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FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

CONCURRING OPINION OF COMMISSIONER LEE ANN ELLIOTT TO ADVISORY OPINION 1992-37

I concur with Advisory Opinion 1992-37 that Mr. Terry may continue to host his radio show without a prohibited contribution occurring.

I am concerned, however, that the standard enunciated by the Commission in answering his request are just case-specific facts and not truly a standard. For example, in answering the request, the Commission's opinion actually parrots the requester's intention that he does "not intend to use the show to promote your candidacy or raise funds for your candidacy, and that no ads raising funds for or promoting your candidacy would be run during the show ... [and you will] refrain from attacks on your opponents." Advisory Opinion 1992-37 at p. 3. Using the word "promotion" is vague and will only require further exploration and judgment by the Commission.[1]

Second, and contrary to the opinion's assertion on page 3, I believe Advisory Opinion 1992-37 modifies the Commission's approach in previous opinions addressing the participation of candidates in possible media-exempt formats. In previous opinions, the Commission used a two-prong test (see, e.g. Advisory Opinion 1988-27) or a less specific "campaign-related" test (see, e.g., Advisory Opinion 1992-6). See Advisory Opinion 1992-5 and opinions

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1. Further, the word "promotion" reminds me of the term "relative to" which the Supreme Court found unconstitutionally vague in Buckley v. Valeo, 424 U.S. 1, 42-43 (1976). Also, generally forbidding "attacks on your opponents" may inhibit protected issue discussion. Buckley at 42 ("incumbents are intimately tied to public issues involving legislative proposals and governmental actions").

cited therein. [2] Without discussing the lack of precision the campaign-related "test" has brought, these approaches have been workable and fairly consistently applied. Id. When legal tests are not used, the Commission slips into a subjective common-law approach where no one knows in advance what rules or lines separate prohibited from permissible speech. It is too easy for us to decide cases by distinguishing them on their facts. The harder question is understanding whether the law directs the Commission to a particular result.

Third, I do not join the opinion's rationale that one reason a prohibited contribution will not occur in this case is because Mr. Terry's radio show does not air in the district in which he is running for Congress. In my opinion, a candidate's statements will (or will not) be considered express advocacy or a solicitation for contributions on the basis of what they say, not where they are spoken. Many candidates effectively raise funds or advocate their election outside their district (such as in Washington, D.C.) and the Commission should not be distracted by geographic considerations.

Fourth, I would have preferred the Commission to specifically address the applicability of the "media exemption" to the requester's conduct. The Federal Election Campaign Act and Commission regulations exclude from the definition of contribution or expenditure "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C.

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2. The Commission's "two-prong test" determines that financing a candidate's activity will result in a contribution or expenditure if the activity involves (i) the solicitation, making or acceptance of contributions to the candidate's campaign, or (ii) communications expressly advocating the nomination, election or defeat of any clearly identified candidate. The campaign-related "test" says the absence of solicitations for contributions or express advocacy of candidates will not preclude a determination that an activity is "campaign-related." Advisory Opinion 1992-5.

§431(9)(B)(i); 11 CFR 100.7(b)(2) and 100.8(b)(2). [3] This media exemption is designed to "assur[e] the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 4 (1974); Advisory Opinions 1982-44 and 1980-109.

In my opinion, the media exemption is applicable to Mr. Terry's situation. The requester is a candidate and he produces and hosts his own radio program. His program, however, is broadcast by satellite over a network which is neither owned or controlled by Mr. Terry or any political committee. The fact that Mr. Terry is a candidate does effect the network's exemption under 2 U.S.C. §431(9)(B)(i). To me, the critical issue is whether the broadcast (not the creation) of Mr. Terry's work is media exempt, and that turns on whether the station or facility is owned or controlled by a candidate or political committee. 2 U.S.C. §431(9)(B)(i). Here it is not.

Lastly, I endorsed an earlier draft of Advisory Opinion 1992-37 by the General Counsel which imposed some conditions on Mr. Terry's ability to speak. My approval of those conditions was not an attempt to modify the media exemption but came from the general principals of 2 U.S.C. §441b. Corporations are not allowed to make contributions in connection with an election or expenditures expressly advocating a candidate's election or defeat. 2 U.S.C. §441b(a).

Because Mr. Terry is paid to state his views as the host of this program, he cannot advocate his own election (or opponent's defeat) without his campaign receiving an impermissible corporate contribution. Such advocacy would be a corporate self-subsidization of his own political speech and prohibited by 441b. This restriction would not, however, prohibit Mr. Terry from talking about other

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3. If the facility is so owned or controlled, the cost for the news story is still not considered a contribution if the story (i) represents a bona fide news account communicated in a publication of general circulation or on a licensed 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).

political campaigns or appearing on another person's talk show as a guest and discussing (or advocating) his own candidacy. It only prohibits Mr. Terry from being the corporate-paid host of a show where he also advocates his candidacy.

Accordingly, I believe the Commission reached the right result in this Advisory Opinion request, but I disagree with its rationale.

Lee Ann Elliott
Commissioner

November 18, 1992