



FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 26, 2007

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2006-35

Mr. William H. Kelley
Treasurer
Kolbe for Congress
P.O. Box 31568
Tucson, AZ 86751

Dear Mr. Kelley:

We are responding to your advisory opinion request on behalf of Kolbe for Congress (the "Committee"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the use of campaign funds to pay for certain legal expenses. These legal expenses were incurred by Representative Kolbe in connection with a recently completed inquiry by the House Committee on Standards of Official Conduct (the "House Ethics Committee"), an inquiry by the Department of Justice, and in connection with related press inquiries.

The Commission concludes that these legal expenses are for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office. The Committee may use campaign funds to pay for legal expenses incurred in responding to these inquiries and related press inquiries.

Background

The facts presented in this advisory opinion are based on your letters received on October 27, November 8, November 27, 2006, and January 16, 2007, and the attachments thereto.

The Committee is the principal campaign committee of Representative Jim Kolbe of Arizona. Representative Kolbe was elected to the House of Representatives in 1984

and retired at the end of the 109th Congress in 2006. He served on the House Committee on Appropriations and was also a Member of the House Page Board from 1996 to 2001.

According to House Ethics Committee documents, the House Ethics Committee established an investigative subcommittee that has jurisdiction to conduct a formal inquiry regarding “any conduct of House Members, officers and staff related to information concerning improper conduct involving Members and current and former House Pages.”¹ Your request represents that a former House Page contacted Representative Kolbe’s office after receiving unwanted communications from Representative Mark Foley, and that Representative Kolbe’s office forwarded the House Page’s concerns to the appropriate authorities.

Similarly, according to your request, the Department of Justice’s preliminary inquiry concerns, in part, information known to or obtained by Representative Kolbe and his staff relating to the interaction between Representative Foley and current or former House Pages. The preliminary inquiry also concerns facts surrounding an official congressional trip to the Grand Canyon attended by Representative Kolbe and two former House Pages, among others.

Questions Presented

1. *May the Committee use campaign funds to pay for legal expenses incurred by Representative Kolbe in connection with the inquiries by the House Ethics Committee and the Department of Justice described in your request?*
2. *May the Committee use campaign funds to pay for legal expenses incurred in responding to the press in connection with the same inquiries?*

Legal Analysis and Conclusions

Question 1. May the Committee use campaign funds to pay for legal expenses incurred by Representative Kolbe in connection with the inquiries by the House Ethics Committee and the Department of Justice described in your request?

Yes, the Committee may use campaign funds to pay for legal expenses incurred by Representative Kolbe in connection with the inquiries by the House Ethics Committee and the Department of Justice described in your request.

The Act identifies six permissible uses of contributions accepted by a Federal candidate, including “for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office.” *See* 2 U.S.C. 439a(a)(2); 11 CFR 113.2.

¹ The House Ethics Committee issued its report while the advisory opinion request was pending. *See Investigation of Allegations Related to Improper Conduct Involving Members and Current or Former House Pages*, 109th Cong., 2d Sess. (Dec. 8, 2006).

Here, your request concerns Representative Kolbe's legal expenses incurred in responding to inquiries by the House Ethics Committee and the Department of Justice. The inquiry by the House Ethics Committee investigative subcommittee concerns conduct of "House members, officers and staff." Moreover, the investigative authority of the House Ethics Committee is limited to "alleged violations of the Code of Official Conduct or of any applicable rules, laws, or regulations governing the performance of official duties or the discharge of official responsibilities."² The Commission concludes therefore that Representative Kolbe's legal expenses related to the House Ethics Committee inquiry are ordinary and necessary expenses incurred in connection with his duties as a Member of the House of Representatives.

The Department of Justice's preliminary inquiry concerns information known to or obtained by Representative Kolbe regarding the interaction between another Member of Congress and current or former Pages. To the extent that Representative Kolbe acquired information regarding these interactions because of his status as a Federal officeholder, the Commission concludes that his legal expenses in responding to this Department of Justice inquiry are ordinary and necessary expenses incurred in connection with his duty as a House member.

Section 439a(b) provides that contributions accepted by a candidate may not be converted to "personal use" by any person. 2 U.S.C. 439a(b)(1); 11 CFR 113.2. Commission regulations define "personal use" as "any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." 11 CFR 113.1(g); *see also* 2 U.S.C. 439a(b)(2).

The Commission analyzes whether the payment of legal fees and expenses constitutes personal use on a case-by-case basis under 11 CFR 113.1(g)(1)(ii)(A), and has previously concluded that legal fees and expenses incurred in legal proceedings involving allegations concerning the candidate's campaign activities or duties as a Federal officeholder would not exist irrespective of the candidate's campaign or duties as a Federal officeholder and therefore are not an improper personal use of campaign funds. *See* Advisory Opinions 2005-11 (Cunningham), 2003-17 (Treffinger), 1998-1 (Hilliard), 1997-12 (Costello), 1996-24 (Cooley), and 1995-23 (Shays).

Thus, the Committee may use campaign funds for legal expenses related to the inquiries by the House Ethics Committee and the Department of Justice regarding Representative Kolbe's role in the investigation of Representative Foley's interactions with House Pages.

Additionally, your request states that the preliminary inquiry by the Department of Justice concerns, in part, Representative Kolbe's rafting trip to the Grand Canyon in 1996. You represent that Representative Kolbe "took the trip under the auspices of his office in light of his oversight role as a member of the House Appropriations Interior

² Rule XI, Rules of the House of Representatives for the 109th Congress.

Subcommittee.”³ You also submit documents showing that the trip was part of an official Congressional visit with support for the trip provided by the National Park Service and the Office of Public Affairs of the Grand Canyon National Park. Accordingly, the Commission concludes that Representative Kolbe’s legal expenses in responding to the inquiry into his trip to the Grand Canyon are ordinary and necessary expenses incurred in connection with his duty as a House member. 2 U.S.C. 439a(a)(2).

As with the inquiry into current and former House pages, Representative Kolbe’s legal expenses in responding to this Department of Justice inquiry regarding the rafting trip are ordinary and necessary expenses incurred in connection with his duty as a House member and would not exist irrespective of his duties as a Federal officeholder. *See* 2 U.S.C. 439a(b)(2); *see also* 11 CFR 113.1(g)(1)(ii). Thus, the Committee may use campaign funds for legal expenses related to the inquiry by the Department of Justice regarding Representative Kolbe’s trip to the Grand Canyon.

The Commission notes that the details of the preliminary inquiry by the Department of Justice are not public at this time, and it is possible that the scope of the inquiry could involve allegations not related to Representative Kolbe’s duties as a Federal officeholder. Thus, the Committee may not use campaign funds to pay for Representative Kolbe’s legal expenses in the preliminary inquiry regarding other allegations, if any, that do not concern the candidate’s campaign activities or duties as a Federal officeholder. *See* Advisory Opinion 2005-11 (Cunningham).

Question 2. May the Committee use campaign funds to pay for legal expenses incurred in responding to the press in connection with the same inquiries?

Yes, the Committee may use campaign funds to pay for legal expenses incurred in responding to the press in connection with the inquiries by the House Ethics Committee and the Department of Justice.

The Commission has previously determined that legal expenses incurred to respond to the press regarding allegations that concern the candidate’s campaign activities or duties as a Federal officeholder may be paid for with campaign funds. *See* Advisory Opinions 1998-1 (Hilliard) and 1997-12 (Costello). Accordingly, the Commission concludes that the Committee may use campaign funds to pay for the legal expenses incurred in responding to the press regarding the inquiries by the House Ethics Committee and the Department of Justice into allegations that are related to Representative Kolbe’s duties as a Federal officeholder, as discussed in response to question one above.

In accordance with 2 U.S.C. 432(c), the Committee must maintain appropriate documentation of any disbursements made to pay legal expenses incurred in connection with the former inquiry by the House Ethics Committee and the preliminary inquiry by

³ The Subcommittee on Interior, Environment, and Related Agencies of the House Committee on Appropriations has oversight jurisdiction of the Department of the Interior, including the National Park Service.

the Department of Justice, including legal expenses incurred in responding to the press. *See also* 11 CFR 102.9(b) and 104.11. In addition, the Committee must report all funds disbursed for such legal expenses as operating expenditures, with the purpose noted. 11 CFR 104.3(b)(2) and 104.3(b)(4)(i).

The Commission expresses no opinion regarding the application of Federal tax law, other law, or the rules of the House of Representatives to the proposed activities, because those questions are not within the Commission's jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Robert D. Lenhard
Chairman

Enclosures (Advisory Opinions 2005-11, 2003-17, 1998-1, 1997-12, 1996-24, and
1995-23)