FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: The Commissioners
Staff Director
General Counsel

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

DATE: February 24, 2000

SUBJECT: Statement of Reasons for MUR 4689

Attached is a copy of the Statement of Reasons for MUR 4689 signed by Vice Chairman Danny Lee McDonald and Commissioner Scott E. Thomas. This was received in the Commission Secretary's Office on Wednesday, February 23, 2000 at 5:25 p.m.

cc: Vincent J. Convery, Jr.
Press Office
Public Information
Public Records

Attachment

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

In the Matter of	)	
	)	
Honorable Robert K. Dornan	)	**MUR 4689**
Dornan for Congress and Honorable	)	
Robert K. Dornan, as treasurer	)	
Salem Radio Networks	)	
Premiere Radio Networks	)	

STATEMENT OF REASONS

VICE CHAIRMAN DANNY LEE MCDONALD
COMMISSIONER SCOTT E. THOMAS

In MUR 4689, Commissioners Sandstrom, Elliott, Mason and Wold found no reason to believe that Robert Dornan and his campaign committee, Dornan for Congress, violated "any provision" of the Federal Election Campaign Act ("FECA" or "the Act"). Without any questioning of Mr. Dornan or his campaign committee, or, any of the other respondents in this matter, our four colleagues summarily rejected allegations that as a federal candidate, Mr. Dornan repeatedly and impermissibly accepted free air time as a radio talk show host to attack his likely 1998 general election opponent, Loretta Sanchez. During these radio broadcasts, Mr. Dornan accused Ms. Sanchez of, among other things, breaking campaign promises; distributing campaign material which contained "deliberate, lying attacks;" betraying her Christian faith; and generally setting a bad example for American youth.

We do not think this matter should have been so quickly and easily dismissed. Based on Commission precedect and the need to resolve the many unanswered questions presented here, we believe the Commission should have pursued this matter and at least conducted an investigation of the allegation. Accordingly, we agreed with the legal analysis and recommendation of the Office of General Counsel to find reason to believe that Mr. Dornan and the Dornan for Congress Committee may have violated the Act by accepting prohibited corporate contributions, and, to open an investigation into the matter.

I.

In November, 1996, Robert Dornan lost a narrow race to Loretta Sanchez for election to the United States House of Representatives from California's 46th Congressional District. Several months later, in February, 1997, Mr. Dornan announced to a local newspaper that he would run again for the House in 1998. *The Orange County Register*, February 13, 1997 ("Dornan to run for House again"). At this time, Mr. Dornan also was engaging in extensive fundraising for his candidacy. Between January 1, 1997 and June 30, 1997, Mr. Dornan's campaign committee received over $630,000 in receipts. On October 8, 1997, Mr. Dornan filed a Statement of Candidacy with the Federal Election Commission as a candidate for the Republican nomination for the U.S. Congress in California's 46th Congressional District in 1998.

During this same time period, Mr. Dornan, also appeared as a "guest host" on several radio talk shows. These included the Oliver North Show, March 10-14, 1997; the Michael Reagan Show, March 31 - April 4, 1997; and the Alan Keyes Show, around October 15, 1997. It appears Mr. Dornan hosted approximately 55 hours of radio time for these three shows. From the limited record available, it appears most of the air time was spent either promoting himself or attacking Ms. Sanchez.

The Federal Election Campaign Act prohibits "any corporation whatever" from making any contribution or expenditure from corporate treasury funds in connection with a federal election and further prohibits any candidate or committee from knowingly accepting any such contribution. 2 U.S.C. §441b(b). The Act defines a "contribution or expenditure" to include "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, *or any services, or anything of value* . . . to any candidate or campaign committee in connection with" any federal election. 2 U.S.C. §441b(b)(2) (emphasis added). The Commission's regulations define "anything of value" to include "all in-kind contributions" and further explain that "the provision of any goods or services without charge . . . is a contribution." 11 C.F.R. §100.7(a)(1)(iii)(3)(A).

The Act, however, specifically excludes certain press activities from the definition of contribution or expenditure. Qualification for the so-called "press exemption" is reserved for:

> 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).

On November 4, 1997, the California Democratic Party filed a complaint with the Commission alleging that Mr. Dornan "has repeatedly used his position as a guest host on several national radio talk shows to raise funds and to attack Congresswoman Loretta Sanchez."

Complaint at 1. The complaint charged that by using the free air time to benefit his candidacy, Mr. Dornan accepted "illegal corporate contributions." *Id.* The complaint explained:

> The value of such time is enormous. The purchase of air time is one of the major expenses in any campaign. Here, Mr. Dornan gets *unrestricted air time* to discuss his candidacy and to attack his opponent. This appears to be a completely partisan effort, with no attempt on the part of the stations to make a balanced presentation of the issues by providing a similar opportunity for Congresswoman Sanchez.

Complaint at 3.

After a comprehensive review of the materials submitted by respondents (neither Mr. Dornan nor his campaign committee filed a response), the Office of General Counsel prepared a report for Commission consideration containing a factual and legal analysis of the allegations presented in the complaint. Based on the Act and Commission precedent, the General Counsel's Report recommended that the Commission find reason to believe that the Salem Radio Network (the entity responsible for the Alan Keyes and Oliver North shows) and the Premiere Radio Networks (the Michael Reagan show) and their respective principal officers violated 2 U.S.C. §441b by essentially providing free advertising time to Mr. Dornan and his campaign committee. The Office of General Counsel also recommended that the Commission find reason to believe that Mr. Dornan and his campaign committee may have violated 2 U.S.C. §441b by accepting these prohibited corporate contributions. Finally, the General Counsel's Office recommended that the Salem Radio Networks ("SRN") and Premiere Radio Networks ("Premiere") may have 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.[1]

A motion to reject the Office of General Counsel's recommendations passed by a vote of 4-2 with Commissioners Sandstrom, Elliott, Mason and Wold voting to support the motion and Commissioners Thomas and McDonald voting against. A motion then was made to:

> Find no reason to believe that Salem Radio Networks and its officers; Premiere Radio Networks and its officers; ABC Radio Networks, Inc.; ABC, Inc.; Dornan for Congress and Honorable Robert K. Dornan, as treasurer; and Honorable Robert K. Dornan, as candidate; violated any provision of the Federal Election Campaign Act as a result of the activities described in the General Counsel's Report dated August 4, 1999.

[1] 2 U.S.C. §441d. The section 441d disclaimer provision requires, *inter alia*, the name of the person who paid for the communication and a notice as to whether the communication was authorized by a candidate on "communications expressly advocating the election or defeat of a clearly identified candidate."

This motion also carried by a vote of 4-2 with Commissioners Sandstrom, Elliott, Mason, and Wold voting affirmatively, and Commissioners Thomas and McDonald dissenting.

II.

We believe the actions of Mr. Dornan, Dornan for Congress, Salem Radio networks and Premiere Radio Networks might well have constituted violations of the Federal Election Campaign Act. There is little doubt that Mr. Dornan received "something of value" when SRN and Premiere gave him 55 hours of free national radio air time. Although the record in this matter is limited, it appears Mr. Dornan repeatedly used the free air time either to promote himself or attack his opponent in the 1998 election. For example, the *Los Angeles Times* described Mr. Dornan's hosting the Oliver North show the week of March 10, 1997, this way: "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 favorite subject: Robert Dornan." *Los Angeles Times*, March 17, 1997.

Similarly, two weeks later on the Michael Reagan show, Mr. Dornan again sought to use the free time to his political advantage – this time by attacking Ms. Sanchez. Although only a few of the Reagan show transcripts were available, they clearly reveal Mr. Dornan charging, among other things, that:

- Ms. Sanchez lied in her campaign "attacks" on Mr. Dornan ("of 23 mail pieces Sanchez put out, 21 were negative, such as the deliberate lying attack which said . . . .").
- Ms. Sanchez consistently had broken her campaign promised ("Term limits -- she campaigned on it the whole time. She said I had been there too long. She broke her promise and voted against term limits.").
- Ms. Sanchez voted for "infanticide" ("Abortion-Betraying her Christian faith, she voted against banning partial birth infanticide. She voted big time for infanticide...").
- Ms. Sanchez sets 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 opponent's signs...'").

General Counsel's Distribution of Transcripts at 2, 5, and 8 (June 25, 1999).

What else did Mr. Dornan say during these broadcasts? Did he ask listeners to vote for him? Or vote against Congresswoman Sanchez? Did he solicit contributions over the air? We simply do not know. The excerpts available come primarily from a small number of transcripts placed on the Internet. The other information comes from newspaper accounts. If this very small sampling is any indication, though, it appears Mr. Dornan spent a considerable amount of time attacking his likely general election opponent. Because our four colleagues blocked any

investigation into this matter, however, we do not know the full extent of what was said by Mr. Dornan during his free air time.

Of course, if Mr. Dornan was a private citizen at the time of these broadcasts, none of this would matter. At the time of these activities, however, it appears Mr. Dornan was a candidate for election to the House from Ms. Sanchez's 46th Congressional District in California. In an interview with a local newspaper the month before he began hosting the North and Reagan radio shows, Mr. Dornan actually announced he was "running again" and "planning a new campaign." Under the headline, "Dornan to run for House again," the February 13, 1997 *Orange County Register* reported:

> Former Rep. *Robert K. Dornan says he is running again.*
>
> The Republican from Garden Grove said Wednesday that even as his lawyers and supporters try to prove that Democrat Rep. Loretta Sanchez "stole" the 1996 election from him, *he's planning a new campaign.*
>
> "I started making calls this morning to *set up the new campaign team and the new structure*," he said. A month ago, Dornan indicated he was content to leave Congress and resume a talk-radio career, but news that Sanchez had scored a seat on the National Security Committee was too much for him.
>
> "The voters replaced me, the Chairman of military personnel (subcommittee) with an airhead, and she got on National Security," Dornan fumed. "*I'm going back to Congress.* I feel it in my bones."
>
> * * * *
>
> *Dornan said he will begin fund-raising from scratch* because he expects the $130,000 left in his campaign fund to be eaten up by lawyers and investigators working overtime to investigate his charges of voter irregularities.

The Orange County Register, February 13, 1997; *see also Roll Call*, February 18, 1997 ("Last week he [Dornan] told the Orange County Register that he's definitely running for the House again in 1998.").

At the same time, Mr. Dornan was also busy raising campaign funds. The Dornan Committee's 1997 mid-year campaign report filed with the Commission discloses $632,445 in receipts and $628,393 in total disbursements. None of these contributions were designated for any purpose other than as contributions for election expenses. If the Dornan Committee intended

that receipts were to be used for some non-election purpose such as an election recount, it should have either: (1) established a separate account to receive monies designated within the category of "other receipts" or "other disbursement;" *see* 2 U.S.C. §§434(b)(2)(J) and (4)(G) and also 11 C.F.R. §§104.3(a)(3)(x) and (b)(2)(vi); or (2) established a separate organizational entity for the purposes of funding an election recount effort. *See, e.g.*, Advisory Opinion 1978-92 [Transfer Binder] Fed. Elec. Camp. Fin. Guide (CCH) ¶5374. The Dornan Committee did neither.

The public declaration to the *Orange County Register* combined with the large amount of campaign funds raised during the first half of 1997 provides a strong basis for concluding Mr. Dornan was a candidate at the time of even the first two broadcasts. The Act defines "candidate" as "an individual who seeks nomination for election, or election, to Federal office." 2 U.S.C. §431(2). "[A]n individual shall be deemed to seek nomination for election, or election...if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000." 2 U.S.C. §431(2)(A). It certainly appears the statutory definition for candidate was met here.[2] At a minimum, there is no doubt that Mr. Dornan was a candidate as of October 8, 1997, when he filed a Statement of Candidacy with the Commission. Thus, at the very least he was a candidate at the time of the Alan Keyes Show which he guest hosted in mid-October, 1997.[3]

Our conclusion at the reason to believe stage that Mr. Dornan and his campaign committee received a prohibited corporate contribution when he hosted approximately 55 hours of radio broadcasts is reinforced by Commission precedent exactly on point. In Advisory Opinion 1992-37, Randall Terry asked whether he could continue to host a daily radio talk show while he was running as a candidate for the United States House of Representatives from the 23rd District of New York. This talk show dealt "with all major contemporary issues, both domestic and foreign," and had a "call-in" format "in which the news of the day was discussed." *Id.*

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[2] Even if Mr. Dornan was not a "candidate" as defined by the Act, he certainly was subject to the Commission's "testing the waters" regulation. Under this regulation, an individual may explore the feasibility of becoming a candidate without having to register and report as a candidate even though the individual may have raised or spent more than $5,000. 11 C.F.R. §100.7(b)(1). This provision is inapplicable where an individual makes statements that refer to himself as a candidate or when an individual begins to amass campaign funds. 11 C.F.R. §100.7(b)(1). Significantly, an individual who is testing the waters may not accept funds from prohibited sources. *Id.* Accordingly, whether a candidate or simply "testing the waters," Mr. Dornan was prohibited from accepting a prohibited corporate contribution. *See* 2 U.S.C. §441b.

[3] The Act further states: "Each candidate for Federal office. . .shall designate in writing a political committee. . .to serve as the principal campaign committee of such candidate. Such designation shall be made no later than 15 days after becoming a candidate." 2 U.S.C. §432(e); 11 C.F.R. §101.1(a). The candidate shall make such a designation by timely filing a Statement of Candidacy or a letter containing specified information with the Commission. 11 C.F.R. §§101.1(a), 105.1.

Given Mr. Dornan's extensive fundraising and his public statement to the *Orange County Register*, there may also have been reason to believe that he failed to file a Statement of Candidacy and designate a political committee in a timely manner. Despite this compelling evidence and its discussion at the Commission table, Commissioners Sandstrom, Elliott, Mason, and Wold broadly found "no reason to believe" that Mr. Dornan and his campaign committee "violated any provision of the Federal Election Campaign Act as a result of the activities described in the General Counsel's report dated August 4, 1999." MUR 4689, Certification. By finding no reason to believe here, our colleagues have muddled the candidate registration provisions.

The Commission concluded Mr. Terry could continue to work as a radio talk show host, but conditioned its approval on a number of factors, including an assurance the candidate would refrain from attacks on his opponents. More specifically, the Commission stated:

> The Commission notes your statements that your show does not air in the 23rd District. The Commission also notes your representations that *you do not intend to use your show to promote your candidacy* or raise funds for your candidacy, and that no ads raising funds or promoting your candidacy would be run during the show. The Commission interprets your representation to include a commitment to *refrain from attacks on your opponents*, or from soliciting funds or airing ads for those purposes. *Based upon these conditions, the Commission concludes that you may continue to host your show during your candidacy without a prohibited contribution occurring.*

Id. (emphasis added).

Under Advisory Opinion 1992-37, the Dornan radio talk show appearances clearly were inappropriate.[4] Not only did the talk show run in the district in which Mr. Dornan was running for election, but Mr. Dornan also used the talk show to promote his candidacy and engage in attacks on his general election opponent.[5] We believe if Mr. Dornan wanted to use the airwaves to promote his candidacy and attack his opponent, his campaign should have paid for that air time as would be required of any other campaign.[6] The Dornan campaign's failure to do so resulted in the making and acceptance of prohibited corporate contributions.

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[4] The courts have recognized the importance of Commission Advisory Opinion precedent. In a Ninth Circuit decision involving the FEC's application of the law to a post-election loan guarantee, the court noted:

> The FEC has regarded loan guarantees and post election donations as contributions *in its advisory opinions*. The *appellees cannot choose to ignore that interpretation* of the regulatory scheme and urge this Court to substitute its own construction for that of the FEC.

FEC v. Ted Haley Congressional Committee, 852 F.2d 1111, 1115 (9th Cir. 1988) (first emphasis added). The D.C. Circuit concluded that the Commission's advisory opinion process is a "prompt means of resolving doubts with respect to the statute's reach." *Martin Tractor Co. v. FEC*, 627 F.2d 375, 384 (D.C.Cir.), *cert. denied*, 449 U.S. 954 (1980). It is clear that the "interpretation of FECA by the FEC through its regulation and advisory opinions is entitled to due deference and is to be accepted by the court unless demonstrably irrational or clearly contrary to the plain meaning of the statute." 852 F.2d. at 1115 (emphasis added). One would expect that if Commission advisory opinions are to be accepted by the courts, they might also enjoy a degree of acceptance by the Commission itself.

[5] This case is very different from MUR 3366. That matter involved Bruce Herschensohn who, at the time, was both a candidate for the United States Senate and worked as a radio commentator. Unlike the Dornan matter, the Herschensohn commentaries contained *no* reference to Mr. Herschensohn's candidacy or his opponent. In fact, the only brief reference to Mr. Herschensohn's candidacy seems to have been initiated by the radio talk show host—not Mr. Herschensohn—in an unplanned and unstructured fashion. Moreover, unlike the Dornan matter, Mr. Herschensohn provided only short commentaries as part of the larger show. By comparison, Mr. Dornan was the host and controlled the content for the entire show.

[6] To our knowledge, none of the other candidates for the 46th district were given a similar opportunity to host any of the radio shows hosted by Mr. Dornan. This case is thus materially distinguishable from Advisory Opinion, 1998-17,

III.

In defending their conclusion that the Dornan campaign did not violate "any" provision of the Federal Election Campaign Act, Commissioners Sandstrom, Elliott, Mason and Wold argue the so-called "media exemption" rescues this prohibited activity. In Advisory Opinion 1992-37, however, the Commission specifically considered and rejected the applicability of the media exemption to a radio talk show host broadcast. An alternative draft before the Commission, Agenda Document #92-138-A, had proposed that "the media exemption is applicable to [the Randall Terry] show." *Id.* at 6. In view of the applicability of the press exemption, the alternative draft concluded that "the continued operation of your show would not constitute a contribution or expenditure under the Act." *Id.* at 7. The alternative draft further stated that "[y]ou may endorse candidates and make statements opposing candidates, including references to or solicitations for your own candidacy." *Id.* At its meeting of October 22, 1992, however, the Commission discussed the applicability of the media exemption, rejected this alternative analysis, and directed the Office of General Counsel to circulate a new draft deleting the media exemption analysis. As a result, under Advisory Opinion 1992-37, a federal candidate acting as a talk show host may not use the media exemption to shield campaign-related activities, i.e., solicitation of contributions, promotion of candidacy, and attacks on opponents, from regulation by the Act.

Interestingly, the media itself takes an even more restrictive view regarding candidate/host appearances. Unlike Advisory Opinion 1992-37 which would allow a candidate to act as a host so long as the candidate does not engage in obvious campaign activities, the broadcast media apparently believes even allowing a candidate to *host* a broadcast, without campaign activity, falls outside accepted journalistic practices and the media exemption. Earlier this year, "CNN abruptly scrapped plans. . .for Vice President Gore to sit in as guest host of 'Larry King Live' after Republicans and many of its own journalists loudly complained." *Washington Post*, May 7, 1999. CNN had invited the Vice President to guest host a show to discuss the shootings in Littleton, Colorado.

CNN's broadcast plans for the Vice President generated "[a] wide range of critics [who] contended that the network was handing the leading Democratic presidential candidate an hour of free air time, unfettered by questions, just as the 2000 White House campaign was heating up." *Id.* Apparently, a number of CNN's "own journalists loudly complained" about the propriety of having a federal candidate "host" a program. *Id.* These critics included CNN White House Correspondent John King who said that the Vice President's appearance as a broadcast host "raises questions about our objectivity. If we are going to give him an hour, how can we defend not giving every other candidate the same opportunity." *Id.* Similarly, Tom Rosenstiel, head of the Project for Excellence in Journalism, maintained that CNN's plan for the Vice President to act as a broadcast host was inappropriate. In his view, CNN was "giving an unfair advantage to a candidate for president by lending him their credibility, their anchor chair, their air time." *Id.*

Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6270. In that opinion, a cable operator was allowed to provide free broadcast time to federal candidates so long as time was made available to *all* candidates.

Nor were journalists alone in objecting to the propriety of a political candidate acting as a broadcast host. Republican National Committee Chairman Jim Nicholson faxed a letter to Larry King "vigorously protesting him *having a candidate* for the presidency *host his show* and have a one hour *reign* on a very popular national television show." *Atlanta Journal and Constitution,* May 7, 1999 (emphasis added). Chairman Nicholson wrote that allowing a political candidate to serve as a broadcast host:

> raises serious concerns. . . Knowing you as I do, I feel certain you will not be comfortable if your fine program is turned into a contribution of free air time to the "Gore for President Campaign." And that is precisely what I fear is happening on CNN.

Washington Post, May 7, 1999.[7]

The criticism directed at CNN recognizes the essential difference between having a federal candidate host a program as opposed to a federal candidate being a guest on a program. In the former situation, it is the media which controls the format, asks the questions, and establishes program content. In the latter situation, however, it is the federal candidate who exercises full control over the entire broadcast, the air time and how it is used.

Indeed, it appears CNN itself recognized this crucial distinction between a federal candidate appearing as a guest as opposed to a host of a program. Just hours before broadcast, CNN changed its mind and instead scheduled the Vice President to appear as a guest and not a host. The producer for "Larry King Live" explained that "upon further reflection, we decided it was too close to the oncoming political season and felt it would be more important to move the Vice President *to the guest's seat.*" *Id.* (emphasis added). Likewise, Larry King explained that "after taking a long hard look at the political calendar, we decided it was too close to the 2000 election to have a presidential contender *as an interviewer, not interviewee.*" *Hotline,* May 7, 1999 (emphasis added). King announced that "the Vice President has graciously agreed to *give me back my microphone.*" *Id.* (emphasis added).

If one were to analogize a radio or television broadcast to a newspaper, it would be as if the entire newspaper were simply handed over to the candidate with the instruction: "Go ahead and do whatever you want." With such control, a federal candidate could make all the editorial decisions—normally made by the media—and exercise complete control over the content of the front page, which favorable or unfavorable news stories to run, the content of those stories, as well as authority over editorials and commentary. Obviously, this is not the way independent

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[7] Similarly, a Rhode Island talk show host plans to form an exploratory committee for the United States Senate in 2000 and continue to host her talk show—"a plan that immediately drew cries of foul" from Republican and Democratic candidates and leaders. *Providence Journal Bulletin.* August 18, 1999. Warwick Mayor Lincoln Chafee stated that "it's an unfair advantage—no doubt about it . . . The rest of us have to pay for air time." *Id.* Likewise, Rhode Island Democratic State Chairman William Lynch said, "I'm not saying that [she] would try to use [the show] to her advantage. . . But it's impossible to avoid." *Id.*

newspapers are run. Similarly, where a federal candidate exercises total and complete control over a radio or television broadcast, it is no longer a news media broadcast, but rather a candidate broadcast and outside the media exemption. In fact, the media exemption specifically does not apply where "facilities are owned or *controlled by any* political party, political committee, or *candidate*." 2 U.S.C. §431(9)(B)(i) (emphasis added).[8]

What if Mr. Dornan solicited contributions for his campaign while "guest hosting" a talk show? Or, what if Mr. Dornan spent three continuous hours as "host" explaining why he should be elected to Congress? In our view, such campaign activity would go well beyond what is considered to be normal exempt media activity. What Mr. Dornan said on the air, however, apparently made little difference to our colleagues as they refused to authorize an investigation to get these facts. It seems they would read the media exemption more broadly than Advisory Opinion 1992-37 and far more broadly than the approach taken by the media itself regarding "Larry King Live." We disagree and would find reason to believe, based on the limited factual record before us, that Mr. Dornan engaged in campaign activity as a radio host which extended well beyond the usual and normal editorializing contemplated by the media exemption.

We also disagree with the argument made by several Commissioners that this impermissible activity is somehow excusable because it occurred during a non-election year. At the outset, we note that the appearance of Vice President Gore on "Larry King Live" which provoked such an outrage amongst journalists and certain political party leaders was May 6, 1999, a non-election year. The dates of Mr. Dornan's talk show appearances were March 10-14, 1997, March 31-April 4, 1997, and around October 15, 1997. If it was outside appropriate media practice to have Vice President Gore host a radio show because it was "too close to the 2000 election," then Mr. Dornan's appearances similarly were too close to the 1998 congressional election.

More importantly, the Commission has never adopted an election year/non-election year rule suggesting that a campaign does not begin until an election year. To the contrary, both the Act and the Commission's Regulations recognize that activity occurring in a non-election year will have an effect on the election year. For example, the limitations on contributions to candidates apply on a "per election" basis. 2 U.S.C. §441a(a)(1)(A), (2)(A); 11 C.F.R. §110.1(b). Indeed, it would be a bizarre interpretation of section 441a or the corporate prohibitions of section 441b to suggest that they do not apply to non-election year activity.

With respect to non-election year activity, we think the law recognizes that it is common for a great deal of House campaign activity to occur in the year before the general election. For instance, in the non-election year of 1997, candidates for the House of Representatives reported $136.2 million in receipts and $73.2 million in disbursements. *Federal Election Commission*

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[8] Under the Commission's regulations, if the facility is so owned or controlled, the cost for a news story is not a contribution if the news 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 the listening area. 11 C.F.R. §§100.7(b)(2), 100.8(b)(2).

Press Release, at 1 (March 6, 1998). In 1997 alone, the Dornan campaign committee reported receipts of $1,498,294 and disbursements of $1,337,060. Thus, one cannot plausibly argue that non-election year activity—especially that of the candidate and the candidate's own campaign committee—has no direct or indirect connection to an election and should fall outside the jurisdiction of the Act.

IV.

We disagree with the decision of Commissioners Sandstrom, Elliott, Mason and Wold to find no reason to believe that Mr. Dornan and his campaign committee violated "any provision of the Federal Election Campaign Act."[9] Such a broad, blanket finding is not only rare at this very early stage in the enforcement process, but it is particularly inappropriate in the instant matter where the violation seems so plainly established. Clearly, Mr. Dornan and his campaign received something of value from a corporate entity when it used free air time to promote Mr. Dornan and to attack his 1998 general election opponent.

Nor is this campaign activity saved by the media exemption. In view of Mr. Dornan's control over the format and content of the show, this went well beyond normal editorializing. The radio talk shows were nothing more than a vehicle to promote Mr. Dornan's candidacy. Based on the statute and direct Commission precedent, there is reason to believe that the provision of free air time to Robert Dornan and his campaign was made in violation of 2 U.S.C. §441b.

Finally, the position taken by our colleagues in absolving Mr. Dornan raises several unanswered questions. Could a radio or television network turn over its news programming the week before an election to a federal candidate who uses the time to promote his candidacy, solicit contributions, and trash his general election opponent? Does it make a difference if the federal candidate/talk show host only solicits contributions and berates his opponent during a non-election year? By not even wanting to ask any questions or conducting the barest investigation in MUR 4689, it appears that the four Commissioners undoubtedly would answer in the affirmative

[9] As a bloc, Commissioners Sandstrom, Elliott, Mason and Wold have voted not to pursue a number of significant matters. *See e.g.*, MUR 4689 (voted no reason to believe against Dornan for Congress); *Federal Election Commission v. Forbes* (voted to withdraw FEC case filed against Forbes for President Committee); *Federal Election Commission v. Christian Coalition* (voted not to appeal district court decision favorable to the Christian Coalition); *Right to Life Duchess County v. Federal Election Commission* (Commissioners Sandstrom, Elliott and Mason voted not to appeal district court decision favorable to Right to Life Duchess County); MUR 4378 (with Commissioner Sandstrom abstaining, Commissioners Elliott, Mason and Wold voted against recommendations that NRSC had violated §441a(d) in sponsoring anti-Max Baucus ads); *see also* Membership Regulations (voted to approve a new definition of member (11 C.F.R. §§100.8, 114.1(e)) which seriously weakens the corporate prohibitions found at 2 U.S.C. §441b).

to the latter question and quite possibly also yes to the more absolutist position found in the former. Thus, they would allow Mr. Dornan to host a show and spend free air time promoting his candidacy and attacking his opponent when, at the same time, the media itself insists that it falls outside traditional media practice even to allow the Vice President to host a one-hour discussion of the Littleton, Colorado shootings that does not mention politics or campaign opponents. This incongruous result alone suggests the error of our colleagues' approach.

2/22/00
Date

Danny Lee McDonald
Vice Chairman

2/22/00
Date

Scott E. Thomas
Commissioner