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FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 2, 1996

AGENDA ITEM
For Meeting of: 5-9-96

MEMORANDUM

TO: The Commission

THROUGH: John C. Sprina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Rosemary C. Smith
Senior Attorney

SUBJECT: Draft AO 1996-11

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 9, 1996.

Attachment

DRAFT

1
2 **ADVISORY OPINION 1996-11**

3
4 **James Bopp, Jr.**
5 **Bopp, Coleson & Bostrom**
6 **2 Foulkes Square**
7 **401 Ohio Street**
8 **P.O. Box 8100**
9 **Terre Haute, Indiana 47808-8100**

10
11 **Dear Mr. Bopp:**

12
13 **This responds to your letter dated March 21, 1996, and supplementary materials**
14 **received on April 4, requesting an advisory opinion on behalf of the National Right to Life**
15 **Conventions, Inc. ("NRL"), a nonprofit incorporated membership organization. Your**
16 **request concerns the application of the Federal Election Campaign Act of 1971, as**
17 **amended ("the Act"), and Commission regulations to speeches by incumbent Members of**
18 **Congress during NRL's upcoming convention.**

19 **You state that NRL is a subsidiary of the National Right to Life Committee, Inc.,**
20 **which is also a nonprofit incorporated membership organization exempt from Federal**
21 **taxation under 26 U.S.C. §501(c)(4). Section 501(c)(4) of the Internal Revenue Code**
22 **grants tax exempt status to civic leagues or organizations operated exclusively for the**
23 **promotion of social welfare. NRL's bylaws state that the purposes of the corporation are**
24 **"[t]o promote respect for the worth and dignity of all human life, including the life of the**
25 **unborn child from the moment of conception, by sponsoring educational speeches,**
26 **seminars and conventions" You further note that NRL "engages in educational and**
27 **lobbying activities relating to the issues of abortion, infanticide, and euthanasia."**

28 **You state NRL will hold a convention from June 20 through June 22, 1996 at hotel**
29 **facilities in northern Virginia. Your letter further indicates that NRL plans to invite two**
30 **officeholders to speak to its members and employees, their families, and the general public**
31 **during its convention regarding "legislative efforts and proposals in Congress and other**
32 **issues of interest to pro-lifers." One speaker is an incumbent Member of the House of**

1 Representatives who is running for reelection, and the other is an incumbent Member of
2 Congress who is a candidate for President, or his representative.¹ Your letter notes that
3 some of the topics which the speakers may address have become campaign issues in
4 various elections, including their own. Your April 4 submission includes two audio tapes
5 of speeches by Members of Congress at the 1989 NRL convention: a workshop
6 presentation by Representative Christopher Smith entitled, *International Abortion Network
7 and the Mexico City Policy*, and a general session presentation by Representatives Henry
8 Hyde, Jim Oberstar and Christopher Smith entitled, *Back to the Future: Post Roe Strategy*.
9 Your letter and supplementary materials explain that, with the exception described below,
10 neither NRL, nor any person on its behalf, nor anyone introducing the speakers, nor the
11 candidates themselves, nor the candidates' staff members, representatives or agents will
12 expressly advocate the election or defeat of any clearly identified candidate or make any
13 express appeals for contributions or other support during any event sponsored by NRL at
14 the convention. However, the candidates will be introduced as such when they make their
15 convention speeches. NRL will not invite opposing candidates or give them an
16 opportunity to speak or appear.

17 You indicate that the candidates may send a representative to appear and speak on
18 their behalf, but you do not know at this point who will be coming in response to the
19 invitations. Candidates may send a family member, friend, legislative staff member, or a
20 campaign staff member so long as the candidate or representative addresses issues and
21 does not expressly advocate the election or defeat of any clearly identified candidate.

22 You have stated that it is anticipated that the candidates' speeches will be at a
23 general session, not a workshop, and thus there will be no opportunity for audience
24 questions. However, you also state that news reporters often hold interviews with
25 candidates on convention premises during convention hours over which NRL exercises no
26 control. In addition, the candidate speakers may participate in a press conference
27 sponsored by NRL at or near the convention site before, during or after the convention to
28 discuss pro-life issues, and they will be identified as candidates. You state that NRL and

¹ The Commission assumes neither candidate speaker is a member of the National Right to Life Committee, Inc.

1 its agents, and the candidates and their agents, will not expressly advocate the election or
2 defeat of any clearly identified candidate during the press conference.

3 You expect to make audio and video tapes of all speeches by candidates, and to
4 give a copy of the audio tapes of any speech to the speaker. Audio tapes are also sold at
5 the convention for fair market value. Video tapes are not routinely given to the speaker or
6 sold, but would be provided to the speaker upon request and would be made available for
7 purchase by interested parties. Thus, the candidate speakers may make use of their
8 appearances in their campaigns.

9 Although the candidate speakers will not be paid an honorarium, NRL will pay
10 travel expenses for their trips to and from the convention. NRL's general treasury funds
11 will be used for this purpose.

12 The campaign committees of the candidate speakers may sponsor and fund
13 campaign events which will take place at the convention site, but which will be separate
14 from the NRL-sponsored convention. The campaign committees may, at their own
15 expense, advertise these events to convention attendees. The example you cite consists of
16 a meet-the-candidate reception (or meeting) or a hospitality suite at the convention hotel
17 during the convention. The candidate's campaign committee would pay for the room
18 rental, would provide refreshments and campaign materials, and would provide an
19 opportunity to meet the candidate or his or her representative. Although NRL will not fund
20 these events, or pay to advertise them, it will have knowledge of them. During events
21 sponsored by the campaign committees at the convention site, those sponsoring the event
22 may expressly advocate the election of their candidate(s) or the defeat of other clearly
23 identified candidates, both orally and in writing. Inherent in the distribution of campaign
24 materials would be appeals for contributions or other electoral support. However, as noted
25 above, there will be no express advocacy or express appeals for contributions or other
26 support during any event sponsored by NRL at the 1996 convention.

27 Regarding this proposal, your request asks the specific questions set out below:

- 28 1. If a candidate discusses issues that are issues in his campaign
29 during his speech at the convention, or if he or she is identified as a

1 candidate for Federal office, does either of these make his presentation
2 "campaign-related"?

3 2. If a candidate discusses issues that are issues in his campaign
4 during his speech at the convention, or if he or she is identified as a
5 candidate for Federal office, does either of these make his appearance one
6 that is "in his or her capacity as a candidate for Federal office"?

7 3. Based on the facts set forth above, may NRL invite the candidates
8 described and may the candidates speak as planned without violating any
9 FEC law or regulation?

10 4. If the candidates may not appear as described in the facts set forth
11 herein without violating FEC law or regulations, what specific changes
12 must be made in the proposed plans to bring the appearances of the
13 candidates into compliance with FEC law or regulations? ²

14 Given the above facts and circumstances, your request presents the question
15 whether the Act and Commission regulations permit Members of Congress who are
16 candidates for re-election to that office, or who are candidates for the Office of President,
17 to speak at the convention and to accept the payment of travel expenses from NRL in
18 connection with these speeches. The answer to these questions depends upon whether the
19 described payment and speaking opportunity would constitute a contribution to the
20 presidential or congressional campaigns of the speakers for purposes of the Act and
21 Commission regulations.

22 The Act provides that the term "contribution" includes any gift of money or
23 anything of value made by any person for the purpose of influencing any election for

² You also inquire as to the regulatory or other legal authority which establishes an exception allowing candidates to give noncampaign-related speeches at conventions when they are not appearing in their capacities as candidates. The Act and Commission regulations govern contributions and expenditures made in connection with Federal elections, but do not place restrictions on activities wholly unrelated to Federal elections, such as legislative or educational activity which constitutes issue advocacy. You also request clarification of the terms "campaign-related" and "in his or her capacity as a candidate for Federal office." Requests presenting a general question of interpretation do not qualify as advisory opinion requests. 11 CFR 112.1(b). However, the application of these concepts to the facts you have presented is discussed below. You do not ask, and this opinion does not address, any issues regarding the application of 11 CFR 114.10 to NRL. That regulation implements an exception to 2 U.S.C. §441b for certain qualified nonprofit corporations.

1 Federal office. 2 U.S.C. §431(8)(A)(i). The term "person" includes an individual, an
2 association, a corporation, or any other organization. 2 U.S.C. §431(11). Furthermore, the
3 Act prohibits a corporation, including a nonprofit corporation, from making any
4 contribution or expenditure in connection with a Federal election and provides in this
5 context that "contribution or expenditure" includes "any direct or indirect payment,
6 distribution . . . or gift of money, or any services, or anything of value . . . to any
7 candidate" in connection with any Federal election. 2 U.S.C. §441b(a) and §441b(b)(2).
8 The phrase "anything of value" includes goods and services provided without charge, or at
9 less than the usual and normal charge for them. 11 CFR 100.7(a)(1)(iii)(A).

10 Commission regulations include several exceptions to the definitions of
11 contribution and expenditure. For example, Commission regulations permit an
12 incorporated membership organization to use its general treasury funds to sponsor and
13 finance campaign-related appearances by candidates in limited circumstances before an
14 organization's restricted class and before a broader audience consisting of the
15 organization's restricted class and other employees. See 11 CFR 114.3(c)(2) and
16 114.4(b)(2), respectively. You have stated that of the approximately one thousand
17 attendees at NRL's convention, there will be some who are members and employees of
18 NRL, and their families, but almost all attendees will be the general public.³ Accordingly,
19 the Commission concludes your proposed convention speeches do not fall within the
20 limited scope of the exceptions provided by 11 CFR 114.3(c)(2) and 114.4(b)(2).

21 The 1995 Explanation and Justification of 11 CFR 114.3(c)(2) notes that these
22 regulations "do not adversely affect the ability of corporations . . . to invite their restricted
23 class, other employees or the general public to attend a speech given by an officeholder . . .
24 who is also a Federal candidate, if the speech is not campaign-related and the individual is
25 not appearing in his or her capacity as a candidate for Federal office." Explanation and
26 Justification, 60 *Federal Register* 64266 (December 14, 1995). The Commission has
27 frequently considered whether particular activities involving the participation of a Federal
28 candidate are campaign-related, and thus result in a contribution to or expenditure on

³ You do not ask, and this opinion does not address, any issues with respect to determining membership in the National Right to Life Committee.

1 behalf of such candidate under the Act. The Commission has determined that financing
2 such activities will result in a contribution to or expenditure on behalf of a candidate if the
3 activities involve (i) the solicitation, making or acceptance of contributions to the
4 candidate's campaign, or (ii) communications expressly advocating the nomination,
5 election or defeat of any candidate. See Advisory Opinions 1994-15, 1992-6, 1988-27 and
6 opinions cited therein. The public funding regulations for presidential candidates also rely
7 upon these factors in determining if travel is campaign-related. 11 CFR 9004.7(b)(2) and
8 9034.7(b)(2). The Commission has indicated that the absence of solicitations for
9 contributions or express advocacy regarding candidates will not preclude a determination
10 that an activity is "campaign-related." Advisory Opinions 1994-15, 1992-37, 1992-6,
11 1988-27 and opinions cited therein. Similarly, Commission public funding regulations
12 state that, "[o]ther factors, including the setting, timing and statements or expressions of
13 the purpose of an event, and the substance of the remarks or speech made, will also be
14 considered in determining whether a stop is campaign-related." 11 CFR 9004.7(b)(2) and
9034.7(b)(2).

15 Advisory Opinions 1992-6 and 1988-27 are the most relevant to the situation
16 presented in your request. In the 1992 opinion regarding an appearance by a candidate
17 speaker in a college speaking program, the Commission concluded that the event described
18 and the related payment of an honorarium and travel costs would not constitute a
19 contribution or expenditure. However, references to the speaker's campaign or to the
20 campaign or qualifications of other candidates would change the character of the
21 appearance to one that is for the purpose of influencing a Federal election. In the 1988
22 opinion the Commission considered a corporation's payment of an honorarium to a
23 Member of Congress and Federal candidate who was to speak at the corporate PAC's
24 fundraiser in return for an honorarium within four months of an election. The candidate
25 speaker was selected to speak at the event on the basis of familiarity with the corporation's
26 business activity. In concluding that the corporation's honorarium to the candidate would
27 not be a contribution to the campaign, the Commission relied on several facts including
28 that the corporation would not solicit or direct or control contributions to the candidate's
29 campaign from those attending the event, either at the event or in the invitations, and that

1 any contribution from the corporation's PAC to the candidate's campaign would not be in
2 consideration for the candidate speaker's appearance.

3 The situation presented by the speeches at NRL's convention is similar in several
4 material respects to that presented in Advisory Opinions 1992-6 and 1988-27. The
5 invitations to the speakers are not based on their status as candidates, but rather are based
6 on their roles as legislators who have had an impact upon current statutes and future
7 legislation of interest to those attending the convention. The speeches themselves will not
8 be staged in a manner that would afford the candidates, or anyone else on their behalf, an
9 opportunity to expressly advocate the election or defeat of the speakers or any other clearly
10 identified candidates, or to solicit or collect contributions from attendees on behalf of the
11 candidate speakers.

12 Nevertheless, candidate activities involving the discussion of campaign issues by
13 the candidate during a campaign necessitates further scrutiny to determine campaign-
14 relatedness. Furthermore, the situation you present differs from that covered by Advisory
15 Opinions 1992-6 and 1988-27 in that, in effect, NRL would be paying the travel costs for
16 the candidate speakers to attend concurrent campaign events to be conducted by their
17 campaign committees during the convention at the hotel facilities where the convention
18 will be held. You have indicated your intention to accept advertising for the campaign
19 events in the program book to be published for the convention, but the advertising would
20 be paid by the candidate's authorized committee. The campaign events conducted by the
21 candidates will likely involve the distribution of campaign literature, express advocacy of
22 the election or defeat of clearly identified candidates and the solicitation of contributions or
23 other electoral support. Moreover, NRL's convention falls within five months of the 1996
24 presidential and congressional elections, and during the primary election season in many
25 states. The topics which the speakers may address have become campaign issues in
26 various elections, including those of the candidate speakers and their representatives. NRL
27 will not invite opposing candidates or give them an opportunity to speak or appear. While
28 you have stated that few, if any, convention attendees are voters from the congressional
29 candidate's home district, they would presumably be eligible to vote for the presidential
30 candidate, and could support either candidate speaker in a variety of other ways. Thus, the

1 candidates' appearances at the convention may be used to promote their candidacies.

2 Under these circumstances the speeches and collateral campaign events are linked by their
3 timing and purpose to presidential and congressional elections and are therefore campaign-
4 related.

5 Nevertheless, based on a review of the above materials and your representations,
6 the Commission concludes that you may invite the candidates to speak on the topics you
7 describe if the following conditions are satisfied. These conditions are necessary to ensure
8 that NRL does not provide something of value to the candidates in connection with their
9 appearances as convention speakers. First, all communications by NRL and any person on
10 its behalf, anyone introducing the speakers, the candidates themselves, the candidates' staff
11 members, representatives and agents must not expressly advocate the nomination, election
12 or defeat of any candidate.⁴ Second, there must be no solicitation, making or acceptance of
13 contributions to the candidate's campaign or distribution of campaign materials at
14 convention functions. Third, all communications by NRL and any person on its behalf,
15 anyone introducing the speakers, the candidates themselves, the candidates' staff members,
16 representatives and agents must not refer to the candidacies of either speaker. Fourth, any
17 contribution from the National Right to Life's political committee to either candidate's
18 campaign must not be in consideration for the candidate speaker's appearance. Fifth, if the
19 candidates' campaign committees sponsor collateral campaign events at the convention
20 facilities during the convention, the travel costs for the candidates and their representatives
21 and staff members may not be paid from NRL's general treasury funds. In addition, NRL
22 may not use its general treasury funds to make expenditures for communications to
23 announce or otherwise publicize campaign events where such communications are directed
24 to the general public attending the convention. Consequently, to avoid the making and
25 acceptance of prohibited contributions, any candidates who wish to advertise in the
26 convention program book must pay NRL in advance for the usual and normal charge for
27 such advertisements.

⁴ Because speeches during NRL's 1989 convention constitutes past activity, this opinion does not address the issue of whether any communications made during that convention expressly advocated the election or defeat of a clearly identified candidate. 11 CFR 112.1(b).

1 With respect to providing free video tapes and audio tapes of the speeches to the
2 candidate speakers, the Commission concludes that the situation in which an incorporated
3 membership organization such as yours provides free copies of audio or video tapes to all
4 speakers, including candidates, is not materially different than one in which a news
5 organization has an established policy of providing a copy of a video tape free of charge to
6 anyone appearing in a newscast, even though the candidates would be free to use the
7 materials to promote their candidacies or to raise funds for their candidacies. See Advisory
8 Opinion 1978-60. However, the Commission cautions that an impermissible contribution
9 would result if NRL were to distribute the taped speeches free of charge to news
10 organizations or to the general public, since the taping and distribution of the candidates'
11 views on the issues addressed at the convention is something of value to the candidates.
12 See Advisory Opinion 1980-90 (taping and free distribution to television stations of
13 candidates' views on energy issues is a corporate contribution). However, NRL may sell
14 such materials to news organizations or the general public for the usual and normal charge.
15 Section 100.7(a)(1)(iii)(B) defines "usual and normal charge" for goods to be the price of
16 those goods in the market from which they ordinarily would have been purchased at the
17 time of the contribution.

18 With respect to the NRL-sponsored press conference to be held at or near the
19 convention site before, during or after the convention, the Commission concludes that the
20 candidate speakers may participate in the press conference to discuss pro-life issues but
21 may not be identified as candidates. This conclusion is predicated upon your
22 representation that NRL and its agents, as well as the candidates and their agents will not
23 expressly advocate the election or defeat of any clearly identified candidate during the
24 press conference. This conclusion also rests upon the presumption that disbursements by
25 NRL for the press conference are *de minimis*. The disbursements will be considered *de*
26 *minimis* if notice of the press conference is distributed only to those news organizations
27 NRL customarily contacts when holding press conferences for other purposes. Cf. 11 CFR
28 114.4(c)(6) and Advisory Opinion 1984-23.

29 While not specifically asked in your request, the speeches and press conference in
30 the proposal may have an impact on the independence of other expenditures made by NRL

1 or National Right to Life's political committee. You state in your request: "NRL will
2 coordinate with those candidates invited to appear as speakers, or with their agents, their
3 appearances at the convention, specifically with regard to the structure, format, and timing
4 of the candidates' appearances and the subject which the candidate is asked to address."
5 The Commission assumes similar coordination would be necessary with respect to the
6 press conference.

7 Commission regulations acknowledge that candidate appearances permitted by
8 section 114.3 and 114.4 may involve contact and coordination with a candidate and the
9 candidate's campaign committee. See 11 CFR 114.3(a)(1) and 114.4(a). However,
10 coordination beyond that described in these sections, while not causing subsequent
11 activities directed at the restricted class to be considered prohibited contributions or
12 expenditures, may be considered evidence that could negate the independence of
13 subsequent communications to those outside the restricted class of the incorporated
14 membership organization or its separate segregated fund. This could result in a conclusion
15 that future communications or expenditures on behalf of the speaker candidates, directed
16 outside the restricted class, were in-kind contributions, rather than permissible activity by
17 NRL or independent expenditures by National Right to Life's political committee. See 11
18 CFR 114.2(c), 109.1(b)(4) and Advisory Opinion 1996-1.

19 The request does not expressly state whether or not National Right to Life's
20 political committee proposes to make any independent expenditures in connection with the
21 elections of the speaker candidates. In these circumstances, the National Right to Life
22 Committee, Inc. may exercise control over both its subsidiary, NRL, and its separate
23 segregated fund. See 11 CFR 114.5(d). Consequently, the Commission emphasizes that,
24 with respect to any purported independent expenditures, NRL's contacts with candidates
25 and their campaigns would result in coordination (and go beyond what is described in
26 sections 114.3 and 114.4) if these contacts become the means by which information is
27 passed regarding the candidates' plans, projects or needs with a view toward having an
28 expenditure made. 11 CFR 109.1(b)(4)(i)(A).

