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FEDERAL ELECTION COMMISSION
SECRETARIAT
2004 AUG 16 P 12:09

2004 AUG 25 P 3:41

August 16, 2004

Jan Witold Baran
202.719.7330
jbaran@wrf.com

Federal Election Commission
Office of the General Counsel
999 E Street, NW
Washington, DC 20463

AOR 2004-33

2004 AUG 16 P 2:

Re: Advisory Opinion Request (Expedited Pursuant To 2 U.S.C. § 437f(a)(2))

Dear Commissioners:

On behalf of The Ripon Society (Ripon) and U.S. Representative Sue Kelly, we respectfully request an advisory opinion from the Federal Election Commission (FEC) pursuant to 2 U.S.C. § 437f, regarding a political message featuring Representative Kelly which Ripon intends to air on cable television in the Summer and Fall of 2004. Requestors are seeking the FEC's advice before airing the message in order to ensure it complies with the Federal Election Campaign Act of 1971, as amended ("FECA"). Representative Kelly is a federal candidate in a New York primary election scheduled for September 14, 2004. Therefore, an advisory opinion must be issued within 20 days of this request. 2 U.S.C. § 437f(a)(2).

The Requestors

The Ripon Society is a non-profit social welfare organization incorporated under § 501(c)(4) of the Internal Revenue Code. Ripon was founded in 1962 for the purpose of promoting a moderate policy agenda in the United States with particular emphasis on policy debate within Republican circles. To achieve its objectives, Ripon sponsors public policy research and conferences, publishes the *Ripon Forum*, a long-standing magazine focused on public affairs and policy, and advocates its policy objectives to the public through various media. Ripon is not affiliated with or part of the Republican National Committee or any other national, state or local committee of the Republican Party. Ripon receives contributions from corporations, individuals and other organizations to fund its activities. Ripon is governed by a Board of Directors drawn from the public.

Rep. Kelly is serving her fifth term in Congress from the 19th Congressional District of New York. She chairs the Oversight and Investigations Subcommittee of the House Committee on Financial Services. Rep. Kelly serves on Ripon's Advisory Board, an honorary board consisting of Members of Congress who

participate in Ripon policy forums and policy research, development and advocacy. Rep. Kelly has no role in the corporate governance of Ripon.

The Public Communication

Beginning in the Summer of 2004, Ripon intends to fund the production and public dissemination via cable television of a message addressing important anti-terrorism measures. Rep. Sue Kelly appears in and narrates the content of the ad. The script of the ad is as follows:

> Sue Kelly (appearing): We all have to do everything possible to fight terrorism. Republicans in Congress are working for bipartisan solutions to the challenges we face.
>
> Video/Graphics: We're creating new tools to detect and sever the financial lifelines that support terrorist cells.
>
> Shutting down the bankrolls of an enemy that hides in the shadows will do a lot to help make our country safer.
>
> We need to do more, and we will.
>
> Ripon Society Contact Information & Disclaimer: The Ripon Society wanted you to have these facts. For more information, contact us.

A script of the message prepared by Ripon's media consultant is attached.

This message is intended to promote a policy Ripon deems relevant to the current public debate regarding homeland security and post-9/11 security reforms. Ripon and its members believe financial counter-terrorism measures are particularly effective and highly important and should be augmented. Rep. Kelly is an excellent advocate given her role in addressing this policy on the Financial Services Committee. Ripon intends to disseminate this policy message to the general public nationwide on cable television for several weeks, except in areas where its content would be prohibited under the FECA.

Legal Discussion

The Ripon anti-terrorism advertisement could potentially trigger four areas of regulation under the FECA and FEC regulations:

(1) Express advocacy;

(2) Electioneering communications within 30 days of a primary or 60 days of a general election;

(3) Coordinated communications within 120 days of an election; and

(4) Federal election activity controlled by Members of Congress.

FECA Prohibition Against Corporate Expenditures
To Expressly Advocate The Election or Defeat of Federal Candidates

The FECA prohibits corporations, including Section 501(c)(4) corporations like Ripon, from making expenditures "in connection with any election" for federal office.[1] This prohibition has been interpreted to mean that corporations may not publicly "expressly advocate" the election or defeat of any "clearly identified" federal candidate.[2]

The Supreme Court has ruled that in order for a communication to constitute "express advocacy," it must unambiguously identify a specific candidate and expressly urge his election or defeat with specific "bright line" words such as "vote for," "elect," "support," "vote against," "defeat," or "oppose."[3] FEC regulations, heretofore based on one lone lower court opinion,[4] appear to sweep a slightly

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1 2 U.S.C. § 441b(a); *see also*, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

2 *Buckley v. Valeo*, 424 U.S. 1, 41-44 (1976)

3 *Buckley v. Valeo*, 424 U.S. 1, 44 n. 52; *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir. 1997); *Faucher v. FEC*, 928 F.2d 468, 471-72 (1st Cir.), *cert. denied*, 501 U.S. 820 (1991).

4 *FEC v. Furgatch*, 807 F.2d 857, 860 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987); *but see California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) ("[A] close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit *words* of

broader range of communications into the prohibition, to include communications which,

> When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy for the election or defeat of one or more clearly identified candidate(s) because (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.[5]

Several federal courts have refused to expand the definition of "express advocacy" as broadly as the FEC regulation.[6]

A review of the Ripon anti-terrorism advertisement indicates that it does not constitute "express advocacy" of the election or defeat of any federal candidate because there is no exhortation to vote for any candidate and the advertisement's message is focused on public policy. Ripon seeks the FEC's confirmation of this conclusion.

Prohibitions Against "Electioneering Communications"

The FECA prohibits all corporations, including tax-exempt corporations such as Ripon, from financing any "electioneering communication" that is disseminated on broadcast, cable or satellite television or radio, refers to a federal

---

(Continued . . .)
advocacy.... 'Context," we emphasized, 'remains a consideration, but an ancillary one, peripheral to the words themselves.'").

[5] 11 C.F.R. § 100.22(b).

[6] *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Maine Right to Life Committee v. FEC*, 914 F.Supp. 8 (D. Me.), *aff'd* 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S.Ct. 52 (1997); *FEC v. Christian Action Network*, 894 F.Supp. 946, 953 (W.D. Va. 1995), *aff'd* 92 F.3d 1178 (4th Cir. 1996)(table); *Right to Life of Dutchess County, Inc. v. FEC*, 6 F.Supp.2d 248 (S.D.N.Y. 1998).

candidate, and is directed, or "targeted," to the relevant electorate within 30 days of any primary election or 60 days of a general election for a federal office.

The FEC defines an "electioneering communication" as any communication publicly distributed via television or radio that:

(1) Refers to a clearly identified candidate for Federal office;

(2) Is publicly distributed within 60 days before the candidate's general election or 30 days before the candidate's primary or preference election (or convention or caucus); and

(3) Is targeted to the candidate's electorate.[7]

"Refers to a clearly identified candidate" means that the

> candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."[8]

A communication is "targeted" to the candidate's electorate if it

> can be received by 50,000 or more persons (i) [i]n the district the candidate seeks to represent, in the case of a candidate for Representative . . .; or (ii) [i]n the state the candidate seeks to represent, in the case of a candidate for Senator.[9]

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7 11 C.F.R. § 100.29(a).

8 11 C.F.R. § 100.29(b)(2).

9 11 C.F.R. § 100.29(b)(5).

Because Rep. Kelly appears and is clearly identified, Requestors understand that the anti-terrorism advertisement may constitute an "electioneering communication" if disseminated on broadcast, cable or satellite television or radio in her New York district within 30 days of a primary election or within 60 days of the November 2, 2004 general election. Requestors seek the FEC's confirmation of this conclusion.

However, the advertisement does not clearly identify any other federal candidate under the provisions of the FEC's regulation. It does not make an "unambiguous reference" to any other candidate even though there is a reference to "Republicans in Congress." This conclusion is supported by the above cited FEC regulations and an FEC Advisory Opinion which held that a reference to "Republicans in Congress" did not constitute an expenditure in connection with a specific candidate's election even when the advertisement was directed to only selected congressional districts.[10] Therefore, Requestors seek the FEC's advice confirming that the advertisement would not be restricted as an "electioneering communication" in any other candidate's district or state outside the viewing area of Rep. Kelly's district in New York, at any time.

Prohibitions Against "Coordination" With Federal Candidates

The FECA equates certain expenditures "*coordinated*" with a candidate or his campaign committee with contributions to the candidate and as expenditures in connection with an election.[11] Ripon understands that it would be prohibited from "coordinating" the content and dissemination of certain public communications with federal candidates, their campaign committees, political party committees, and their respective consultants and agents.

FEC regulations provide a two-part test for determining whether an outside organization's expenditure on public communications is "coordinated" with a federal candidate, campaign, or political party. The test turns on two factors: *content* and *conduct*. Both factors must be present for coordination to exist. Ripon is seeking the FEC's advice with respect to whether the *content* of its anti-terrorism message would trigger the FEC's coordination restrictions.

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10 FEC Advisory Opinion 1985-14 (Democratic Congressional Campaign Committee).

11 2 U.S.C. § 441a(a)(7).

Regarding *content*, the FEC's coordination regulations restrict, among other things, public communications that refer to a political party or clearly identified candidate for federal office and are distributed within 120 days of an election, convention, or caucus.[12] To be covered, the communications must also be directed at voters in the jurisdiction of the clearly identified candidate or in which the political party has one or more candidates appearing on the ballot. If such a 120-day communication is found to be coordinated with a candidate or party, then a non-profit corporation that receives corporate donations would be prohibited from distributing the communication.[13]

Rep. Kelly's appearance in the advertisement may constitute material involvement in the production and content of the anti-terrorism advertisement, and she is clearly identified. Therefore, Requestors seek the FEC's advice regarding whether any airing or other distribution of the anti-terrorism advertisement in Rep. Kelly's congressional district is prohibited 120 days prior to the primary election (in New York, May 17, 2004 to September 14, 2004) and 120 days prior to the general election (July 3, 2004 to November 2, 2004).

Additionally, Requestors seek the FEC's advice regarding whether the content of the message would trigger coordination restrictions in the event Ripon wishes to discuss its distribution of the message with any other federal candidate or official of a political party. Whether the anti-terrorism advertisement would trigger restrictions on coordination with candidates other than Rep. Kelly or with Republican Party officials due to use of the phrase "Republicans in Congress" is the subject of some ambiguity under the new FEC regulations. If a Ripon communication clearly identifies the Republican Party and any aspect of the advertisement is coordinated with a Republican Party committee or its representatives or agents, then Ripon might find it is prohibited from disseminating the anti-terrorism message in any district or State where a Republican congressional candidate is up for election within the 120-day pre-general and pre-primary election periods.

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[12] 11 C.F.R. § 109.21(c)(4). A "public communication" is "any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public." 11 C.F.R. § 100.26. It does not include communications made on the Internet or via electronic mail. *See also* 68 Fed. Reg. at 430; 67 Fed. Reg. 49,064, 49,071-72 (Explanation and Justification on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money).

[13] 11 C.F.R. §§ 100.16 & 109.20(b).

FEC regulations define "political party" to mean

> an association, committee, or organization which nominates or selects a candidate for election to any Federal office, whose name appears on an election ballot as the candidate of the association, committee or organization.[14]

On its face, the phrase "Republicans in Congress" does not refer to the Republican Party as an organization, but only to a class of Representatives and Senators in Congress who happen to be Republicans. The word "Republican" serves only as an adjective describing which Representatives and Senators are working to develop the effective counter-terrorism measures Ripon supports. However, there is a risk that use of the word "Republican," even as an adjective describing legislators, would be interpreted in a case of first impression to constitute a clear identification of the Republican Party for purposes of triggering "coordination" restrictions.

In any event, absent any coordination *conduct* with a Republican Party committee, representative or agent, Ripon understands that it would be permitted to disseminate the anti-terrorism message in congressional districts and States outside the viewing area of Rep. Kelly's congressional district – even if the phrase "Republicans in Congress" were interpreted as a clear identification of the Republican Party. Again, Requestors seek the FEC's advice on any limitations applicable to its ability to coordinate and disseminate its anti-terrorism policy message with party officials as well as candidates or their campaign committees, representatives or agents.

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[14] 11 C.F.R. § 100.15. "Party committee" is defined as "a political committee which represents a political party and is part of the official party structure at the national, State, or local level." 11 C.F.R. § 100.5(e)(4).

Restrictions on Members of Congress Who
Serve on Ripon's Honorary "Advisory Board"

The FECA prohibits Members of Congress and federal candidates, as well as organizations they control, from spending funds donated by corporations and individuals (of over $5,000) on Federal election activities:

> A candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office, shall not solicit, receive, direct, transfer or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act....[15]

The Federal election activities subject to this restriction include, among other things, "generic campaign activity" and "public communications" that refer to clearly identified candidates and that support or oppose those candidates.[16] "Generic campaign activity" means any "public communication that promotes or opposes a *political party* and does not promote or oppose a clearly identified Federal candidate or a non-Federal candidate."[17] We have discussed above why the anti-terrorism advertisement should not be deemed such a "public communication" or political party reference. Requestors seek the FEC's guidance regarding whether the fact that Members of Congress serve in wholly honorary capacities on Ripon's "Advisory Board" might be deemed "control" by a Member of Congress or candidate, restricting Ripon to raise no more than $5,000 from individuals and other "hard money" political committees to fund its activities.[18]

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[15] 2 U.S.C. § 441i(e)(1)(A); *See also*, 11 C.F.R. §§ 300.60 and 300.61.

[16] 11 C.F.R. § 100.24.

[17] 11 C.F.R. § 100.25 (emphasis added).

[18] *See* FEC Advisory Opinion 2003-12 (Stop Taxpayer Money for Politicians Committee and Congressman Jeff Flake).

The FEC's test for whether a Member of Congress "controls" an organization is highly contextual and based on the "overall relationship" between the Member and the organization.[19] Among the relevant factors the FEC will consider are whether the Member of Congress:

(1) owns a controlling interest;

(2) has authority or ability to direct or participate in the organization's governance (formally or informally);

(3) has authority to hire, appoint, demote or control the organization's officers or other decision-making employees;

(4) maintains overlapping membership between the organization and other organizations the Member controls (such as a principal campaign committee);

(5) maintains common officers or employees between the organization and other organizations the Member controls;

(6) provides significant funding or on-going funding to the organization;

(7) causes or arranges significant funding or on-going funding for the organization;

(8) played an active or significant role in formation of the organization; and/or

(9) shares overlapping patterns of receipts and disbursements with the organization.[20]

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19 11 C.F.R. § 300.2(c)(2).

20 11 C.F.R. § 300.2(c)(2)(i)-(x).

Members of Congress serving on Ripon's Advisory Board do not engage in active governance or similar control over Ripon activities. They serve merely in an *honorary* capacity to advise Ripon from time to time on policy development, assist Ripon in communicating its ideas to the public (similar to Rep. Kelly's appearance in the anti-terrorism message), and participate as speakers at Ripon policy conferences. They do not exercise governance power or control over Ripon. Thus, their service should not subject Ripon to "hard money" limitations. Requestors seek the FEC's confirmation of this understanding.

Questions Presented

Based upon the circumstances explained above, Ripon asks whether it may fund the production and dissemination of the anti-terrorism policy message on television as described above in compliance with the Federal Election Campaign Act of 1971, as amended, and FEC regulations. Specifically:

(1) May Ripon pay to produce and televise the anti-terrorism policy message featuring Rep. Kelly outside the viewing area of the 19th congressional district of New York in the Summer and Fall of 2004, and specifically within 60 days of a federal general election or 30 days of a federal primary election?

(2) May Ripon pay to produce and televise the anti-terrorism policy message featuring Rep. Kelly within the viewing area of the 19th congressional district of New York in the summer and fall of 2004, and specifically within 120 days of the 2004 federal general election?

(3) May Ripon pay to produce and televise the anti-terrorism policy message featuring Rep. Kelly within and outside the 19th congressional district of New York at other times?

(4) May Ripon coordinate its plans to air the anti-terrorism policy message featuring Rep. Kelly with other federal candidates in their states or congressional districts in the Summer and Fall of 2004?

(5) May Ripon coordinate its plans to air the anti-terrorism policy message featuring Rep. Kelly with officials of a Republican Party committee in districts where the Republican Party has federal candidates on the ballot?

(6) If the answer to any of the foregoing is "no" or qualified, what is the result if Ripon removes the words "Republicans in" from the text of the message?

(7) Does the honorary service of Members of Congress and federal candidates on Ripon's "Advisory Board" or their participation as speakers at Ripon's policy forums constitute "control" under 11 C.F.R. § 300.2 or trigger any other FEC restrictions on Ripon's contributions or expenditures?

(8) Does Ripon's dissemination of the anti-terrorism message featuring Rep. Kelly constitute "generic campaign activity" under 11 C.F.R. § 100.25?

(9) Does Ripon's dissemination of the anti-terrorism message featuring Rep. Kelly constitute a "public communication that refers to a clearly identified candidate for federal office . . . and that promotes or supports, or attacks or opposes any candidate for federal office" under 11 C.F.R. § 100.24(b)(3)?

Respectfully submitted,

Jan Witold Baran
Lee E. Goodman

Enclosure

GREENER and HOOK

DATE: July 27, 2004
TELEVISION: 30 Seconds
CLIENT: Ripon Society
PRODUCER: Bill Greener III
TITLE: A Little Safer Now (For FEC Approval)

Video	Audio
Scenes of terrorist activity throughout the world **not** limited to 9-11 (with support headlines).	Kelly: We all have to do everything possible to fight terrorism.
Sue Kelly to Camera with chryon i.d.	Republicans in Congress are working for bipartisan solutions to the challenges we face.
Man and woman at screen of computer in high-tech situation. Super: Locate The Terrorists Money.	We're creating new tools to detect and sever the financial lifelines that support terrorist cells.
Pictures or video of terrorists being arrested, support headlines. Super: Stop The Terrorists Money.	Shutting down the bankrolls of an enemy that hides in the shadows will do a lot to help make our country safer.
Video reinforcing continuing nature of threat. Super: There's More To Be Done.	We need to do more, and we will.
Ripon Society information, including website, phone number, etc. (Disclaimer)	The Ripon Society wanted you to have these facts. For more information, contact us.

FEDERAL ELECTION COMMISSION

Washington, DC 20463

August 20, 2004

Jan Witold Baran, Esq.
Lee E. Goodman, Esq.
Wiley Rein & Fielding, LLP
1776 K Street, NW
Washington, DC 20006

Dear Messrs. Baran and Goodman:

This refers to your letter dated August 16, 2004, on behalf of The Ripon Society ("Ripon") and Representative Sue Kelly, concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to television advertisements featuring Rep. Kelly and paid for by the Ripon Society.

You state that Ripon is a non-profit social welfare organization incorporated under section 501(c)(4) of the Internal Revenue Code and receives contributions from corporations, individuals, and other organizations to fund its activities. You state that Rep. Kelly, who is a member of Ripon's Advisory Board, represents the 19th Congressional District of New York and is a candidate in a New York primary election scheduled for September 14, 2004. You note that other unnamed Members of Congress also serve on Ripon's Advisory Board.

You indicate that Ripon intends to fund the production and dissemination of a cable television advertisement featuring Rep. Kelly, both within the 19th Congressional District and nationally. You have provided the script of the advertisement, entitled "A Little Safer Now," along with a brief description of the video that will accompany the script. You note that the script refers to "Republicans in Congress," and you indicate that the communication may be coordinated with Rep. Kelly and/or with other Federal candidates and the Republican Party committees.

You request guidance regarding the participation of Members of Congress in Ripon's Advisory Board, and you ask whether Ripon may pay for the communications as presented and coordinate them with Federal candidates and a political party committee.

The Act authorizes the Commission to issue an advisory opinion request in response to a "complete written request" from any person about a specific transaction or

activity by the requesting person. 2 U.S.C. 437f(a). The request must concern a specific transaction or activity that "the requesting person plans to undertake or is presently undertaking and intends to undertake in the future." 11 CFR 112.1(b). Such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 CFR 112.1(c). The Office of General Counsel shall determine if a request is incomplete or otherwise not qualified as an advisory opinion request. *See* 11 CFR 112.1(d).

In view of the above requirements, this Office will need further detail regarding the activities you describe. Specifically:

1) Please provide a full video or storyboard of the communication featuring Rep. Kelly. The summary of "A Little Safer Now" attached to your request is not specific in areas that could be directly relevant to the analysis of whether the communication promotes, supports, attacks, or opposes a clearly identified Federal candidate. For example, the video portion states that the advertisement will include "scenes of terrorist activity throughout the world," "video reinforcing continuing nature of threat" and "support headlines," and does not foreclose the possibility that additional Federal candidates would be identified in the "support headlines" or elsewhere in the communication.

2) Please state when Ripon intends to disseminate "A Little Safer Now." In doing so, please clarify whether 50,000 or more people within the 19th Congressional district will be able to receive the communication via broadcast, cable, or satellite television prior to Rep. Kelly's September 14 primary. *See* 11 CFR 100.29(b).

3) As presented, your request appears to seek guidance as to the content and conduct prongs of 11 CFR 109.21 with respect to Rep. Kelly, but only appears to seek guidance as to the content prong in 11 CFR 109.21 with respect to other Federal candidates and political party committees.
   a. Please confirm that this is the scope of your request.
   b. Please describe Rep. Kelly's involvement in the production and distribution of "A Little Safer Now," including whether or not she or her agents will have the opportunity to review and approve the script and other aspects of the communication.

4) Please provide additional information regarding the relationship of Rep. Kelly, as well as any other Federal candidates serving on the Ripon Advisory Board, to Ripon. Specifically, focusing on the factors set forth in 11 CFR 300.2(c)(2) and applying the safe harbor in 11 CFR 300.2(c)(3) where appropriate, please state whether:
   a. Rep. Kelly or any other Federal candidate, directly or through an agent, has the authority or ability to hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members

of the entity, or otherwise direct or participate in the governance of the entity, through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures;

b. the principal campaign committee of Rep. Kelly or any other Federal candidate, other than by virtue of the candidate's service on Ripon's Advisory Board, has a common or overlapping membership with Ripon or has common or overlapping officers or employees with Ripon;
c. Rep. Kelly or any other Federal candidate, directly or through an agent, directly or indirectly provides funds or goods on an ongoing basis to Ripon and, if so, please state the amount of these funds or goods;
d. Rep. Kelly or any other candidate currently seeking Federal office, directly or through an agent, played a role in the formation of Ripon and, if so, please describe that role; or
e. the principal campaign committee of Rep. Kelly or any other Federal candidate shares an overlapping pattern of receipts and disbursements with Ripon.

If you have any questions about the advisory opinion process or this letter, please contact Richard Ewell, an attorney in this Office, at 202-694-1650.

Sincerely,

Rosemary C. Smith
Associate General Counsel

wrf

Wiley Rein & Fielding LLP

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FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
OPERATIONS CENTER

2004 AUG 24 P 2:47

August 24, 2004

Jan Witold Baran
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jbaran@wrf.com

RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
2004 AUG 24 P 3:21

Rosemary Smith, Esq.
Associate General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

VIA HAND DELIVERY

Re: Advisory Opinion Request of Rep. Sue Kelly and The Ripon Society

Dear Ms. Smith:

This letter responds to your letter requesting additional information dated August 20, 2004. Please note our clients' responses to each of your office's questions:

(1) Please provide a full video or storyboard of the communication featuring Rep. Kelly. The summary of "A Little Safer Now" attached to your request is not specific in areas that could be directly relevant to the analysis of whether the communication promotes, supports, attacks, or opposes a clearly identified Federal candidate. For example, the video portion states that the advertisement will include "scenes of terrorist activity throughout the world," "video reinforcing continuing nature of threat" and "support headlines," and does not foreclose the possibility that additional Federal candidates would be identified in the "support headlines" or elsewhere in the communication.

Response

A video of the message has not been produced pending approval by the FEC. Requestors represent that the video portion of the message will not include any images or references of any Federal candidate other than Rep. Kelly.

(2) Please state when Ripon intends to disseminate "A Little Safer Now." In doing so, please clarify whether 50,000 or more people within the 19th Congressional district will be able to receive the communication via broadcast, cable, or satellite television prior to Rep. Kelly's September 14 primary. *See* 11 CFR 100.29(b).

Response

Ripon intends to disseminate the message on cable television wherever it is permitted by law. Accordingly, Ripon intends to disseminate the message on cable television to be viewed by over 50,000 citizens within the 19th Congressional District of New York beginning immediately upon receipt of an advisory opinion from the FEC (which we anticipate will be before September 14) and throughout the Fall of 2004 *if* the FEC concludes it would be legal to do so. If the FEC concludes it would not be legal to do so, then Ripon intends to disseminate the message on cable television in other places around the country.

(3) As presented, your request appears to seek guidance as to the content and conduct prongs of 11 CFR 109.21 with respect to Rep. Kelly, but only appears to seek guidance as to the content prong in 11 CFR 109.21 with respect to other Federal candidates and political party committees.

a. Please confirm that this is the scope of your request.

Response

Your characterization of our request is accurate. As for Rep. Kelly's conduct, we ask whether her involvement in producing the message constitutes "coordination" and is restricted by the FEC's coordination regulation. As for the conduct of Ripon and other Federal candidates, Ripon intends to coordinate distribution of the message with Federal candidates unless the FEC concludes the content of the message subjects it to coordination restrictions. In addition to seeking the FEC's opinion as to whether the advertisement is subject to coordination restrictions, Requestors also seek the FEC's opinion on the ultimate issue of whether Ripon can coordinate the message featuring Rep. Kelly and referencing "Republicans in Congress" with other Federal candidates and/or party officials.

b. Please describe Rep. Kelly's involvement in the production and distribution of "A Little Safer Now," including whether or not she or her agents will have the opportunity to review and approve the script and other aspects of the communication.

Response

Rep. Kelly appeared in the video, read the script, and narrated the message. Throughout the production process and following production, Rep. Kelly retains the right to approve or edit the script and to approve of Ripon's use of the message.

(4) Please provide additional information regarding the relationship of Rep. Kelly, as well as any other Federal candidates serving on the Ripon Advisory Board, to Ripon. Specifically, focusing on the factors set forth in 11 CFR 300.2(c)(2) and applying the safe harbor in 11 CFR 300.2(c)(3) where appropriate, please state whether:

a. Rep. Kelly or any other Federal candidate, directly or through an agent, has the authority or ability to hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of the entity, or otherwise direct or participate in the governance of the entity, through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures.

Response

Rep. Kelly and other Federal candidates do not have the authority or ability over employment matters or employees described in your request. In one instance, Ripon's Board of Directors decided to employ the son of a U.S. Representative and candidate who also serves on Ripon's Advisory Board. The Representative did not participate in the employment decision and maintains no formal or informal control over the employment relationship. *See* Advisory Opinion 2003-10.

b. The principal campaign committee of Rep. Kelly or any other Federal candidate, other than by virtue of the candidate's service on Ripon's Advisory Board, has a common or overlapping membership with Ripon or has common or overlapping officers or employees with Ripon.

Response

Requestors are unaware of any overlapping officers or employees as described in your question. Accordingly, the FEC may assume in providing its opinion that there are none.

c. Rep. Kelly or any other Federal candidate, directly or through an agent, directly or indirectly provides funds or goods on an ongoing basis to Ripon and, if so, please state the amount of these funds or goods.

Response

Rep. Kelly and other Federal candidates do not, directly or indirectly, provide funds or goods on an ongoing basis to Ripon.

d. Rep. Kelly or any other candidate currently seeking Federal office, directly or through an agent, played a role in the formation of Ripon and, if so, please describe that role.

Response

The Ripon Society was founded in 1964. Requestors are not aware of any current Members of Congress who played a role in founding Ripon.

e. The principal campaign committee of Rep. Kelly or any other Federal candidate shares an overlapping pattern of receipts and disbursements with Ripon.

Response

Requestors are unaware of any pattern of common receipts or disbursements between Ripon and a Federal candidate's campaign and, moreover, believe in good faith that no such pattern exists.

We trust this response provides the FEC all information it needs to provide a prompt advisory opinion.

Sincerely,

Jan Witold Baran
Lee E. Goodman