FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC RECORDS

FROM: COMMISSION SECRETARY D.H.

DATE: January 28, 2004

SUBJECT: COMMENT: PROPOSED AO 2004-01

Transmitted herewith is a timely submitted comment from Mr. Stephen M. Hoersting regarding the above-captioned matter.

Proposed Advisory Opinion 2004-01 is on the agenda for Thursday, January 29, 2004.

Attachment

National Republican Senatorial Committee

Stephen M. Hoersting
General Counsel

January 27, 2004

Mr. Lawrence Norton
General Counsel
Federal Election Commission
999 E. Street, NW
Washington, DC 20463

VIA ELECTRONIC MAIL

Re: Advisory Opinion 2004-1; General Counsel's Blue Draft

Dear Mr. Norton:

Candidate Alice Forgy Kerr is in a battle to become the next U.S. Representative to the Sixth Congressional District of Kentucky. Nobody in the world believes the media campaign paid for by the Alice Forgy Kerr for Congress Committee exists to make in-kind contributions to the Bush-Cheney 2004 Committee.

The National Republican Senatorial Committee ("NRSC") is an unincorporated association designed, in part, to aid the election of Republican Senate candidates. The NRSC anticipates that several Republican Senate candidates this election cycle will advertise that they are endorsed by other federal candidates. And the NRSC also anticipates that these same Senate candidates will lend their endorsement to other Federal candidates who will in turn advertise that fact within the same election cycle, as is their right under the First Amendment. *See McConnell v. FEC*, slip op. at 77 (2003). The NRSC appreciates the opportunity to comment on the General Counsel's Blue Draft of Advisory Opinion 2004-1 ("Blue Draft").

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Because payments by the Alice Forgy Kerr for Congress Committee ("Kerr Committee") do not meet the payment requirements of 11 CFR 109.21(a), the Commission should not recognize payments for communications made by the Kerr Committee as in any way creating an in-kind contribution to the Bush-Cheney 2004 Committee, whether or not the respective federal candidates review or approve the nature of the endorsement. The position contained in the Blue Draft differs significantly from the Commission's treatment of endorsement spots in past advisory opinions, and we urge the Commission to recognize that nothing in BCRA requires this change. If the Commission concludes that BCRA does require a radical alteration of past practice, the NRSC requests that the Commission state with clarity why such a change is necessary.

Applicable Law

No policy of FECA or BCRA is fostered by preventing federal-candidate endorsers from reviewing the endorsement ads of federal-candidate endorsees.

The Federal Election Campaign Act of 1971, as amended, ("FECA") was upheld as a means of preventing the actual and apparent "corruption spawned by the real or imagined coercive influence of large financial contributions." *Buckley v. Valeo*, 424 U.S.1, 25 (1976). The Bipartisan Campaign Reform Act of 2002 ("BCRA") added three core provisions to FECA. It required national party committees to fund all activities with Federal funds. It redrew, for State and local party committees, the boundary between Federal and non-Federal election activities. And it strengthened disclosure and funding requirements for advertisements run by entities other than political committees close to an election. Much like FECA, BCRA was upheld as an "effort to confine the ill effects of aggregated wealth on our political system." *McConnell, supra*, slip. op. at 118.

Neither FECA nor BCRA, however, were promulgated or upheld to prevent any alleged "corruption" between one hard-dollar Federal campaign account and a hard-dollar Federal campaign account of another candidate.[1] There is no discussion of such activity in the anti-corruption rationale of *Buckley*; nothing in the anti-circumvention rationale of *FEC v. Colorado Republican Federal Campaign Committee*, 121 S. Ct. 2351 (2001); and nothing in the anti-circumvention rationale of *McConnell v. FEC, supra*. Preventing "corruption" between Federal candidate committees is simply not a core concern recognized by Congress or the Courts.

[1] The NRSC is aware of 2 U.S.C. § 432(e)(3). But the NRSC notes that this provision was never a basis for the Commission to include the value of reviewed endorsements spots run by authorized committees in previous coordination regulations. Nothing in BCRA mandates a change in Commission practice in this area.

There is no reason to believe BCRA now requires the Commission to begin prohibiting review of federal-candidate endorsement ads paid by other federal candidate committees, under a theory of coordinated communications.

In its rulemaking on "General Public Political Communications Coordinated with Candidates and Party Committees", 65 Fed. Reg. 76138 (Dec. 6, 2000), the Commission stated that its rules applied to expenditures "paid for by separate segregated funds, nonconnected committees, individuals, or any other person *except candidates, authorized committees, and party committees.*" *Id.* at 76142 (emphasis added). It is no secret that Congress viewed this rulemaking with disfavor. In BCRA, Congress ordered the Commission's December 2000 regulations repealed within 270 days of the passage of BCRA. *See* BCRA Sections 214(b) and 402(c)(1), Public Law 107-155, 116 Stat. 94 and 112, (Mar. 27, 2002).

It is also no secret that Congress was acutely aware of the details in the December 2000 rulemaking. In BCRA Section 214(c), Congress ordered the Commission to correct all perceived problems with this rulemaking. It ordered the Commission to address payments for republication of campaign materials, payments for use of a common vendor, payments for communications directed by former employees, and payments made after substantial discussion. *Id.* Congress ordered the Commission not to require "agreement or formal collaboration" to establish coordination. *Id.* And Congress even amended 2 U.S.C. § 441a(a)(7)(B) to address coordination between party committees and outside groups. *Id.* Despite its command of the details of the Commission's December 2000 rulemaking, Congress did not order the Commission to address coordination between one principal campaign committee and another. Indeed, Congress, in BCRA, ordered that the Commission "shall promulgate new regulations on coordinated communications *paid for by persons other than candidates, authorized committees of candidates*, and party committees." *Id.* (Emphasis added).

A "candidate" is defined as "an individual who seeks nomination for election, or election, to *Federal* office," etc. 2 U.S.C. § 431(2) (emphasis added). An "authorized committee" is defined as the "campaign committee ... authorized by a [federal] candidate." 2 U.S.C. § 431(6).

The Bayh AO is different because it addressed ads paid by non-federal candidates, and implicated a core provision of BCRA.

Advisory Opinion 2003-25, the "Bayh AO," is different, however. The Bayh AO implicates a core provision of BCRA and warranted enhanced consideration from the Commission. The Bayh AO contemplates the use of a

federal candidate's image in an endorsement ad for a mayoral candidate, paid with non-Federal funds, in an era of BCRA prohibitions on non-federal candidates running soft-dollars ads that "promote, support, attack or oppose" federal candidates. The Commission concluded that the ad run by the Weinzapfel Committee did not violate this provision.

However, the Commission also considered whether the Weinzapfel Committee ad would constitute an in-kind contribution to Senator Bayh; a coordinated communication. *See* AO 2003-25. The Commission concluded it would not, because the communication did not meet the content standard at 11 CFR 109.21(c)(4). *Id.* These sentiments were echoed by three concurring Commissioners. *See* Concurring Opinion of Vice Chairman Bradley A. Smith and Commissioners David M. Mason and Michael E. Toner (without benefit of a content standard Senator Bayh would have received an in-kind contribution). The Commission agreed that because Senator Bayh was "talking to camera" he obviously had some direction or control over the Weinzapfel message. *Id.*

The Commission also held that the Weinzapfel Committee met the payment requirement under 11 CFR 109.21(a) because the Weinzapfel Committee was not a [Federal] authorized committee of a Federal candidate. *See* AO 2003-25. But unlike the Weinzapfel Committee addressed in the Bayh AO, the Kerr Committee is a [federal] authorized committee of a Federal candidate, and therefore should not meet the payment prong of 11 CFR 109.21. Remarkably, in AO 2003-25 the Commission noted that the "Weinzapfel Committee *is not* a Federal candidate, *so* its payment for 'Committed' [the television ad] would satisfy the 'payment source' prong." (Emphasis added). Yet, the General Counsel does not remain true to the Bayh AO in its treatment of the Kerr Committee. *See* Blue Draft at 4, lines 18-19.

The Blue Draft improperly places the Kerr Committee under the payment requirement of 11 CFR 109.21(a), and thereby creates policy problems where none need exist.

The Blue Draft notes that the Commission's current regulation at 11 CFR 109.21(a) states that "the communication must be paid by someone other than a candidate, an authorized committee, a political party, or an agent of any of the foregoing." 68 *Fed. Reg.* 426. From this language it is clear that payments by federal candidates or [federal] authorized committees do not meet the payment requirement of the Commission's current regulation. The Blue Draft, however cites the following language to rope the Kerr Committee into the payment requirement: "However, a *person's status as* a candidate does not exempt *him or her* from this section with respect to payments *he or she* makes for communications on behalf of a different candidate." *Id.* (emphasis added). This is

either an unfortunate sentence that shows the Commission went unnecessarily beyond of the scope of its directive in BCRA Sec. 214(c). Or, the sentence is easily explained. This sentence likely means that a person that is a candidate may not, in his or her personal capacity, spend personal funds in coordination with another candidate and escape the coordinated-expenditure prohibitions by the mere fact that he or she is also a Federal candidate. Note that the language at 68 *Fed. Reg.* 426 does not mention authorized committees or agents of that candidate. For these reasons, it is more likely than not that the reference at 426 refers to individuals, "persons," acting in a personal capacity, that happen also to be candidates. Therefore, while payments by Alice Forgy Kerr, from personal resources in her personal capacity, "for the contemplated advertisements would satisfy the 'payment source' prong," payments "by the Kerr *Committee* for the contemplated advertisements would [clearly not] satisfy the 'payment source' prong," despite the assertion of the General Counsel at page 4 of the Blue Draft. (Emphasis added).

This reading of a single sentence in the Explanation and Justification squares sound public policy with the reading of the Commission's most recent coordination regulations, all while keeping faith with BCRA. To read this sentence in the Explanation and Justification any differently would negate the plain meaning of 11 CFR 109.21(a) and create unnecessary problems between authorized committees; problems that are not required by BCRA.

Legal Compliance

At page 6 of the Blue Draft, the General Counsel concludes that review for legal compliance would result in "material involvement" that meets the conduct standard at 11 CFR 109.21(d)(2). The NRSC urges the Commission to address carefully issues of "legal review" before quickly concluding such review constitutes "material involvement." As the Commission is aware, compliance is one of the foremost goals of the Commission, legal expenses are in some cases exempt from the definitions of "contribution" and "expenditure", *see* 2 U.S.C. §§ 431(8)(b)(viii), 431(9)(vii), and, more often than not, lawyers are the last to know of a candidate's political considerations with regard to timing, placement, and content of communications.

Conclusion

The NRSC appreciates the opportunity to comment on this Advisory Opinion.

Respectfully submitted,

/s/ *S.M. Hoersting*

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