FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Statement on Advisory Opinion Request 2011-23 (American Crossroads)
Chair Cynthia L. Bauerly and Commissioner Ellen L. Weintraub

December 1, 2011

Today, the Commission considered a request by American Crossroads to determine whether its proposed payment for advertisements featuring incumbent candidates would be considered "coordinated communications" and thus constitute contributions under the Act. We (along with Commissioner Walther) voted for the only draft that found, under the facts as presented by American Crossroads, that those ads would be in-kind contributions under the plain language of the Act. *See* Agenda Document 11-68-A (Revised Draft D).

The Act defines a "contribution" to include "any gift, subscription, loan, advance, or deposit of money *or anything of value* made by any person for the purpose of influencing any election for Federal office."[1] Moreover, an expenditure will be treated as a contribution when made "by any person in cooperation, consultation, or concert with, or at the request or suggestion of," a candidate, his or her authorized political committee, or their agents.[2] American Crossroads represented that its proposed advertisements would be "fully coordinated" with incumbent members of Congress who would be featured in the ads and help write their scripts; that the ads would be "thematically similar" to the featured Members' "re-election campaign materials" and feature the same signature issues as the Members' campaign websites; and that "the purpose of these advertisements . . . would be to improve the public's perception of the featured Member of Congress in advance of the 2012 campaign season." Based on these facts, the proposed ads would plainly meet the statutory definition of "contribution."

Nevertheless, American Crossroads asked the Commission to analyze its request solely through the prism of our three-part regulatory test for "coordinated communications."[3] We disagree with this approach. Like Commissioner Walther, we supported a broader version of the regulation than the Commission eventually enacted. But we also voted for the final regulation as a necessary compromise. That regulation was drafted to avoid chilling speech that is not election-related and therefore outside the scope of the Act. It does not forestall application of the statutory definition of "contribution" in a case such as this, where the requestor acknowledged that the ads would be "fully coordinated" and for the purpose of influencing federal elections. Given this acknowledgment, any concerns about potentially intrusive investigations are

[1] 2 U.S.C. § 431(8)(A)(1) (emphasis added).
[2] 2 U.S.C. § 441a(a)(7)(B).
[3] *See* 11 C.F.R. § 109.21.

unwarranted. It is uncontested that a payment could be treated as an in-kind contribution if it amounted to simply paying a candidate's bills without reaching the regulation on "coordinated communications." We see no meaningful distinction between that situation and the facts presented by American Crossroads. The Act plainly applies.

It does not take an election lawyer to understand this. Indeed, the Commission received almost 500 comments on this request from members of the bar and ordinary citizens, and *not one* of those comments supported the notion that these advertisements would not be contributions. Such a result would ignore not only the plain language of the Act, but also decades of governing precedent, from *Buckley v. Valeo* to *Citizens United*, on the distinction between independent and coordinated speech. This we cannot do.