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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2006 JAN 18 A 9:37

January 18, 2007

MEMORANDUM

**AGENDA ITEM**

For Meeting of: 01-25-07

TO: The Commission

FROM: Lawrence H. Norton  
General Counsel

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Rosemary C. Smith  
Associate General Counsel

Handwritten initials "RCS" in black ink.

J. Duane Pugh  
Acting Assistant General Counsel

Handwritten initials "J.P." in black ink.

Robert Knop  
Attorney

Handwritten initials "RMK" in black ink.

Stacey Shin  
Law Clerk

Handwritten initials "SJS" in black ink.

Subject: Draft AO 2006-35

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 25, 2007.

Attachment

1 ADVISORY OPINION 2006-35

2

3 Mr. William H. Kelley

4 Treasurer

5 Kolbe for Congress

6 P.O. Box 31568

7 Tucson, AZ 86751

8

9 Dear Mr. Kelley:

**DRAFT**

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

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

21 ***Background***

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

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

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

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

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

17 ***Questions Presented***

- 18 1. *May the Committee use campaign funds to pay for legal expenses incurred by*  
19 *Representative Kolbe in connection with the inquiries by the House Ethics Committee*  
20 *and the Department of Justice described in your request?*  
21  
22 2. *May the Committee use campaign funds to pay for legal expenses incurred in*  
23 *responding to the press in connection with the same inquiries?*  
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<sup>1</sup> 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*, 109<sup>th</sup> Cong., 2d Sess. (Dec. 8, 2006).

1 ***Legal Analysis and Conclusions***

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

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

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

12 Here, your request concerns Representative Kolbe’s legal expenses incurred in  
13 responding to inquiries by the House Ethics Committee and the Department of Justice.  
14 The inquiry by the House Ethics Committee investigative subcommittee concerns  
15 conduct of “House members, officers and staff.” Moreover, the investigative authority of  
16 the House Ethics Committee is limited to “alleged violations of the Code of Official  
17 Conduct or of any applicable rules, laws, or regulations governing the performance of  
18 official duties or the discharge of official responsibilities.”<sup>2</sup> The Commission concludes  
19 therefore that Representative Kolbe’s legal expenses related to the House Ethics  
20 Committee inquiry are ordinary and necessary expenses incurred in connection with his  
21 duties as a Member of the House of Representatives.<sup>3</sup>

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<sup>2</sup> Rule XI. Rules of the House of Representatives for the 109<sup>th</sup> Congress.

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

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

14           The Commission analyzes whether the payment of legal fees and expenses  
15 constitutes personal use on a case-by-case basis under 11 CFR 113.1(g)(1)(ii)(A), and has  
16 previously concluded that legal fees and expenses incurred in legal proceedings involving  
17 allegations concerning the candidate’s campaign activities or duties as a Federal  
18 officeholder would not exist irrespective of the candidate’s campaign or duties as a  
19 Federal officeholder and therefore are not an improper personal use of campaign funds.  
20 *See* Advisory Opinions 2005-11 (Cunningham), 2003-17 (Treffinger), 1998-1 (Hilliard),  
21 1997-12 (Costello), 1996-24 (Cooley), and 1995-23 (Shays).

22           Thus, the Committee may use campaign funds for legal expenses related to the  
23 inquiries by the House Ethics Committee and the Department of Justice regarding

1 Representative Kolbe's role in the investigation of Representative Foley's interactions  
2 with House Pages.

3         Additionally, your request states that the preliminary inquiry by the Department  
4 of Justice concerns, in part, Representative Kolbe's rafting trip to the Grand Canyon in  
5 1996. You represent that Representative Kolbe "took the trip under the auspices of his  
6 office in light of his oversight role as a member of the House Appropriations Interior  
7 Subcommittee."<sup>4</sup> You also submit documents showing that the trip was part of an  
8 official Congressional visit with support for the trip provided by the National Park  
9 Service and the Office of Public Affairs of the Grand Canyon National Park.

10 Accordingly, the Commission concludes that Representative Kolbe's legal expenses in  
11 responding to the inquiry into his trip to the Grand Canyon are ordinary and necessary  
12 expenses incurred in connection with his duty as a House member. 2 U.S.C. 439a(a)(2).

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

20         The Commission notes that the details of the preliminary inquiry by the  
21 Department of Justice are not public at this time, and it is possible that the scope of the

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<sup>4</sup> 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.

1 inquiry could involve allegations not related to Representative Kolbe's duties as a Federal  
2 officeholder. Thus, the Committee may not use campaign funds to pay for  
3 Representative Kolbe's legal expenses in the preliminary inquiry regarding other  
4 allegations, if any, that do not concern the candidate's campaign activities or duties as a  
5 Federal officeholder. *See* Advisory Opinion 2005-11 (Cunningham).

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

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

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

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

1 *See also* 11 CFR 102.9(b) and 104.11. In addition, the Committee must report all funds  
2 disbursed for such legal expenses as operating expenditures, with the purpose noted. 11  
3 CFR 104.3(b)(2) and 104.3(b)(4)(i).

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

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

13  
14 Sincerely,

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17  
18 Robert D. Lenhard  
19 Chairman  
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22 Enclosures (Advisory Opinions 2005-11, 2003-17, 1998-1, 1997-12, 1996-24, and 1995-  
23 23)  
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