



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**Dissenting Opinion of Commissioner Scott E. Thomas**

**Re Advisory Opinion 2004-14**

I dissented from the majority vote because it suggests Congressman Davis has a green light to undertake the public service announcements (PSAs) even though no guidance was given regarding the expenses the National Kidney Foundation incurred to create the PSA. I assume that although Congressman Davis was using official funds to pay for taping expenses, the National Kidney Foundation may have paid a vendor or a staffer to draft the script and may have incurred production costs other than taping the PSAs. If that is the case, the coordination apparently involved would make the National Kidney Foundation's expenses a "coordinated communication" under the Commission's rules at 11 CFR 109.21.

The "coordinated communication" rules, adopted over my objection, pose many problems, and this request points out one. Under prior regulations, the FEC was able to evaluate whether a communication coordinated with a candidate was an "expenditure," and hence whether the communication was undertaken "for the purpose of influencing a federal election." This allowed a realistic assessment of whether the candidate's involvement mattered if the communication involved had no relation to the election process. In many prior advisory opinions, the FEC had permitted candidate involvement in public communications without labeling the activity an in-kind contribution. See Advisory Opinions 1994-15, 1992-5, 1991-17, 1982-56, 1981-37, 1978-88, and 1978-76, available at [www.fec.gov](http://www.fec.gov). That result would be appropriate in this case if the former regulations were in play.

In an effort to establish 'bright lines,' a majority of commissioners approved the rule that any public communication making reference to a federal candidate within 120 days of an election will be deemed an in-kind contribution if there is sufficient coordination. This has led to a rather wooden approach in situations like the one at hand. Even the Congressman's costs for taping the PSA would have had to be treated as an in-kind contribution were it not for the flat exemption for Federal Government costs in the contribution definition at 2 U.S.C. § 431(8)(A) and the coordinated communication definition at 11 CFR 109.21(a)(1).

It may well be that the costs of the National Kidney Foundation for "creating" the PSAs were minimal. Nonetheless, the Congressman's committee may find itself mired in an impermissible contribution receipt situation and a reporting problem if this matter is not properly addressed. I would urge the Congressman to remove any potential problem by ascertaining the value of any such costs and using his campaign committee to pay the National Kidney Foundation this amount to the extent it would constitute an impermissible receipt.

In any event, the Commission should have made the effort to explore and explain the legal consequences regarding this part of the Congressman's request. It is not helpful to argue that the question was not raised.

6/17/04  
Date

  
\_\_\_\_\_  
Scott E. Thomas  
Commissioner