

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

OFFICE OF COMMISSIONER  
JAMES H. QUELLO

April 29, 1994

The Honorable Alfonse M. D'Amato  
United States Senate  
Washington, DC 20554

Dear Senator D'Amato,

Before correcting the specific points raised in your caustic remarks in the Congressional Record of March 16, 1994, I'd like to state my bottom line opinion regarding First Amendment rights.

At the recent award dinner of the Radio & Television News Directors Foundation, I received their highest award as a strong exponent of First Amendment rights. I stated in my keynote speech before the group that "reporters and broadcasters have a First Amendment right to be wrong, especially a First Amendment right to criticize or ridicule government officials, a right to be insufferable smart-asses as I characterized the D.J. and talk show hosts opposing the Congressional pay raise adjustment for inflation; but no one has a right to violate established indecency and obscenity laws." It is under these laws that Infinity Broadcasting Corporation has been issued four Notices of Apparent Liability (NALs) totalling \$1,506,000 for apparent violations of our indecency rules by Howard Stern. Each of the Commission's opinions in these cases were adopted by a unanimous vote of the Commissioners. I find it hard to understand criticism by a Member of Congress directed against the FCC for enforcement of established Federal laws or for exhorting licensees to comply with FCC rules.

You must not have been aware of the content of the material cited in the NALs issued to Infinity. The public reports are always bland compared to the actual passages that generate Commission action. It would embarrass any responsible adult, let alone we Catholic Italian-Americans, to condone the egregious Stern broadcasts found by the FCC to be or to apparently be actionably indecent. I am including more detailed excerpts at the end of this letter for your information, but will give you a brief summary now of the material we found actionable: doing his "business" on tissues and then feeding it to the dog as "protein;" reciting song lyrics about having sex with my daughter ("My thick fingers will make you happier than Barney."); spoofing Woody Allen saying that Dylan, a young child, is the right height to wash my genitals in the shower; describing masturbating to a

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picture of Aunt Jemima as the closest he came to making love to a black woman; talking about eating tuna fish reminds him what his wife tastes like, etc. One of the other statements that I found actionable (but my fellow Commissioners at the time did not), was Stern's description of homosexuals shaving and placing vaseline on gerbils, putting them in a tube and "inserting" the tube in an unspecified location (presumably in the rectum). Please, Senator, take time to read the more detailed excerpts of the indecency violations attached to this letter but please don't share them with your priest, even in the confessional, and risk excommunication. In my opinion, this type of indecency would be overwhelmingly defeated in any public referendum.

I do not believe you will find similar language or discussion as those gross examples attached to this letter "readily available on the air at any time of day" as you appear to believe. To the extent, however, that similar language or discussion, considered in context, may have been aired by other stations without citation by the Commission, that is likely a result of the fact that no complaint against the programming was filed. In this regard, it should be noted that the Commission does not -- out of a concern for the very "chilling" effect on speech which you decry -- monitor stations to determine whether indecent programming is being aired. Rather, we rely on documented complaints filed by listeners or viewers of the station involved. If a complaint is not filed, Commission review and action are not triggered. In each of the cases involving Infinity, complaints, with full documentation, were filed.

As a former broadcaster, I appreciate elected government officials loyal to friends and staunch supporters. I have personally appreciated the friendship of many elected officials. I also personally appreciated strong support from the Italian-American Foundation.

However, any unqualified public support of Stern, in light of the repeated, egregious indecency violations with which he has been charged, is perplexing. This is particularly true given the current public outcry against explicit glamorized sex and brutal violence on TV and radio. Millions of people in church groups, citizen public interest activists, and responsible parents are outraged. For example, the FCC has received many thousands unsolicited letters complaining about Howard Stern material. Many were concerned about the effect of the Stern broadcasts on children and young teenagers.

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Stern is an entertaining talent that could keep his audience without risking Infinity's licenses by the repeated, egregious offenses quoted here. I'm afraid the publicity evoked by the FCC penalties against Infinity for Stern broadcasts caused a similar reaction as "banning the book" in Boston years ago -- it has assured that Stern is a "best seller." While this result is unfortunate, the FCC nonetheless has an obligation to enforce established federal indecency laws.

Now for the exhaustive task of correcting some of the points raised in your inaccurate remarks in the Congressional Record.

In these remarks, you discussed in considerable detail the Federal Communications Commission's treatment of Infinity Broadcasting Corporation, Inc. and its ongoing efforts to purchase new radio broadcast stations. The principal point you seemed to be making was that the FCC had somehow mistreated Infinity by not acting rapidly on its application for Commission consent to purchase a Los Angeles radio station, KRTH-FM. You appear to believe that the Commission's failure to grant the application before it resolved the then-pending indecency allegations against several Infinity-owned stations constituted both a threat to the First Amendment and an "outrageous . . . bureaucratic abuse." I respectfully beg to differ and I believe you were a victim of misinformation.

Before addressing the specific points raised in your remarks, it is helpful to review some important background information. The FCC is required by the Communications Act to review and approve any transaction that proposes to transfer control of a broadcast license. In conducting that review, the Commission is primarily concerned with the basic qualifications of the seller and the buyer -- that is, with those characteristics that go to the basic honesty and reliability of the parties as licensees. Certainly relevant in this connection is a party's willingness and capacity to conform its conduct as a licensee to the requirements of the law, both statutory and regulatory. Section 1464 of Title 18 of the United States Code makes it a criminal offense to utter indecent language by radio and the Commission is both authorized and obliged to administratively enforce this provision. See 47 U.S.C. Sections 312 and 503.

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In 1987, the Commission first determined that portions of the "Howard Stern Show" as broadcast by an Infinity-owned station were indecent. No sanction was imposed on Infinity because the Commission was, in the 1987 decision, broadening the scope of its indecency enforcement efforts and believed that licensees should be warned of that fact before sanctions were imposed. The Commission's indecency determination in the 1987 case was appealed and was affirmed by Court of Appeals for the District of Columbia Circuit in Action for Children's Television v. FCC (ACT I). That decision is final.

In 1988, the Commission again determined that material aired by Infinity-owned stations during the "Howard Stern Show" was indecent. The Commission imposed a \$6,000 forfeiture in connection with this broadcast and that action has been reconsidered by the staff and reviewed by the Commission. Each successive administrative decision in this case has affirmed the original staff forfeiture action. No further administrative appeal in this case is available.

In 1992 and again in 1993, the Commission issued NALs to Infinity -- in the aggregate amount of \$1.1 million -- for indecent programming aired during the "Howard Stern Show" as broadcast by Infinity-owned stations. These NALs were still pending when the Commission received yet another complaint alleging that material aired by Infinity during more recent episodes of the "Howard Stern Show" was also indecent. This last indecency complaint, which ultimately resulted in another NAL in the amount of \$400,000, was pending while the Commission considered the KRTH-FM application, and thus resulted in a delay in FCC action on that application.

Under these circumstances, I do not believe that it is a "bureaucratic abuse" for the Commission to have taken the time to carefully and deliberately consider the past conduct of Infinity in determining whether the Commission could make the statutorily required finding that Infinity was qualified to acquire new broadcast facilities. While the Commission ultimately granted Infinity's application to acquire KRTH-FM, its decision in that case reflects the extremely difficult nature of the questions presented by Infinity's application and its past conduct and the



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honest divergence of opinion which they engendered among the Commissioners. In short, this was not a routine case and the fact that it took more time than a routine case to resolve is neither extraordinary nor sinister.<sup>1</sup>

You also assert that the Commission impermissibly joined "two FCC proceedings that . . . are supposed to be kept separate -- the sale of a broadcast license and the issuance of notices of apparent liability" and suggest that this "improper joining" could lead to a denial of due process. I believe this view seriously misrepresents both the Commission's obligations and the law. The Commission cannot ignore past licensee conduct when reviewing that licensee's qualifications in the context of a transfer or assignment application simply because that conduct has also been the subject of an NAL. Moreover, consideration of past licensee conduct, whether the subject of an NAL or not, in an application context does not lead to some deprivation of due process. Existing forfeiture procedures ensure that a licensee will have more than ample opportunities subsequent to the issuance of an NAL to make its case before any monetary penalty attaches. And the statutory application process ensures that our consideration of a transfer or assignment application either results in a grant or in a hearing at which the applicants are afforded a full measure of due process and appellate rights.

There are, in my view, several additional inaccuracies and misleading implications in your remarks:

(1) You state, with apparent surprise, that the Commission held up its approval of the KRTH-FM sale because "it did not like the content -- the content -- of one of Infinity's programs," implying that it was the Commission's disagreement with the point of view expressed in that program that prompted us to withhold action. This is simply untrue. Federal law prohibits the broadcast of indecent speech and the Commission is charged with ensuring compliance with that law. To discharge our obligations in this connection, we must review the content of programs alleged to be indecent. Our review, however, is strictly limited to whether the

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<sup>1</sup> Your remarks -- apparently made on March 16, 1994 -- seem to assume that the Commission had not yet acted on the KRTH-FM application. Because the time taken by the Commission to act appears to have been one of your principal concerns, I should note that the Commission granted the KRTH-FM application on January 31, 1994, a full month and a half before your remarks were entered in the Congressional Record.

material, in context, meets the definition of indecency. It is not related to the opinion or point of view expressed in the programming. It is worth noting in this connection that the prohibition in the Communications Act on censorship of broadcasts by the Commission "has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties." FCC v. Pacifica Foundation, 438 U.S. 726, 735 (1978) (footnote omitted).

(2) You state in your remarks: "I like Howard. But I know some people get offended by some of the things he says on it. That is OK. This is the United States of America. If they do not like it, they can turn it off or turn the dial." While it is certainly true that listeners can change their radio dials when they don't like the programming, this is not a solution that comports with our regulatory obligation under Section 1464. As Justice Stevens said in rejecting this approach in Pacifica: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." Id. at 749. Moreover, one of the government's principal interests in regulating indecent speech in broadcasting is the protection of children, a class of individuals that the courts and Congress have recognized may not possess the judgment and maturity to avoid potentially harmful speech by their own actions.

(3) In an apparent reference to the decisions of the Court of Appeals for the District of Columbia Circuit in ACT I and ACT III, you state "[i]n both decisions, the court struck down the foundations of the FCC's enforcement schemes, which should tell it something." In point of fact, the court's decision in ACT I affirmed the Commission's authority to sanction indecent speech and its definition of broadcast indecency as well as a finding that material aired by Infinity during the Howard Stern Show was indecent, while remanding two other cases to the Commission for further proceedings as to the proper scope of the safe harbor period. (The safe harbor period is the time of day during which a broadcaster can air indecent programming without fear of FCC sanction.) Moreover, on February 16, 1994, the D.C. Circuit's panel decision in the ACT III case was vacated by the full court and the Commission was granted rehearing en banc.

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Finally, let me turn to the Washington Post editorial which you endorsed in your remarks and included in the record. First, both your remarks and the editorial use the term "censorship" in describing the Commission's indecency enforcement program. As I noted above, post-broadcast review of programming in the discharge of the Commission's regulatory responsibilities is not censorship within the meaning of that term as defined in the Communications Act. Second, the Post editorial opines that "Mr. Stern's program can hardly be described as everyone's idea of acceptable entertainment - to put it mildly - but the same could be said about many other talk shows that are readily available on the air at any time of day." Anyone making such a statement needs to more carefully acquaint himself with the indecent material cited in the Commission's opinions concerning the Howard Stern Show.

Because of the negative implications of your acrimonious and inaccurate remarks in the Congressional Record, I am impelled to try to salvage my reputation and that of the FCC by sending copies of this letter to our oversight Chairmen -- Senators Hollings and Inouye and Chairmen Dingell and Markey.

Respectfully and regretfully,

  
James H. Quello

Enclosure

cc: Chairman John D. Dingell  
Chairman Ernest F. Hollings  
Chairman Daniel K. Inouye  
Chairman Edward J. Markey  
Infinity Broadcasting Corp.  
Americans for Responsible TV

The following excerpts were found actionable by the unanimous vote of the Commissioners.

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RQ: She's in love, yeah.  
HS: So she had to sleep next to me, so she comes in at midnight, bangs open the door, I'm wide awake, I got no sleep last night.  
RQ: Oh no.  
HS: I'm up and she's snoring away in the bed. I went downstairs to masturbate.  
AS: Oh get out.  
HS: I did and you know, this is after making love to my wife.  
RQ: Oh, you're a hero.  
HS: I was wild yesterday. My little love juice catcher.  
AS: I thought you said you were going to start masturbating?  
AS: Oh, stop it.  
HS: I didn't say start it. Where you been? But tell everyone, why was I in such a good mood yesterday? Did you figure it out?  
AS: No.  
HS: The Imus thing with his lung.  
AS: Oh.  
HS: Yeah, that was it. You know I love good news.  
AS: (Laughs) You're terrible, you're terrible.  
HS: And you were really hot for me too. I didn't need any foreplay. She was like screaming the whole time, I want foreplay, I want foreplay. I said you don't even need it, you're ready. I tested you, you're ready.  
AS: Well, it would have been nice, a little foreplay.  
HS: You didn't need it.  
RQ: How long was the whole thing.  
HS: About two minutes.  
AS: (Laughs)  
HS: Not even, but honey, did you have an orgasm?  
AS: Not really.  
HS: No?  
AS: But it felt good.  
HS: I had one.  
AS: No, it was fun.  
HS: It was good but then, I was afraid you'd charged up because I really didn't finish her off and I'm not, if I was with a new girl.  
AS: Oh would you stop it.  
HS: I would probably get into a whole bunch of stuff afterwards just to please her, but it's my wife, who cares? I had an orgasm.

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HS: I'm going to home and drag you around the floor today with, by your hair. Treat you like a dish rag.  
AS: I don't like that.  
HS: Treat you like a whore.  
AS: No, I don't like that.  
HS: Tonight you're my whore, I treat you like a whore. See how horny she got?  
RQ: You know it's always interesting with love talk and you chewing at the same time.  
AS: I know.  
HS: Hey, why not do two things at same time? I'm ambidextrous. You were on fire. You were on fire and you know where I'm talking about.  
AS: I know but what are you eating?  
HS: Something that tastes like you.  
AS: Oh.  
HS: Fish. I'm eating some tuna fish (Fish pronounced like "Fee-shh") My little tuna. You know what I do when you're not in bed next to me? I put a can of tuna next to me.  
RQ: Oh Howard.  
HS: That's a cute one. Alright, you did good.  
AS: Oh God.  
HS: Plus I didn't have to do any foreplay with two hours with that stupid vibrator, boy, I went right in for the kill. That's the kind of love I like.  
AS: It would have nice with a little foreplay.  
HS: Hey, who had time?  
AS: Listen, it was very nice.  
HS: Alright, you might get more, you might get more. Alright, thank you.  
AS: Goodbye.  
HS: Keep everything, keep everything moist and nude.

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HS: This is the one about incest? Daughter?  
RQ: Let me hear that.  
HS: I want to have sex with my daughter.  
RQ: That's romantic.  
HS: It's romantic too. It's a ballad to my daughter.  
(Laughter) You're so cute in your jammies, I don't know what I'm saying, I know Jerry Lee Lewis is with his cousin but.  
RQ: Daughters too close.  
MV: (Unintelligible) Breakfast table in an otherwise empty room, beyond her.  
HS: This is going to be a big hit this one.  
MV: My only.  
HS: This guy goose bumps.  
MV: That are ever. (Unintelligible)  
HS: My thick fingers will make you happier than Barney. I know, yeah.

MV: (Unintelligible)  
HS: Yeah, they're good.  
RQ: Yeah, where's my copy?  
MV: I'll bring it tomorrow.  
HS: I'll take this one home, before Robin grabs it from me, she's wrestling me. This one's about getting it on with your father. Guys.  
RQ: Daughters.  
HS: No, this is guys who get it on with their dads.  
RQ: I see.  
HS: I love you dad, you're my dessert, every night. This is good.  
MV: (Unintelligible) That's okay man cause I love.  
RQ: (Unintelligible) Played this one before.  
HS: Why don't those dudes come on my show? Let's come down here and be naked.

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[Discussing Kathy Lee Gifford]

HS: From your heart. She didn't reach into, she always, you know, you notice everything about her now, she's reaching into toilets.  
RQ: Yes. Or somebody's reaching in for her.  
HS: First, listen to this woman, first she loses her jewelry in the toilet, which I don't know how that happened, then she, she pees in the toilet and she has an assistant reach in and grab the watch out of the toilet.  
RQ: Right. Right, she doesn't go get it herself.  
HS: Yeah. Some guy reached into her pee to get a (water sound effect) toilet. You know, to get a, to get her watch. Then, now the next story is that she'd have you believe, she's having a miscarriage, so she reaches in the toilet like that's a baby in there.  
\* \*  
HS: Yeah, you know, I, you know, when I make a bowel movement it is so perfect, I just can't bear to see it go down the toilet, you know it, it's Kathy Lee's bowel movement. It might be worth something. So I reach in and I grab it.  
RQ: You know Reg, I'm saving every one of those.  
HS: You know what, if I saved every one of my bowel movements we could auction them off on the show. Probably make a ton of dough. I wouldn't have to do all those stupid commercials. I mean for God's sake. Can you imagine the balls on this, I've never heard a woman say you reach, I've never heard of anyone reaching into a toilet (water sound effect) for a bloody mess. And you don't even see like a head or, I mean you don't see anything.  
RQ: No, it's like an ink blot.

HS: I cry when Frank, when Frank plays with himself and everything dries up and I realize that could have been a baby. (Laughter) I can't handle it. (Laughter) Who's she kidding?

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HS: He was lubed up. He jams his finger into Tony O. Tony O felt like a woman raped. Tony goes, "how, how." He stayed maybe ten minutes and left.

RQ: Yeah, he had to leave, he was embarrassed.

JM: He never said another word.

HS: And Jackie, and Jackie didn't miss a bite after he, after, after he gave a rectal exam to Tony O.

RQ: He went right back to eating.

HS: Right Fred. Right back to his ribs and wings.

MV: The un, the unbelievable part was he used that hand.

HS: That's right.

MV: He didn't wash.

HS: Right.

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HS: And this Sun Yi, why does, it's an amazing thing what's going on. Here you are an older man and yet you're with a younger woman. Isn't it amazing.

RQ: Fifty four right?

HS: Right.

WA: Somehow Sun Yi enjoys my old Jewish penis.

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WA: I love to eat Chow Mein off of Sun Yi's bare ass.

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WA: I taught Dylan to put a condom on with one hand.

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WA: I like to play nude twister with five year old's. Is that so wrong?

HS: Alright. You know Woody, I got to say goodbye to you if you really, serious, make a serious comment about this whole, this whole situation.

WA: Dylan is the right height to wash my genitals in the shower.

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HS: Let me tell you this Pee Wee. If they are going to make him do public service, the service should be he should go to every movie theater in Sarasota and scrub the theater seats where guys drop their load. Because I'm going to tell you something that that's disgusting. Imagine I go to the movie theater and I'm sitting in Pee Wee's mess.

RQ: It's interesting, because the other day the lawyers for Mr. Reubens decided they would try another argument to get him out of the case. They wanted the case dropped on the grounds that nudity is expected at a triple x-rated theater. so that Pee Wee was only doing what was expected. If he was nude at the time.

HS: That's brilliant. That's some defense. because there's a movie on there you're allowed to whip it out and spew that evil gunk all over everybody. Now, I don't know about you but I've heard people actually say that this is not a serious offense. He did not hurt anybody.

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HS: The closest I came to making love to a black woman was, I masturbated to a picture of Aunt Jemima.

GR: Oh, come on.

HS: On a pancake box. (Laughter) All right? And that was it. And then I heard Aunt Jemima died in a plane crash.

GR: Were you really one of those two finger guys?

HS: Yeah. (Laughter) Yeah, Geraldo, oh boy. No, I did it right on her kerchief. (Laughter)

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HS: When I go to a movie, I don't need a hail storm coming out of some guy's genitalia. And I see the Pee Wee's offense as being a serious one. Now I know people think I'm joking but I am absolutely not. If my daughters or my wife were in a movie theater and they came back with some pervert throwing a huge hail storm on to their backs.

RQ: Wouldn't you be upset?

HS: I'd sure as hell would. I'd beat the piss out of him.

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The following excerpts though offensive, were not found actionable by the majority of Commissioners.

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MV: Howard you know all about this.  
HS: Oh, I know all about this stuff.  
MV: Explain it to us.  
HS: You shave a gerbil  
MV: Okay.  
HS: And the reason you shave them is so that he's slippery and you grease him up with vaseline.  
MV: K-Y.  
HS: You put him in a tube.  
MV: Mm mm.  
HS: Alright, the tube, I don't have to tell you where to insert that, this is a family program, at the other end of the tube you cut off the oxygen. Okay, you hold it, you clip it and you hold it. The gerbil has only one way to run now.  
RQ: Oh.  
HS: For oxygen if he wants to live and believe me they want to live. these gerbils. God knows why.  
FV: I think I.  
HS: Cause look where they're going.  
FV: I don't want to live.  
HS: I'd rather stay in the tube. So the gerbil runs for air and guess where the air is?  
RQ: Oh.  
HS: Okay?  
FV: Little claws though.  
HS: Excuse me?  
FV: Doesn't he use his little claws?  
HS: You can de-claw him before he goes in for the kill.  
FV: (Unintelligible)  
HS: He goes in there and when he's there, again lack of oxygen forces him to squirm around looking for oxygen. What do the gerbils say when the gays come walking into a pet store.  
MV: Arf, arf, arf. (bark)

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RQ: Becoming a mother takes a toll on a woman's whole body.  
HS: Yeah, what about their horny husbands?  
RQ: After a month nearly half of the women surveyed in this study they did, said that they had breast problems.  
HS: Yeah.  
RQ: Including discomfort, infection and nipple irritation.  
HS: Yeah, my wife's got all that.  
RQ: Other common problems at one month included fatigue, hemorrhoids, constipation, poor appetite and hot flashes.  
HS: Appetite she hasn't lost.



RQ: (Laughs) Oh, stop it, after three months 40 per cent reported sexual problems such as painful intercourse.  
HS: Are their hands alright after, how about some action that way.  
RQ: Decreased desire.  
HS: She, you know, she went out and bought condoms.  
RQ: Or difficulty reaching orgasm.  
HS: She went out and bought condoms, my wife, you know, I bought condoms, but I know she.  
RQ: Nine out of five still have problems after delivery a year later.  
HS: Yeah, how are their mouths?  
RQ: Oh stop it.  
HS: Okay, I mean, you know, I'm sensitive to all that stuff you just read. But how are their hands and mouths? Fine, right?  
RQ: They're tired too.  
HS: Oh, I see. Take a nap is right. Got a housekeeper, take a nap.  
RQ: Oh, you're so understanding.  
HS: Get your hand and mouth ready.

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HS: I go over to him, let me see it. He starts pulling his pants off. Look at this. I thought he was going to show me, you know, his nuts. I don't know what he was going to show me. And then he pulls his underpants to the side and he shows me this whole, green, globby mess.

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HS: But I used to take tissues out of that bathroom and I would tuck 'em in the pants and charge into my bed, do my business and then I had to get the contaminated tissues back into the toilet.  
RQ: What's funny to me is they, you actually have your parents comment.  
HS: Mm.  
RQ: About that.  
HS: Yeah, it's a good book. I wasn't like other kids, I didn't have a dog so I couldn't feed my ratty tissues to the dog.  
RQ: Is that what they did?  
HS: Sure, that's how you get rid of them. After you.  
RQ: No wonder dog is man's best friend.  
HS: After you do your rudeness, after you do your rudeness you just feed the dog the tissue.  
RQ: Feed the tissue to the dog?  
HS: Yeah, he loves it. It's protein.  
RQ: That's sick. Nobody ever did that.  
HS: That's how I got my dog pregnant.  
MV: (Unintelligible) Only female dog.

HS: Yeah. Right.  
RQ: Nobody ever did that.  
HS: No, I knew a guy used to feed his dog used condoms. He  
didn't feed it to him, he'd just throw them off the side of  
the bed and.  
RQ: An accidentally.  
HS: Yeah.  
RQ: The dog devoured.  
HS: It could really hurt the dog cause it was hard for them to  
go to the bathroom.  
MV: Sure, show up.  
HS: Yeah, those condoms don't get destroyed in the bloodstream.  
They reappear.  
RQ: See how good they are? They survive.  
HS: They're strong.

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