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January 28, 2004

Lawrence H. Norton  
Federal Election Commission  
Office of the General Counsel  
999 E Street, N.W.  
Washington, D.C. 20463

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FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

Re: Draft Advisory Opinion 2004-1

Dear Mr. Norton:

Thank you for providing us with the Office of General Counsel's draft of Advisory Opinion 2004-1, an opinion requested by Bush-Cheney '04, Inc. ("Bush-Cheney '04") and Alice Kerr for Congress (Kerr for Congress") relating to presidential endorsements in the upcoming Kentucky Congressional Special Election. We appreciate your prompt consideration of the matter and the Commission's decision to issue an expedited opinion within 20 days of receiving our request in accordance with 2 U.S.C. § 437f(a)(2) and 11 CFR § 112.4(b).

Because endorsements of federal candidates by other federal officeholder candidates in political advertisements, not only at the presidential level but also at the Senate and Congressional levels as well, will continue to be an integral part of the political landscape, the Commission must seriously consider the implications of limiting the ability of participating in such endorsements. We respectfully submit that any such regulation should be limited, and clear guidance be provided by the Commission in light of its well established policies delineated in many previous advisory opinions.

In reviewing the Office of General Counsel's draft, Bush-Cheney '04 respectfully submits the following comments on the draft of Advisory Opinion 2004-1. Specifically, on page 5, lines 2 though 8, your draft states that based upon the facts presented, the actions of the President's agents would constitute "material involvement", under the Federal Election Commission's ("FEC") coordination regulations, "for the purposes of the conduct standard." This conclusion is reached based upon our representation that, the agents of the president would review the final scripts in advance of the ads being aired, "for legal compliance, factual accuracy, quality, consistency with the President's position and any content that distracts from or distorts the 'endorsement' message the President wishes to convey." Although this is an accurate description for certain ads already aired

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Paid for by Bush-Cheney '04, Inc.

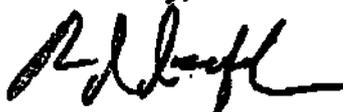
at the time the request was submitted, it was our intention that the Commission give guidance on each element of the activity for other ads not yet final but intended to air prior to the special election. For example, would it be permissible for agents of the President to review such ads for legal compliance? Would it be permissible for agents of the President to review for factual accuracy? Would it be permissible for agents of the President to review for quality? Would it be permissible for agents of the President to review for consistency with the President's position and any content that distracts or takes away from or distorts the 'endorsement' message the President wishes to convey?

The draft seems to look at the activity as a whole and conclude that the conduct constitutes "material involvement" under the conduct standard. It does not provide any guidance as to which, if any, of the elements would be permissible. Based upon the conclusions reached in draft Advisory Opinion 2004-1, it appears that the Commission would negate a number of the FEC's long standing advisory opinions relating to candidate endorsements. The Bipartisan Campaign Finance Reform Act, Pub. Law No. 107-155 ("BCRA"), would not appear to require such a change. As a result, examining each element of the facts as presented and providing specific guidance is necessary to the parties involved.

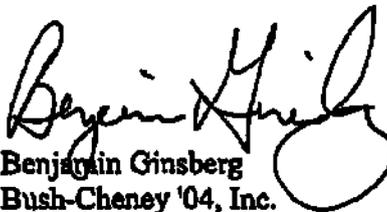
Also, on page 5, lines 12 through 15, you state that the video in question was produced by Kerr for Congress "expressly for its advertisements" and that under such circumstances the President's participation would constitute "material involvement." This description of the facts is based upon a telephone conversation between Thomas J. Josefiak, General Counsel of Bush-Cheney '04, and J. Duane Pugh, Jr. of the General Counsel's Office on January 16, 2004. There may be some confusion as to that discussion. Mr. Josefiak stated that Kerr for Congress was responsible for the production, not that the video was produced "expressly" for their advertisements. At the time of the shooting, the use of the video was unclear. Would that distinction have any effect your conclusion? Some of the other ads may use footage filmed at public events either by Kerr for Congress or by others and then purchased by Kerr for Congress where the President would not be aware of such filming. Would that change the conclusion? Finally, there may be old footage or pictures with the President used in the Kerr for Congress ads that were either shot prior to any election or for another purpose such as a social event with many other participants. Would the use of such footage alter the conclusion?

Again, thank you for your expedited consideration of this matter.

Sincerely,



Thomas J. Josefiak  
Bush-Cheney '04, Inc.



Benjamin Ginsberg  
Bush-Cheney '04, Inc.

Cc: The Commissioners