

January 18, 2007

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2006-35 is available for public comments under this procedure. It was requested by, William H. Kelley on behalf of Kolbe for Congress.

Draft Advisory Opinion 2006-35 is scheduled to be on the Commission's agenda for its public meeting of Thursday, January 25, 2007.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on January 24, 2007.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2006-35, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

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Washington, DC 20463

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January 18, 2007

MEMORANDUM

TO: The Commission

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RS*
Associate General Counsel

J. Duane Pugh *JDP*
Acting Assistant General Counsel

Robert Knop *RNK*
Attorney

Stacey Shin *SJS*
Law Clerk

Subject: Draft AO 2006-35

AGENDA ITEM
For Meeting of: 01-25-07

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."¹ 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?*

24

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).*

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.”² 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.³**

² Rule XI. Rules of the House of Representatives for the 109th 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."⁴ 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

⁴ 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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16
17
18 Robert D. Lenhard
19 Chairman
20

21
22 Enclosures (Advisory Opinions 2005-11, 2003-17, 1998-1, 1997-12, 1996-24, and 1995-
23 23)
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27