

CONCURRING OPINION

VICE CHAIRMAN BRADLEY A. SMITH
AND COMMISSIONERS DAVID M. MASON AND MICHAEL E. TONER

ADVISORY OPINION 2003-25

On October 16, 2003, the Commission issued an advisory opinion to counsel for Indiana State Representative Jonathan Weinzapfel.¹ We concluded that Weinzapfel, presently a candidate for Mayor of Evansville, Indiana, could feature U.S. Senator Evan Bayh as an endorser in campaign advertisements. The requester sought our opinion in light of amendments made by the Bipartisan Campaign Reform Act that prohibit the use of non-federal funds to pay for public communications that promote, support, attack, or oppose a clearly identified candidate for federal office.²

Weinzapfel first asked the Commission's advice on August 7. Over the course of our examination of the request, the Weinzapfel campaign provided us with storyboards and scripts for their spot, titled "Committed," so we could evaluate the legal status of the proposed advertisement. We learned that Weinzapfel desired to feature Senator Bayh on screen before an American flag. Shots of the candidate would be interspersed with shots of Senator Bayh giving this testimonial:

Hi. I'm Evan Bayh. Over the past few years, I've come to know Jonathan Weinzapfel very well. We've worked together, and I've seen firsthand how committed he is to making Evansville a better city. From working to cut taxes to passing a law that protects our kids from drugs, Jonathan Weinzapfel knows how to get the job done. He's got a bipartisan, common-sense way of solving problems. He cares about what really matters to people. And he's exactly the kind of mayor Evansville needs.

Given the law, our task as Commissioners was to determine whether this "public communication" promoted, supported, attacked or opposed Senator Bayh. If so, then the Weinzapfel for Mayor campaign could not pay for it, because this mayoral committee raised funds in compliance with Indiana law, but not under federal contribution limits or source restrictions.

Accordingly, the Commission's consideration of this Advisory Opinion request required us to meet in open session, mere weeks before the election, to decide whether the people of Evansville could hear about Senator Bayh's endorsement of Jonathan Weinzapfel. The Commission voted 5-0 that the advertisement could be run.³

¹ See Federal Election Commission, Minutes of an Open Meeting (Oct. 16, 2003) at 3-6 (Commissioners Mason, McDonald, Smith, Thomas and Toner voting affirmatively, Chair Weintraub recused) ("Minutes").

² 2 U.S.C. 431(20)(a)(iii); 11 C.F.R. 100.24(b)(3).

³ Minutes at 5-6.

We believe this is the only conclusion congruent with our Constitution's protection of speech from regulation. Voters should be informed who endorses their candidates. We do not see any anti-circumvention or anti-corruption rationale to justify federal censorship of the advertisement, or federal regulation of the finances of an Evansville campaign committee. Yet, if the Commission were to apply the ordinary meaning of the regulatory standard, conceivably our answer would instead be that this message does promote and support Senator Bayh. The script does not merely state that Bayh endorses Weinzapfel, it features him personally conveying the message. He is placed before an American flag, which in Evansville probably evokes positive responses from viewers. He is associated with issues like cutting taxes, and protecting kids from drugs. Accordingly, "promote" and "support" must be construed as something narrower than their ordinary meaning if the law is to coexist with the First Amendment.⁴

Our colleagues, Commissioners Thomas and McDonald, write separately to describe how the final advisory opinion issued by the Commission differed from the draft prepared for us by the Office of General Counsel.⁵ The Counsel's draft contained a longer analysis explaining why the proposed advertisement did not "promote" or "support" Bayh. It considered whether the communication referred to Bayh as a candidate for federal office, or his qualifications (it did not); whether it referred to Bayh's record, positions, character, or party affiliation (it did not); and whether the advertisement contained an exhortation to elect Weinzapfel as mayor of Evansville (it did). We supported amendments that would excise this additional analysis from the opinion. While we concurred with the draft's conclusions, we resisted setting forth standards for evaluating the regulation that might not be appropriate in other situations. Rather than release an interpretation other candidates might feel constrained to follow, we believe that until federal courts provide controlling First Amendment analysis of the "promote, support, attack or oppose" standard, the regulation must speak for itself.⁶

Moreover, under BCRA, the advertisement could have been prohibited as an illegal coordinated contribution. But for our newly enacted coordination regulations, we would be compelled to conclude that this advertisement was made in coordination with Senator Bayh, or his representatives or agents, as it would be made "in cooperation, consultation, or concert with, or at the request or suggestion of" Senator Bayh.⁷ If conduct were the only factor to be considered, the advertisement would be a coordinated contribution to his campaign, and would be unlawful because of the Indiana campaign's "soft money" funding. Our Commission's regulation, however, requires not only coordinated conduct, but also certain content before the

⁴ See *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone" in regulation of First Amendment protected activity); *Thomas v. Collins*, 323 U.S. 516, 535 (1945) (effect of vagueness to put "speaker wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning").

⁵ See Concurring Opinion, Advisory Opinion 2003-25 (Thomas, McDonald) (citing Agenda Document No. 03-75 (Oct. 9, 2003)) ("Concurring Opinion").

⁶ 2 U.S.C. 437f(b)(general rules must be issued as regulations in accord with Section 438(d)). In enacting BCRA, Congress did not define "promote, support, attack or oppose." The Commission likewise did not define "promote, support, attack or oppose" in regulations, and several commenters during the "soft money" rulemaking, who opposed a narrower and clearer definition for this phrase, argued that "promote, support, attack or oppose" required no further definition. See Comment: Center for Responsive Politics (May 29, 2002) at 10 ("There is no need for the Commission to attempt to further define in the regulations the language adopted by Congress . . ."); Comment of Senators McCain and Feingold and Reps. Shays and Meehan (May 29, 2002) at 2, 19. Thus it would be inappropriate to articulate a new definition in an advisory opinion.

⁷ See 2 U.S.C. 441a(a)(7)(B)(i).

expenditure is deemed a contribution to the federal candidate.⁸ The Weinzapfel advertisement does not contain express advocacy of Senator Bayh, is not an electioneering communication for Bayh, does not republish Bayh campaign material, nor does it feature Bayh and appear within 120 days of a federal election. Under the regulation, therefore, it is not a coordinated in-kind contribution.

Our colleagues' Concurring Opinion expresses their concern about the "loophole" in the law they believe is created by the regulation's content standard. These Commissioners made much the same argument during the consideration of the regulation, but were not successful in persuading other Commissioners of the merits of their views. Their Concurring Opinion suggests that the reader "[i]magine the attack ads paid for by corporations, unions, and other well-funded sources that can be orchestrated by the candidates themselves during that crucial [120-day] period!"⁹ Without revisiting the debate over the coordination rulemaking, we suggest the reader instead imagine a regulatory regime where the merest mention of an individual who is also a federal candidate (i.e. a Senator or Congressman) made with some contact from that person's staff, paid for with nonfederal funds – for instance a grassroots lobbying message paid for by a wealthy individual, non-profit, corporation, or labor union – is illegal.

We are hard-pressed to understand how, under this statute the Weinzapfel advertisement could run, absent the Commission's coordination regulation. In any case, both Commissioners Thomas and McDonald believed that in the request before the Commission in 2003-25, the local campaign advertisement should be allowed. We are pleased that the coordination regulation produces that result.

December 8, 2003

Bradley A. Smith
Vice Chairman

Michael E. Toner
Commissioner

David M. Mason
Commissioner

⁸ See 109.21(c)(1) – (4).

⁹ Concurring Opinion at 3 n.2.