



FEDERAL ELECTION COMMISSION
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**ADVISORY OPINION 2004-1
CONCURRING OPINION**

**CHAIRMAN BRADLEY A. SMITH, COMMISSIONER DAVID M. MASON
AND COMMISSIONER MICHAEL E. TONER,**

On January 29, 2004, the Commission issued an advisory opinion to counsel on behalf of Bush-Cheney '04, Inc. ("the Bush-Cheney Committee") and Alice Forgy Kerr for Congress ("the Kerr Committee") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to television advertisements that include President Bush endorsing Ms. Kerr. Although the undersigned voted to approve the final advisory opinion, we write now to address its treatment of what disclaimers were required on Kerr Committee advertisements publicly distributed before January 19, 2004.

First, we do not believe that the issue of what disclaimers should have been placed on the Kerr Committee advertisements that were publicly distributed before January 19, 2004 was the proper subject of an advisory opinion.¹ Although the opinion's separate discussion of other aspects of these advertisements is necessary because there are future reporting obligations for such activity, the question of what disclaimer was required on prior advertisements has been rendered moot by the passage of time and is therefore an improper subject of an advisory opinion under Commission regulations. 11 CFR 112.1.

Second, and more importantly, even if the Commission were to reach this question, we would not hold that communications by one federal candidate, which meet the conduct standard of the Commission's coordination regulations as to a second candidate yet fail to meet the content standard as to that candidate, require an authorization statement as to the second candidate. *See* 11 CFR 109.21(c)(content standard for coordinated communications); 11 CFR 109.21(d)(conduct standard for coordinated communications); 2 USC 441d(a)(disclaimer provision). All communications paid for by authorized committees must include a "paid for by" disclaimer. 2 USC 441d(a)(1). Communications by persons other than authorized committees must include an authorization/non-authorization statement. 2 USC 441d(a)(1) and (2). The disjunctive "or" between provisions (1) and (2) of 441d(a) clearly indicates that the 441d(a) requirements for an authorization statement do not apply to communications paid for by

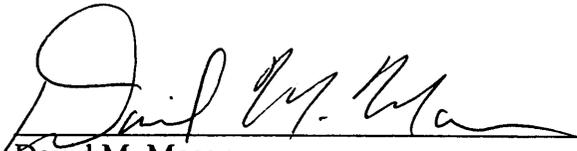
¹ The Commission, by a vote of 3-3, rejected Commissioner Mason's motion to exclude this issue from the opinion's analysis. Chairman Smith and Commissioners Mason and Toner voted to approve, Commissioners McDonald, Thomas, and Weintraub voted against.

authorized committees.² To conclude otherwise would also necessarily require non-authorization statements when, for instance, an authorized committee pays for a communication attacking an opponent. In the final version of the advisory opinion, the analysis of disclaimers for advertisements publicly distributed before January 19, 2004 was presented merely as one permissible interpretation of the disclaimer statute, and it is on this limited basis that we voted to approve Advisory Opinion 2004-1.

February 2, 2004



Bradley A. Smith
Chairman



David M. Mason
Commissioner



Michael E. Toner
Commissioner

² Communications paid for proportionately by two or more authorized committees must include a "paid for by" statement for each committee paying a share of the cost.