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January 22, 2004

Lawrence H. Norton
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Comment on

Re: Advisory Opinion Request 2004-1

AOR 2004-1

Dear Mr. Norton:

I am writing on behalf of the Campaign Legal Center to provide comment on Advisory Opinion Request (AOR) 2004-1, submitted on behalf of Bush-Cheney '04, Inc. ("Bush-Cheney '04") and Alice Forgy Kerr for Congress ("Kerr for Congress").

AOR 2004-1 inquires as to whether payments by Kerr for Congress for certain advertisements which advocate the election of Ms. Kerr to represent the 6th Congressional District of Kentucky in Congress constitute in-kind campaign contributions to Bush-Cheney '04.

According to scripts supplied by the AOR, the advertisements in question would all feature express audio references to President Bush and, through audio, tout policy positions that are closely associated with the President. Moreover, they would contain footage or pictures of President Bush – in all cases involving visual images of the President and Ms. Kerr appearing together (and in one instance, an additional image of the President waving).

The advertisements would air prior to February 17, 2004 (*i.e.*, the date of the special election for the 6th Congressional District House seat sought by Ms. Kerr). President Bush is a candidate for re-election and will be on the Kentucky presidential primary ballot on May 18, 2004 (as well as, assumedly, on the Kentucky presidential general election ballot on November 2, 2004). The AOR indicates that, if judged permissible by the Commission, the advertisements would run both before and after the date that is 120 days from Kentucky's presidential primary.¹

The request also states that "[a]gents of the President will review the final script in advance of the President's appearance in the advertisements for legal compliance, factual

¹ However, it is currently within 120 days of that primary election – so any advertisements aired henceforth would appear within the 120-day window.

accuracy, quality, consistency with the President's position and any content that distracts from or distorts the 'endorsement' message that the President wishes to convey." This process of "reviewing" the advertising would occur both outside and inside the 120-day window for the Kentucky presidential primary.

Analysis

FEC Coordination Regulations

The Commission's coordination regulations (which are determinative here) establish "conduct" and "content" standards for coordination analysis – both of which must be met for a payment for a public communication to constitute an in-kind contribution to a federal candidate or political party. *See* 11 C.F.R. § 109.21.

Among other things, the "content" standard is satisfied where the advertising constitutes (i) a public communication, which (ii) refers to a clearly identified candidate for federal office, (iii) is publicly distributed or disseminated 120 days or fewer before a general, special, primary, or runoff election, and (iv) is directed to voters in the jurisdiction of the clearly identified candidate. *See* 11 C.F.R. § 109.21(c)(4).

To the extent aired within 120 days of the Kentucky presidential primary election, the advertisements for which scripts have been provided would satisfy the content standard. The advertisements would be aired on television, rendering them a "public communication" as defined in the Act and the Commission's regulations. *See* 2 U.S.C. § 431(22) (The term 'public communication' means a communication by means of any broadcast, cable or satellite communication . . . or any other form of general public political advertising"); 11 C.F.R. § 100.26. As indicated above, they would expressly refer to President Bush. Moreover, the advertisements would surely be directed to voters in Kentucky's 6th Congressional District – who are voters in the electoral jurisdiction of the President (in the primary election and, assumedly, in the subsequent general election).

Likewise, the coordination regulations specify various circumstances in which the "conduct" standard would be satisfied. These circumstances include where (i) a federal candidate is materially involved in decisions regarding the content, intended audience, means or mode, media outlet, timing and frequency, or duration of a broadcast, cable or satellite communication (*see* 11 C.F.R. § 109.21(d)(2)); or (ii) the communication is created after one or more substantial discussions about the communication between the person or entity paying for the communication and the federal candidate clearly identified therein, or his or her agents (a discussion would be "substantial" in this respect if information about the campaign plans, projects, activities, or needs of the candidate were conveyed to the payor, and that information were material to the creation, production, or distribution of the communication) (*see* 11 C.F.R. § 109.21(d)(3)).

The AOR indicates that President Bush's agents will review the scripts for legal compliance, factual accuracy, quality, consistency with the President's position and "any content that distracts from or distorts the 'endorsement' message that the President

wishes to convey.” This review would patently constitute “material involvement” in decisions regarding the content of the communication, thus satisfying the conduct standard. As the Commission stated in Advisory Opinion 2003-25:

[Y]our request explicitly assumes that Senator Bayh or his representative will review the final script in advance “for appropriateness.” *To suggest that a candidate may personally approve the content of an advertisement without satisfying the conduct standard in 109.21(d) would be to obviate that section of the regulations.*

(emphasis added)

This conclusion would not change if the President’s agents approved the use of the President’s image without making any changes. Their approval would constitute “material involvement” in decisions relating to the content of the advertising. Approval by the President’s agents would surely be important to the decision regarding whether the advertising will use the President’s image. If Kerr for Congress cares to seek approval from the President’s agents to use the President’s image, it is fair to assume that the response is of importance to the committee’s ultimate decision concerning use of that image. Moreover, the participation of the President or his agents in creating, producing, assembling or supplying footage or audio for this advertising would constitute “material involvement” in decisions relating to the content of the communication.²

In applying its coordination regulations, the Commission should be mindful of the broad and functional perspective on coordination enunciated by the Supreme Court in *McConnell v. FEC*. In *McConnell*, the Court reiterated its conception of “independent expenditures” as “expenditures ‘made *totally independently* of the candidate and his campaign.’” *McConnell v. FEC*, 540 U.S. [], 124 S.Ct. 619, 705 (citing *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)) (emphasis added). It emphasized that the rationale for affording special constitutional protection to independent expenditures was their lesser potential to be of use to candidates. As the Court stated,

[T]he rationale for affording special protection to *wholly independent expenditures* has nothing to do with the absence of an agreement and everything to do with the functional consequences of different types of expenditures. Independent expenditures “are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate’s view.”

See McConnell, 124 S.Ct. at 705 (citations omitted) (emphasis added).

² The “substantial discussion” prong of the conduct standard would also likely be fulfilled. In reviewing the advertisement to ensure that its message is consistent with the President’s wishes, it is difficult to imagine that the President’s agents would not convey information about the President’s campaign plans, projects, activities or needs which is material to the communication’s production. *See* FEC Advisory Opinion 2003-25 fn. 5.

At the same time, the Court revealed a broad perspective on what sort of candidate involvement with the “expenditures” of others could render that spending “as useful to the candidate as cash” and thus properly trigger a finding of coordination: a “wink or nod” would suffice in this regard. *See id.* (citations omitted). The participation of federal candidates or their agents in reviewing, creating, producing or approving “expenditures” by others thus clearly falls within the Supreme Court’s conception of coordination. The resulting “expenditures” are a far cry from “totally independent” spending; they are instead “as useful to the candidate as cash.”

Thus, under the Commission’s regulations and the proposal set forth in the AOR, payments by Kerr for Congress for any of the advertisements in question which are aired within 120 days of the Kentucky presidential primary would constitute in-kind contributions to Bush-Cheney ’04.

Statutory Coordination Standard

While they must be applied here, we believe that the Commission’s coordination regulations fail in many respects to properly implement the statutory standard for coordination. The statutory standard refers to “expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of” a federal candidate. *See* 2 U.S.C. § 441a(a)(7)(B)(i) In turn, “expenditures” are defined as payments “for the purpose of influencing any election for Federal office.” *See* 2 U.S.C. § 431(9)(A)(i).

The proper application of that statutory standard would treat some payments for advertising in which a federal candidate conveys an endorsement of another candidate as an in-kind contribution to the endorser federal candidate. In particular, we believe that, among other things, the statutory coordination standard encompasses payments for advertisements produced in clear “cooperation, consultation, or concert, with” the endorser federal candidate (who is not the payor) or his or her agents (as stands to be the case here) and which refer to that candidate, favorably identify policy positions while making evident connections between the candidate and those policy positions, and are aired to the candidate’s electorate. Given these conduct and content elements, such payments are properly considered to encompass a purpose of influencing the election to federal office of the candidate and treated as in-kind contributions to the candidate.

For example, the “Seniors,” “Absolutely” and “Values” scripts clearly fall into this category. “Seniors” directly characterizes “President Bush’s prescription drug law” as “such a godsend to seniors.” In “Absolutely,” the announcer states that “In Congress, Alice Forgy Kerr will work with President Bush to help continue our economic recovery,” with Ms. Kerr then adding, “I absolutely support President Bush’s tax cuts.” And “Values” proclaims:

American values. If you share the values of President Bush, you’re going to like Alice Forgy Kerr. They are cut from the same cloth. While others

attack the President's economic program, and his fight to protect our national security, Alice Forgy Kerr stands with President Bush. Unlike her opponent, Alice supported the Bush tax cuts that are now triggering new jobs and economic growth.

All of these ads contain statements which directly and unabashedly laud the President. Given the "conduct" elements specified above, spending on these advertisements would properly be considered in-kind contributions to Bush-Cheney '04.³

It is likewise clear that, under the statutory coordination standard, some payments for advertising featuring an endorsement of a candidate by a federal candidate would *not* amount to an in-kind contribution to the endorser federal candidate. Some advertisements will not be an "expenditure" with a purpose of influencing the endorser's election and thus will not amount to an in-kind contribution to him or her. Indeed, one such example is that presented by Advisory Opinion 1982-56, cited in this AOR. The advertisement in that instance was described as follows in the Opinion:

The narrator is reciting: "Ann Delaney is the Democrat running for Marion County Prosecutor so you expect the Democrats to recognize her hardhitting courtroom qualifications." Marion County Sheriff Jim Wells, an incumbent candidate for Sheriff then comes around the corner of the County Court House and says: "Ann Delaney turns arrests into convictions. Vote for Ann Delaney." His name is printed across the picture as he makes his comments. Then Congressman Jacobs comes down the steps of the Federal Building with "Congressman Andy Jacobs" across the picture and says: "I think Ann Delaney is one of the best courtroom prosecutors we've ever had in this country." Then the narrator continues, "but would you expect her opponent to agree which he did when he said 'she's a tiger in the courtroom.'" There is a picture of just a blank with a tiger behind it and it comes back to Ann Delaney's face in the close-up. The narrator continues: "Vote for the tiger; vote for Ann Delaney."

This advertisement is not in any sense a campaign pitch for the endorser federal candidate. Among other things, there are no references or indications as to that candidate's positions on public policy issues. Nor is this the only instance in which an endorsement advertisement would not constitute an in-kind contribution to the endorser federal candidate under the statutory coordination standard. Again, we merely note that the Commission has, in its rigid and unjustified elevation of "bright-line rules" as the

³ The "Endorsement" advertisement presents a closer call. The advertisement is similar in respects to that properly judged by the Commission not to "promote," "support," "attack" or "oppose" a federal candidate in Advisory Opinion 2003-25. In this context, however, the Commission's coordination regulations – particularly its 120-day content standard triggered by reference to a federal candidate – improperly rob it of the ability to make judgments based on the full particulars of the communication.

defining objective for the promulgation of coordination regulations, rendered itself unable to draw the distinctions required for proper enforcement of the statute.

Thank you in advance for your consideration of these comments.

Sincerely,

/s/ Glen Shor

Glen Shor
FEC Program Director