

AGENDA DOCUMENT #92-138-A



FEDERAL ELECTION COMMISSION
WASHINGTON DC 20463

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OCT 21 11:27

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

Attached is an alternative draft of the subject advisory opinion for Commission consideration in conjunction with Agenda Document #92-138.

The alternative is identical to Agenda Document #92-138 until page 5, line 5. Beginning at that point the alternative sets forth a legal analysis of the broad scope of the media exemption as reflected in the Reader's Digest case and in prior advisory opinions.

We request that this alternative draft also be placed on the agenda for October 22, 1992.

Attachment

SUBMITTED LATE
AGENDA ITEM
For Meeting of: OCT 22 1992

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2
3 **ADVISORY OPINION 1992-37**

SEP 23

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

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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
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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 In Reader's Digest Association, Inc. v. Federal Election
6 Commission, 509 F.Supp. 1210 (S.D.N.Y. 1981), the court
7 discussed threshold questions for determining the scope of
8 the media exemption. It stated that "the two questions on
9 which the exemption turns" were "whether the press entity is
10 owned by the political party or candidate and whether the
11 press entity was acting as a press entity in making the
12 distribution..." Id. at 1215.

13 The Commission has included a wide range of broadcast or
14 newspaper activities within the press exemption. In Advisory
15 Opinion 1980-109, the Commission considered the endorsement
16 of and solicitations on behalf of a candidate in a regularly
17 published commentary by the publisher in his independent
18 periodical publication. The Commission concluded that the
19 endorsement and solicitation of contributions fell within the
20 press exemption as long as the periodical did not act as a
21 conduit or intermediary for a contribution going to the
22 endorsed candidate. More directly related to your request
23 was the proposal by the two major political parties in
24 Advisory Opinion 1982-44. The Commission decided in that
25 opinion that the press exemption would permit an incorporated
26 broadcasting station to donate free cablecast time in a
27 two-hour block each to the DNC and the RNC for
28 campaign-related messages without the donation of such time
29 being treated as a contribution. The DNC's program had
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3 already been planned and was to consist of leading
4 Democratic party officials and officeholders discussing
5 public issues and programs and soliciting contributions to
6 support the DNC. The Commission recognized that the
7 exemption would allow access by third persons (not just the
8 broadcaster) to the broadcast media to discuss issues in a
9 political and partisan manner. It also noted that the
10 exemption did not define the permissible issues, the format,
11 or the length of the commentary. Advisory Opinion 1982-44.

12 The Commission concludes that the media exemption is
13 applicable to your show. Neither your company nor you
14 control the broadcast facilities. See Advisory Opinion
15 1990-5. In addition, the program is being broadcast for
16 reception by the listening public audience. See, by analogy,
17 Advisory Opinions 1989-28, 1984-23, and 1982-58 (excluding
18 from the media exemption periodicals that are of circulation
19 generally limited to an association or by entities not
20 engaged in the news media business).

21 Another factor to be considered that was not
22 contemplated in Reader's Digest Association, Inc., supra, was
23 the purpose of the show itself with respect to your
24 particular candidacy. The show began well before you were
25 asked to be a candidate and does not appear to have been
26 started for the purpose of promoting your Federal candidacy.
27 See Advisory Opinion 1990-5. In addition, given your
28 previous experience on radio and the timing of this present
29 venture, it does not appear that your host position was
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3 provided to you to subsidize you while you are a candidate,
4 and is instead for a purpose genuinely independent of your
5 candidacy. See Advisory Opinions 1979-74 and 1977-68.

6 In view of the applicability of the press exemption to a
7 wide range of activities, including the endorsement of
8 candidates and the solicitation of contributions, the
9 Commission concludes that the continued operation of your
10 show would not constitute a contribution or expenditure under
11 the Act. You may endorse candidates and make statements
12 opposing candidates, including references to or solicitations
13 for your own candidacy. You may not use the show, however,
14 as a conduit or intermediary for contributions to your
15 campaign. Advisory Opinion 1980-109. In addition, the
16 Commission concludes that the exemption would not allow any
17 print or other distribution by you of campaign statements
18 made on the show.^{4/} See Reader's Digest Association, Inc.,

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21 ^{4/} The Commission has frequently considered whether
22 particular activities involving the participation of a
23 Federal candidate, or communications referring to a Federal
24 candidate, result in a contribution to or expenditure on
25 behalf of such a candidate under the Act. The Commission has
26 determined that financing such activities will result in a
27 contribution to or expenditure on behalf of a candidate if
28 the activities involve (i) the solicitation, making or
29 acceptance of contributions to the candidate's campaign, or
30 (ii) communications expressly advocating the nomination,
election or defeat of any candidate. See Advisory Opinion
1992-5 and opinions cited therein. The Commission has also
indicated that the absence of solicitations for contributions
or express advocacy regarding candidates will not preclude a
determination that an activity is "campaign-related."
Advisory Opinions 1992-6, 1990-5, 1988-27, 1986-37, 1986-26,
1984-13 and 1983-12. The Commission, however, did not treat
the press exemption as applicable in any of these
opinions. The broader permission granted in this advisory
opinion is not intended to modify those standards used in

3 supra.

4 The Commission expresses no opinion as to any
5 ramifications of communications law, which is outside its
6 jurisdiction.

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

11
12 Sincerely,

13
14 Joan D. Aikens
15 Chairman for the
16 Federal Election Commission

17 Enclosures (AOs 1992-6, 1992-5, 1990-5, 1989-28, 1988-27,
18 1986-37, 1986-26, 1984-23, 1984-13, 1983-12,
19 1982-58, 1982-44, 1980-109, 1979-74, and 1977-68)

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30 (Footnote 4 continued from previous page)
situations where the press exemption is not applicable.