

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 4689

DATE COMPLAINT FILED: 11/4/97

DATE OF NOTIFICATION: 11/12/97

DATE ACTIVATED: 1/26/99

STAFF MEMBER: Nancy E. Bell

COMPLAINANTS:

California Democratic Party and Honorable Art
Torres, Chairman

RESPONDENTS:

Alan Keyes
Oliver North
Salem Radio Networks
Michael Reagan
ABC Radio Networks
Honorable Robert K. Dornan

RELEVANT STATUTES:

2 U.S.C. § 431(2)
2 U.S.C. § 431(9)(B)(i)
2 U.S.C. § 441b
11 C.F.R. § 100.7(b)(2)
11 C.F.R. § 100.8(b)(2)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. GENERATION OF MATTER

This matter was generated by a complaint filed on October 17, 1997, by the California Democratic Party and Honorable Art Torres, its Chairman, against Honorable Robert K. Dornan, Alan Keyes, Oliver North, Salem Radio Networks ("SRN"), Michael Reagan, and ABC Radio Networks ("ABC Radio"). The complaint alleges that prohibited corporate contributions have been made from Alan Keyes, Oliver North, and Michael Reagan to Robert Dornan, in that

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Dorman continued to work as a guest host for the Alan Keyes Show ("Keyes Show"), the Oliver North Show ("North Show") and the Michael Reagan Show ("Reagan Show") (collectively, "the Shows") even though he had been a declared candidate, and subsequently qualified as a candidate, for the U.S. House in California for the 1998 election cycle. On December 15, 1997, counsel for Salem Radio Network submitted a response. On December 30, 1997, counsel for ABC Radio, submitted a response. No responses have been received from Alan Keyes, Oliver North, Michael Reagan, and Robert Dorman.

II. SUMMARY OF COMPLAINT AND RESPONSES

A. The Complaint

According to the complaint, Robert Dorman, since his defeat in November 1996, has used his position as a guest host on several national radio talk shows to raise funds and to attack Congresswoman Loretta Sanchez. More specifically, during 1997 Dorman used appearances as a guest host on several national radio shows including the North radio show, the Reagan radio show, and the Keyes radio show to raise money for his candidacy and to attack Congresswoman Sanchez. The complaint further alleges that the radio stations had simply turned over three hours or more of free air time each day to Dorman as a "guest host" to discuss his candidacy. There had apparently been no effort by the radio station to provide Dorman with a format or a subject to cover or with guests to question, as might be expected of other guests hosts or on the regular program. Furthermore, there was no attempt on the part of the stations to make a balanced presentation of the issues by providing a similar opportunity for Congresswomen Sanchez.

The complaint further notes that although Dorman filed his official statement of candidacy for the 1998 California GOP primary on October 8, 1997, Dorman was a "declared" candidate for California's 46th congressional district since late 1996. According to the complaint, Dorman

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raised \$632,445 between January 1, 1997 and June 30, 1997, although he had no outstanding debts to pay from his 1996 campaign. Also, Dornan repeatedly asserted that he was raising funds for a rematch with Sanchez.

The complaint concludes that Dornan's continued "guest host" appearances, while a candidate for the U.S. House of Representatives, amounts to an impermissible corporate contribution to Dornan because the exposure time is clearly a thing of value given by the radio stations and thus a contribution or expenditure which gives the appearance of corporate backing for the Dornan campaign.

B. The Responses

Counsel for SRN submitted a response which describes SRN as a commercial entity that hires its radio talk show hosts based on their entertainment value. SRN further states that Dornan has worked for numerous other non-SRN radio and television talk shows around the country. SRN's response also includes "Declarations" from Greg R. Andersen, President of SRN, as well as from Joe Giganti and Griff Jenkins, producers of the Alan Keyes and Oliver North shows respectively. According to these declarations, SRN asserts the following: 1) that Dornan has worked for other numerous non-SRN radio and television shows around the country, 2) Dornan acted as a talk show host prior to his involvement in federal politics, 3) SRN would employ Dornan regardless of whether he was a candidate for political officer or not, 4) SRN's employment of Dornan has everything to do with good business practices and has nothing to do with his personal involvement in politics, and 5) Mr. Dornan has never, on SRN, expressly advocated his own election, or Congresswoman Sanchez's defeat, in any electoral contest - specifically, he has never used such phrases as "vote for me," "elect me," "support me," "cast your ballot for me," "vote against Sanchez," "do not elect Sanchez," or any equivalent. Notably

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absent from SRN's response are transcripts and/or tapes for Dornan's appearances as host on the Keyes and North shows.

Counsel for ABC Radio submitted a response and Affidavit of Frank L. Raphael, Vice President of network programming for ABC Radio Network, Inc., the owner of ABC Radio. As an initial matter, the response states that the named respondent, ABC Radio, is an indirect subsidiary of ABC, Inc. ("ABC").¹ Three ABC-owned stations, KSFO(AM) (San Francisco), WJR (AM) (Detroit), and WMAL (AM) (Washington, DC), entered into affiliation agreements with Premier Broadcasting Services ("Premiere"), the independent syndicator of Reagan Show, by which these stations licensed the right to broadcast the program.² These stations' rights and obligations under their affiliation agreements are not dependent on the views expressed on the show.

According to the Affidavit of Mr. Raphael, who supervises ABC Radio talk programming, Dornan appeared as a guest host on the Reagan Show on or about the week of March 31, 1997. The decision to invite Mr. Dornan to appear was made without the knowledge or participation of any ABC entity. No ABC - owned station paid Mr. Dornan for his appearance, nor was his appearance in any way contingent on the views he expressed. Furthermore, no ABC - owned station had advance notice or control over the content of the Reagan Show or whether Dornan would guest host. Furthermore, neither ABC, ABC Radio, KSFO, WJR, nor WMAL, are owned or controlled by any political party, political committee, or candidate. In fact, ABC Radio does not own or control any radio stations and did not broadcast any of the three programs cited in the complaint: the North Show, the Keyes Show and the

¹ Although it is not stated explicitly in ABC Radio's response, it is inferred that ABC Radio Network, Inc. is a direct subsidiary of ABC.

² No ABC-owned radio station carries the Keyes or North Shows.

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Reagan Show. While ABC Radio does not produce or broadcast the programs, it does lease satellite time to the programs' independent syndicators, Premier and SRN, to enable them to transmit the Programs to remote licensing stations. However, neither of the programs syndicators advised ABC Radio of the content of its programming prior to transmission and ABC Radio does not pre-screen transmitted material.

III. FACTUAL AND LEGAL ANALYSIS

A. The Law

The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits any corporation from making any contribution or expenditure in connection with a federal election and prohibits any candidate or committee from knowingly accepting such a prohibited contribution or expenditure. 2 U.S.C. §§ 441b(a) and 441a(f); 11 C.F.R. § 114.2(b).

The Act defines a candidate to mean an individual who is seeking nomination or election to federal office and who has received contributions or made expenditures aggregating in excess of \$5,000 or has consented to another person receiving contributions or making expenditures in his or her behalf that aggregate more than \$5,000.³ 2 U.S.C. § 431(2).

The Act defines contribution or expenditure to include any gift, subscription, loan, advance, or deposit of money, or anything of value made by any person for the purpose of influencing any federal election. 2 U.S.C. §§ 431(8)(A) and 431(9)(A). Any gift or payment constituting a contribution or expenditure is required to be disclosed under the Act.

2 U.S.C. §§ 432 and 434. Contributions are also subject to limitations and, in some cases, are prohibited. See 2 U.S.C. §§ 441a, 441b, 441c, 441e, and 441f. For the purposes of Section

³ Commission regulations permit a candidate to "test the waters" by receiving and disbursing funds "solely for the purpose of determining whether" to "become a candidate." 11 C.F.R. §§ 100.7(b)(1) and 100.8(b)(1). The regulations provide further that only funds permissible under the Act may be used for such activities. 11 C.F.R. §§ 100.7(b)(1)(i) and 100.8(b)(1)(i).

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441b, the Act defines contribution or expenditure to include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money or services, or anything of value to any candidate or campaign committee in connection with any election for federal office. 2 U.S.C. § 441b(b)(2).⁴ The term "anything of value" includes all in-kind contributions, 11 C.F.R. § 100.7 (a)(1)(iii)(A).

The Act provides that whenever any person makes an expenditure for the purpose of financing a communication expressly advocating the election or defeat of a clearly identified candidate or soliciting contributions, such communication must include a disclaimer clearly stating the name of the person who paid for the communication and indicating whether the communication was authorized by any candidate or candidate's authorized committee. 2 U.S.C. § 441d(a); *see also* 11 C.F.R. § 110.11.⁵

⁴ Commission regulations make exceptions from the cited definitions for gifts, loans, or payments made with respect to a recount of the results of a Federal election contest concerning a Federal election. 11 C.F.R. §§ 100.7(b)(20) and 100.8(b)(20). In explaining these exceptions, the Commission stated that, although such contests are related to elections, they are not Federal elections as defined by the Act and Federal Election Commission Regulations. Explanation and Justification. House Document No. 95-44, at 40 (1977). In granting these exceptions, however, the regulations also bar the receipt or use of funds prohibited by 11 C.F.R. §§ 100.4(a) and Part 114; that is funds from corporations, national banks, labor organizations, or foreign nationals. *Id.* Under the Act, a federal candidate raising and spending funds to finance an election challenge may raise funds using his principal campaign committee, or he may set up a separate organizational entity established solely for the purposes of funding the defense effort. *See* A.O.s 1998-26 and 1978-92. A principal campaign committee receiving donations designated for such an effort should establish a separate bank account and the receipts and disbursements of the account would be reportable transactions of the committee, within the categories of "other receipts" and "other disbursements" respectively. 2 U.S.C. §§ 434(b)(2)(J) and (4)(G); 11 C.F.R. §§ 104.3(a)(3)(x) and (b)(2)(vi).

⁵ In *Buckley*, the Supreme Court provided some examples of phrases that would constitute express advocacy, i.e., "vote for," "elect," or "support." *Buckley*, 424 U.S. at 43-44, n. 52. In *Federal Election Commission v. Furgatch*, 807 F.2d 857, 862-864 (9th Cir.) *cert. denied*, 484 U.S. 850 (1987), the Ninth Circuit set forth a test for determining whether express advocacy exists even in the absence of the "magic words." The Commission's regulation at 11 C.F.R. § 100.22(a) and (b) essentially incorporates the express advocacy tests announced in *Buckley* and *Furgatch*. The First and Fourth Circuits have rejected the *Furgatch* test and held that the "magic words" are required for express advocacy. *FEC v. Christian Action Network*, 110 F.3d 1049, 1050 (4th Cir. 1997); *Maine Right to Life v. FEC*, 914 F. Supp. 8 (D.ME 1996), *aff'd* 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S.Ct. 52 (1997) (invalidating Commission regulation at 11 C.F.R. § 100.22(b)).

However, the Act excludes from the definition of 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. § 431(9)(B)(i); *see also*, 11 C.F.R. §§ 100.7(b)(2) and 100.8(b)(2).⁶ Commission regulations similarly exclude from the definitions of contribution and expenditure "[a]ny cost incurred in covering or carrying" a news story, commentary, or editorial by any broadcasting station, newspaper, magazine, or other periodical publication. 11 C.F.R. §§ 100.7(b)(2) and 100.8(b)(2).⁷

B. Factual Background

According to the chronology of events revealed through the complaint, responses, and press reports, Robert Dornan hosted approximately 55 hours of radio time during March-October 1997 as he appeared on the respective radio talk shows on the following dates during the above-mentioned time slots: North Show, March 10-14, 1997; Reagan Show, March 31-April 4; Keyes Show, on and/or around October 15, 1997.

The latest Statement of Organization filed by Dornan's principal campaign committee, Dornan for Congress ("Committee"), on December 31, 1994, identifies Dornan as treasurer.⁸ He designated Dornan for Congress as his principal campaign committee. On September 10, 1997,

⁶ One court has said that this language only exempts "those kinds of distribution that fall broadly within the press entity's legitimate press function." *Reader's Digest Association, Inc. v. FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981). This court also noted that the statute would bar "even investigations of press activities which fall within the exemption," although it acknowledged there could be a limited investigation to determine if the news exemption was applicable.

⁷ According to the legislative history of this "press exemption," Congress intended to preserve the traditional role of the press with respect to campaigns: "[I]t is not the intent of Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press and of association. Thus, [the exemption] assures 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. at 4 (1974).

⁸ On January 3, 1997, Dornan filed with the Commission a Statement of Candidacy as a candidate for the U.S. Congress in California, District 46, for a Special Election in 1997. In 1996, Loretta Sanchez defeated Bob

the Reports Analysis Division notified Dornan that, based upon filed reports of receipts and disbursements with the Commission, the Committee appeared to have received contributions and/or made expenditures in support of his 1998 candidacy in excess of \$5,000. Dornan was instructed to file a Statement of Candidacy or disavow this activity. On October 8, 1997, Dornan filed a Statement of Candidacy with the Commission as a candidate for the Republican nomination for the U.S. Congress in California, District 46, for 1998.

The Committee's first report after the 1996 election was the 1996 30 Day Post-General Report, which was filed on December 12, 1996. This report disclosed \$312,692.73 in receipts and \$341,670.15 in disbursements and \$0.00 debts owed by the committee. The receipts included \$301,477.73 in contributions and the cash on hand at the close of the reporting period totaled \$100,548.74. The amount of contributions reported as received after election day, November 5, 1996, equaled \$7,641.00. The next report filed by the Committee was the 1996 Year End Report, which was filed on January 31, 1997. This report disclosed \$73,353.37 in receipts and \$60,269.52 in disbursements and \$0.00 in debts owed by the committee. The receipts included \$69,353.38 in contributions and the cash on hand at the close of the reporting period totaled \$113,638.59. The committee's 1997 mid-year report discloses \$632,445.65 in receipts and \$628,393.59 in total disbursements. The receipts included \$607,505.65 in contributions and the cash on hand at the close of the reporting period totaled \$117,684.65.

Both the 1996 Year End and the 1997 Mid Year were amended on November 14, 1997,

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Dornan in the General election for the 46th District by 984 votes. Acting on a recommendation from a contested-election task force for a new election, the House Oversight Committee on February 4, 1998 voted 8 to 1 to drop the investigation of Dornan's claim that the election was stolen through rampant illegal voting by non-citizens. (Congressional Quarterly, February 7, 1998). See Attachment 1.

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less than a week after Dornan was notified of the Complaint in this matter. The Committee amended these reports to include debts of \$325,000 and \$203,000, respectively, to the law firm of Hart, King & Golden for "legal fees." Notwithstanding these debts, the Committee had, with apparent regularity, already disbursed Hart, King and Golden "legal fees," in amounts totaling approximately \$250,000, to Hart, King and Golden between December 10, 1996 and November 3, 1997.

Dornan has not claimed that he was "testing the waters."⁹ The reports filed by Dornan for Congress between December 5, 1996 and July 31, 1997 (1996 Post General, 1996 Year End, 1997 Mid Year) "contain activity for the 'general election'" as indicated on the summary sheets and the listings of itemized receipts.¹⁰ More specifically, on or about November 15, 1996, the Committee accepted over \$5,000 in contributions while, at that time, not reporting any debts. Furthermore, in the period prior to October 8, 1997, the Committee disbursed funds, designated as "operating expenditures," for the purpose of influencing a federal election, totaling almost one million dollars for what appears to be-campaign related expenses including direct mail services, bulk rate mailing, advertising in the Washington Times, event facilities, fundraising facilities, research services, consulting fees, and printing services.¹¹ Therefore, Dornan appears to have

⁹ An individual who tests the waters (rather than campaigns for office) does not have to register as a candidate, as mentioned above. Nevertheless, funds raised to test the waters are subject to the Act's contribution limits. Moreover, the individual may not accept funds from prohibited sources in violation of the Act. 11 C.F.R. §§ 100.7(b)(1)(i) and 100.8(b)(1)(i).

¹⁰ As such, Dornan gave no indication that he was raising and spending funds with respect to a recount of the results of a Federal election or an election contest concerning a Federal election. Neither Dornan nor the Committee set up, as required by Commission regulation or custom (A.O. 1978-92), either: 1) a separate account of the principal campaign committee to receive monies designated within the categories of "other receipts" and "other disbursements" respectively, or 2) a separate organizational entity for the purposes of funding a recount or election contest effort. As stated *supra*, a separate recount committee could not accept funds or anything of value from a national bank, foreign national, corporation or labor organization. 2 U.S.C. § 441b.

¹¹ SRN and Dornan's representatives have asserted, through press reports, that the former Congressman was free to go on the air because he was not a candidate for federal office. They assert that Congress had not acted on

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qualified as a candidate for the 1998 General Election under the Act prior to October 8, 1997 and prior to the airing of the Reagan and North Shows which he hosted in March-April 1997. As such, he was subject to the prohibitions of the Act at the time of these "guest appearances," as well as at the time of his appearance on the Keyes Show in October 1997, after having declared himself a candidate for the 1998 General Election.

The Reagan Show is a six hour program which airs Monday through Friday 3:00 PM to 9:00 PM Pacific Standard Time ("PST"). The series focuses on various political topics and pressing issues of the day through interviews with leading political figures and interaction with callers nationwide. The Reagan Show is broadcast by over 140 major market affiliates. In 1997, Reagan's national program was heard by 2.5 million listeners in about 150 cities on about 156 stations nationwide. (Fresno Bee, 2/27/97, 12/27/97; PR Newswire, 2/5/97). The show is also distributed *via* the World Wide Web at <http://www.reagan.com>.

Premiere, one of the top three radio networks in the country, acquired world wide distribution rights to the Reagan Show in February 1996 and the radio distribution rights to the Reagan Show in February 1997. (Businesswire, 3/25/98).¹² Premiere's association with the Reagan Show dates to 1994, when Premiere became its advertising sales representative. *Id.* Premiere is a leading independent creator, producer and distributor of comedy, entertainment and

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his petition for a new election, nor had he declared his candidacy for the 1998 GOP primary for the 46th Congressional District. (Los Angeles Times, 3/15/97). Greg Andersen, president of SRN, is quoted as stating that "for now, Dornan is a 'private citizen' and therefore free to be on the radio." (Los Angeles Times, 3/17/97). According to the press account, Dornan's attorney, William Hart, stated "[i]f there was a campaign and there was a scheduled election and there was an office he had declared for, that would be a different situation. But I don't think any of those points have been met....What they want to do is shut Bob Dornan up...I think it's rather open and shut that he's not a candidate....[i]t's difficult to be a candidate for an election that hasn't been called." *Id.*

¹² Although press reports and the response from ABC Radio indicate that Premiere, not ABC Radio, owns and/or produces the Reagan Show, this Office initially notified ABC Radio of the complaint in this matter as publicly available information lists ABC Radio as the mailing address of the Reagan Show.

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music radio programs and services. Founded in 1987, Los Angeles-based Premiere produces 60 syndicated programs and services that are delivered to more than 5,300 radio affiliates under contract that broadcast its programming and use its services. (PR Newswire, 2/5/97). Premiere distributes these programs and services in exchange for commercial air time. *Id.*

The Keyes Show, a call-in program hosted by Keyes, who was a candidate in the 1996 presidential race, fills the "crucial" 7:00 am to 10:00 am PST "morning drive slot." (Los Angeles Times, 1/6/99).

The North show, airing from 3:00 until 5:00 PM weekdays, is broadcast in 38 states on stations with a mix of formats combining conservative political opinion, news and live interaction with callers. (Roanoke Times & World News, 4/5/97). Talkers', a well-known talk radio trade journal, ranked the North Show as tied for 10th in talk radio ratings for 1997, with an estimated daily listening audience of 2.5 million. (Insight, 2/9/98).

SRN produces, syndicates and distributes news and talk programming, including the Keyes Show and the North Show to over 700 stations nationwide. SRN is a division of Salem Communications Corporation which owns and operates over 40 radio stations including facilities in 9 of the top 10 radio markets. (Business Wire, 8/23/96; Houston Chronicle, 1/18/97; The Detroit News, 8/17/97). Like Premiere, SRN is a for-profit, barter-based company, meaning it trades programming to stations for blocks of time that it resells to advertisers.¹³

C. Analysis

1. *Purpose of Influencing*

The Commission has, in past opinions, considered whether the activities of a particular organizational entity which involves the participation of a Federal candidate, or communications

¹³ Salem Communications Corp. is a privately held company that does not release revenue figures, but it is reported that the amount of advertising it sells is in the multimillion of dollars annually.

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referring to a Federal candidate, result in a contribution or expenditure, i.e., something of value for the purpose of influencing a Federal election. See 2 U.S.C. § 431(8)(A)(i). The Commission has taken the position that financing the foregoing activities would result in a contribution to or an expenditure on behalf of a candidate if the activities involve 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 candidate. A.O.s 1988-27, 1986-37, 1986-26, 1982-56, 1981-37, 1980-22, 1978-56, 1978-15, 1977-54, 1977-42. 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." A.O.s 1992-6, 1990-5, 1988-27, 1986-37, 1986-26, 1984-13 and 1983-12.¹⁴ Furthermore, as discussed below, the Commission has addressed situations particularly relevant to the disposition of the matter at hand.

The Commission has considered the role of a candidate within the broadcasting context in its Advisory Opinions. A.O. 1977-42 is of particular relevance to this matter. In that opinion, a candidate for Federal Office had participated in various radio public affairs programs. In these radio programs, the candidate either moderated discussions with public officials regarding the issues of the day or participated in the discussions through a "call in" format. The Commission concluded that the production or broadcasting of the programs did not have reporting consequences or result in contributions to the candidate since the radio conversations were not conducted for the purpose of influencing the speaker's election. The Commission, in examining

¹⁴ Two recent A.O.s, 1999-2 (Premera) (corporate luncheon forum for candidates is "in connection with a Federal election" but otherwise permissible under Commission regulations) and 1999-11 (Byrum) (officeholder's billboards advertising weekly "coffee" are not campaign-related), did not address whether the absence of express advocacy and solicitation would preclude a determination that an activity is "campaign-related."

the circumstances involved, focused on the absence of any communication expressly advocating the election of the candidate involved or the defeat of any other candidate, and the avoidance of any solicitation, making, or acceptance of campaign contributions for the candidate in connection with the activity.¹⁵

More recently, in A.O. 1992-5 and A.O. 1992-37, the Commission conditioned its approval of candidates appearing in or hosting radio shows and broadcasts on the assurance that they would be: 1) issue-oriented, 2) devoid of campaign related material or content and, 3) committed to refraining from attacks on opponents.¹⁶

Although the Commission has concluded that contributions or expenditures for Federal candidates would not result in the aforementioned circumstances, the Commission has distinguished that, in contrast to activity involving mere candidate participation, activity personally orchestrated or controlled by the candidate is campaign-related. This precept was reinforced in A.O. 1990-5, where reportable "in-kind contributions" to candidates included those instances where, in coordination with candidates, newsletters contained substantive statements generally favoring a candidate or criticizing his opponent or contained references to a candidate's campaign event in a scheduling feature. The Commission, citing to A.O. 1988-2, noted the legal consequences of activity undertaken in coordination with a candidate's campaign:

[i]f statements, comments or references regarding clearly identified candidates appear in the newsletter and are made with the cooperation, consultation or prior consent of, or at the request or suggestion of, the candidates or their agents, regardless of whether such references contain 'express advocacy' or solicitations for contributions, then the payment for allocable costs incurred in making the communications will constitute 'expenditures' by [the organization] and 'in-kind contributions' to the identified candidates. 2 U.S.C. § 441a(a)(7)(B).

¹⁵ This opinion made no reference to the news exemption.

¹⁶ These opinions made no reference to the news exemption.

See A.O. 1990-5 & 1988-22. The Commission, citing to A.O. 1983-12, based this conclusion "on the presumption that the financing of a communication to the general public, not within the 'press exemption,' that discusses or mentions a candidate in an election related context and is undertaken in coordination with the candidate or his campaign is 'for the purpose of influencing a federal election.'" Id. By analogy, the media activity of a candidate host is held to a different standard than the media activity of a third party host or commentator discussing or interviewing a candidate.

Finally, the Commission has also considered and recognized that an individual may pursue gainful employment at the same time he or she is a candidate for federal office. In A.O. 1977-45, an individual was employed, in part, as an editorial writer, prior to "officially announcing" his federal candidacy. Such an arrangement was found not to give rise to a contribution from the employer, since it reflected a "bona fide" employment situation.

In light of past Commission actions on this subject, it appears that the fact that the host is himself a candidate is not by itself dispositive of the issue, but rather all circumstances are to be examined in order to determine the purpose of the communication.

In the present matter, it appears that Dornan hosted the Reagan Show and the North Show after he qualified as a candidate for the 1998 General Election on approximately November 15, 1996. Furthermore, Dornan hosted the Keyes Show after he filed his Statement of Candidacy for the 1998 General Election.

In addressing the purpose of the radio broadcasts, SRN denies that there was an intent, through the talk-show process, to influence the outcome of a federal election. Instead, SRN asserts that it was merely exercising its business judgment and the fulfillment of its obligations as a licensee to present programming to discuss public policy and provide entertainment. SRN

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indicates that the intent behind Dornan's appearances was to provoke public discussion of issues and issue advocacy.

As discussed above, SRN asserts that, "Mr. Dornan has never, on SRN, expressly advocated his own election, or Congresswoman Sanchez's defeat, in *any* electoral contest," referring to the *Buckley* decision. Specifically they cite, "[t]he Supreme Court has stated that '[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our constitution.' *Buckley* 424 U.S. at 14-15 (emphasis added)." Likewise, ABC Radio claims that the "complaint is deficient because it lacks any recitation of the on-air statements that allegedly constituted impermissible 'express advocacy' of the election or defeat of a clearly identified candidate."

Respondent's contentions that the purpose of the radio broadcasts was not to influence Dornan's election is contradicted by the presence of factors, as cited by the Commission in its A.O.s, which appear in both press accounts and a few transcripts of Dornan's appearances which were located by staff on the World Wide Web. These statements and excerpts reflect instances in which guests and callers questioned him about aspects of his candidacy or that of his opponent, as well as instances in which Dornan, on his own initiative, discussed his candidacy and his opponent in a disparaging manner.

As mentioned above, Dornan guest hosted the North Show during the week of March 10, 1997. The press has reported that, during his appearances, Dornan asked the House to set aside Sanchez's victory and call a special election, contending he lost due to voter fraud perpetrated by "[his] opponent" Sanchez, and he "declared" himself a candidate. Complaint at page 2.

According to the *Los Angeles Times*,

three hours a day over five days last week, Dornan substituted for North on the nationally syndicated radio program. On day one, Dornan spent most of the time discussing his

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favorite subject: Robert Dornan. In a format he dubbed a 'national' news conference, which drew no reporters, he detailed the status of his appeal to overturn the election of the 'Palos Verdes princess,' as he calls Sanchez, his democratic rival. Past the halfway mark of his week-long stint, Dornan's raspy voice took on a 'Valley girl' accent. It was a sing-song imitation of Sanchez criticizing him: 'Bob Dornan.... Why doesn't he just move on? Why doesn't he just leave me alone?' Dornan told his friend Rep. John T. Doolittle (R-Rocklin), a guest on the show via telephone, that he could be a regular on radio were he not preoccupied with his pending election contest. He boasted that he's ready for radio drive time if he decides that his 18-year congressional career ended last November." (Los Angeles Times, 3/17/97).

Dornan filled in two weeks later for talk show host Michael Reagan, whose show is aired in several markets across the country. A review of the content of the available transcripts indicates a purpose to influence an election or election contest. Dornan, while hosting this show over the course of five days, made the following assertions, amongst others, that:

- 1) he lost the 1996 election due to voter fraud involving Sanchez ("...I won...I was declared the winner in the 46th Election District of California...[w]hat put Loretta Sanchez 979 votes ahead...walk in absentees....turned in late in the election day afternoon, after it was dark, all in precincts in downtown Santa Ana...areas with high numbers illegal aliens");
- 2) Sanchez lied in her campaign "attacks" on Dornan ("of 23 mail pieces Sanchez put out 21 were negative, such as deliberate, lying attack..."),
- 3) Sanchez and her husband committed a felony by tearing down Dornan's campaign posters and signs ("Loretta's husband had a sign of mine in each hand when my son Mark arrested him...theft of personnel property and you win the election?...From Clinton to Sanchez-Brixey, its the same message...since the end is correct, any means to that end, even breaking the law is ok."),
- 4) Sanchez has consistently broken her campaign promises ("Term limits-she campaigned on them the whole time. She said I had been there too long...[s]he broke her promise and voted against term limits.");
- 5) Sanchez voted for "infanticide" ("Abortion - Betraying her Christian faith, she voted against banning partial birth infanticide. She voted big time for infanticide..."); and
- 6) Sanchez is a setting a bad example for America's youth ("What kind of example is this for young people...what is it when our opponents tell the youth of our nation, 'tear down your opponents signs...'").

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See Attachment 2.¹⁷

It appears in the press reports and the small number of transcripts cited above that Dornan hosted these radio shows with the knowledge that his name would be inextricably linked with his candidacy before the same electorate voting on his reelection and at the same time as the campaign and prior to voting for such reelection takes place. The fact that Dornan is continuously identified by both himself, callers and guests as a candidate for federal office reveals an apparent or objectively recognizable "purpose to influence" his Congressional campaign.

Furthermore, the three Reagan Show excerpts discussed above may also exhibit instances of express advocacy. Although the available few transcripts contain no words of advocacy such as "vote for," "elect," "vote against," or "defeat," the Court in *Furgatch* indicated that communications do not have to contain certain key words or phrases to expressly advocate, but instead the speech should be read as a whole.¹⁸ Besides the mention of Dornan as a candidate, there is also indication of Dornan's party affiliation. These appearances indicate support for Dornan's candidacy and explicit disparagement of Sanchez as well as call for her removal from office.

Consequently, there is reason to believe that the comments quoted above, as well as those cited in the aforementioned press reports, constitute the express advocacy of Dornan's future election and/or the express advocacy of Sanchez's future defeat. Given the nature and purposes

¹⁷ This summary is based upon a limited sampling of excerpts from transcripts of dates on which Dornan hosted the Reagan Show. These transcripts were located on the web site "conservativenet.com."

¹⁸ If that speech conveys an exhortation through some form of a call to action, and that call to action is unambiguous, in that it cannot be reasonably interpreted to mean anything else, the requirement of express advocacy is satisfied. Conversely, if the speech is ambiguous as to what sort of action is called for, the Ninth Circuit's standard is not fulfilled.

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of these programs, it is unlikely, as next discussed, that the aforementioned instances of express advocacy could be exempted under the press exemption.

2. *Press Exemption*

The above-mentioned situation invariably raises the question of whether the references to and discussions about Dornan's candidacy would indeed be considered in-kind contributions from SRN and Premiere to Dornan's campaign after the application of the press exemption. For apparently this reason, counsel for ABC Radio cites to the "media exemption" as fully insulating respondents' activities from the complainant's assertions. In stating that the ABC entities are media entities exempt from the constraints of the Act, counsel for ABC Radio further notes that the broadcast of the Reagan Show "remains, undiminished, an exercise of the ABC-owned stations' legitimate press function."

As recited above, the Act and Commission regulations exclude from the definitions of contribution and expenditure "any cost incurred in covering or carrying" a news story, commentary, or editorial by any broadcasting station, newspaper, magazine, or other periodical publication. Several factors, though, must be present to conclude that the campaign-related activity falls within the press exemption of 2 U.S.C. § 431 (9)(B)(i). The entity must be a press entity as described in the section. *See* A.O.s 1987-8, 1980-109, and 1980-90. *See also Federal Election Commission v. Multimedia Cablevision, Inc.*, Civ. Action No. 94-1520-MLB, slip. Op. At 6 (D.Kan. August 15, 1995), *vacated as moot*, Nos. 95-3280 and 3315 (10th Cir. Sept. 18, 1997) (referring to the need for "a qualified press entity" in applying the exemption).¹⁹ In previously applying the press exemption to candidates' media appearances, the Commission cited two criteria, based on the statutory exemption, that would be relevant to determining the

¹⁹ This opinion was vacated following the Commission's Notice of Suggestion of Mootness dated September 10, 1997.

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scope of the press exemption. These are (1) whether the press entity is owned by the political party or candidate and (2) whether the press entity is acting as a press entity in performing the media activity. A.O. 1982-44 (citing *Reader's Digest Association v. Federal Election Commission*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981)).

Furthermore, the Commission has indicated the following determinate factors as to whether a press entity is acting as a press entity in performing its media function: 1) the extent to which the press entity retains control over the means of presentation of the candidate, 2) the manner in which the press entity utilizes campaign related material, and 3) whether the press entity takes affirmative steps to ensure that viewers do not conclude that the airing of the programs or material constitutes an endorsement by the network or syndicators of the candidate depicted. A.O.s 1996-41, 1996-48, 1996-16; compare A.O. 1996-2 (CompuServ) (where a non-press entity proposed to give free on-line computer accounts to candidates whereby they would have an unlimited opportunity to present their election advocacy messages to the other subscribers).²⁰

Additionally, the Commission has determined that the preferential donation of blocks of air time by a press entity to any one candidate will be deemed to fall outside of the Act's media exemption. See A.O.s 1998-17 and 1982-44 (the Commission decided in that opinion that the commentary exemption would permit an incorporated broadcasting station to donate free time in two-hour blocks to each of the two major political parties for campaign-related messages with

²⁰ In concluding that the press entity will be acting as a press entity in A.O. 1996-41 the Commission states, "in producing these programs, [the press entity] proposes to create and cover a news event in which candidates for Federal office appear and answer a pre-determined question posed by a news division interviewer under circumstances controlled by the broadcaster. For example, each candidate will have a limited amount of time in which to answer the question." Similarly, in A.O. 1996-16, the Commission concludes that the press entity will be acting as a press entity because "[m]uch like the presentation of a more traditional news stories and news programs, the means of presentation are controlled by the press entity. This is a discrete, structured forum with a moderator, a set format, and a time limit.

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the donation of such time being considered to fall within the category of commentary rather than being treated as a contribution under the Act).

First, SRN and Premiere, the entities that are involved in this activity, are press entities as set forth in the exemption. Through ABC Radio and other presently unknown broadcasting networks, SRN and Premiere serve as commercial/non-commercial producers and providers of 24-hour a day programming devoted to news, commentary and editorials. There is no indication that SRN and Premiere are controlled, in whole or in part, by any political party, committee, or candidate.²¹ Second, we recognize that Dornan's candidacy was itself a legitimate news story, one that the television and radio station would cover, report, and comment on in the same manner as it would with other candidates for the U.S House of Representatives.

Nevertheless, in producing the Shows, SRN and Premiere did not retain control over the context in which Dornan's campaign discussions were used. In fact, from the limited information available to this Office at this time, it appears the neither SRN nor Premiere took any affirmative steps to prevent Dornan, a Federal candidate, from engaging in election related activity on the shows.²² SRN and Premiere have essentially provided to Dornan and his

²¹ This situation is, therefore, unlike cases where the candidate owned the media outlet in question. See MUR 2268 (Epperson), Advisory Opinion 1990-5 (Mueller), and *Federal Election Commission v. Forbes, et al.*, Civ. Action No. 98-6148-BSJ (filed S.D. N.Y. August 28, 1998, dismissed February 19, 1999) (matter dismissed following the Commission's determination to withdraw the suit and close the file). See also, e.g., 11 C.F.R. § 100.7(b)(2) (recognizing that the news exemption would apply to a station owned by a candidate if the news story represents a bona fide news account and is part of a general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the listening area). It should be noted that Stuart Epperson, the 1986 Republican candidate for the United States House of Representatives from the fifth congressional district of North Carolina owns SRN, formerly known as Salem Media of North Carolina, Inc., and both Epperson's committee and SRN conciliated agreements with the Commission in MUR 2298 in which they admitted violations of Section 441b.

²² The existence of any prohibition on election-related activity during broadcasting by Federal candidates appearing on SRN or Premiere shows is unclear as the respondents have not provided a copy of Dornan's employment contract or a copy of any written station policy regarding on the air commentaries. Moreover, there has been not evidence produced or allegations made by respondents that Dornan has breached his contractual obligations or violated any corporate policy.

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campaign a benefit akin to free advertising time.

Unlike the presentation of more traditional news stories and news programs such as that in MUR 3366 (Herschensohn), a previous matter which differs in several essential respects from the matter at hand, the means of presentation of Dornan's radio broadcasts were not controlled by the press entities SRN and Premiere.²³ The Shows were not discrete, structured forums with a moderator, a set format, and a time limit as to issue discussion. See A.O. 1996-2.

And, in stark contrast to situations where the Commission has viewed free airtime provided by a press entity to a candidate as falling within the commentary category of the press exemption, neither press entity appears to have attempted to provide equal access opportunities to Dornan's opponent, Sanchez, and/or other candidates. See A.O.s 1998-17 & 1982-44. Thus, the activities by SRN and Premiere exist within the realm of mere in-kind contributions of advertising space rather than as constituting the performance of a media function.

Based on the foregoing, there is reason to believe that SRN and Premiere are press entities that were not acting in their capacities when producing and carrying the above described programming. These corporations may have given numerous hours of free airtime to a Federal candidate. As such, the dissemination of the radio programs with Dornan appearing as a "guest host" as a part of their programming may not be permissible under the Act. Finally, Dornan's

appearances as host on the Shows may not be protected by the "press exemption" and, therefore, may be prohibited by Section 441b.

²³ Herschensohn, a Federal candidate, was not acting as a "host" of any radio program and appeared to exercise a negligible level of control over his commentary. He acted as a mere "news commentator" who delivered a daily radio commentary approximately three minutes in length. Moreover, Herschensohn discussed his candidacy only during instances in which the hosts of the radio program, on their own initiative, briefly questioned him about aspects of his candidacy before or after his commentaries.

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IV. CONCLUSIONS

Although this Office has received responses from SRN and ABC Radio, many questions remain unanswered and much information which should exist in the possession of respondents, particularly transcripts of the North and Keyes shows, remains currently unproduced and unavailable to this Office. However, based on the evidence discussed above which both indicates that violations of the Act may have occurred and begs further inquiry, this Office recommends that the Commission open an investigation into this matter by finding that SRN, Greg Anderson, as the principal officer of SRN, Premiere, and Kraig T. Kitchen, as the principal officer of Premiere, violated 2 U.S.C. § 441b by making prohibited corporate contributions and expenditures in connection with a federal election. The Office also recommends that Premier and SRN violated Section 441d(a) by failing to issue disclaimers during the broadcasts of the Shows that expressly advocated the election or defeat of clearly identified candidates.

The facts suggest that the Dornan for Congress committee, with the personal involvement of Dornan, may have violated the Act by accepting prohibited in-kind contributions from SRN and Premiere. By knowingly accepting contributions from the aforementioned entities, Robert Dornan and the Dornan for Congress committee may have violated 2 U.S.C. § 441b by accepting prohibited corporate contributions.

At present, this Office, has no indication that either Alan Keyes, Oliver North, or Michael Reagan, all named respondents in this matter, are officers and/or directors of SRN and Premiere and could incur Section 441b liability by agreeing or consenting to corporate contributions. Thus, it is this Office's recommendation that the Commission find no reason to believe that Alan Keyes, Oliver North, and Michael Reagan violated 2 U.S.C. § 441b.

Although ABC Radio has been named as a respondent in this matter for its association with the Reagan Show and has responded to the complaint. Information discovered in the preparation of this report indicates that Premiere owns the distribution rights to the Reagan Show. As discussed *supra*, Premiere produces, represents and distributes the Reagan show. According to ABC Radio's response, ABC Radio merely leases satellite time to the Shows independent syndicators, SRN and Premiere. In fact, the named respondent, ABC Radio, is an indirect subsidiary of ABC, Inc. ("ABC"). ABC, not ABC Radio, owns the three stations which entered into affiliation with Premiere. Informal discovery pursued in this matter will undoubtedly clarify whether in fact ABC Radio and/or ABC has any involvement with SRN or Premiere beyond that discussed in ABC Radio's response. Additionally, informal discovery, as discussed below, will aid this Office in assigning a monetary value to the aforementioned radio broadcasting time. Thus, it is this Office's recommendation that the Commission take no action at this time with respect to ABC Radio as well as ABC.

V. DISCOVERY

Informal discovery concerning the full extent and nature of election-related activities conducted by SRN, Premiere, Dornan, and the Dornan for Congress committee is necessary to gain a full understanding of the dialogue that occurred on the Shows and the activities that occurred in conjunction with Dornan's appearances on the Shows. This Office plans to investigate this matter by pursuing informal discovery at this time due to media sensitivity concerns. The questions and document request directed to SRN and Premiere will focus on obtaining transcripts and/or tapes of the pertinent Shows, as well as relevant station policies. The informal discovery directed to Robert Dornan and the Committee will concentrate on the

legitimacy of the \$528,000 debt to Hart, King and Golden recorded on the amended 1996 Year End and 1997 Mid Year reports.

It is this Office's opinion that a limited investigation into the relevant election-related activities of ABC Radio Networks and ABC-owned stations is warranted. This effort will assist in determining the role, or absence thereof, of this entity in the coordination of electoral activities between itself, Robert Dornan, and the Reagan Show's syndicator, Premiere, as well as aid this Office in determining the amount in violation through ABC's "going-rate" on advertising time.


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VI. RECOMMENDATIONS

1. Find reason to believe that Salem Radio Networks and Greg Anderson, as its principal officer, violated 2 U.S.C. § 441b.
2. Find reason to believe that Premiere Radio Networks and Kraig Kitchen, as its principal officer, violated 2 U.S.C. § 441b.
3. Find reason to believe that Premiere Radio Networks violated 2 U.S.C. § 441d(a).
4. Find reason to believe that Salem Radio Networks violated 2 U.S.C. § 441d(a).
5. Find reason to believe that Dornan for Congress and Honorable Robert K. Dornan, as treasurer, and Honorable Robert K. Dornan, as candidate, violated 2 U.S.C. § 441b.
6. Find no reason to believe that Alan Keyes violated 2 U.S.C. § 441b.
7. Find no reason to believe that Oliver North violated 2 U.S.C. § 441b.
8. Find no reason to believe that Michael Reagan violated 2 U.S.C. § 441b.
9. Take no action at this time against ABC Radio Networks, Inc. and ABC, Inc.
10. Approve the attached Factual and Legal Analyses.
11. Approve the appropriate letters.

Lawrence M. Noble
General Counsel

8/4/99
Date

BY: 
Lois G. Lerner
Associate General Counsel

Attachments:

1. Excerpt from Congressional Quarterly dated February 7, 1998
2. Appendix 1, excerpted transcripts from the Reagan Show
3. Factual and Legal Analyses

6500-163-10-66



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Lawrence M. Noble
General Counsel

FROM: Mary W. Dove/Lisa R. Davis
Acting Commission Secretary

DATE: August 10, 1999

SUBJECT: MUR 4689 - First General Counsel's Report
dated August 4, 1999.

The above-captioned document was circulated to the Commission
on Thursday, August 5, 1999.

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Elliott	<u>XXX</u>
Commissioner Mason	<u>XXX</u>
Commissioner McDonald	—
Commissioner Sandstrom	<u>XXX</u>
Commissioner Thomas	<u>XXX</u>
Commissioner Wold	—

This matter will be placed on the meeting agenda for
Tuesday, August 17, 1999.

Please notify us who will represent your Division before the Commission on this
matter.