration is calling for 'substantive changes to our current international tax laws' - a position that congressional sources described as similar to one favored by House Ways and Means Chairman Thomas."
> [Source: National Journal's Congress Daily, 2/7/03]

> "While stepping around the substance of the legislation, [U.S. Trade Representative Robert] Zoellick praised Thomas for coming forward with a bill, calling it 'a pretty good start.'"
> [Source: National Journal, 2/26/03]

Many Democrats and even Republicans opposed the type of tax plan proposed by Rep. Thomas, saying it would "send American jobs overseas." Rep. Don Manzullo (R-Ill.) described the approach favored by Rep. Bill Thomas:

> "I've told them that I just don't think [it] is a good bill. It essentially encourages American companies to move jobs overseas. It's not the right approach... [It] will send more American jobs overseas."
> [Source: Manzullo letter, reported in Market News International's "The Main Wire", 11/4/03]

Supporters of the [Thomas] bill even acknowledged "that the ability of companies to avoid taxes on profits from factories abroad so long as they were not returned to the United States encouraged

American companies to invest, and create jobs, overseas." [Source: "Bill Closing Bermuda Loophole Also Includes Tax Breaks," New York Times, 7/17/02.]

Democrats in the House and Senate suggested that if the FSC/ETI tax provisions were going to be repealed, they should be replaced with a tax credit for domestic manufacturers. But instead of endorsing that approach, Bush's Secretary of the Treasury John Snow criticized proposals for tax breaks for domestic manufacturers:

> "Snow said the Bush administration has reservations about... legislation that replaces the export tax credit with an across-the-board corporate tax cut for all manufacturers." Snow said instead that the Bush administration supports "reform [ing] the rules that increase costs for US companies doing business in foreign markets."
> [Source: Chemical News & Intelligence, 2/13/04] (Note: after opposing this type of tax break for over a year, the Bush administration recently endorsed a package that includes it.)

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In testimony before the US Senate's Finance Committee, Jim Berges, President of Emerson, a multinational equipment manufacturing company headquartered in St. Louis, argued that an approach like Bush's would not provide him any incentive to create, or retain, a single U.S. manufacturing job.

> At a time when manufacturing is in crisis, repealing FSC/ETI, without some back-fill for all manufacturers in the United States is like kicking a dog when he's down. Such a policy choice... provide(s) one more disincentive, among many already, to not locate, or maintain, manufacturing in the U.S...
>
> The FSC/ETI provides an important incentive for job creation for domestic manufacturing and production, at a time when manufacturers face negative price and increasing costs in health care...
>
> As I have visited with key policymakers here in Washington, I am often asked, "Emerson is a global company. Wouldn't you rather see broad reform of our international tax laws?" My response is simple. These are good ideas and if you want to lower my company's international tax rates, fine. But it won't provide me any incentive to create, or retain, a single U.S. manufacturing job. Period. Full stop. In fact, lower effective tax rates at our international subsidiaries could actually encourage more job movement out of this country.
> [Source: Emerson Testimony, Senate Finance Committee, 7/8/03]

Additionally, Bush's top official for tax policy, Assistant Secretary of the Treasury for Tax Policy Pamela Olson, has spoken against legislation that would stop companies from getting tax breaks when they send their company headquarters to Bermuda and other countries.

Olson testified on July 1, 2002, in opposition to closing a loophole that gives tax breaks to companies incorporating offshore. Instead, Olson supported a temporary moratorium:

> OLSON: "A moratorium would be preferable to putting up a complete block on these kinds of transactions because they are just not going to work, and they are going to have other effects that are harmful for the economy."
>
> QUESTIONER: "What will not work?"
>
> OLSON: "An approach such as saying companies just cannot move. Number one, people will find ways to get around it...
>
> (earlier in testimony..) "First, I would say that I think trying to put up a Berlin Wall in response to these transactions is something that is unlikely to work and likely to have harmful effects on the U.S. economy.."
> [Source: Olson testimony to House Ways and Means Committee, 7/1/02]

Newspapers characterized this sham "temporary moratorium" as essentially allowing continuation

of "this latest attempt within the private sector to put greed above patriotism.":

> Once again, however, the [Bush administration's] acknowledgement has not been accompanied by a clear, much less firm resolve to respond aggressively. Instead, [former Treasury Secretary] O'Neill has begun to talk, with quiet Bush White House support, of supporting a one-year moratorium on this latest attempt within the private sector to put greed above patriotism.
> [Source: Thomas Oliphant, Boston Globe, 5/28/02]

Furthermore, the Bush administration disapproved of a bill to close the offshore-incorporation loophole, by Rep. Richard Neal.:

> Representative Richard Neal... is continuing to press an unassailable case for legislation that would effectively ban the practice and... remains insistent that government contracts should not be going to companies that have pulled up their stakes in legal addresses only in order to cheat the taxman in a manner that appears far more likely to enrich their executives than their ordinary shareholders.
> [Source: Thomas Oliphant, Boston Globe, 5/28/02]

Speaking for the administration, Assistant Secretary Pamela Olson made direct comments that the administration opposed Rep. Neal's bill:

> OLSON: "I want to first address the Neal and Maloney bill. We are not enthusiastic about any kind of a bill that would just kind of erect a blockade against companies going because we think that it would produce other ways of doing the same thing... The Neal-Maloney bill, I think, is one that people would fairly quickly find their way around, and because of that and because of the other ways of achieving the same effects that the inverted companies are achieving, we do not think that is the right direction to go."
> [Source: Olson testimony to House Ways and Means Committee, 7/1/02]

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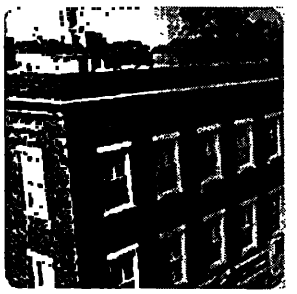

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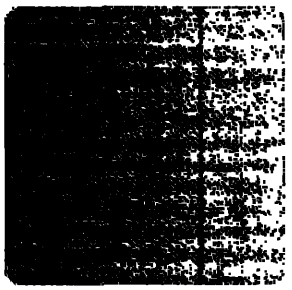

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Bush raided Social Security to pay for a tax cut for millionaires.

The Facts:

In just three years, Bush has spent roughly $500 billion of the Social Security surplus...

In 2001, Social Security took in $602 billion from the Social Security payroll tax, and spent $439 billion on benefits. **The remaining $163 billion of the Social Security Trust Fund was spent.**

In 2002, Social Security took in $627 from the Social Security payroll tax, and spent $461 billion on benefits. **The remaining $166 billion of the Social Security Trust Fund was spent.**

In 2003, Social Security took in $632 from the Social Security payroll tax, and spent $479 billion on benefits. **The remaining $153 billion of the Social Security Trust Fund was spent.**

TOTAL: Bush has spent $482 billion of the Social Security Trust Fund surplus.
[Source: Social Security Trust Fund data, updated 2/12/04, http://www.ssa.gov/OACT/STATS/table4a3.html]

At the same time, Bush's tax cuts have already cost $500 billion.

The tax cut Bush signed in 2001 was projected to cost more than $309 billion through the end of 2004; and $1.35 trillion over ten years.
[Source: Joint Committee on Taxation, 5/26/01, http://www.house.gov/jct/x-51-01.pdf]

The tax cut Bush signed in 2003 - which included tax cuts for dividends on stock profits and a capital gains cut - cost $209 billion in just 2003 and 2004 alone; and has a cost of $350 billion over ten years.
[Source: Joint Committee on Taxation, 5/22/03, http://www.house.gov/jct/x-55-03.pdf]

TOTAL: Through 2004, Bush has already spent roughly $518 billion on tax cuts.

Quite simply - Bush's tax cuts have eaten $500 billion from Social Security Trust Fund surplus. This is radically different than the last years of the Clinton administration. Under Clinton, "the assumption" was that the Social Security and Medicare Trust Fund surpluses "would be used to shore up entitlements." But now, "the tax cuts have left the federal government practically helpless."

> In testimony before the House Budget Committee on Wednesday, Mr. Greenspan raised a red flag about Social Security, warning that federal deficits, already large, would begin to explode after the first wave of baby boomers becomes eligible for Social Security benefits four years from now, and for Medicare three years after that. During the Clinton administration, the assumption was that part of the surplus would be used to shore up entitlements for retirees. Now the tax cuts have left the federal government practically helpless.
> [Source: NY Times, 2/27/04]

Alan Greenspan says Bush's huge deficit - which was caused by his tax cuts - now requires "cuts to Social Security and Medicare."

> Reacting to the combination of the largest U.S. population group nearing retirement and a hefty deficit, Federal Reserve Chairman Alan Greenspan on Feb. 25 recommended cuts to Social Security and Medicare benefits for future retirees. It wasn't a popular suggestion, but it spotlighted the problems of government overspending.
> [Source: Baltimore Sun, 3/14/04]

Several studies show specific benefits to millionaires in the Bush tax cuts.

In one example, just 4,500 people will share a $28 billion benefit from the ultimate full repeal of the estate tax in the 2001 tax cut. This amounts to a tax cut of $6 million per person.
[Source: Center on Budget and Policy Priorities, "Estate Tax Cuts in the Bush Tax Plan," 2/26/01]

In Bush's 2003 tax cut, 27% of the income tax bracket reductions went to millionaires. Overall, millionaires will receive approximately $139 billion in tax cuts through 2013 just from this tax cut.
[Source: Center on Budget and Policy Priorities, "Millionaires and the Ways and Means Tax Plan," 5/7/03]

According to the Center on Budget and Policy Priorities, over a ten year period, "the richest Americans-the best-off one percent-are slated to receive tax cuts totaling almost half a trillion dollars." Specifically, the group gets, "$477 billion in tax breaks" from the Bush administration.

CTJ notes that the "the richest one percent" by 2010 will have an average income of "$1.5 million." For these people, their tax-cut windfall in the year 2010 alone will average $85,000 each.
[Source: Citizens for Tax Justice, 6/12/02]

The Center on Budget and Policy Priorities points out that if Bush's tax cuts were reversed, there would be enough funding to cover the entire Social Security shortfall projected by the Social Security Trustees.

> The revenue loss that will occur over the next 75 years if the 2001 tax cut takes full effect and is made permanent is more than twice the size of the entire Social Security shortfall over that period.
> [Source: Center on Budget and Policy Priorities, 3/17/03]

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