

Ritchfield
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FEDERAL ELECTION COMMISSION
WASHINGTON DC 20463

October 20, 1992

10/19/92
**SUBMITTED LATE
AGENDA ITEM**

MEMORANDUM TO: The Commission
THROUGH: John C. Surina
Staff Director
FROM: Lawrence M. Noble
N. Bradley Ritchfield
SUBJECT: *hmd*
M Draft AO 1992-37

For Meeting of: OCT 22 1992

Attached is a proposed draft of the subject advisory opinion.

OGC has designated this request for consideration under the expedited 20-day advisory opinion procedure. 2 U.S.C. §437f(a)(2); 11 CFR 112.4(b). The 20th day was October 19, 1992. This office notes, however, that the initial inquiry from the requester was received in early August and on August 11 OGC asked several questions to develop further facts. The responses to these questions were not submitted until September 29. Given these circumstances, this office views Commission consideration of the request on October 22 as timely.

We request suspension of Commission rules on timely submission in order to consider this document on the agenda for October 22, 1992.

Later today, OGC will separately circulate another draft of this opinion, also for the October 22 agenda. This alternative draft will rely on the broadcast or news media exemption of the Act as the sole basis for the conclusion that the radio program would not constitute an expenditure or contribution.

Attachment

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3 **ADVISORY OPINION 1992-37**

4 **Randall A. Terry**
5 **Box 196 RD2**
6 **Harpursville, NY 13787**

7 **Dear Mr. Terry:**

8 **This responds to your letters dated September 29 and**
9 **August 5, and August 4, 1992, requesting an advisory opinion**
10 **concerning the application of the Federal Election Campaign**
11 **Act of 1971, as amended ("the Act"), and Commission**
12 **regulations to the airing of your radio show while you are a**
13 **candidate for Federal office.**

14 **You are the Right-to-Life candidate for the House of**
15 **Representatives from the 23rd District of New York. Among**
16 **your opponents is Congressman Sherwood Boehlert, the**
17 **Republican nominee. You have not filed a Statement of**
18 **Candidacy indicating that your campaign has raised or spent**
19 **\$5,000 but you are on the 1992 general election ballot as the**
20 **Right to Life candidate and intend to raise funds. You state**
21 **that, in late July 1992, you accepted the Right-to-Life**
22 **Party's request to run on their ballot line.**

23 **You have also been the host of a daily radio talk show**
24 **entitled "Randall Terry Live," since the beginning of May,**
25 **1992. The show "deals with all major contemporary issues,**
26 **both domestic and foreign," and has a "call-in" format "in**
27 **which the news of the day is discussed." You state that you**
28 **do not intend to use the show to promote your candidacy or**
29 **raise funds for your candidacy, and that no ads raising funds**
30 **for or promoting your candidacy would be run during the show.**

3 Randall Terry Live, Inc. produces the show which is
4 distributed via satellite around the nation on a Christian
5 Broadcasting Network satellite. The show airs on
6 approximately 95 stations nationwide, but on only one station
7 in New York State, WLNL in Horseheads, near Elmira. You
8 state that the show does not air in the 23rd District. You
9 note that WLNL beams into areas west of the district, but
10 that "the signal is almost extinct" at Binghamton which is
11 just outside the district on the southwest side.

12 You state that you are a contracted employee of Randall
13 Terry Live, Inc., and neither an owner or stockholder of the
14 company. A family member is the sole incorporator of the
15 company. You state that neither the family member nor the
16 corporation has made any donations or in-kind contributions
17 to the campaign.

18 You spend about 35 hours a week working for Randall
19 Terry Live and average another 15 hours a week as a lecturer
20 and pro-life activist. You are employed by the company at a
21 salary of between \$23,000 and 25,000 per year and earn
22 roughly the same amount of money through speaking honoraria.^{1/}

23 You have sent three tape cassettes of your show, one
24 each for August 3, 4, and 5, 1992. Your usual format appears
25 to be to begin with three or four news headlines, to comment
26

27
28 1/ Previous radio experience included a five-minute daily
29 show entitled "Operation Rescue News Update" which aired from
30 the fall of 1988 to this past summer. Between July 1991 and
February 1992, you had three one-week stints and one two-week
stint at hosting daily one-hour radio shows.

3 on these stories, and to talk with phone-in listeners either
4 about a specific topic for the program or general topics.
5 There were also satirical features (i.e., on the Clinton-Gore
6 campaign bus and on Ross Perot). The shows repeatedly
7 attack "humanists" and "liberals." During these shows, you
8 derogate the Clinton-Gore ticket and express support for
9 George Bush's candidacy.^{2/}

10 You begin the August 3 show with a tape of a male voice
11 saying the following:

12 One, I find him to be one of the most
13 offensive people I've ever been exposed to in my
14 life, trampling all over the constitutional rights
15 of other people. That's not the type of people
16 that we want representing us in any elective
17 office.

18 You identify the speaker as Congressman Sherwood Boehlert and
19 explain that he is talking about you. You then remark that,
20 if you are one of the most offensive people he knows, then he
21 must not know many people, because you are "a nice guy."

22 You ask whether you may continue to host your radio show
23 while you are running for Federal office. This question may
24 also be expressed as whether the expenses incurred by Randall
25 Terry Live, Inc., or by the radio stations or network
26 carrying the show, or payments by sponsors, would be in-kind
27 corporate contributions to your campaign.

28 The Act and regulations prohibit corporations from

29 ^{2/} The Commission also notes that you criticize the
30 President on his handling of the situation in Sarajevo.
After making this criticism, you state that this is proof to
your listeners that you are not a "lapdog" of the Bush
administration.

3 making contributions or expenditures in connection with any
4 Federal election campaign, and prohibit any Federal candidate
5 or campaign from knowingly accepting such a prohibited
6 contribution or expenditure. 2 U.S.C. §441b(a); 11 CFR
7 114.2(b) and (c). The term "contribution or expenditure" is
8 defined to include "any direct or indirect payment,
9 distribution, loan, advance, deposit, gift of money, or any
10 services, or anything of value ... to any candidate, campaign
11 committee, or political organization in connection with any
12 [Federal] election." 2 U.S.C. 441b(b)(2); 11 CFR
13 114.1(a)(1). See 2 U.S.C. §431(8)(A)(i) and (9)(A)(i); 11
14 CFR 100.7(a)(1) and 100.8(a)(1).

15 The Act and regulations, however, exclude from the
16 definition of contribution or expenditure "any news story,
17 commentary, or editorial distributed through the facilities
18 of any broadcasting station, newspaper, magazine, or other
19 periodical publication, unless such facilities are owned or
20 controlled by any political party, political committee, or
21 candidate." 2 U.S.C. §431(9)(B)(i); 11 CFR 100.7(b)(2) and
22 100.8(b)(2).^{3/} The media exemption is a limited exemption to
23 "assur[e] the unfettered right of the newspapers, TV
24 networks, and other media to cover and comment on political
25

26 ^{3/} If the facility is so owned or controlled, the cost for
27 a news story is not a contribution if the news story (i)
28 represents a bona fide news account communicated in a
29 publication of general circulation or on a licensed
30 broadcasting facility, and (ii) is part of a general pattern
of campaign-related news accounts which give reasonably equal
coverage to all opposing candidates in the circulation or
listening area. 11 CFR 100.7(b)(2), 100.8(b)(2).

3 campaigns." H.R. Rep. No. 93-1239,, 93d Cong., 2d Sess. 4
4 (1974)); Advisory Opinions 1982-44 and 1980-109.

5
6 The Commission concludes that the media exemption is
7 applicable to your show. The show began well before you were
8 asked to be a candidate and does not appear to have been
9 started for the purpose of promoting your Federal candidacy.
10 In addition, from your previous experience on radio and the
11 timing of this present job, it does not appear that the host
12 position was given to you to subsidize you while you are a
13 candidate.

14 Although your show falls broadly within the news story
15 exemption, the Commission notes that you control the format
16 and content of the show. The Commission has frequently
17 considered whether particular activities involving the
18 participation of a Federal candidate, or communications
19 referring to a Federal candidate, result in a contribution to
20 or expenditure on behalf of such a candidate under the Act.
21 The Commission has determined that financing such activities
22 will result in a contribution to or expenditure on behalf of
23 a candidate if the activities involve (i) the solicitation,
24 making or acceptance of contributions to the candidate's
25 campaign, or (ii) communications expressly advocating the
26 nomination, election or defeat of any candidate. See
27 Advisory Opinion 1992-5 and opinions cited therein. The
28 Commission has also indicated that the absence of
29 solicitations for contributions or express advocacy regarding
30 candidates will not preclude a determination that an activity

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3 is "campaign-related." Advisory Opinions 1992-6, 1990-5,
4 1988-27, 1986-37, 1986-26, 1984-13 and 1983-12.

5 In the opinions cited above, the press exemption was not
6 applied. Nevertheless, in view of the candidate control of
7 the show, certain references by you would extend beyond
8 editorializing and would indicate your use of the show as a
9 vehicle to promote your candidacy. The Commission concludes
10 that the following will result in a contribution or
11 expenditure with respect to your House campaign: (i) any
12 solicitation or acceptance of contributions on your show;
13 (ii) any communication expressly advocating your election or
14 the defeat of any of your opponents; and (iii) repeated, or
15 more than incidental reference to your candidacy or campaign,
16 or similar references to your opponents or their campaigns.^{4/}
17 These restrictions are applied with the knowledge that your
18 show is not a news show, but a news commentary show.

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19 You have pre-recorded and used the comments of one of
20 your election opponents, Congressman Boehlert, about your
21 qualifications to hold office, and you make a follow-up
22 reference to him. Such a reference is pre-planned and more
23 than incidental, and would cause the entire program for that
24 day to be an expenditure. The amounts spent by Randall
25 Terry Live, Inc., the radio station or network carrying the
26 show, and corporate sponsor payments for that program would

?

AS known in advance

27
28 ^{4/} The use of a narrower standard than that referred to in
29 the opinions cited in the paragraph above is not intended to
30 modify those standards used in situation where the press
exemption is not applicable.

LAIS
RTL only
Candidate
Sponsor
Contributor
Sponsor
Contributor

3 be in-kind corporate contributions to your campaign. See
4 Advisory Opinion 1990-5.

5 The Commission is aware that your show includes live
6 call-ins, and that some caller may decide to refer to your
7 candidacy or that of another seeking the same office. Since
8 you are in control of the show, you will be able to exercise
9 your ability to instruct the caller as to the campaign-
10 related consequences of such references in order to minimize
11 them.

12 The Commission expresses no opinion as to any
13 ramifications of communications law, which is outside its
14 jurisdiction.

15 This response constitutes an advisory opinion concerning
16 application of the Act, or regulations prescribed by the
17 Commission, to the specific transaction or activity set forth
18 in your request. See 2 U.S.C. §437f.

19
20 Sincerely,

21
22 Joan D. Aikens
23 Chairman for the
24 Federal Election Commission

25 Enclosures (AOs 1992-6, 1992-5, 1990-5, 1988-27, 1986-37,
26 1986-26, 1984-13, 1983-12, 1982-44, and 1980-109)
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