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December 19, 1997

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AOR 1997-27

Hand-Delivered

N. Bradley Litchfield, Esq.
Associate General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C.

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FEDERAL ELECTION COMMISSION
DEC 19 1997

Re: Advisory Opinion Request

Dear Mr. Litchfield:

This office represents Congressman John Boehner and Friends of Boehner, on whose behalf we hereby request an Advisory Opinion from the Federal Election Commission ("the Commission") pursuant to 2 U.S.C. § 437f and 11 C.F.R. Part 112. Our clients seek the Commission's opinion on whether Congressman Boehner may use campaign committee funds to pay legal expenses incurred in evaluating and pursuing civil remedies under the Electronic Communications Privacy Act of 1986, 16 U.S.C. §§ 2510 et seq. ("ECPA").

On December 21, 1996, Congressman Boehner, as Chairman of the House Republican Conference, participated in a conference call with several other members of the House via cellular telephone. Shortly thereafter, he discovered through press accounts that his cellular phone conversation has been intercepted, taped, and released to several individuals, including members of the media, without the consent or knowledge of any of the participants in the call. See Adam Clymer, Gingrich Heard Urging Tactics in Ethics Case, N.Y. Times, Jan. 10, 1997 at A1; Excerpts from Republican Leaders' Conference Call, N.Y. Times, Jan. 10, 1997 at A20. The incident is the subject of a criminal investigation. Congressman Boehner is concerned that the pace and direction of that investigation may prejudice his legal rights.

Accordingly, Congressman Boehner intends to retain legal counsel to investigate and pursue any civil legal remedies available to him under the ECPA. He plans to pay the expenses incurred in pursuit of these claims with funds from his federal campaign committee, Friends of

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Boehner. Any damages that he receives from such a suit will be used first to defray litigation costs, with any remaining monetary damages to be donated to a tax-exempt charitable organization.

We are requesting an FEC Advisory Opinion confirming that use of Friends of Boehner campaign committee funds to defray the expenses arising from this legal action is not a "personal use" prohibited by federal election laws. The Federal Election Campaign Act of 1971, as amended ("FECA") provides in pertinent part that campaign funds

may be used . . . to defray any ordinary and necessary expenses incurred in connection with . . . duties as a holder of federal office . . . or may be used for any other lawful purpose . . . except that no such amounts may be converted by any person to personal use, other than to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office.

2 U.S.C. § 439a. The Commission's regulations further define personal use as an expenditure of campaign funds "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 C.F.R.

§ 113.1(g). Additionally, in FEC Advisory Opinion 1997-12, which considered "personal use" in the legal defense context, the Commission stated that "any legal expense that relates directly to allegations arising from campaign or officeholder activity would qualify for 100% payment with campaign funds." FEC Advisory Opinion 1997-12, Fed. Election Camp. Fin. Guide (CCH) ¶ 6240 (1997) .

Under FECA as interpreted by the Commission, Congressman Boehner's use of campaign funds to pay the legal costs of his ECPA action seems permitted. The conversation, its recording, and its dissemination would not have occurred but for Congressman Boehner's position as an elected official and member of the House Republican leadership. The contents of the conversation were newsworthy, and hence worth recording and distributing, because of his political position and the positions of others participating in the call. Furthermore, Congressman Boehner was acting in his capacity as a Member of the House Republican leadership at the time his rights were violated. The subject matter of the telephone call pertained to political business, not personal matters. The invasion of Congressman Boehner's rights that gives rise to this action took place because of his political and official status, and no action under ECPA would exist but for his political position. Certainly, the legal expenses arise directly "from campaign or officeholder activity." Moreover, Mr. Boehner will not personally benefit from any monetary award of damages, since any such award will only be used to defray legal fees or will be donated

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to charity. Hence, Congressman Boehner's use of campaign funds to finance the expenses necessary to vindicate his legal rights should not be considered a "personal use" under FECA.

For your information, we have attached a copy of the advice Congressman Boehner received from the House of Representatives Committee on Standards of Official Conduct. The Committee concluded that use of Friends of Boehner funds to pursue this action would not be a conversion of campaign funds to personal use prohibited by House Rule 43. While this determination is not controlling on the Commission, it may be relevant to the Commission's consideration of this request. In the Explanation and Justification for Part 113, the Commission stated in response to concerns that the congressional and FECA personal use provisions might be interpreted inconsistently that "in most circumstances . . . political and officially connected expenses will be considered ordinary and necessary expenses . . . under the FECA." Hence, the Commission "[did] not anticipate a significant number of conflicting results." Final Rules: Expenditures: Reports by Political Committees: Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7871 (Feb. 9, 1995).

Thank you for your assistance in this matter. Please do not hesitate to call with any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Witold Baran", written in a cursive style.

Jan Witold Baran

Enc.

ONE HUNDRED FIFTH CONGRESS

U.S. House of Representatives

COMMITTEE ON STANDARDS OF
OFFICIAL CONDUCT

Washington, DC 20515-6328

December 1, 1997

The Honorable John A. Boehner
U.S. House of Representatives
1011 Longworth House Office Building
Washington, D.C. 20515

Dear Colleague:

This responds to your letter of November 7, 1997 inquiring whether you may, under the rules of the House, use funds of your campaign committee to pay expenses that you incur in assessing and pursuing civil remedies under the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§2510 *et seq.* (ECPA).

The pertinent background on this matter is as follows. On December 21, 1996 you participated, via cellular telephone, in a conference call that included a number of other members of the House Republican Leadership, and several days later you learned that your cellular telephone conversation had been intercepted, recorded and disclosed to various persons and media outlets. While this matter is currently the subject of a criminal investigation, your letter states that you are concerned that the current pace and direction of the investigation will prejudice your rights in this matter. Because of these concerns, you have decided to retain legal counsel to assess and pursue any and all civil remedies against any and all persons who engaged in conduct which individually, and/or through a conspiracy, violated ECPA.

The specific question presented in your letter is whether you may, under House Rules, use the funds of your campaign committee, the Friends of John A. Boehner, to pay any and all expenses that you incur, legal or otherwise, in connection with these claims. Your letter also states that any and all damages received as a result of this civil action will first be used to defray the costs of the litigation, and any additional amounts received will be donated to an appropriate tax-exempt charitable organization.

The provision of the House rules that is applicable here is clause 6 of House Rule 43, which provides in pertinent part as follows:

A Member shall convert no campaign funds to personal use in excess of reimbursement for legitimate and verifiable campaign expenditures and shall expend no funds from his campaign account not attributable to bona fide campaign or political purposes.

As to the part of the rule prohibiting expenditure of campaign funds for other than campaign or political purposes, the Committee's view has been that Members have wide discretion in determining what constitutes a bona fide political purpose. As the Select Committee on Ethics observed in its final report,

[I]f a Member determines, for example, that advertisements in publications of civic organizations, the mailing of holiday greetings to constituents, or travel to meetings with local party officials, would constitute a political expenditure . . . or are otherwise politically related, then he may use campaign funds for that purpose.

H. Rep. No. 95-1837 at 16. In a similar vein, the Committee has determined that Members may use campaign funds to defend legal actions arising out of their campaign, election, or the performance of their official duties, on the basis that protection of a Member's presumption of innocence is a valid political purpose. *House Ethics Manual* (102d Cong., 2d Sess.) at 277. In sum, the determination of whether a particular expenditure will serve a bona fide political purpose is primarily for the Member to make, although that determination must be a reasonable one.

However, in view of the part of the rule prohibiting conversion of campaign funds to personal use, the Committee has also taken the position that "a bona fide campaign purpose is not established merely because the use of campaign money *might* result in a campaign benefit as an incident to benefits personally realized by the recipient of such funds" H. Rep. No. 99-333 at 13 (emphasis in original), *reprinted in House Ethics Manual* at 272-73. The Committee adopted that position to avoid situations in which "campaign funds were expended for the personal enjoyment, entertainment, or economic well-being of an individual without any clear nexus that the funds so expended achieved any political benefit to the disbursor (campaign organization) of the funds." *Id.* Thus, for example, the use of campaign funds to pay legal expenses resulting from a matter that is primarily personal in nature, such as a matrimonial action, would be impermissible.

In view of (1) the specific facts regarding the background and subject matter of the prospective litigation as summarized above, and (2) your representation that any and all damages received will first be used to defray the costs of the litigation, and any additional amounts received will be donated to an appropriate tax-exempt charitable organization, your use of campaign funds for the stated purposes would not constitute a prohibited personal use of campaign funds. However, to help ensure that no prohibited personal benefit results from this matter, your use of campaign funds for these purposes is subject to the following additional conditions: (1) there should be no tax benefit to you, direct or indirect, as a result of any award of damages (see pp. 140-41 of the *House Ethics Manual*), and (2) any charitable organization to which a donation is made may not be one from which you, or anyone in your immediate family (parent, sibling, spouse, child, or dependent relative) derives any financial benefit.

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Provided that the above conditions are complied with, and provided further that you determine that a bona fide political purpose will be served by your assessing and pursuing civil remedies under ECPA, your use of campaign funds to pay the expenses incurred in doing so is permissible under House Rule 43, clause 6. However, as your letter notes, pursuant to the Federal Election Campaign Act, the Federal Election Commission administers a separate set of restrictions on the use of campaign funds. Thus you do need to consult with the FEC to determine whether this proposed expenditure is permissible under that Act.

If you have any further questions, please contact the Committee's Office of Advice and Education at extension 5-3787.

Sincerely,


James V. Hansen
Chairman


Howard L. Berman
Ranking Democratic Member

JVH/HLB:jev