



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY *MWD*

DATE: OCTOBER 22, 2008

SUBJECT: COMMENT ON DRAFT AO 2008-15
National Right to Life Committee, Inc., by
James Bopp, Jr., Esquire, and
Clayton J. Callen, Esquire

Transmitted herewith is a timely submitted comment from Mr. Fred Wertheimer, on behalf of Democracy 21, and Messrs. J. Gerald Hebert and Paul S. Ryan, on behalf of the Campaign Legal Center, regarding the above-captioned matter.

Proposed Advisory Opinion 2008-15 is on the agenda for Thursday, October 23, 2008.

Attachment

October 22, 2008

By Electronic Mail

Mary Dove
Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Draft Advisory Opinion 2008-15 (NRLC)

Dear Ms. Dove:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to Draft Advisory Opinion 2008-15 (Agenda Doc. No. 08-32), a draft advisory opinion prepared by the Office of General Counsel in response to a request by the National Right to Life Committee, Inc. for the Commission's "guidance as to whether it is permitted to broadcast two radio advertisements that mention a federal candidate for office." See AOR 2008-15 at 1.

The Campaign Legal Center and Democracy 21 submitted comments on October 9 in response to the advisory opinion request, and we incorporate those comments here by reference.

In our October 9 submission, we noted that both NRLC ads overtly assail the veracity of Senator Barack Obama, the Democratic presidential nominee, and thereby attack his character and fitness for office. For that reason, we urged the Commission to advise NRLC that both of its proposed radio ads contain "express advocacy" as defined in 11 C.F.R. § 100.22(b), because the ads "could only be interpreted by a reasonable person" as exhorting listeners to vote against Senator Obama.

The Draft Opinion acknowledges that "[t]he two advertisements are nearly identical." Draft Op. at 3. We agree with the general counsel's conclusion that the second NRLC ad – the one that ends with the tag line, "Barack Obama: a candidate whose word you can't believe in" – meets the subpart (b) express advocacy standard. Draft Op. at 8-9.

But we strongly disagree with the general counsel's conclusion that the "nearly identical" first ad is not express advocacy simply because it lacks the overt tag line of the second ad, even

though, as the general counsel repeatedly acknowledges, the first ad also contains multiple “indicia of express advocacy,” by:

- “raising questions regarding Senator Obama’s character;” Draft Op. at 7.
- “cast[ing] doubt on Senator Obama’s trustworthiness and truthfulness;” *Id.*
- “referenc[ing] ‘misrepresentations’ made by Senator Obama;” *Id.*
- “intimat[ing] that Senator Obama needs to apologize for calling the NRLC liars when it was ‘telling the truth;”’ *Id.*
- “intimating that Senator Obama was not being truthful in calling the NRLC liars;” *Id.* at 11, 12.
- “alleging that Senator Obama made ‘misrepresentation’ about a vote he cast in the Illinois Senate;” *Id.* at 12.
- and thus, “tak[ing] a position on [Senator Obama’s] character, qualifications or fitness for office.” *Id.*

These are the general counsel’s own descriptions of the first ad. Yet the general counsel concludes that this first ad is not express advocacy because the ad “could reasonably be interpreted as having a meaning other than to encourage the defeat of Senator Obama.” Draft Op. at 7.

What is this alternate meaning? The general counsel posits that the ad can be understood, not as an exhortation to listeners to vote against Senator Obama for his lack of truthfulness, but instead as an exhortation to Senator Obama “to take a specific action, namely, to ‘apologize for calling [the NRLC] liars.’” *Id.*

In other words, the general counsel has no doubt that the ad repeatedly attacks Senator Obama’s veracity and character. But the general counsel thinks it is reasonable to believe that this public, pre-election character assault can be interpreted as an effort to extract an apology from Senator Obama, not to defeat his candidacy.

With respect, this is not reasonable and does not stand up. This is not an ad that “focuses predominantly on a public policy issue – a vote Senator Obama cast while serving in the Illinois Senate.” Draft Op. at 12. This is an ad that focuses predominantly on Senator Obama’s purported lack of truthfulness, and that any reasonable listener will understand as attacking his character, not as extracting an apology from him.

Compare, for instance, an ad that was at issue in an enforcement action arising from the 2004 presidential campaign, where the Commission found the ad to constitute subpart (b) express advocacy:

Friends

Even before Jane Fonda went to Hanoi to meet with the enemy and mock America, John Kerry secretly met with enemy leaders in Paris.

....

Eventually, Jane Fonda apologized for her activities, but John Kerry refuses to.

In a time of war, can America trust a man who betrayed his country?

Conciliation Agreement, *In the Matter of Swiftboat Veterans and POWs for Truth*, MURs 5511 and 5525 (Dec. 4, 2006) at 7. The Commission found that this ad, and several similar ones, were subpart (b) express advocacy because they “attacked the character, qualifications, and fitness for office of Senator John Kerry, the Democratic Presidential nominee.” *Id.* at 6.

The same is true here. Like the Swiftboat ad that attacked Senator Kerry’s trustworthiness, the NRLC ad attacks Senator Obama’s truthfulness. But in the Swiftboat case, the Commission did not posit that the anti-Kerry ad “focused predominantly” on the Vietnam War as a “public policy issue.” Nor did the Commission see the ad as an exhortation to Senator Kerry to “apologize” for his purportedly traitorous activities, the way “Jane Fonda apologized for her activities.” Yet that is precisely the logic to be found in the Draft Opinion, which argues that the NRLC ad is about the “public policy” of Senator Obama’s long ago vote in the Illinois Senate, and is an exhortation for him to “apologize” for “misrepresenting” NRLC’s position.

The Commission should be mindful that a federal district court recently held the Commission erred in deciding that an ad sponsored by Real Truth About Obama – the “Change” ad – was not subpart (b) express advocacy. That ad stiffly attacked Senator Obama’s position on abortion, concluding, “Now you know the real truth about Obama’s position on abortion. Is this the change you can believe in?”

As the district court noted, “[I]t is clear that reasonable people could not differ that this advertisement is promoting the defeat of Senator Obama.” *The Real Truth About Obama, Inc., v. FEC*, No. 08-CV-483, 2008 WL 4416282 at *7 (E.D. Va. Sept. 14, 2008) (Spencer, J.).

Here, the same conclusion is warranted. The only reasonable interpretation of an ad that repeatedly calls into question Senator Obama’s veracity is as an appeal to vote against him in next month’s presidential election. With or without the tag line, both NRLC ads are about attacking Senator Obama’s character by challenging his truthfulness. The fact that the first ad omits the tag line contained in the second does not change the overt meaning of this “nearly identical” ad.

Accordingly, we urge the Commission to reject the conclusion in the draft advisory opinion that “Waiting for Obama’s Apology #1” does not contain express advocacy, and instead to adopt an opinion advising NRCL that both of its ads constitute express advocacy.

Consequently, the Commission should advise NRLC that it is prohibited from using general treasury funds to broadcast the ads, but that it may continue funding the broadcast of the ads using federally permissible funds through NRLPAC.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer

/s/ J. Gerald Hebert

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