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January 26, 2004

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Acting Associate General Counsel

J. Duane Pugh Jr.
Senior Attorney

SUBJECT: Advisory Opinion 2004-1: Bush-Cheney '04, Inc., and Alice Forgy Kerr for Congress

AGENDA ITEM
For Meeting of 01-29-04

SUBMITTED LATE

Attached is a draft of Advisory Opinion 2004-1, which was requested by Benjamin L. Ginsberg, Thomas J. Josefiak, and William H. Piper III on behalf of Bush-Cheney '04, Inc., and Alice Forgy Kerr for Congress. We request that this draft be placed on the Commission's agenda for January 29, 2004.

Attachment

DRAFT

1 **ADVISORY OPINION 2004-1**

2 **Benjamin L. Ginsberg**
3 **Thomas J. Josefiak**
4 **Bush-Cheney '04, Inc.**
5 **P.O. Box 10648**
6 **Arlington, Virginia 22210**

William H. Piper III
 Alice Forgy Kerr for Congress
 811 Corporate Drive, Suite 303
 Lexington, Kentucky 40503

7 **Dear Messrs. Ginsberg, Josefiak and Piper:**

8 **This responds to your letter dated January 8, 2004, requesting an advisory opinion**
9 **on behalf of Bush-Cheney '04, Inc. ("the Bush-Cheney Committee"), and Alice Forgy**
10 **Kerr For Congress ("the Kerr Committee"), concerning the application of the Federal**
11 **Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to**
12 **advertisements to be paid for by a Congressional candidate's principal campaign**
13 **committee that will feature President Bush endorsing Ms. Kerr in a special election,**
14 **which will take place three months prior to the presidential primary election in that State.**
15 **As set forth below, the Commission concludes that the proposed advertisements that are**
16 **publicly distributed within 120 days of the Kentucky presidential primary election would**
17 **be "coordinated communications" under 11 CFR 109.21, and if paid for entirely by the**
18 **Kerr Committee, would constitute in-kind contributions to the Bush-Cheney Committee.**
19 **Advertisements that are publicly distributed more than 120 days before the Kentucky**
20 **presidential primary election would not be "coordinated communications," and would not**
21 **constitute in-kind contributions to the Bush-Cheney Committee.**

22 ***Facts***

23 **Kentucky State Senator Alice Forgy Kerr seeks election to Congress from her**
24 **State's Sixth Congressional District in a special election on February 17, 2004, and the**
25 **Kerr Committee is her principal campaign committee. President George W. Bush will**

1 appear on the ballot for re-election in Kentucky's presidential primary on May 18, 2004,
2 and he designated the Bush-Cheney Committee his principal campaign committee.

3 The Kerr Committee would like to pay for one or more television advertisements
4 for State Senator Kerr's election that include visual images of the President, audio of him
5 speaking, or both, which you describe as "intended to convey his support of State Senator
6 Kerr's election." You explain that agents of the President will review the final script in
7 advance of his appearance in the advertisements for legal compliance, factual accuracy,
8 quality, consistency with the President's position, and any content that distracts from or
9 distorts the "endorsement" message that the President wishes to convey.

10 Exhibit A to your request consists of scripts for four advertisements, including
11 descriptions of the video and audio content of the advertisements. Your Exhibit A is an
12 Appendix to this Advisory Opinion.

13 The advertisements do not mention or refer to the President's candidacy for re-
14 election, and they do not expressly advocate the election or defeat of any presidential
15 candidate. You further state that the advertisements will not include any "on-screen
16 graphics" or "other communicative content" that refer to the President, such as a sign in
17 the background. As the scripts attest, the advertisements will not solicit any funds. You
18 also state that the advertisements will not include any campaign materials prepared by the
19 Bush-Cheney Committee, the President, or agents of either. You explain that the
20 advertisements' scripts were not developed by the Bush-Cheney Committee, the
21 President, or agents of either, nor did the request or suggestion that the President appear
22 in the advertisements originate with him, the Bush-Cheney Committee, or their agents.

1 *Legal Analysis and Conclusions*2 *Advertisement Publicly Distributed After January 18, 2004*

3 The Act has long defined as an in-kind contribution an expenditure made by any
4 person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a
5 candidate, his authorized political committees, or their agents."

6 2 U.S.C. 441a(a)(7)(B)(i). In the Bipartisan Campaign Reform Act of 2002, Pub. Law
7 No. 107-155, sec. 214(a), 116 Stat. 81, 94 (Mar. 27, 2002) ["BCRA"], Congress
8 expanded this definition with respect to political party committees. See 2 U.S.C.
9 441a(a)(7)(B)(ii). BCRA also repealed the Commission's prior regulations on
10 coordinated communications, directed the Commission to promulgate new regulations on
11 coordinated communications, and specified certain matters that the Commission was
12 required to address in promulgating new regulations. See BCRA, sec. 214(b) and (c),
13 116 Stat. at 94-95. The Commission's "coordinated communication" regulation at 11
14 CFR 109.21 implements this directive by setting forth a three-pronged test: (1) the
15 communication must be paid for by a person other than a Federal candidate, a candidate's
16 authorized committee, or political party committee, or any agent of any of the foregoing;
17 (2) one or more of the four content standards set forth in 11 CFR 109.21(c) must be
18 satisfied; and (3) one or more of the six conduct standards set forth in 11 CFR 109.21(d)
19 must be satisfied. See 11 CFR 109.21(a). The regulation also specifies that a payment
20 for a coordinated communication is made for the purpose of influencing a Federal
21 election, and is an in-kind contribution to the candidate or authorized committee with
22 whom or which it is coordinated and must be reported as an expenditure made by that
23 candidate or authorized committee. 11 CFR 109.21(b)(1). The Commission explained

1 its determination that a payment that satisfies the content and conduct standards of
2 11 CFR 109.21 "satisfies the statutory requirements for an expenditure in the specific
3 context of coordinated communications, and thereby constitutes a contribution under 2
4 U.S.C. 441a(a)(7)(B)(i) and (ii)." *Coordinated and Independent Expenditures, Final*
5 *Rules*, 68 Fed. Reg. 421, 427 (Jan. 3, 2003) (*Explanation and Justification for*
6 *11 CFR 109.21(b)*) [*"Coordinated Expenditures"*].

7 *Payment source*

8 The first prong of the definition of a "coordinated communication" specifies that a
9 communication is coordinated with a candidate or an authorized committee when the
10 communication is paid for by "a person other than *that* candidate [or] authorized
11 committee." 11 CFR 109.21(a)(1) (emphasis added). Although the Kerr Committee is an
12 authorized committee of Senator Kerr, its advertisements can be evaluated for
13 coordination with another Federal candidate or his committee, in this case the President
14 or the Bush-Cheney Committee. The Commission contemplated situations like this in its
15 *Explanation and Justification* for section 109.21(a) by stating: "a person's status as a
16 candidate does not exempt him or her from this section with respect to payments he or
17 she makes for communications on behalf of a different candidate." *Coordinated*
18 *Expenditures*, 68 Fed. Reg. at 426. Payments by the Kerr Committee for the
19 contemplated advertisements would satisfy the "payment source" prong.

20 *Conduct*

21 Conduct standards operate as another prong of the definition of "coordinated
22 communication." 11 CFR 109.21(d)(1) through (6). The "material involvement" conduct
23 standard is satisfied if, among other things, the Federal candidate, the candidate's

1 authorized committee, or one of their agents is "materially involved" in a decision
2 regarding the content of the communication. 11 CFR 109.21(d)(2)(i). You stated in your
3 request that "[a]gents of the President will review the final script in advance of the
4 President's appearance in the advertisements for legal compliance, factual accuracy,
5 quality, consistency with the President's position and any content that distracts from or
6 distorts the 'endorsement' message that the President wishes to convey." This
7 involvement by the President's agents, whenever it occurs, would constitute material
8 involvement for purposes of the conduct standard. As stated in the Explanation and
9 Justification, a candidate is "'materially involved in decisions' if the candidate . . . or
10 agent conveys approval or disapproval of the other person's plans." *Coordinated*
11 *Expenditures*, 68 Fed. Reg. at 434. Moreover, each of the advertisements described in
12 your request includes at least some video of President Bush with Ms. Kerr. You advised
13 us by telephone that such video was produced by the Kerr Committee expressly for its
14 advertisements. Under such circumstances, the President's participation in the production
15 of the advertisements would also constitute material involvement.

16 Consistent with this conclusion, the Commission recently determined that the
17 appearance of a United States Senator in an advertisement endorsing a candidate for
18 mayor of a city in his State showed sufficient involvement by the Senator to satisfy the
19 "materially involved" conduct standard. Advisory Opinion 2003-25.¹ The Commission
20 stated:

¹ In Advisory Opinion 2003-25, the Commission concluded that payments for the advertisements would not be an in-kind contribution to the United States Senator because it did not meet any of the content standards of the definition of "coordinated communication" in 11 CFR 109.21(c).

1 Given the importance of and potential campaign implications for each
2 public appearance by a Federal candidate, it is highly implausible that a
3 Federal candidate would appear in a communication without being
4 materially involved in one or more of the listed decisions regarding the
5 communication. In fact, your request explicitly assumes that [the United
6 States Senator] or his representative will review the final script in advance
7 “for appropriateness.” To suggest that a candidate may personally approve
8 the content of an advertisement without satisfying the conduct standard in
9 109.21(d)(2) would be to obviate that section of the regulations.

10
11 AO 2003-25 (citation and footnote omitted).

12 Because the facts presented in your request show that the Kerr Committee
13 advertisements would satisfy the “material involvement” conduct standard, this advisory
14 opinion does not address the other conduct standards. You ask a number of other
15 questions that raise additional facts; however, all are premised on the underlying facts of
16 your request, including the fact that the President’s agents will review the advertisements
17 in the manner described. So long as the advertisements are subject to the described
18 review and approval of the President or his agents, the Commission’s conclusion is
19 unaffected by the extent to which the proposed advertisements are edited.

20 *Content*

21 Another prong of the definition of “coordinated communication” provides four
22 content standards. 11 CFR 109.21(c)(1) through (4). The only one applicable to the fact
23 presented in your request requires that a communication: (1) satisfy the definition of
24 “public communication” in 11 CFR 100.26; (2) refer to a clearly identified candidate for
25 Federal office; (3) be publicly distributed or disseminated within 120 days of an election
26 for Federal office; and (4) be directed to voters within the jurisdiction of the clearly
27 identified candidate. 11 CFR 109.21(c)(4). The Kerr Committee advertisements
28 distributed after January 18, 2004, would meet the definition of public communication in

1 11 CFR 100.26; each would refer to another clearly identified candidate for Federal office
2 (President Bush); and they would be distributed within 120 days of the Kentucky
3 presidential primary. 11 CFR 109.21(c)(4)(i) and (ii).

4 This content standard also requires that the public communication be directed to
5 voters in the jurisdiction of the clearly identified candidate. 11 CFR 109.21(c)(4)(iii). In
6 the presidential primary election setting, this targeting concept is satisfied whenever a
7 public communication is publicly distributed to voters in a State with a presidential
8 primary election in the next 120 days or less. With respect to the Kerr Committee
9 advertisements publicly distributed after January 18, 2004, the Kentucky presidential
10 primary will occur within the 120 days following the public distribution of these
11 advertisements, and therefore satisfies this requirement of the fourth content standard in
12 the "coordinated communication" definition.

13 Having satisfied the three prongs of the definition of "coordinated
14 communication" in 11 CFR 109.21(a), the Kerr Committee advertisements that would be
15 publicly distributed after January 18, 2004, would be coordinated communications within
16 the meaning of 11 CFR 109.21, and would result in an in-kind contribution to the Bush-
17 Cheney Committee under 2 U.S.C. 441a(a)(7)(B)(i) or 11 CFR 109.21(b)(1) unless the
18 Bush-Cheney Committee reimburses the Kerr Committee for its attributed portion of the
19 coordinated communications.

20 *Advertisement Publicly Distributed Before January 19, 2004*

21 The Kerr Committee advertisements publicly distributed before January 19, 2004,
22 do not meet any of the four content standards. Because they were expenditures by the
23 Kerr Committee, they were not electioneering communications under

1 11 CFR 100.29(c)(3). 11 CFR 109.21(c)(1). The Kerr Committee advertisements do not
2 include any Bush-Cheney campaign materials, 11 CFR 109.21(c)(2), and they do not
3 express advocate the President's re-election, 11 CFR 109.21(c)(3). The advertisements
4 publicly distributed before January 19, 2004, were not publicly distributed within 120
5 days of the Kentucky presidential primary, so they do not meet the fourth content
6 standard of the Commission's coordination rules.² On this basis, none of the content
7 standards are satisfied by the earlier advertisements, so they are not coordinated
8 communications, nor are they in-kind contributions to the Bush-Cheney Committee if
9 paid for by the Kerr Committee.

10 *Attribution*

11 You ask whether advertisements publicly distributed both before and after 120
12 days before the Kentucky presidential primary need to be attributed. The Commission
13 concludes that the Kerr Committee advertisements distributed after January 18, 2004,
14 must be attributed to avoid an in-kind contribution, but the advertisements distributed
15 before that date do not need to be. Expenditures, including in-kind contributions, made
16 on behalf of more than one clearly identified Federal candidate are attributable to each
17 such candidate according to the benefit reasonably expected to be derived.

18 11 CFR 106.1(a)(1). For broadcast communications, like the Kerr Committee

² While advertisements that reach the Kentucky 6th Congressional District could also reach viewers in Ohio, which has a presidential primary scheduled for March 2, 2004, the content of the Kerr Committee advertisements shows they are not "directed to voters" in Ohio because the advertisements are endorsements of a Kentucky candidate, who appears in the advertisements that focus on her election. Additionally, you advised us that only Kentucky television stations that serve the 6th Congressional district have or will distribute the advertisements. See 11 CFR 109.21(c)(4)(iii); *Coordinated Communications*, 68 Fed. Reg. at 431. In the absence of any other facts or circumstances indicating that the advertisements are directed to any other jurisdiction, the Commission concludes that the Kerr Committee advertisements are not directed beyond Kentucky.

1 advertisements, attribution shall be determined by the proportion of space or time devoted
2 to each candidate as compared to the total space or time devoted to all candidates. *Id.* On
3 this basis, if all the production and distribution costs of the Kerr Committee
4 advertisements publicly distributed after January 18, 2004, are attributed to the Bush-
5 Cheney Committee and the Kerr Committee using 11 CFR 106.1(a)(1)'s time and space
6 method, and if the Bush-Cheney Committee reimburses the Kerr Committee for its
7 attributable share of the expenses, there is no contribution.³

8 With respect to the Kerr Committee advertisements that were broadcast prior to
9 January 19, 2004, under 11 CFR 106.1(a), no attribution would be required of the costs
10 related solely to the early advertisements. Production costs and distribution costs for all
11 of the Kerr Committee advertisements must be divided between the advertisements
12 distributed before January 19, 2004 and those distributed on or after that date, with only
13 the later subject to attribution between the Kerr Committee and the Bush-Cheney
14 Committee.

15 *Disclaimers*

16 BCRA expanded the Act's disclaimer requirements applicable to television
17 advertisements paid for by political committees and authorized by Federal candidates.
18 See 2 U.S.C. 441d(d)(1)(B); BCRA, sec. 311(2), 116 Stat. at 105-06; 11 CFR 110.11.
19 Because the Kerr Committee advertisements would be paid for and authorized by State
20 Senator Kerr and the Kerr Committee, the advertisements would require a disclaimer that,
21 with respect to State Senator Kerr, complied with the "general content requirements" of

³ The Commission reiterates that the determination about attribution in this advisory opinion applies only to two Federal authorized committees spending entirely Federal funds.

1 11 CFR 110.11(b)(1), the "specifications for all disclaimers" in 11 CFR 110.11(c)(1), and
2 the "specific requirements for television communications authorized by a candidate" in
3 11 CFR 110.11(c)(3). Television advertisements authorized by a candidate are required
4 to include a candidate appearing in an unobscured, full screen view making a statement
5 that identifies the candidate and states his or her approval of the communication or a
6 voice-over of a photograph of the candidate to a similar effect. 11 CFR 110.11(c)(3)(ii).

7 Any communications that would be subject to the described review by the
8 President's agents must be considered communications authorized by the President under
9 11 CFR 110.11(b) and (c)(3), in addition to State Senator Kerr. Therefore, the disclaimer
10 requirements apply both to Ms. Kerr and President Bush with respect to all of the Kerr
11 Committee advertisements. This conclusion is consistent with the Commission's
12 treatment of political party expenditures. There, the Commission stated that if an
13 advertisement paid for by a political party committee as a coordinated expenditure under
14 2 U.S.C. 441a(d) is, in fact, authorized by the candidate, an authorization statement by
15 the candidate would be required for that advertisement, in addition to the disclaimer
16 requirements for party coordinated expenditures in 11 CFR 110.11(d). *See Disclaimers,*
17 *Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds; Final*
18 *Rules, 67 Fed. Reg. 76962, at 76968 (Dec. 13, 2002).*

19 In this instance, for example, the disclaimer for the advertisements distributed
20 after January 18, 2004, could state: "Paid for and authorized by Alice Fergy Kerr for
21 Congress and Bush/Cheney '04." 11 CFR 110.11(b)(1). The disclaimer for the Kerr
22 Committee advertisements publicly distributed before January 19, 2004, could state:
23 "Paid for by Kerr for Congress and authorized by Kerr and Bush/Cheney '04." Both

EXHIBIT A

"ENDORSEMENT"	
VIDEO	AUDIO
	(Music Up & Under)
	ANNCR:
Patriotic beauty shots	American values.
	If you share those values,
Alice talking to people	you're going to like Alice Forgy Kerr.
	She's committed to a strong economy...helping to create good jobs in Kentucky.
Alice at desk	Alice supports the kind of tax cuts that are now triggering new jobs and economic growth.
	She's hailed the new prescription drug benefit law as a "godsend to Seniors"...
Alice talking to people	and is committed to fight to protect Social Security.
	Alice Forgy Kerr stands with us.
Bush-Alice walk	The reason President Bush has strongly endorsed her election saying, "in Congress she will work to protect Kentucky values...American values".
Bush-Alice looking off camera shot	
	KERR:
GRAPHIC TREATMENT:	I'm Alice Forgy Kerr and I approve this message.
	(Music Under and Out)

<p>Add Endtag Graphics</p> <p>Kerr Talking to Camera Disclaimer APPROVED BY ALICE FORGY KERR & PAID FOR BY ALICE FORGY KERR FOR CONGRESS</p>	
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"SENIORS"	
VIDEO	AUDIO
Alice talking to off-camera interviewer SUPER: Alice Forgy Kerr	<u>KERR ("talking" to off-camera interviewer):</u> I was the primary caregiver for my mom before she died.
Still photo of Alice and her mom	I saw firsthand how she was overrun by prescription costs.
Alice with Bush	That's why President Bush's prescription drug law is such a godsend to seniors,
Alice talking to off-camera interviewer	And that's why I'll work to strengthen and protect Social Security.
	No privatization.
	No increase in the retirement age.
Endtag Graphics/Freeze Frame/Disclaimer	<u>ANNCR:</u> Alice Forgy Kerr. Congress is her first choice, not a consolation prize.
	<u>KERR (to camera):</u>
Alice talking to camera	I'm Alice Forgy Kerr and I approved this message because we owe a good retirement to all of our parents.

"ABSOLUTELY"

VIDEO	AUDIO
<p>Alice on camera SUPER: Alice Forgy Kerr</p>	<p>MUSIC UP & UNDER</p> <p>ALICE: Businesses are overregulated, and they're overtaxed, and they're overburdened. Government doesn't create jobs - businesses do.</p>
<p>Alice walking down hallway SUPER: Alice Forgy Kerr</p> <p>Alice with workers inside warehouse Alice with employees outside warehouse</p>	<p>ANNOUNCER: Alice Forgy Kerr.</p> <p>She's committed to strengthening Kentucky businesses and helping create good jobs.</p>
<p>Bush with Alice</p> <p>Alice with people</p>	<p>In Congress, Alice Forgy Kerr will work with President Bush...</p> <p>to help continue our economic recovery.</p>
<p>Alice on Camera SUPER: Alice Forgy Kerr</p>	<p>ALICE: I absolutely support President Bush's tax cuts.</p>
<p>Alice with workers inside warehouse Kevin McCarthy on camera ID: Kevin McCarty Warehouse Manager</p>	<p>KEVIN MCCARTHY: We need to make and keep good jobs here in Kentucky, and I think Alice will fight to make sure that happens.</p>
<p>SUPER: Alice Forgy Kerr For Congress</p> <p>APPROVED BY ALICE FORGY KERR AND PAID FOR BY ALICE FORGY KERR FOR CONGRESS</p>	<p>ALICE: I'm Alice Forgy Kerr and I approve this message.</p>

"VALUES"

VIDEO	AUDIO
Patriotic beauty shots	(Music Up & Under)
Bush waving	ANNCR:
Bush-Alice walk	American values.
GRAPHIC TREATMENT: Bush talking at podium SUPER under: match audio line	If you share the values
Add second SUPER under Bush: Match audio line	of President Bush,
Bush-Alice looking off camera shot	you're going to like Alice Forgy Kerr.
Alice talking to people	They are cut from the same cloth.
SUPER: Supported Bush Tax Cuts Add Economic Headlines	While others attack the President's economic program,
Reprise Bush-Alice shot Add Endtag Graphics	and his fight to protect our national security,
Kerr Talking to Camera Disclaimer	Alice Forgy Kerr stands with President Bush.
APPROVED BY ALICE FORGY KERR & PAID FOR BY ALICE FORGY KERR FOR CONGRESS	Unlike her opponent,
	Alice supported the Bush tax cuts that are now triggering new jobs and economic growth.
	Alice Forgy Kerr is the only candidate who will work with President Bush.
	KERR:
	I'm Alice Forgy Kerr and I approve this message.
	(Music Under and Out)