

October 6, 2004

The Honorable Tom DeLay
Majority Leader
U.S. House of Representatives
Suite H-107, The Capitol
Washington, D.C. 20515

Dear Colleague:

As you are aware, the Committee has made a number of decisions regarding the allegations made in the complaint that was filed against you by Representative Bell on June 15, 2004. This letter implements determinations made by the Committee that you be admonished for your conduct in two respects:

- your participation in and facilitation of an energy company golf fundraiser at The Homestead resort for your leadership PACs on June 2-3, 2002. Those actions were objectionable under House standards of conduct because, at a minimum, they created an appearance that donors were being provided special access to you regarding the then-pending energy legislation.
- your intervention in a partisan conflict in the Texas House of Representatives using the resources of a Federal agency, the Federal Aviation Administration. This action raises serious concerns under House standards of conduct that preclude use of governmental resources for a political undertaking.

The bases of these Committee determinations are as follows.

Your actions regarding the energy company golf fundraiser at The Homestead resort on June 2-3, 2002. With regard to the solicitation and receipt of campaign contributions, the Committee has clearly stated that a Member may not make any solicitation that may create even an appearance that, because of a contribution, a contributor will receive or is entitled to either special treatment or special access to the Member in his or her official capacity. This point is made on p. 34 of the *Campaign Activity* booklet that the Committee issued in December 2001.^[1] In the same vein, a Member should not participate in a fundraising event that gives

^[1] More generally, under House standards of conduct as set out in Committee publications, a Member may not make any solicitation for campaign or political contributions that is linked with any specific official action taken or to be taken by that Member. In addition, a Member may not accept any contribution that is linked with any specific official action taken or to be taken by that Member.

even an appearance that donors will receive or are entitled to either special treatment or special access.

On the basis of the information before the Committee, the Committee concluded that your participation in and facilitation of the energy company golf fundraiser at The Homestead resort on June 2-3, 2002 is objectionable in that those actions, at a minimum, created such an improper appearance. As a general matter, fundraisers directed to a particular industry or to others sharing a particular federal interest are permissible, and at such events Members are free to talk about their record and positions on issues of interest to the attendees. In addition, of course, a Member has no control over what the donors at a fundraising event spontaneously say to or ask of the Member with regard to their legislative interests. Nevertheless, there are a number of considerations regarding this particular fundraiser that make your participation in and facilitation of the fundraiser objectionable under the above-stated standards of conduct.

In particular, there was the timing of the fundraiser, *i.e.*, it took place just as the House-Senate conference on major energy legislation, H.R. 4, was about to get underway. Indeed, one of the communications between organizers of the fundraiser that you provided to us – an e-mail of May 30, 2002 from Mr. Maloney to Mr. Perkins that notes the legislative interests of each of the attendees – includes a specific reference to the conference. That legislation was of critical importance to the attendees. In addition, there was the fact that you were in a position to significantly influence the conference, both as a member of the House leadership and, by action taken about a week and a half after the fundraiser, your appointment as one of the conferees.

In view of these considerations, other aspects of the fundraiser that would have been unobjectionable otherwise had the effect, in these specific circumstances, of furthering the appearance that the contributors were receiving impermissible special treatment or access. One of these aspects was the presence at the fundraiser of two of your key staff members from your leadership office: Jack Victory, who handled energy issues, and your office counsel, Carl Thorsen. In addition, there were the limited number of attendees, and the fact that the fundraiser included several events at a resort over a two-day period, both of which facilitated direct contact with you and your congressional staff members.

We also note the description of the event that was provided to the Committee by counsel for the attendees of one of the contributors, Westar Energy, Inc. That description includes the following:

On Sunday, June 2, 2002 Douglas Sterbenz and Doug Lawrence [Westar executives] attended a reception and dinner with fifteen to twenty others at the Homestead. Representative Tom DeLay was present for the reception and dinner. Mr. DeLay asked the group to advise him of any interest we had in Federal Energy Legislation. Mr. Lawrence advised Mr. DeLay that Westar supported repeal of the P.U.C.H.A. [sic] provision in the Energy Bill, provided that Westar's restructuring wouldn't be harmed by the [r]epeal. Lawrence advised that Westar needed a grandfather clause to continue as a safe harbor if P.U.C.H.A. was to be repealed. The following day, Mr. Lawrence provided a staff aide to Rep. DeLay a bound briefing book that Westar had put together on this issue. [emphasis added]

On June 3rd, 2002, Mr. Lawrence attended a golf outing at the Homestead where he played golf with the attendees. Mr. Lawrence shared a cart with an aide to Congressman Delay and advised the aide he would give him the materials in the briefing book and later did. At lunch that day, Mr. Sterbenz, Mr. Lawrence and others participating in the golf outing had lunch. During the lunch Mr. Lawrence restated to Rep. DeLay Westar's position regarding the need for a grandfather clause if P.U.H.C.A. was to be repealed.

When we brought the above-quoted statement to your attention and requested your response to it, you stated that you gave a general briefing on energy issues at that event, but that you have no recollection of your specific remarks. You also stated that "it would not be typical" for you to have made such a statement at a fundraiser, and that this is not at all consistent with the manner in which you "normally would interact with attendees at such an event." In view of your response, the Committee's determination on this matter is not based on Mr. Lawrence's characterization of your remarks. Rather, the other circumstances of the event, as set forth above, are more than sufficient to support the Committee's determination.

In addition, while the views of any one donor are not dispositive on whether a fundraising activity creates an appearance of impropriety, the documents we obtained indicate that the individuals who were active on Westar's behalf were of the view that the company's participation in the fundraiser provided special access to you. In this regard, later in June 2002, when Mr. Lawrence was proposing that Westar executives make additional contributions, he stated that Westar had made "significant progress" with you and Representative Barton, and that, "The contributions made in the first round were successful in opening the appropriate dialogue." When we asked Mr. Lawrence about that statement, he said he was referring to the presentations he was able to make at the fundraiser earlier that month. In addition, the following month, when Westar's lobbyist, Mr. Richard Bornemann, sent a memorandum to your staff seeking an appointment with you for the company's CEO, he noted Westar's participation in The Homestead fundraiser.

Your use of governmental resources for a political undertaking. The Committee has long taken the position that House standards of conduct prohibit Members from taking (or withholding) any official action on the basis of the partisan affiliation (or the campaign support) of the individuals involved. This is the point made in an advisory memorandum that the Committee issued to House Members, officers and employees on May 11, 1999. In addition, a provision of the Code of Ethics for Government Service, which the Committee deems to be fully applicable to House Members and staff, requires that federal officials "[u]phold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion." These laws include, of course, those that generally prohibit the use of governmental resources for political purposes – particularly 31 U.S.C. § 1301, which provides that official funds are to be used only for the purposes for which appropriated, and, with regard to executive branch personnel, the Hatch Act, which prohibits those employees from engaging in political activity while on duty or in a government building.

Your intervention in a partisan conflict in the Texas House of Representatives using the resources of a Federal agency, the Federal Aviation Administration, raises serious concerns under these standards of conduct. Your contacts with the FAA were in connection with the dispute over congressional redistricting in the Texas House of Representatives that occurred in May 2003. The purpose of these contacts was to obtain information on the whereabouts of Democratic Members of the Texas House who had absented themselves from Austin for the purpose of denying the House a quorum. You have stated to us that you made these contacts at the request of the Speaker of the Texas House of Representatives, who was seeking information on the location of an airplane that was shuttling the absent legislators, and that you relayed the information you had obtained on the location of the airplane solely to the Texas House Speaker.

The submissions that you made to the Committee argue that those contacts with the FAA were proper, but those arguments are not persuasive.

First, your submissions assert that the Inspector General of the U.S Department of Transportation (DOT IG) found no wrongdoing in this matter. It is correct that the statement that the DOT IG submitted to the House Transportation and Infrastructure Committee states, “We did not find that actions [taken by the FAA official whom your office contacted] in this matter to have violated any rules or regulations.” However, the assertion made in your submissions disregards a number of important considerations. To begin with, the DOT IG’s statement raises specific concern about the FAA official’s failure to inquire of your staff member as to why she was requesting information on the location of the particular airplane, “[W]e do not understand why he did not ask the staffer about the purpose of her request – particularly since he told us he thought it might involve a safety issue.” In addition, there are the statements made by the FAA official to the DOT IG regarding his views of the requests of your office and his handling of them after he learned about the absent Texas legislators on May 13th:

I figured out why they were calling. . . I just felt like I had been used. . . I don’t do anything for political purposes. . . and I just did not like. . . somebody calling me for political reasons. . . I would never use my office to help somebody politically, for any political reasons, period.

He also stated that in hindsight, “he would have handled the staffer’s request differently, by coordinating with the FAA Chief Counsel’s Office and senior agency officials, along with asking the requestor for background about the request.” In short, without being apprised of the reason for the request, the FAA was denied the opportunity to make a prior, reasoned determination on whether collecting and providing the requested information would be both permissible and appropriate under the laws, rules and policies governing the FAA at the time.

Yet another pertinent point here is that on July 15, 2003, upon the recommendation of the DOT IG, the FAA issued an order setting out a specific policy regarding disclosure of aircraft and flight data from FAA information systems. That policy includes the following basic provision:

No request for Flight Track Data shall be granted unless it is first determined that the request is being made in the interest of aviation safety or efficiency, or for an

official purpose by a United States Government agency or law enforcement organization with respect to an ongoing investigation.

In sum, the statements made by the FAA official regarding his views of his actions after he had learned the purpose of the requests, and the FAA's later establishment of a restrictive policy on responding to such requests, indicate a larger concern about the propriety of the FAA's response to your requests for information, regardless of whether, in the specific circumstances, the actions of the FAA official did not violate the FAA rules or regulations that were in effect at the time.

Second, it is asserted that the House Committee on Transportation and Infrastructure found no wrongdoing in this matter. In this regard, the report that the Transportation Committee issued on this matter states with regard to the DOT IG's report, "[T]here were no findings that federal resources were misused or that agency personnel violated any departmental rules or regulations." Because the Transportation Committee report merely characterizes the findings of the DOT IG, the materials set out above regarding the DOT IG's report respond to this assertion as well. It should also be noted that it is the Committee on Standards of Official Conduct, and not the Transportation Committee, that has the jurisdiction to make determinations regarding the official conduct of House Members and staff.

Third, your submissions assert that the information that you sought and that was provided to you is publicly available over the Internet. Indeed, according to the statement of the DOT IG, "[C]omparable information – including near real-time aircraft locator data – is currently available to the general public through commercial databases accessible via the internet." However, the issues discussed here have arisen because you did not obtain the information on the location of the particular aircraft from one of the commercial databases, but instead you obtained it from FAA databases using the services of FAA personnel.

Finally, your submissions assert that these contacts were proper because they were made in the context of a "legitimate law enforcement issue." While acknowledging that this matter arose out of a political dispute, one of your submissions states that it "was a proper matter for the law enforcement authorities of Texas," citing certain letters of the Sergeant-at-Arms and the Texas Attorney General on the matter. However, review of those documents establishes that to the extent that there was any "enforcement" issue here, it was solely a matter of enforcement of rules of the Texas House of Representatives that govern its Members.

Indeed, this consideration highlights a separate basis on which the contacts with the FAA were objectionable, and that is that such use of federal executive branch resources to resolve an issue before a state legislative body raises serious concerns under the fundamental concepts of separation of powers and federalism. The enforcement of the rules of the Texas House – like enforcement of the rules of the U.S. House of Representatives or any other legislative body – is the responsibility of the Members, officers and employees of that body.

Insofar as enforcing the rules of the Texas House on Member attendance is concerned, the rules of that body provide that this is the responsibility of "the sergeant-at-arms or an officer appointed by the sergeant-at-arms." Whether it is permissible and appropriate for the Texas House Sergeant-at-Arms to appoint every official of the Texas Department of Public Safety as

such an officer, as occurred here, is a matter to be resolved by Texas authorities under Texas law. However, the invocation of Federal executive branch resources in a partisan dispute before a state legislative body is a different matter entirely, and such action raises the serious concerns that are set out here.

* * *

We note that your response to the Committee's decision of last week included the statement, "During my entire career I have worked to advance my party's legislative agenda." Your actions that are addressed in this letter, as well as those addressed in the Committee's decision of last week and in prior Committee actions, are all ones that, in a broad sense, were directed to the advancement of your legislative agenda. Those actions are also ones that your peers who sit on this Committee determined, after careful consideration, went beyond the bounds of acceptable conduct.

As you are aware, it does not suffice for any House Member to assert that his or her actions violated no law, or violated no specific prohibition or requirement of the House Rules. The House Code of Official Conduct broadly requires that every House Member, officer and employee "conduct himself at all times in a manner that shall reflect creditably on the House." It is particularly important that members of the House leadership, who are the most publicly visible Members, adhere to this requirement scrupulously. The fact that a violation results from the overaggressive pursuit of one's legislative agenda simply does not constitute a mitigating factor.

In addition, a state criminal investigation of the 2002 election activities of the Texans for a Republican Majority PAC, with which you were involved during the period in question, is underway. While Committee action on Count II of the complaint regarding those activities has been deferred pending further action in the state cases and investigation, the Committee will act on the underlying allegations at an appropriate time.

In view of the number of instances to date in which the Committee has found it necessary to comment on conduct in which you have engaged,^{2[2]} it is clearly necessary for you to temper your future actions to assure that you are in full compliance at all times with the applicable House Rules and standards of conduct. We remind you that the House Code of Official Conduct provides the Committee with authority "to deal with any given act or accumulation of acts which, in the judgment of the committee, are severe enough to reflect discredit on the Congress."^{3[3]}

Sincerely,

^{2[2]} In addition to the two matters addressed in this letter and the conduct addressed in the Committee report of last week, there was the Committee letter to you of November 7, 1997 that concerned, in part, statements that may create the impression that official access or action are linked with campaign contributions, and a confidential Committee letter to you of May 7, 1999.

^{3[3]} *House Ethics Manual* at 12 (reprinting excerpt from the 1968 committee report on the House Code of Official Conduct (emphasis added)).

Joel Hefley
Chairman

Alan B. Mollohan
Ranking Minority Member
