

## CONCURRING OPINION

COMMISSIONER SCOTT E. THOMAS  
COMMISSIONER DANNY LEE MCDONALD

### ADVISORY OPINION 2003-25

In Advisory Opinion 2003-25, the Weinzapfel for Mayor Committee (“Weinzapfel Committee”) asked whether it could pay for a television advertisement featuring an endorsement of Jonathan Weinzapfel for mayor of Evansville, Indiana in the November, 2003 election by Indiana Senator Evan Bayh (a 2004 federal candidate). The Commission concluded that the Weinzapfel Committee could use ‘non-Federal funds’ (funds not permissible for Federal elections) to pay for the advertisement. Central to this determination was the Commission’s finding that the Weinzapfel Committee ad would not “promote, support, attack, or oppose” Senator Bayh under 11 C.F.R. 300.72 (“The requirements of section 11 CFR 300.71 [‘Federal funds required for certain public communications’] shall not apply if the public communication is in connection with an election for State or local office, and refers to one or more candidates for State or local office or to a State or local officeholder *but does not promote, support, attack or oppose any candidate for Federal office.*”)(emphasis added).

Although we agree with the result reached in Advisory Opinion 2003-25, we believe the Commission also should have approved the full analysis contained in the General Counsel’s proposed draft explaining why the advertisement did not promote, support, attack or oppose Senator Bayh. *See* Agenda Document No. 03-75 (October 9, 2003). Because there were not four votes to include the General Counsel’s proposed language in the Commission’s final opinion, it was deleted and the Commission went with a “bare-bones” approach in its analysis. In our view, the General Counsel’s explanatory language would have provided helpful guidance to the regulated community and we provide that language here.

In particular, the Office of General Counsel draft pointed out:

While Senator Bayh may benefit, as an incidental matter, from appearing in the “Committed” advertisement in that it may increase his name recognition in Evansville, Indiana, six months before the primary election, the salient features of this advertisement, taken together, point to an endorsement of the mayoral candidate, and not directly or indirectly to the re-election of Senator Bayh.

*Id.* at 6, lines 7-12.

The General Counsel's draft then explained:

In determining that the advertisement does not promote, support, attack, or oppose a Federal candidate, the Commission notes that Senator Bayh does not refer to himself as a Federal candidate, nor is he identified in any manner other than "Evan Bayh" and "Senator Bayh." All references to positions on issues are characterized as Mr. Weinzapfel's positions, and not those of Senator Bayh. Senator Bayh states his own opinion of Mr. Weinzapfel's character, but never mentions his own views or qualifications for the office of U.S. Senator. In addition, the advertisement ends with the words that the Commission construes as an exhortation to elect Mr. Weinzapfel as mayor of Evansville, Indiana: "Weinzapfel. Mayor."

The Commission further notes the absence of any statements about Senator Bayh's record or position or views on any issue (other than Mr. Weinzapfel's qualifications for mayor), or on the Senator's character, or his qualifications or fitness for Federal office, or his party affiliation. Nor are audio/visual techniques employed to influence the audience's views of Senator Bayh as a candidate. Nor does the advertisement contain any solicitation of funds, or any reference to any other Federal candidate or any political party.

*Id.* at 6, line 21, through page 7, line 12.

Finally, the General Counsel's draft properly indicated that the conclusion reached by the Commission in Advisory Opinion 2003-25 was limited to the facts presented in the request:

The Commission emphasizes, however, that its consideration of the various factors described above is limited to the situation presented by your request. The presence or absence of any one of these factors, or any particular combination of these factors, is not necessarily determinative of whether a different communication promotes, supports, attacks, or opposes a clearly identified Federal candidate. Other factors, such as the presentation of policy issues or opinions that appear closely associated with a Federal candidate's campaign, could be relevant in other situations.

*Id.* at 7, lines 15-22.

We agree with the factors and analysis discussed above in the General Counsel's

draft of Advisory Opinion 2003-25. These are all considerations which should be taken into account when deciding whether a particular communication “promotes, supports, attacks or opposes” a federal candidate who is mentioned in a non-federal candidate advertisement, and these are the considerations we took into account when we considered the Weinzapfel advertisement.<sup>1</sup>

In Advisory Opinion 2003-25, the Commission also found the ad in question would not be a “coordinated communication” within the meaning of 11 C.F.R. § 109.21(d) and, accordingly, payment for the advertisement would not constitute a contribution to the Bayh campaign. Although we agree with that result under the facts and circumstances presented by the requestor here, it is important to point out the loophole contained in the Commission’s new “coordination” regulation.

Section 109.21 broadly exempts from the limits, prohibitions, and contribution reporting provisions *fully coordinated* communications that run more than 120 days before the election as long as they avoid express advocacy or the direct republication of campaign materials issued by a candidate. 11 C.F.R. § 109.21(c)(4). As a result, even ads that promote, support, attack or oppose a candidate can be created and fully controlled by a candidate and yet be paid for without limit by a party committee, corporation, union,

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<sup>1</sup> During the discussion of the advisory opinion draft it was suggested that the Commission’s failure to adopt regulations better defining ‘promote, support, attack or oppose’ terminology was in accord with the wishes of chief supporters of the Bipartisan Campaign Reform Act (BCRA). It is true the supporters expressed concern about efforts to define this term during the ‘soft money’ phase of the FEC’s BCRA rulemaking. See May 29, 2002 comment of Sens. McCain and Feingold and Reps. Shays and Meehan, p.2 (“proposed definition. . . would severely and improperly limit the reach of the state party soft money ban.”). Their concern, though, reflected discomfort with the definition posed for public comment. It would have left out the phrase “promote, support, attack or oppose;” would have relied instead on whether the message “[u]nmistakably and unambiguously encourages action to elect or defeat a clearly identified candidate. . . ;” and would have exempted a communication referring to a Federal candidate that mentions that another candidate “agrees or disagrees with the Federal candidate’s position on an issue or on legislation.” 67 Fed. Reg. 35654, 35681 (May 20, 2002). This definition would have excluded an ad saying, “Candidate Dinglethorp is a liar, tax cheat, and wife-beater,” or an ad saying, “As your Governor, you should know I agree with candidate Dinglethorp’s plan to cut taxes, his plan to better educate children, and his plan to fight terrorism.” No wonder the supporters of BCRA urged the Commission to cease trying to ‘clarify’ the “promote, support, attack or oppose” concept in the ‘soft money’ phase of the BCRA rulemaking.

By contrast, the FEC’s proposals for public comment during the later “electioneering communication” phase of rulemaking did not generate the same concern on the part of the BCRA supporters. See, e.g., Aug. 21, 2002 Comment of Center for Responsive Politics, p.5 (“Of the four alternatives, we believe version B is most consistent with BCRA.”). Some specific exceptions designed to avoid the ‘promote, support, attack or oppose’ construction steered clear of the obvious problems associated with the earlier rulemaking. For example, one proposed exception was crafted to deal with ‘grass roots lobbying’ ads that merely asked recipients to contact a named elected official. See 67 Fed. Reg. 51131, 51135 (Aug. 7, 2002). The BCRA supporters even offered technical suggestions to facilitate an exception along these lines. See, e.g., Aug. 21, 2002 Comment of Campaign and Media Legal Center, pp. 9-11; Aug. 23, 2002 Comment of Sens. McCain, Feingold, Snowe and Jeffords and Reps. Shays and Meehan, pp. 10, 11. Regrettably, the effort to adopt such an approach was blocked by commissioners who erroneously relied on the comments of the BCRA supporters in the other phase of the rulemaking.

or even a foreign government. All of this can be done, for example, in an early primary state from the time of the state’s primary until early July of an election year.<sup>2</sup>

When the Supreme Court upheld the Act’s contribution limits in *Buckley v. Valeo*, 424 U.S. 1 (1976)(“*Buckley*”) the Court warned that the contribution limits would become meaningless if they could be evaded “by the simple expedient of paying directly for media advertisements or for other portions of the candidate’s campaign activities.” *Id.* at 46. In order to “prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions,” *id.* at 47 (emphasis added) the *Buckley* Court treated “coordinated expenditures . . . as contributions rather than expenditures.” *Id.* at 46-47 (emphasis added). In contrast, the Court found:

The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

*Id.* at 47 (emphasis added). By effectively taking candidate approved communications run only a few months before the general election outside the limitations, prohibitions and reporting provisions of the Act, § 109.21 of the Commission’s regulations ignores the important lessons of *Buckley*.<sup>3</sup>

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<sup>2</sup> In Indiana, the 2004 Senate primary is scheduled for May 4. With the general election scheduled for November 2, the period when candidates may fully coordinate with willing funding sources will run from May 5 through July 5. Imagine the attack ads paid for by corporations, unions, and other well-funded sources that can be orchestrated by the candidates themselves during that crucial period! The potential for quid pro quo arrangements will be great. The problem will be further exacerbated in states with even earlier primary elections for House and Senate seats (California, Illinois, Maryland, Mississippi, Ohio, Pennsylvania, and Texas are scheduled to have March or April primaries.)

<sup>3</sup> The Commission had better alternatives before it when considering the “coordinated communication” regulations. It could have kept the approach that had worked fairly well for most of the FEC’s history: analyzing whether the coordinated message was an “expenditure” under the law, i.e., whether it was “for the purpose of influencing” or “in connection with” a Federal election. See 2 U.S.C. §§ 431(9)(A)(i), 441a(a)(7)(B)(i), 441b(b)(2); see also Advisory Opinion 1982-56 (non-Federal candidate ad containing endorsement by Federal candidate not an “expenditure”) and Advisory Opinion 1996-11 (candidate appearances at non-profit corporation event not an “expenditure”). Alternatively, the Commission could have adopted a ‘content standard’ whereby only coordinated messages that ‘promote, support, attack or oppose’ a named candidate would be covered by the coordination rules. See 67 Fed. Reg. 60042, 60049 (Sept. 24, 2002). Either one of these approaches would have avoided the peculiar results that will flow from the ‘120 day rule.’

Date

Danny Lee McDonald  
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