



FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 20, 1996

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1996-11

James Bopp, Jr.
Bopp, Coleson & Bostrom
2 Foulkes Square 401 Ohio Street
P.O. Box 8100
Terre Haute, Indiana 47808-8100

Dear Mr. Bopp:

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

You state that NRL is a subsidiary of the National Right to Life Committee, Inc., which is also a nonprofit incorporated membership organization exempt from Federal taxation under 26 U.S.C.E501(c)(4). Section 501(c)(4) of the Internal Revenue Code grants tax exempt status to civic leagues or organizations operated exclusively for the promotion of social welfare. NRL's bylaws state that the purposes of the corporation are "[t]o promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception, by sponsoring educational speeches, seminars and conventions" You further note that NRL "engages in educational and lobbying activities relating to the issues of abortion, infanticide, and euthanasia.

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

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

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

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

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

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

The campaign committees of the candidate speakers may sponsor and fund campaign events which will take place at the convention site, but which will be separate from the NRL- sponsored convention. The campaign committees may, at their own expense, advertise these events to convention attendees. The example you cite consists of a meet-the-candidate reception (or meeting) or a hospitality suite at the convention hotel during the convention. The candidate's

campaign committee would pay for the room rental, would provide refreshments and campaign materials, and would provide an opportunity to meet the candidate or his or her representative. Although NRL will not fund these events, or pay to advertise them, it will have knowledge of them. During events sponsored by the campaign committees at the convention site, those sponsoring the event may expressly advocate the election of their candidate(s) or the defeat of other clearly identified candidates, both orally and in writing. Inherent in the distribution of campaign materials would be appeals for contributions or other electoral support. However, as noted above, there will be no express advocacy or express appeals for contributions or other support during any event sponsored by NRL at the 1996 convention.

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

1. If a candidate discusses issues that are issues in his campaign during his speech at the convention, or if he or she is identified as a candidate for Federal office, does either of these make his presentation "campaign-related"?
2. If a candidate discusses issues that are issues in his campaign during his speech at the convention, or if he or she is identified as a candidate for Federal office, does either of these make his appearance one that is "in his or her capacity as a candidate for Federal office"?
3. Based on the facts set forth above, may NRL invite the candidates described and may the candidates speak as planned without violating any FEC law or regulation?
4. If the candidates may not appear as described in the facts set forth herein without violating FEC law or regulations, what specific changes must be made in the proposed plans to bring the appearances of the candidates into compliance with FEC law or regulations?²

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

The Act provides that the term "contribution" includes any gift of money or anything of value made by any person for the purpose of influencing any election for Federal office. 2 U.S.C. 431(8)(A)(i). The term "person" includes an individual, an association, a corporation, or any other organization. 2 U.S.C. 431(11). Furthermore, the Act prohibits a corporation, including a nonprofit corporation, from making any contribution or expenditure in connection with a Federal election and provides in this context that "contribution or expenditure" includes "any direct or indirect payment, distribution . . . or gift of money, or any services, or anything of value . . . to any candidate" in connection with any Federal election. 2 U.S.C. 441b(a) and 441b(b)(2). The

phrase "anything of value" includes goods and services provided without charge, or at less than the usual and normal charge for them. 11 CFR 100.7(a)(1)(iii)(A).

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

The 1995 Explanation and Justification of 11 CFR 114.3(c)(2) notes that these regulations "do not adversely affect the ability of corporations . . . to invite their restricted class, other employees or the general public to attend a speech given by an officeholder . . . who is also a Federal candidate, if the speech is not campaign-related and the individual is not appearing in his or her capacity as a candidate for Federal office." Explanation and Justification, 60 *Federal Register* 64266 (December 14, 1995). The Commission has frequently considered whether particular activities involving the participation of a Federal candidate are campaign-related, and thus result in a contribution to or expenditure on behalf of such candidate under the Act. The Commission has determined that financing such activities will result in a contribution to or expenditure on behalf of a candidate if the activities involve (i) the solicitation, making or acceptance of contributions to the candidate's campaign, or (ii) communications expressly advocating the nomination, election or defeat of any candidate. See Advisory Opinions 1994-15, 1992-6, 1988-27 and opinions cited therein. The public funding regulations for presidential candidates also rely upon these factors in determining if travel is campaign-related. 11 CFR 9004.7(b)(2) and 9034.7(b)(2). The Commission has indicated that the absence of solicitations for contributions or express advocacy regarding candidates will not preclude a determination that an activity is "campaign-related." Advisory Opinions 1994- 15, 1992-37, 1992-6, 1988-27 and opinions cited therein. Similarly, Commission public funding regulations state that, "[o]ther factors, including the setting, timing and statements or expressions of the purpose of an event, and the substance of the remarks or speech made, will also be considered in determining whether a stop is campaign-related." 11 CFR 9004.7(b)(2) and 9034.7(b)(2).

Advisory Opinions 1992-6 and 1988-27 are the most relevant to the situation presented in your request. In the 1992 opinion regarding an appearance by a candidate speaker in a college speaking program, the Commission concluded that the event described and the related payment of an honorarium and travel costs would not constitute a contribution or expenditure. However, references to the speaker's campaign or to the campaign or qualifications of other candidates would change the character of the appearance to one that is for the purpose of influencing a Federal election. In the 1988 opinion the Commission considered a corporation's payment of an honorarium to a Member of Congress and Federal candidate who was to speak at the corporate PAC's fundraiser in return for an honorarium within four months of an election. The candidate speaker was selected to speak at the event on the basis of familiarity with the corporation's

business activity. In concluding that the corporation's honorarium to the candidate would not be a contribution to the campaign, the Commission relied on several facts including that the corporation would not solicit or direct or control contributions to the candidate's campaign from those attending the event, either at the event or in the invitations, and that any contribution from the corporation's PAC to the candidate's campaign would not be in consideration for the candidate speaker's appearance.

The situation presented by the speeches at NRL's convention is similar in several material respects to that presented in Advisory Opinions 1992-6 and 1988-27. The invitations to the speakers are not based on their status as candidates, but rather are based on their roles as legislators who have had an impact upon current statutes and future legislation of interest to those attending the convention. The speeches themselves will not be staged in a manner that would afford the candidates, or anyone else on their behalf, an opportunity to expressly advocate the election or defeat of the speakers or any other clearly identified candidates, or to solicit or collect contributions from attendees on behalf of the candidate speakers. Nevertheless, candidate activities involving the discussion of campaign issues by the candidate during a campaign necessitates further scrutiny to determine campaign-relatedness. Furthermore, the situation you present differs from that covered by Advisory Opinions 1992-6 and 1988-27 in that, in effect, NRL would be paying the travel costs for the candidate speakers to attend concurrent campaign events to be conducted by their campaign committees during the convention at the hotel facilities where the convention will be held. You have indicated your intention to accept advertising for the campaign events in the program book to be published for the convention, but the advertising would be paid by the candidate's authorized committee. The campaign events conducted by the candidates will likely involve the distribution of campaign literature, express advocacy of the election or defeat of clearly identified candidates and the solicitation of contributions or other electoral support. Moreover, NRL's convention falls within the 1996 presidential and congressional election season. The topics which the speakers may address have become campaign issues in various elections, including those of the candidate speakers and their representatives. NRL will not invite opposing candidates or give them an opportunity to speak or appear. While you have stated that few, if any, convention attendees are voters from the congressional candidate's home district, they would presumably be eligible to vote for the presidential candidate, and could support either candidate speaker in a variety of other ways. Thus, the candidates' appearances at the convention may be used to promote their candidacies. Under these circumstances the speeches and collateral campaign events are linked by their timing and purpose to presidential and congressional elections and are therefore campaign-related.

Nevertheless, based on a review of the above materials and your representations, the Commission concludes that you may invite the candidates to speak on the topics you describe if the following conditions are satisfied. These conditions are necessary to ensure that NRL does not provide something of value to the candidates in connection with their appearances as convention speakers. First, all communications by NRL and any person on its behalf, the candidates themselves, the candidates' staff members, representatives and agents must not expressly advocate the nomination, election or defeat of any candidate.⁴ Moreover, anyone introducing the speakers may not discuss the candidacy except to briefly note the fact that the speaker is a candidate. Second, there must be no solicitation, making or acceptance of

contributions to the candidate's campaign or distribution of campaign materials at convention functions. Third, any contribution from the National Right to Life's political committee to either candidate's campaign must not be in consideration for the candidate speaker's appearance. Fourth, if NRL knows that the candidates' campaign committees will sponsor collateral campaign events at the convention facilities during the convention, NRL may not use its general treasury funds to pay the travel costs for the candidates and their representatives and staff members. NRL must notify each candidate that it cannot pay travel costs if the candidate holds a collateral campaign event. In addition, NRL may not use its general treasury funds to make expenditures for communications to announce or otherwise publicize campaign events where such communications are directed to the general public attending the convention. Consequently, to avoid the making and acceptance of prohibited contributions, any candidates who wish to advertise in the convention program book must pay NRL in advance for the usual and normal charge for such advertisements.

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

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

While not specifically asked in your request, the speeches and press conference in the proposal may have an impact on the independence of other expenditures made by NRL or National Right to Life's political committee. You state in your request: "NRL will coordinate with those

candidates invited to appear as speakers, or with their agents, their appearances at the convention, specifically with regard to the structure, format, and timing of the candidates' appearances and the subject which the candidate is asked to address." The Commission assumes similar coordination would be necessary with respect to the press conference. Commission regulations acknowledge that candidate appearances permitted by section 114.3 and 114.4 may involve contact and coordination with a candidate and the candidate's campaign committee. See 11 CFR 114.3(a)(1) and 114.4(a). However, coordination beyond that described in these sections, while not causing subsequent activities directed at the restricted class to be considered prohibited contributions or expenditures, may be considered evidence that could negate the independence of subsequent communications to those outside the restricted class of the incorporated membership organization or its separate segregated fund. This could result in a conclusion that future communications or expenditures on behalf of the speaker candidates, directed outside the restricted class, were in-kind contributions, rather than permissible activity by NRL or independent expenditures by National Right to Life's political committee. See 11 CFR 114.2(c), 109.1(b)(4) and Advisory Opinion 1996-1.

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

The Commission emphasizes that it does not purport to express any opinion with respect to qualifications for tax- exempt status under 26 U.S.C. 501(c)(4) or any other tax ramifications, since such questions are outside its jurisdiction.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Lee Ann Elliott
Chairman

Enclosures (AOs 1996-1, 1994-15, 1992-37, 1992-6, 1988-27, 1984-23, 1980-90 and 1978-60)

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

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.E441b for certain qualified nonprofit corporations.

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.

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).