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To colbertAOR@fec.gov
cc
bcc
Subject Comments on AOR 2011-11

Dear FEC,

I have attached my comments on Drafts A,B, and C of the advisory opinions you have posted on the FEC website regarding AOR 2011-11 being made by Stephen Colbert. I hope my comments can assist you in your decision making process.



Steven Beard colbertfeccommentsbeard.pdf

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Cynthia L. Bauerly, Chair
Mr. P. Christopher Hughey, Acting General Counsel ^
Ms. Shawn Woodhead Werth, Secretary and Clerk
Federal Election Commission
999 E Street, N.W. 3 S m
Washington, D.C. 20463

6-28-2011

RE: Comments on AO 2011-11

I write this letter in support of the draft Advisory Opinion titled "Draft B". I have several concerns about the language used in "Draft A" which could be used to restrict or dissuade legitimate press activities. Draft C, though I agree with its conclusion, lacks important language on the standard the FEC will apply to determine when the press exemption applies. Since one of the goals of the advisory opinion should be to serve as a guidelines for other media outlets, and for the reasons I state in the upcoming paragraphs, I encourage the Commission to adopt the language in Draft B.

My Comments on Advisory Opinion Draft A

In the Advisory Opinion Draft A, "the Commission concludes that Viacom would not be acting within its legitimate press function by providing independent expenditure advertisements to the Committee for the Committee to distribute outside of the show". AO 2011-11 Draft A Page 13. I express concern that both this conclusion and the language used by the commission in support of said conclusion might be overly broad inasmuch as it would also require material produced by media companies, in their legitimate press capacity, to be reported as in-kind contributions. As noted in both the Advisory Opinion Request and the Supplementary Material provided by Mr. Colbert, the material

produced for the Colbert SuperPAC will be aired on *The Colbert Report* as part of its coverage of the issue of Campaign Finance. AOR Page 7 (“These independent expenditure ads will be used as content for *The Colbert Report*”). The language used in the draft opinion would require inquiry into the subjective intent of the producers of the *Colbert Report* and Viacom staff to ascertain whether an ad was made with the intent of being aired on the *Report* or with the intent of it being solely used by Colbert SuperPAC. Would an independent expenditure ad produced using Viacom resources with the intent of being aired on *The Colbert Report*, but is subsequently not aired after being removed from a later episode script, be required to be reported as an in-kind contribution if the ad is subsequently used by Colbert SuperPAC for another purpose? How would the FEC ascertain whether Viacom actually intended to have the air outside the show? To answer these questions requires inquiry into the scripting and production of *The Colbert Report*, which goes against the intent and policy behind the media exception.

As noted in the AOR, substantial coverage will be given to Colbert SuperPAC on *The Colbert Report*. The conclusion made in Draft A would also allow for possible frivolous complaints to the FEC by candidates and individuals who oppose Colbert SuperPAC. Such individuals may falsely allege that material used solely by Colbert SuperPAC was produced by Viacom staffers, despite being actually produced by staff of the SuperPAC. The conclusion made by the FEC in the draft with regards to independent expenditure ads would invite the floodgates for frivolous claims such as those by Mr. Colbert's political opponents. Furthermore, a contrary conclusion to the one on this issue in Draft A would not “stretch the boundaries of the press exemption far beyond those contemplated by Congress and the Supreme Court”, but instead would protect the press exemption from unwarranted inquiry into the subjective intent of the producers of the *Colbert Report*. If material is produced solely for the *Colbert Report*, and is on a subsequent date used by Colbert SuperPAC as part of an independent expenditure advertisement, would that have to be reported as an in-kind contribution? To say yes would

allow require any use of a newscast, television show, or newspaper used by a PAC in an independent expenditure ad to be reported as an in-kind contribution by the producer of said newscast, television show, or newspaper article. Anyone would be able to make a frivolous claim just by speculating that the subjective intent of the media outlet was to solely benefit the PAC.

Given these concerns I have made, and given the information in the AOR indicating the wide coverage to be given to Colbert SuperPAC on *The Colbert Report*, the Commission should conclude that all independent expenditure ads and other materials produced by *Colbert Report* staffers for use by Colbert SuperPAC falls under the press exception. This bright line rule would protect the integrity of the press exemption in the campaign finance law and would protect the principles of free speech and free press that are contained in the first amendment.

Draft A has a section discussing a possible administration of Colbert SuperPAC by Viacom, which the supplementary materials produced by Stephen Colbert state is not the case since only he will be administering the SuperPAC, not Viacom, and their role is limited to the material that is shown on the *Colbert Report*. As a result, that section of Draft A should be removed from the final opinion.

Advisory Opinion DRAFT B

For the reasons stated above, I encourage the commission to reject the language and the conclusions made in Draft A that I discussed above. I would encourage the commission to adopt the language and conclusions made in Draft B, especially the conclusion that “such, costs incurred by Viacom in covering the Committee, including costs associated with producing independent expenditure advertisements for the Committee, would be protected by the press exemption” and “the costs incurred by Viacom in establishing and maintaining the Committee, including filing the Committee’s reports with the FEC, are protected by the press exemption”. This language prevents the FEC from overstepping its role and unintentionally intervening with Viacom and its legitimate press

work in producing and airing *The Colbert Report*. It also provides a clear standard that can be used by other press outlets when covering material produced by Political Action Committees and it protects the right of Political Action Committee to used materials from the press in their own PAC materials, without undue interference from the FEC.

Draft B also provides a clear, easily understandable explanation of when the Press Exemption applies (in its description of the 2 part test). Since the discussion of the 2 part test is missing from Draft C, and since Draft C's articulation of when the press exemption applies is hard to follow and vague, I encourage adoption of Draft B.

My thoughts on Draft C

For the reasons I have already stated, Draft C lacks the necessary thorough discussion of when the press exemption applies, and though I support the conclusion of Draft C, I think the articulation made in Draft B best serves as a guideline for the press while protecting the freedom of the press and the free speech rights of Stephen Colbert. Please do not adopt Draft C.

In Summary

For the reasons stated above, I encourage adoption of Advisory Opinion Draft B. Thank you for your time, and I hope my comments and thoughts are useful in your adjudication of these important issues.

Sincerely,

Steven Beard