

# LOBBYING ACCOUNTABILITY AND TRANSPARENCY ACT OF 2006

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## HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

**H.R. 4975**

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APRIL 4, 2006

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**Serial No. 109-96**

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Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://judiciary.house.gov>

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U.S. GOVERNMENT PRINTING OFFICE

26-911 PDF

WASHINGTON : 2006

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## LOBBYING ACCOUNTABILITY AND TRANSPARENCY ACT OF 2006

TUESDAY, APRIL 4, 2006

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON THE CONSTITUTION,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 10:06 a.m., in Room 2141, Rayburn House Office Building, the Honorable Steve Chabot (Chairman of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order. This is the Judiciary Committee Subcommittee on the Constitution. I am Steve Chabot, the Chairman of the Committee. We will be joined shortly here by the Ranking Member, Mr. Nadler, and I want to welcome all the other Members for being here as well. We have one witness, I believe that is running a little bit late, but that shouldn't really affect us significantly at this time.

I want to thank everyone again for being here at the Subcommittee on the Constitution. This is the legislative hearing on H.R. 4975, the "Lobbying Accountability and Transparency Act of 2006." As an original cosponsor of the 1995 Lobbying Disclosure Act, this issue has always been an important one to me.

Today the Subcommittee on the Constitution will examine legislation that would require lobbyists to disclose more information more frequently. It would require that these increased disclosures be made available to the public on the Internet as soon as practically possible in a form that can be easily sorted and searched by the average citizen. The bill would also require registered lobbyists to disclose their past government employment over the previous 7 years to allow for the spotting of possible conflicts of interests. The bill also requires lobbyists to disclose contributions to Federal candidates, leadership and other PACs and political party committees and to disclose the recipient and amount of any gift that counts toward the cumulative annual limit of \$100 as provided for under House rules.

The bill doubles to \$100,000 the civil penalty for a failure to report under these requirements. The bill also requires that the Clerk of the House give notice to Members and staff of the 1-year post-employment ban on lobbying activities and prohibits registered lobbyists from accompanying Members on corporate flights. The bill also requires random audits of lobbying reports filed by lobbyists by the House Inspector General, and permits the Inspector General to refer violations by lobbyists to the Department of

Justice for prosecution, which puts more teeth into the enforcement of current law. These reforms are necessary and prudent.

Throughout history people have paid other people to help them make their views known. The United States Constitution grants everyone the right to petition their Government for redress of their grievances, and today, organizations such as the American Association of Retired Persons, the American Cancer Society, the Boy Scouts, and all manner of nonprofit organizations also hire lobbyists. While there is nothing wrong with hiring help to communicate one's views, there is also much good in requiring that financial, political contributions by such organizations be made known to the American public so they can decide for themselves what to make of them.

More disclosure means more information, and more information is always welcome in a vibrant democracy such as ours. This hearing today, with the help of our invited witnesses, will examine H.R. 4975, which seeks in a very practical and accessible way to provide greater transparency and accountability in the lobbying profession without infringing on people's essential right to speak freely to their elected officials.

Members in this body serve in what has always been known as "the people's House." The House of Representatives is unique among all branches and bodies of the entire Federal Government because its Members must always be elected, and they serve limited 2-year terms so their service can be frequently evaluated by the voters they represent. As James Madison wrote in "America", "The people may publicly address their Representatives, may privately address them, or declare their sentiments by petition to the whole body." Those rights are safe in this legislation.

But it is also often said that the price of liberty is eternal vigilance. This legislation is designed to allow the American people to maintain that vigilance as easily as possible by providing them with more information and greater access to it.

No one has a monopoly on good ideas and I look forward to hearing from our panel of witnesses, and also hearing from our colleagues on the Committee during the course of this hearing.

I would now be happy to yield to the gentleman from Virginia for the purpose of making an opening statement if he should like to do so.

Mr. SCOTT. Mr. Chairman, I ask unanimous consent that the Ranking Member be able to make a statement when he arrives.

Mr. CHABOT. Without objection, we'll do it. If not necessarily right when he arrived, at an appropriate point then.

Does any other panel Member wish to make an opening statement? If not, we will get to our witnesses and I will introduce them at this time. As I mentioned before, we have one witness that will be coming shortly.

Our first witness is Mr. Ken Gross, who heads the political law practice at Skadden, Arps, Slate, Meagher & Flom. Mr. Gross is a recognized expert in the field of government ethics and disclosure, particularly in the context of lobbying disclosure. Roll Call has named Mr. Gross among the outstanding lawyers in the who's who among the Congressional Ethics Bar. Mr. Gross is a graduate of

the University of Bridgeport, and received his law degree from the Emory University School of Law.

We welcome you here this morning, Mr. Gross.

Mr. GROSS. Thank you, Mr. Chairman.

Mr. CHABOT. Our second witness is Mr. John Graham, President and CEO of the American Society for Association Executives. ASAE provides educational resources for its members, and promotes the goals and interest of the association profession. Prior to joining the ASAE, Mr. Graham served as CEO of the American Diabetes Association and held several executive positions with the Boy Scouts of America. Mr. Graham holds a bachelor's degree from Franklin and Marshall College, and we welcome you here this morning, Mr. Graham.

Mr. GRAHAM. Good morning, Mr. Chairman.

Mr. CHABOT. Our third witness is the Honorable Chellie Pingree, President and CEO of Common Cause, which advocates for open and accountable government. Prior to joining Common Cause, Ms. Pingree served 8 years in the Maine Senate and was the Democratic candidate for the United States Senate for that State in the year 2002.

And our fourth witness, which, again, hasn't arrived, but I will go ahead and introduce him now, our fourth and final witness is the Honorable Bradley Smith, Professor of Law at Capital University Law School. Professor Smith served 5 years as Commissioner, Vice Chairman and Chairman of the Federal Election Commission. As Chairman of the Commission from January 2004 until August 2005, Professor Smith oversaw the administration of the Bipartisan Campaign Reform Act of 2002, and as such, is intimately familiar with the role that disclosure plays in an open democracy. He graduated from Kalamazoo College and received his juris doctor, cum laude, from Harvard Law School.

Again, we'd like to welcome all the witnesses for their testimony here. Before we start, I'd like to bring to your attention the lights that you see before us. We have what's called the 5-minute rule here, which means that you all can testify for 5 minutes, and then there will be questions up here, and each of us is also limited to 5 minutes. The green light will be on for 4 minutes, the yellow light remains on for 1 minute to let you know that things are kind of winding down, and then when the red light comes on, your time is up. I won't gavel you down immediately, but we'd ask you to stay within that timeframe if at all possible.

And it's the practice to swear in all witnesses before it, so if you would please rise and raise your right hands.

[Witnesses sworn.]

Mr. CHABOT. All witnesses have indicated in the affirmative, and you can all, please, be seated. Again, we appreciate your testimony here this morning, and, Mr. Gross, you're recognized for 5 minutes.

**TESTIMONY OF KENNETH A. GROSS, PARTNER, SKADDEN,  
ARPS, SLATE, MEAGHER & FLOM, LLP**

Mr. GROSS. Thank you, Mr. Chairman. I am here to discuss 4975. Make no mistake about it, these are difficult times for Congress. Today's news certainly brings added stress to the situation, and I am pleased that this bill has many provisions in it that will begin

hopefully to turn the tide of the process here in Washington that will make it a system with greater disclosure.

When we're talking about regulation of lobbying, we're talking about first amendment protected activity, core political speech. So the only way that we can regulate it is through the disclosure process. And what this bill does, as you had mentioned in your opening statement, is it really does three things: it increases disclosure, it increases accessibility and the timeliness, with quarterly reports. With a much tighter lag time, that's a very helpful thing, just getting the information out on the street.

In terms of disclosure of gifts, in terms of disclosure of political contributions right on the report, those are, I think, very useful pieces of information in the entire process of the transparency of lobbying, and all gifts are in this bill, those who are over \$10 disclosed right on the lobby report. The electronic filing, obviously, is something that is a significant improvement. So all that, I think, brings greater transparency, and I support it.

In terms of enforcement, I know that there have been proposals for stronger enforcement, other, you know, Office of Public Integrity, et cetera. What this bill does with the Inspector General I think will certainly be sufficient in terms of getting lobby disclosure out on the table. My experience representing many lobbyists is that they're not disclosure shy. Obviously, we have bad apples, but the overwhelming percentage of lobbyists is that they tell me what the rule—tell me what the rule is. We'll put it out on the report, and we'll get it out in a timely fashion.

With the specter of random audits, if it is done properly, and it becomes a real part of the enforcement process, that should do it in terms of quality enforcement. It's not going to take—this is a handful of provisions. We're talking about title I, title IV in this bill. It's going to take more than just a handful of provisions. This Committee has limited jurisdiction, but this is a piece of the puzzle. You know, there are other critical elements, the lawmaking process itself, the disclosure, the transparency of earmarking, et cetera. These provisions should fit well into those provisions and hopefully begin to turn the tide and restore confidence to the American people in the process.

[The prepared statement of Mr. Gross follows:]

PREPARED STATEMENT OF KENNETH A. GROSS

Good morning Chairman Chabot, Ranking Member Nadler, and Members of the Judiciary Subcommittee on the Constitution. Thank you for the opportunity to appear before you today to discuss the merits of H.R. 4975, the "Lobbying Accountability and Transparency Act of 2006."

My name is Ken Gross. I am a partner at Skadden, Arps, Slate, Meagher & Flom LLP, where I head the firm's political law practice. I specialize in compliance with campaign finance, lobbying, and ethics laws. Prior to Skadden, I was head of enforcement in the General Counsel's Office of the Federal Election Commission.

H.R. 4975 is, overall, a constructive step toward positive reform of the federal lobbying law. By emphasizing increased disclosure, the bill succeeds in effecting practical change in the way lobbying activities are reported and monitored in our nation's capital without infringing upon our First Amendment rights as citizens to petition our government for a redress of grievances.

The bill undertakes to increase the transparency of lobbying by requiring more frequent disclosure with shorter lag time (days between the end of a reporting period and the report's due date), and by requiring more substantive disclosure—for example, requiring lobby registrants, their political action committees, and their lobbyists to disclose federal political contributions; requiring the reporting of certain



gifts to Members and legislative staff made by lobby registrants and their lobbyists; and increasing the number of years that current lobbyists who are former federal officials must be disclosed as such on lobby reports.

H.R. 4975 also takes great steps to increase the transparency of governmental decision-making by making electronic filing the standard and requiring reports to be searchable, sortable, and posted quickly for the benefit of the public.

Although the bill does not create an independent enforcement body, it does increase the penalties for violations of the lobbying law, and it gives substantive powers to the House Office of Inspector General. For example, the Inspector General will conduct random audits of lobby reports to ensure compliance, will have the authority to refer potential violations to the Department of Justice, and will review and report on the progress of the lobbying reform in action. These changes are very important because without a functioning enforcement mechanism, you can change rules but the effect of the reforms will be weakened.

These changes only address part of the puzzle, but the regulation of lobbying activity is a delicate process. Lobbying is a protected core First Amendment right. Effective disclosure is the only viable method of regulation and this bill addresses shortcomings in the current law. I do not want to see the response to Cunningham and Abramoff to simply result in a lot more rules and forms for lobbyists. You can shine the car on the outside but if the engine is leaky inside you have a piece of junk. The engine is the legislative process itself. Some of the institutional reforms that relate to the legislative process are outside of this Committee's jurisdiction, but the aspects of reform that are before this Committee are a very constructive step in improving the current system. It is my sincere hope that with the changes proposed in H.R. 4975 under discussion here, supplemented by those under consideration in other Committees, it will start the process of restoring public confidence to a system that is currently under great strain.

Mr. CHABOT. Thank you very much.

Mr. Graham, you're recognized for 5 minutes.

I'm sorry. I'll tell you what, if you wouldn't mind, we won't go into your time now, but the Ranking Member is here, so we're going to go ahead and let him make his opening statement. Then we'll get to you.

Mr. GRAHAM. Fine.

Mr. NADLER. Thank you, Mr. Chairman.

Today we examine an issue that goes part way to the very heart of this institution's credibility and integrity, the urgent need to curtail the corrupting abuses and influence peddling that have become pervasive among some of those who attempt to influence Congress, and unfortunately, some of the Members they hope to influence. This issue's not about free speech, though it could be—but hopefully it isn't—or the right of citizens to petition their Government for redress of grievances. It is about the corrupting influence of money and our democratic process.

All citizens should have an equal voice in speaking to Congress, whether for personal enrichment or for the means to acquire political power, money distorts our democracy and renders what we do here, at best, suspect. The recent indictments, convictions and resignations of leading Members of Congress and their staff, up to and including the former Majority Leader, Mr. DeLay, have cast a pall over this institution and over every one of us, whether we like it or not, whether any of us have done anything improper or not. Unless this Congress acts and acts effectively and with credibility, the public will rightly judge this institution and its Members harshly. The public will become only more cynical.

One place we could start, which is not really addressed in any of these reform bills, is to open up our legislative process and adhere to our rules of procedure. Bills hundreds of pages long, written in the dead of night and brought to a vote with little or no ex-

amination by the Members, will always be an invitation to disaster and to corruption, because they are an invitation to payoffs for campaign contributions when no one is looking. There was a time when legislation was actually the result of a deliberative and bipartisan process. That is, regrettably, becoming the exception rather than the rule in this Congress. It creates a bad policy and innumerable opportunities for mischief.

I must add that this lobbying reform, as mild as this bill is—and it's, frankly, a very halfhearted bill—or as good as an lobbying reform could be if we did a stronger bill, is totally useless without reform of the campaign finance system.

In the film “Braveheart,” which our former colleague, Mr. Gephardt, always used to refer to, there's a scene in which the two armies are lined up preparing for battle, and the committee goes out, the king and a few of his friends on one side, and the rebels on the other. And they meet in the center of the battlefield and they negotiate, and if they come to an agreement, everybody goes home and there's no battle, if not, they go back and they have the battle. If there were only one army lined up on the field, one of those negotiating groups would have little negotiating leverage.

The lobbying is an extension of the campaign finance system. If we don't have a strong system of public finance and get the hundreds of millions or billions of dollars given to buy legislation out of the system, then what we're talking about today is totally irrelevant.

I do not believe that Members are corrupted by a \$50 or \$75 dinner. They are corrupted by the necessity to raise large sums of campaign finance from private sources. If we want people to really have confidence in our legislative process again, we have got to clean up not only lobbying—that's the minor problem—the major problem is the campaign finance system, which is a metastasized cancer on our democratic system today.

I really believe that if we don't clean it up, if we don't enact some sort of public finance system like the clean election system, then historians will eventually write, as they do of the Roman Republic, that they had a good 200, 250 year run with democracy, and then it evolved into a different system, and that's the direction we're heading today.

Plainly, this legislative effort could stand—even on this bill—could stand a bit of openness and deliberation. We seem to be moving down the road again toward another partisan “take it or leave it” bill.

Tomorrow the Committee will vote on this bill and vote to report it, no Subcommittee consideration. That's no way to bring sunshine to an institution that sorely needs it, not only no Subcommittee consideration, no time after this hearing till the markup tomorrow. The hearing is a formality just to say we had a hearing. There's no time for the public to digest it, for people to comment on the testimony, for people to incorporate in the bill anything that may come out of this hearing or out of comments that people make as a result of the hearing. The hearing's a sham. It's designed to say we had a hearing, but the markup is tomorrow. It's preordained.

I hope I'm proved wrong, but I doubt I will be.

I welcome our witnesses and their expertise. I hope that your suggestions will receive serious consideration by the Members of this Committee, since—obviously, they won't since the bill is written and will be passed as written tomorrow—and that we'll be able to work together to rescue our democracy, and again, that we will be able to work together toward a decent campaign finance bill, without which this is all meaningful.

I thank you, Mr. Chairman, for your indulgence.

Mr. CHABOT. Thank you.

Mr. NADLER. Excuse me—without which, this is all meaningless, I meant to say.

Mr. CHABOT. Do any of the witnesses still want to testify after that? [Laughter.]

Mr. Graham, you're recognized for 5 minutes.

**TESTIMONY OF JOHN GRAHAM, IV, CAE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES**

Mr. GRAHAM. Thank you, Mr. Chairman. And, Congressman Nadler, thank you, I think. No, I thank you for the opportunity to be here, and other Members of the panel.

My name is John Graham. I'm President and CEO of the American Society of Association Executives, ASAE. We represent roughly 22,000 members, the majority of whom are CEOs and other association professionals representing the predominantly large trade professional and philanthropic organizations.

ASAE supports true reform that will provide for meaningful disclosure activity, needed reporting changes and elimination of abuses. We ask only that in its consideration of more stringent disclosure requirements and other reforms, Congress not inadvertently impede the ability of associations to carry out their primary missions for the public good, that Congress preserve its access through associations to firsthand information about the issues of the day and how they potentially impact vast constituencies of individuals across the country.

Associations can be a tremendous public information source for Congress and other audiences. The last thing we want to see happen is the promulgation of new rules that effectively stymie access, and hence, these vital lines of communication.

To this point in the continuing discussion of lobby reform, ASAE has focused its public comments on one proposal in particular, the proposed ban on privately funded travel, which we feel poses a serious threat to the exchange between Congress and associations at educational programs and conferences around the country. Realizing the jurisdiction of the House Judiciary and its Subcommittees, however, I will confine my remaining remarks to the provisions in H.R. 4975 on enhancing lobbying disclosure, enforcement, slowing the so-called revolving door, and prohibiting lobbyists on corporate flights.

Enhancing lobby disclosure. ASAE is not opposed to quarterly filing requirements so long as the reporting processes are not overly burdensome from an administrative standpoint, and that the filing system is uniform for both the House and the Senate. Also, requiring electronic filing seems both appropriate and conducive to the

goal of increased transparency. ASAE supports making all lobby disclosure forms publicly accessible to increase the public perception and understanding of the legislative process and the role of associations and other organizations engaged in advocacy efforts on behalf of their constituents.

**Enforcement.** ASAE is supportive of disclosure, but disclosure does little good without enforcement. A good example of this is the IRS which has oversight of 1.8 million nonprofit organizations. The vast majority of tax-exempt organizations faithfully comply with the spirit and letter of the law in carrying out their important missions, but the IRS has also identified enforcement in the tax-exempt sector as a key objective, and yet, does not have the resources to enable that enforcement. Random audits of lobbying disclosure seem a responsible safeguard against complacency or incomplete reporting.

ASAE supports increased oversight and enforcement of lobby reports, but suggests the House and Senate designate one oversight body to report violations by lobbyists for prosecution in the interest of avoiding duplicative, time-consuming activities that could result in increased administrative compliance for association and other lobbyists as well. This designated oversight body could issue annual reports to both chambers of Congress.

**Slowing the revolving door.** The term “revolving door” has been commonly used in discussions of lobby reform, but it implies to me that there are an endless number of former Members of Congress or staffers who leave their positions to take jobs as lobbyists for associations or other multi-client firms. I know that does happen, but it’s not the norm. It’s been my experience in 30 plus years in association management, including 13 as the CEO of the American Diabetes Association before joining ASAE, that governing boards hire the best people for the job. The vast majority of association CEO positions are filled by experienced association executives or someone with expertise in the industry or profession that the association represents. ASAE has no objection though to maintaining the 1-year cooling off period in cases where a former Member of Congress is hired.

**Prohibiting lobbyists on corporate flights.** ASAE supports the proposal in H.R. 4975 to prohibit registered lobbyists from accompanying Members of Congress on corporate flights because it cures a public concern about extravagance. I do want to reiterate, however, the value we see in Members of Congress getting outside of Washington, D.C. and engaging in truly educational dialogue with members of the association community or other constituencies with real concerns and information to share. ASAE believes that there should be a clear distinction between trips on corporate jets to exotic locales where the agenda is more socially or recreationally driven, and educational trips to an association meeting or a conference where an association might pay for an elected official’s domestic plane or train ticket.

We have suggested in our communications to Congress on this issue that a preapproval and disclosure process for privately funded congressional travel would be an amenable solution to the concerns about travel, while still preserving the valuable perspectives gained

when Members of Congress attend legitimate educational meetings around the country.

In conclusion, I want to thank Congress for recognizing the need to enhance accountability and public trust, and for avoiding a rush to judgment on any one proposal that may have resulted in unintended consequences for us all.

H.R. 4975 is a comprehensive bill that represents input and feedback from a lot of Members of Congress, constituents and outside experts. ASAE is confident Congress will pass a good bill.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Graham follows:]

PREPARED STATEMENT OF JOHN H. GRAHAM, IV

Chairman Chabot, Congressman Nadler, and other distinguished members of the subcommittee, thank you for the invitation to testify on the important issue of lobbying reform.

I am John Graham, president and CEO of the American Society of Association Executives ("ASAE"), a 501(c)(6) tax exempt organization founded in 1920 and representing roughly 22,000 members, the majority of whom are the CEOs or senior staff professionals of trade, professional or philanthropic organizations in the U.S. and in 50 countries worldwide. Among the services provided by ASAE to its members are education and knowledge resources, credentialing, industry research, and advocacy on issues that impact or threaten to impact the success of the association and nonprofit community.

Lobbying is of course an important part of our political process and an essential function of many associations responsible for communicating the interests of groups of individuals, corporations, charitable institutions and others potentially impacted by legislation. According to a "Value of Associations" study conducted by ASAE in the last six months with Harris Interactive Inc. the average association dedicates about 14 percent of their budget to advocacy. The balance of a typical association's budget is heavily weighted toward education and public information, meeting planning, standard setting, and so on.

Recently of course, we have all followed the media coverage about abuse of existing lobbying rules, and hence, we fully understand the need to reexamine these rules to ensure public accountability and trust in the political process. ASAE supports true reform that will provide for meaningful disclosure activity, needed reporting changes, and elimination of abuses. We ask only that, in its consideration of more stringent disclosure requirements and other reforms, Congress not inadvertently impede the ability of associations to carry out their primary missions for the public good, and that Congress preserve its access through associations to firsthand information about the issues of the day and how they potentially impact vast constituencies of individuals across the country. Associations can be a tremendous public information source for Congress and other audiences. The last thing we want to see happen is the promulgation of new rules that effectively stymie access, and hence, these vital lines of communication.

To this point in the continuing discussion of lobbying reform, ASAE has focused its public comments on one proposal in particular—the proposed ban on privately funded travel—which we feel poses a serious threat to the exchange between Congress and associations at educational programs and conferences around the country.

Though the issue falls outside the interest of this subcommittee, I do want to commend Congress for its careful deliberations on the travel ban and other lobbying reform proposals. While recognizing the need for action in this area, Congress has avoided any rush to judgment that might result in unintended consequences for elected officials or the many associations who invite lawmakers and Hill staff to speak with their members.

Realizing the jurisdiction of the House Judiciary and its subcommittees, however, I will confine my remaining remarks to the provisions in H.R. 4975 on enhancing lobbying disclosure; enforcement; slowing the so-called "revolving door"; and prohibiting lobbyists on corporate flights.

ENHANCING LOBBY DISCLOSURE:

ASAE is not opposed to quarterly filing requirements so long as the reporting processes are not overly burdensome from an administrative standpoint, and that the filing system is uniform for both the House and Senate. Requiring electronic fil-

ing seems both appropriate and conducive to the goal of increased transparency. A uniform, online filing system would seem to support Congress's goal of creating an Internet database that is easily searchable by the public and reducing criticism that Congress and lobbyists seek to operate in a covert environment. ASAE supports making all lobbying disclosure forms publicly accessible to increase public perception and understanding of the legislative process and the role of associations and other organizations engaged in advocacy efforts on behalf of their constituencies.

H.R. 4975's emphasis on increased disclosure instead of imposing federal limitations on lobbying offers a balance between the public's need to know what interests are active in various policy debates, and the First Amendment rights of individuals and associations to petition government.

#### ENFORCEMENT:

ASAE is supportive of disclosure, but disclosure does little good without enforcement. A good example of this is at the IRS, which has oversight of 1.8 million nonprofit organizations in the U.S. The vast majority of tax-exempt organizations faithfully comply with the spirit and letter of the law in carrying out their important missions. But the IRS has also identified enforcement in the tax-exempt sector as a key objective, to deter abuse and misuse of these organizations by third parties for tax avoidance or other unintended purposes. We certainly support efforts to curb abuse in our sector, but the IRS in many ways lacks the resources it needs to properly enforce the laws on the books. If the IRS had the resources to scrutinize the nonprofits that disgraced lobbyist Jack Abramoff had involvement with, and whether contributions to these groups were used to influence lawmakers, we might not be having this hearing today. Lobbying is necessary, but like any activity, it requires regulation and enforcement to ensure that everyone is playing by the same rules.

Random audits of lobbying disclosures seem a responsible safeguard against complacency or incomplete reporting. ASAE supports increased oversight and enforcement of lobbying reports, but suggests the House and Senate designate one oversight body to report violations by lobbyists for prosecution in the interests of avoiding duplicative, time-consuming activities that could result in increased administrative compliance for associations and other lobbyists as well. This designated oversight body could issue annual reports to both chambers of Congress.

#### SLOWING THE 'REVOLVING DOOR':

The term "revolving door" has been commonly used in discussions of lobbying reform, but it implies to me that there are an endless number of former members of Congress or staffers who leave their positions to take jobs as lobbyists for associations or multi-client firms. I know that does happen, but it's not the norm.

It's been my experience in 30+ years in association management, including 13 years as CEO of the American Diabetes Association before joining ASAE, that governing boards or executive search committees hire the best person for the job. Association executives should be hired for their leadership abilities and professional acumen.

The vast majority of association CEO positions are filled by an experienced association executive or someone with expertise in the industry or profession that the association represents. ASAE has no objection though to maintaining the one year "cooling off" period in cases where a former member of Congress is hired.

#### PROHIBITING LOBBYISTS ON CORPORATE FLIGHTS:

ASAE supports the proposal in H.R. 4975 to prohibit registered lobbyists from accompanying members of Congress on corporate flights because it cures a public concern about extravagance. Lobbyists should certainly be free to communicate a legislative agenda, but any restrictions that put that activity on a level playing field seem warranted and ultimately beneficial to the political process.

I do want to reiterate, however, the value we see in members of Congress getting outside Washington, DC, and engaging in truly educational dialogues with members of the association community or other constituencies with real concerns and information to share. ASAE believes there should be a clear distinction between trips on corporate jets to exotic locales where the agenda is more socially or recreationally driven, and educational trips to an association meeting or conference, where an association might pay for an elected official's domestic plane or train ticket.

We have suggested in our communications to Congress on this issue that a pre-approval and disclosure process for privately funded congressional travel would be an amenable solution to concerns about travel, while still preserving the valuable

perspectives gained when members of Congress attend legitimate, educational meetings around the country.

CONCLUSION:

In conclusion, I want to thank Congress for recognizing the need to enhance accountability and public trust in our legislative process, and for avoiding a rush to judgment on any one proposal that may have resulted in unintended consequences for us all.

H.R. 4975 is a comprehensive bill that represents input and feedback from a lot of members of Congress, constituents and outside experts, and ASAE is confident Congress will pass a good bill.

Thank you again for the opportunity to share the perspectives of the association community, and please consider ASAE a ready resource in your continued deliberations.

Mr. CHABOT. Thank you very much.

Ms. Pingree, you're recognized for 5 minutes.

**TESTIMONY OF THE HONORABLE CHELLIE PINGREE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, COMMON CAUSE**

Ms. PINGREE. Thank you very much, Mr. Chair, and Congressman Nadler, Members of the Committee.

Mr. CHABOT. Chellie—

Ms. PINGREE. Oh, sorry. Thank you again, Mr. Chair, Congressman Nadler, Members of the Committee. I'm very grateful for the opportunity to speak in front of you today, and also for the privilege of being the President of Common Cause, where our motto is "holding power accountable." I know on Capitol Hill we're also called Common Curse and it's often thought that we're never happy and that we often treat Members of Congress with disdain and finger pointing. But I really want to be here with a slightly different perspective today and speak to you in a humble in that perspective.

As you heard earlier, I have spent much of my life myself as an elected official from the local school board all the way up to the Majority Leader of the Maine Senate. And two things I uniquely understand, our own ability to function as elected officials comes from our dependence on the public's faith in the work that we do, and that we are usually uniquely in charge of policing the bodies in which we work.

Today I have the privilege of speaking for the many members of Common Cause, and I also want to convey that we strongly believe in the work and the purpose of our democracy and our Government, and we are, again, here today not just to criticize, but also in the hope that we can help offer suggestions as you think of ways to restore the faith in government.

I want to remind us again that the public is very concerned about the current climate in Washington, and mention one fact. You know, 87 percent of the American public today is deeply concerned about the war in Viet—in Iraq. [Laughter.]

And they're still worried about Vietnam too. But 85 percent is worried about the corruption of elected officials. That's not much lower. And there's a considerable amount of talk in Congress—Congressman Nadler just talked about it—about whether or not this Congress will ignore the headlines—and they can't be much bolder than they are this morning—and not get in a dialogue with the public about how to change what's going on in Washington. This dialogue is going to continue through November, and as hard as it

is to make these changes, and how much your colleagues would prefer that you did nothing here, I want you to remember those members of the public who are deeply concerned today.

I don't think at this moment I have to remind you about the significant scandals that are going on, and the numbers of Members who are being questioned, the headlines, the Members who are now facing potential major challenges, and I can't focus on all aspects of the ethics laws, but let me talk about two things that are of greatest concern.

The first, to reform groups, is certainly the questions that have come about based on our deep concern that the House Committee on Standards and Official Conduct, the Ethics Committee, is again stalled, all of last year worked in suspended animation, and appears to be deadlocked again, unable to agree on which cases to pursue. Clearly, this is a body that has failed to enforce the rules of conduct for Members of this chamber. And I want to again emphasize that the public views this as Congress protecting their own, a lack of action which is clearly inexcusable, perhaps the greatest factor in the low approval ratings for Congress and our public officials. This is often looked at by the public as an old boy network instead of a judicial body.

We have proposed, and are happy to give you more information, and provided more information today, a similar model that is implemented in several States of an outside body. Kentucky, Florida, nearly 30 State legislators have these independent bodies, and we have answered many of the questions in our backup documentation today that have been raised. This is not unconstitutional. It does not provide a permanent outside counsel, and in fact, it offers an opportunity to remove the adversarial relationship and the difficulties that often come from being inside the Ethics Committee and needing to act on the concerns about your fellow Members.

We also are concerned that there is no opportunity for organizations such as ours to file outside complaints, and we know that that needs to be changed.

One other matter I want to address, again, because of the limited scope of this particular Committee, is this issue of lobbyists on corporate flights. Again, this does not get to the concern. Lobbyists are not the problem on the jets. This is something of value given at a lower cost and the public does not feel this looks right. This also allows for the opportunity that a lobbyist would not be on the flight, but a CEO. It does not solve the problem.

In general, we do not feel that the House yet has tackled or gone far enough on many of the issues that we care about. This bill comes closest in looking at disclosure, but does not deal with the tie of lobbyists as fund raisers. The trip ban is only temporary. The gifts and revolving doors, I could go on for a long time about the things that we think are important. We've give you backup documentation on that.

Let me just end by saying two things that we think are important, that is about the essence of what truly needs to change. This morning we're looking at headlines about the leader of this body leaving in disgrace. Untold staff, possibly Members, will be touched, behavior which now to the public looks as if it's become commonplace.



I want to ask two things of you. I know that you have to think about in your public face how you discuss this with your colleagues, with your constituents, but I also want to ask you how this feels in your heart. Is your behavior or your colleague's behavior one that affects a strong character and good judgment? Do we have the system available to us that is required to enforce? You on this Committee have the unique power and ability to restore Americans' faith in our elected leaders, to return the democracy to a place where not only can we be proud to be role models for this country around the world, but also where the American people feel that they want to be engaged to vote, to participate, to care.

And I speak lastly as a mother and a father, a person who in America has to talk to their children about a career that they should choose. And I am fortunate to have a daughter who's a State legislator. I don't want to say to her, "You know, I think you should go to Congress. It's great there. You can fly for free on corporate jets. There's a lot of free lunches. You'll get to know lobbyists. You can spend your time raising endless amounts of money and making decisions that you don't feel good about." I want to be able to say to her, "This is honorable. It's public service. You have the kind of character that makes you belong in that place, where you can be part of a system that operates in a way that makes people proud, and you can make the tough decisions and do the right thing."

Thank you very much.

[The prepared statement of Ms. Pingree follows:]

PREPARED STATEMENT OF THE HONORABLE CHELLIE PINGREE

Chairman Chabot, Ranking Member Nadler and members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss the Lobbying Accountability and Transparency Act of 2006.

The House of Representatives is about to consider a difficult matter. Unlike most issues that come before you, the issue of lobbying and ethics reform directly impacts the lives of members of Congress and their staff. I understand how difficult this can be having served as a State Senator in Maine for a number of years.

Nevertheless, I am here today to give my candid view of the Lobbying Accountability and Transparency Act and the ways in which I think it can be improved.

I do not need to remind the members of this committee of the circumstances surrounding this debate: one member of Congress recently sentenced to more than eight years in prison; a recent guilty plea from a top aide to the former Majority Leader, who himself has been indicted in a different matter; a lobbyist sentenced to almost six years in prison and awaiting further sentencing; and at least six members of Congress currently being investigated by the Department of Justice.

It should be no surprise that the goal of this legislation is nothing less than restoring the public's confidence in this institution. Thanks to the misconduct of perhaps a handful of members of Congress and at least one lobbyist, most Americans consider corruption to be one of the major problems facing our country—in league with the war in Iraq.

Let me repeat that: many Americans believe that corruption in Congress is as much of a problem as the war in Iraq.

Since this is all public knowledge, I am surprised by the response of some members in both the House and the Senate to this situation. Unlike these legislators, I am not concerned that Congress is overreacting by passing lobbying and ethics reform legislation. But rather, I am concerned that Congress' credibility problem is going to continue beyond this election year.

With this in mind, let me share with you some of the policy positions Common Cause has advanced in lobbying and ethics reform as you consider the legislation we have come here to discuss.

According to a recent article, the House Committee on Standards of Official Conduct (Ethics Committee) is once again stalled. After spending all of last year in a

state of suspended animation, the Ethics Committee appears deadlocked again, unable to agree on which cases to pursue.

I think I speak for the entire reform community when I say: the House Ethics Committee, despite the hard work of some of its members—notably former-Chairman Joel Hefley—has failed to enforce the rules of conduct for members of this chamber. This is the biggest problem you face, and it needs to be fixed.

The Lobbying Accountability and Transparency Act will have little effect on the problem of enforcement.

I propose that this committee consider the reasonable and widely utilized model adopted by many state legislatures to deal with this problem. That is: inject some level of independence into the process of investigating possible ethics violations by members of this body.

The simple truth is that the public sees the House and Senate as protecting their own. The lack of action by both the House and the Senate involving the widely publicized misconduct of several members and staff is simply inexcusable. I believe it is the single biggest reason that the public approval ratings for Congress are as low as they are.

Common Cause supports the legislation introduced in the Senate by Senator Barack Obama, which would create an independent ethics enforcement commission modeled on commissions that already exist in a number of states.

Recently, several members of the Tennessee state legislature were targeted in a federal corruption sting. The Governor called a special session, and the legislature created an independent ethics commission in response to the scandal. According to the National Conference of State Legislatures, more than 30 states have some form of independent ethics commission with jurisdiction over the legislature.

Some have argued that an independent ethics enforcement commission in Congress is unconstitutional. Many legal scholars, however, believe that it is constitutional. You will find included with my written testimony a memorandum written by former general counsel to the House of Representatives Stan Brand, which sets forth the arguments as to why an independent ethics enforcement commission is indeed consistent with constitutional requirements.

Unless this Congress deals with the failed system for enforcing its rules by seeing to it that its own members are held accountable, I suspect that it will not be long before we are back here talking about this same problem.

I would like to also briefly discuss Section 303 of the Lobbying Accountability and Transparency Act, which would prohibit registered lobbyists on corporate flights.

I think this legislation misses the mark on the problem of registered lobbyists traveling around with members on chartered company jets. The lobbyists are not the problem, the jets are.

Here again, the public perception is critical. Most Americans never have and never will fly on a chartered jet, much less a fancy corporate jet complete with wet bar and leather couches. So when members of Congress constantly fly around on corporate jets and pay only the cost of a commercial ticket, it contributes to the corrosive public perception that members of Congress are more like the fat cats of Wall Street than they are like the rest of us.

Besides, even if lobbyists are not on the flight, someone from the company, like the C.E.O., will be on board to discuss the company's legislative agenda in their place.

Members who travel on private corporate jets are being subsidized by the companies that own those jets. The difference in price between a first class commercial ticket and the price of chartering a plane is enormous, and has the appearance of a gift to the member. This legislation would do nothing to change that.

A recent *Washington Post* editorial about the lobby reform bill recently passed by the Senate includes this passage:

If the Senate bill is disappointing, though, the House is poised to do even worse. A proposal unveiled last month by the Republican leadership would do nothing to restrict gifts from lobbyists. It would merely impose a temporary moratorium on privately funded travel while the ethics committee studies what to do—or, more cynically, while members wait for the storm over Jack Abramoff to blow over. It suffers from the same shortcomings as the Senate measure in terms of enforcement and corporate jets.

I have touched on just two provisions in the legislation that is before this committee today. But there are many other areas where this bill fails to make the necessary changes that are needed if it is going to assure the American people that when it comes to dealing with corruption, this Congress “gets it.”

Again, I appreciate the opportunity to appear before the committee today and, of course, will answer any of your questions about this issue.

Thank you.

## ATTACHMENTS

## Appendix A

**DATE:** February 7, 2006

**TO:** Legal Counsel / Lobbying Reform LA

**FROM:** Common Cause  
Written by Stanley M. Brand, Esq.<sup>1</sup>, Brand Law Group

**RE:** Power of the House and Senate to Create Independent Ethics Commission

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You have asked whether the power conferred upon the House (and Senate) to punish its Members for disorderly behavior, U.S. Const., Art. I, § 5, cl.2, prevents the House from delegating certain responsibilities to an independent body outside the House to investigate ethical conduct of Members and make recommendations regarding punishment for breaches thereof to the full House for disposition. While there is no judicial authority directly deciding this question, in my view there is no textual constitutional impediment to doing so and analysis of jurisprudence interpreting collateral matters lends support to the conclusion that the House may enlist the aid of an outside independent body when exercising its powers under Art. I, § 5, cl. 2.

The provision at issue provides, in pertinent part, that “[e]ach House may...punish its Members for disorderly behavior, and, with the concurrence of two thirds, expel a Member.” The first point to note is that the power is phrased in discretionary (“may”) not mandatory terms. This contrasts with the other provisions respecting internal matters placed within the power of the House, such as the power to judge the elections, returns and qualifications of its Members, U.S. Const., § 5, cl.1, or the constitutional protection for speech or debate, *id.*, § 6, cl.1, or the disqualification clause of Art. I, § 6, cl.2, all of which specify that those powers “shall “ be exercised. This is not a distinction without significance given the considerable judicial gloss which

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<sup>1</sup> Mr. Brand served as General Counsel to the House of Representatives from 1976 to 1984. He was counsel of record on behalf of Speaker O’Neill as *amicus curiae* and argued on his behalf in *United States v. Helstoski*, 442 U.S. 477 (1979) and *Helstoski v. Meanor*, 442 U.S. 500 (1979), cases involving the self-disciplinary powers of Congress. He was also counsel in *INS v. Chadha*, 462 U.S. 919 (1983).

establishes that generally the use of the word “may” is a term of permission and the use of the word “shall” is a term limiting discretion. Black’s Law Dictionary 883 (5<sup>th</sup> ed. 1979).

Beyond the textual analysis, there is a heavy presumption that the means Congress chooses to implement its constitutional powers are legitimate unless they directly impinge upon the express powers of a coordinate branch, *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)(Congress’ statutory disposition of presidential papers) or implicate the rights of persons outside the legislative branch upon whom its enactments or actions impinge. *United States v. Watkins*, 354 U.S. 178, 216 (1957)(“By making the Federal judiciary the affirmative agency for enforcing the authority that underlies the congressional power to punish for contempt, Congress necessarily brings into play the specific provisions of the Constitution relating to prosecution of offenses...”).

The delegation of investigative powers respecting Members to an outside body impinges on neither of these interests; its compass is purely internal. The Supreme Court has concluded that the stringent constitutional requirements for law making -- bicameralism and presentment<sup>2</sup> -- do not apply to matters that are wholly internal to the Houses of Congress. *INS v. Chadha*, 462 U.S. 919, 955 n. 21 (1983)(noting that each House has power to act alone in determining certain internal matters).

The House’s judgment as to the appropriate procedures for exercising its self-disciplinary power is not cabined by the requirements imposed on law making, or on the contempt procedures established to enforce its subpoenas because it only affects Members of the House. And in this regard, the Courts have uniformly refused to interfere in or review the exercise of the self-disciplinary power. *Williams v. Bush*, Memorandum Opinion (unpublished)(court will not enjoin Senate proceeding to expel Member based on a claim of threatened violation of his constitutional rights), Civ. Action No. 81-2839 (D.D.C. 1982).

There is one respect only in which the House’s power to discipline its Members is limited by the Constitution, and that is the requirement to obtain

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<sup>2</sup> U.S. Const. art. I, § 7, cl.3 requires that all legislation be presented to the President for his approval, or veto and Art. I, §§ 1, 7 requires that the concurrence of a majority of both Houses of Congress.

a two-thirds supermajority to expel a Member. This power was construed by the Supreme Court in *Powell v. McCormack*, 395 U.S. 486 (1969). There the Court was faced with the claim that Representative Adam Clayton Powell has presented himself as duly elected from the 19<sup>th</sup> Congressional District of New York but was excluded by the House based on findings of impropriety despite the fact that he possessed the standing qualifications for office specified in the Constitution. Powell challenged his exclusion asserting that since the House determined he possessed the standing qualifications, it has no choice but to seat him and then if it determined he had breached House rules, to expel him by a two-thirds vote. The Court agreed and held that the House exceeded its power. It did so after canvassing the English and colonial antecedents to the qualifications clause and concluding that the Framers intended to give the greatest deference to the will of the people in electing their representatives and that permitting the legislature to, in affect, add to the standing qualifications by allowing the House to exclude a Member for any reason other than those specified in the Constitution would undermine the electorate's choice.

The analysis of the Court in *Powell* underscores the discretion which the House has to utilize any procedures it deems appropriate in disciplining its Members save in those instances where it seeks to expel – because when it imposes punishments short of expulsion, whether that be censure, reprimand or fine, it does not deprive the electorate of its free choice.

In interpreting the powers of the House in this area, the Courts are likely to accord substantial deference to its choice of the means to implement its Art. I, § 5, cl.1 self-disciplinary power particularly if that legislative judgment is supported by a finding that the self-disciplinary process is not functioning in an orderly and efficient manner. By now, it is apparent to most observers and even Members themselves that the ethics process is in dire need of repair. The Supreme Court itself has remarked on the problems inherent in exercise of the self-disciplinary power in stating that “Congress is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process.” *United States v. Brewster*, 408 U.S. 501, 518 (1972). The Court noted that the process of disciplining a Member in the Congress is not without “countervailing risks of abuse since it is not surrounded with the panoply of protective shields that are present in a criminal case.” *Id.* And perhaps more relevant to the current ethical vacuum in the House, the Court noted that Congress “has shown little inclination to exert itself in this area.” *Id.*, at 519.

It is this last consideration that the Court could find persuasive in deferring to a mechanism chosen by the House to diminish the arbitrariness recognized by the Court in *Brewster*. Surely, a system designed to vest the initial judgment of whether and under what objective standards to review allegations of Member misconduct in an independent Commission would address many of the concerns articulated by the Court in *Brewster*.

Finally, it is difficult to conceive of grounds upon which the Court would void a delegation of investigative authority to an outside commission when the Congress has already vested broad jurisdiction in the Department of Justice over the investigation and prosecution of Members for a vast array of criminal offenses. *See e.g.*, 18 U.S.C. § 201 (Members of Congress within definition of public officials prosecutable under statute for bribery). The Supreme Court laid to rest any suggestion that Members of Congress were outside the reach of the criminal laws when it held that the immunity from arrest clause<sup>3</sup> (Members “shall in all cases, except Treason, Felony and Breach of the Peace be privileged from Arrest during their attendance at the Session of their respective Houses...”) of the Constitution did not shield Members from prosecution for subornation of perjury. In *Williamson v. United States*, 207 U.S. 425 (1908), the Court rejected a claim made by a Member convicted of subornation of perjury in proceedings for the purchase of public lands that he could not be arrested, convicted or imprisoned for any crime other than treason, felony or breach of the peace.

In conclusion, nothing in the text of the Constitution or the jurisprudence interpreting the separation of powers embodied therein offers any basis for asserting that Congress lacks the power to structure its self-disciplinary as it sees fit, including the creation of an outside independent body to investigate ethical breaches and recommend appropriate discipline to the House.

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<sup>3</sup> U.S. Const., art. I, § 6, cl.1.

## Appendix B

An independent ethics commission for Congress is constitutional and can work. That was the consensus of a group of experts who discussed the issue on Monday, Jan. 23 at the National Press Club in Washington.

The panel, convened by Common Cause, was moderated by Common Cause President and CEO **Chellie Pingree**. Speakers included: **Norman Ornstein**, resident scholar and congressional expert at the American Enterprise Institute; **Stanley Brand**, founding partner, Brand Law Groups, and a former counsel to the U.S. House of Representatives, and **Dennis Thompson**, Alfred North Whitehead Professor of Political Philosophy at Harvard University's Kennedy School of Government and founding director of the Edmond J. Safra Foundation Center for Ethics. Providing a real-world perspective were the executive directors of two successful state ethics commissions – **The Hon. Anthony Wilhoit**, Kentucky Legislative Ethics Commission, and **Bonnie Williams**, State of Florida Commission on Ethics.

Pingree stated that Common Cause had lobbied for an independent ethics commission for years as a way to ensure that members are held accountable for their conduct. The need for a commission is even more pronounced at a time when Congress is under the cloud of multiple scandals, and where ethics rules are “routinely flouted.” This is an idea whose time has come,” she said. “New rules and new prohibitions around lobbying and ethics won't mean anything without credible enforcement. A number of states have already created independent ethics commissions because of the inherent problems of peer review for elected officials. Washington should follow their lead.”

### Why An Ethics Commission is Needed Now

Norman Ornstein said that one would have to go back to the “gilded age” of the 1880s, when “robber barons brought large sums of money” to Washington to advance their agendas to find an era of ethical misconduct that best categorizes Congress's current ethical malaise. The robber barons' money “sloshing around Washington sounds an awful lot like the K Street Project with amounts adjusted for inflation,” Ornstein said.

The problem, he added, was that “while Congress has a constitutional responsibility to police itself,” congressional ethics panels “are damned if they do and damned if they don't”, struggling against accusations that they are waging political vendettas if they pursue ethics investigations or that they are declining to do any enforcement that they are protecting the “old boy network” of incumbents.

In the 1990s, he noted, “the ethics process was used as a weapon. Some charges [against Members] were real, and some were trumped up. But now, we've had the other extreme, an informal truce and the banning of outside complaints.”



Ornstein concluded that there has to be “a better way” to strike a balance with a process that brings in outsiders – perhaps formers members and former staffers with demonstrated integrity, with the power to investigate and issues recommendations to the House and Senate.

#### **Are Ethics Commissions Constitutional?**

Stan Brand said that he now was convinced that an independent ethics commission for Congress could pass constitutional muster. Decades ago, during the Koreagate scandal, Brand said, Congress hired an independent counsel, Leon Jaworski, convened 16 public hearings, conducted more than 700 interviews, and “the House voted disciplinary sanctions on three sitting members.”

But in 2006, there is no functioning process for oversight of members, Brand said, who added that the Justice Department is already beginning to fill that vacuum.

“Congress can constitutionally delegate to an outside body the initial steps for investigating [members and staff] and making recommendations to Congress,” Brand said. Noting that the states are “many times ahead of the federal government” in ethics and other reforms, he stressed that an independent ethics commission would be constitutional because the House and Senate would retain the final authority to ratify the recommendations and findings of the commission and to approve them.

Professor Thompson agreed, adding that the notion that “self-regulation is wrong on principle. Nobody should be the judge of his own cause.” Thompson noted that even members with the best intentions would find themselves in a conflict of interest because they would be not only thinking about the impact of their recommendations of their colleagues, but also its political ramifications for their parties “with an eye on the [next] elections.”

Thompson agreed that final decisions ought to still be left to the House and Senate, but added that the concept of an independent ethics commission “ought to be welcomed” by Congress. “Nobody wants to serve on ethics committees,” Thompson said. He added that an independent commission would actually “reduce incentives for [Members or others] to file false charges” because an independent body would have the power to “say this charge is frivolous.”

#### **Can Ethics Commissions Be Effective?**

Both the Florida and Kentucky ethics commissions were created because of legislative scandals. In both cases, legislators approached the process with wariness and suspicion. But in both states, the commissions have worked well and legislators have grown to trust them.

Kentucky has a nine-member ethics board; four members are named by the Speaker of the House, and four by the President of the Senate. The ninth member must be chosen by the combined leadership of the House and Senate. At least three members must be from the minority party. Commissioners must be nonpartisan, without a history of fundraising for

legislators or the governor, Wilhoit said. He added that the political leaders have been “very careful about who they appoint, and it’s worked very well.”

Commissioners earn \$100 per diem and rely on a small enforcement counsel staff to investigate complaints. Citizens may file complaints, as may the enforcement counsel, but the Commission as a body cannot file a complaint, Wilhoit said. The commission oversees the ethical conduct of legislators, lobbyists and the employers of lobbyists.

“Initially there was bad blood between the Commission and the legislators,” Wilhoit said, but added that bad feelings dissipated as the Commission “worked with legislators” to help them avoid “ethical lapses.” Since there are penalties for filing frivolous complaints, Wilhoit said that the actual number of complaints filed against legislators has actually declined in the eight years the commission has operated.

Florida has had an ethics commission since 1974, said Williams. The Governor appoints five members, the House and Senate leaders appoint the rest, and no more than three can be from the same political party. Generally, Williams said, the Commission operates with a one-vote majority for the party in power. “These are political appointees,” she concedes, but adds that unlike the members of the Federal Election Commission, “our members see it as a kind of calling.”

Commissioners strive to be nonpartisan and have jurisdiction over all offices and employees, both state and local, including state legislators, but excluding judges. The Commission has the power to investigate complaints, and make its determinations, but leaves “final action” on a complaint to the legislature.

The Commission investigates only after a complaint is filed. Sworn complaints may be filed by members of the public.

Williams stressed that investigators are not out to play “gotcha.” “Investigators look to find the truth. There is no prosecutorial bias and we are known for our fairness.”

### **Next Steps**

The panel is part of an ongoing process by Common Cause to come up with a workable solution to the ethics crisis facing Congress. While individual panelists disagreed on some of the nuts and bolts on what an independent commission would look like, they all agreed that ethics enforcement was a key to any reform package, and that members of Congress should be assisted in this task by some type of independent body.

No system may be perfect, they agreed. But as Harvard’s Thompson observed: “Anything would be better than the current system.”

Appendix C

**Campaign Legal Center • Common Cause • Democracy 21  
League of Women Voters • Public Citizen • U.S. PIRG**

March 29, 2006

The United States Senate failed the American people today.

The Senate failed to pass effective lobbying and ethics reform legislation, and failed to address the biggest lobbying and ethics problems facing the Senate.

As Washington lobbyist Jack Abramoff was being sentenced today in one of the criminal cases brought against him, a majority of Senators were choosing to ignore deep public concerns about the corruption and lobbying scandals in Washington that Abramoff symbolizes.

Our organizations issued six benchmarks for lobbying and ethics reform on January 23, 2006. Enclosed with this statement is our report card on the Senate's performance on these six benchmarks. It is not a report card that any child would like to take home to their parents.

A majority of Senators, for example, voted against the establishment of an Office of Public Integrity for the Senate. The Office was proposed to address the biggest ethics problem facing the institution, the absence of a publicly credible and publicly acceptable system for enforcing the Senate ethics rules.

The defense of the current system by Senate Ethics Committee Chairman George Voinovich (R-OH) came down to the public equivalent of "Trust us. We're doing a good job. We just can't tell you what we are doing."

That is not good enough for the American people.

Our organizations will continue to work for the establishment of an independent, impartial Office of Public Integrity in the Senate to help ensure that the Senate ethics rules are enforced.

The Senate lobbying bill also fails to provide any new restrictions on privately-funded travel for Members. The bill also fails to stop Members from treating corporate planes as their own private air force. The bill also fails to stop lobbyists from financing lavish parties for Members. These are all areas of great abuse that will now continue unabated.

The Senate lobbying bill also fails to require disclosure of numerous ways in which lobbyists provide financial help for Members, such as soliciting and bundling campaign contributions for Members, paying for Members' parties, making contributions to foundations and other entities controlled by Members and paying for Members' events, including conferences and retreats.

We recognize that the legislation does make improvements in a number of areas, including a ban of gifts from lobbyists, quarterly reports by lobbyists that are searchable on the Internet, disclosure for the first time of spending on grassroots lobbying activities, and disclosure for the first time of fundraisers held by lobbyists for Members and other federal candidates.

These positive features of the legislation, however, do not compensate for the greater failures of the Senate to address its most important lobbying and ethics problems.

We greatly appreciate the outstanding leadership provided for strong and effective lobbying and ethics reforms during this effort by Senators Susan Collins (R-ME) and Joe Lieberman (D-CT), the Chairman and Ranking Democrat on the Homeland Security and Governmental Affairs Committee, and by Senators Barack Obama (D-IL), John McCain (R-AZ) and Russell Feingold (D-WI).

We very much regret that a majority of Senators did not support their efforts; if they had we would be looking at a very different result.

Instead the Senate has chosen to reject essential lobbying and ethics reforms.

The American people will not be fooled.

## Senate Scorecard on Six Benchmarks for Lobbying and Ethics Reforms Issued By Reform Groups on January 23, 2006

### 1. Break the nexus between lobbyists, money and lawmakers.

Cap contributions from lobbyists and lobbying firm PACs to federal candidates at \$200 per election and to national parties and leadership PACs at \$500 per election cycle.

Prohibit lobbyists and lobbying firms from soliciting, arranging or delivering contributions and from serving as officials on candidate campaign committees and leadership PACs.

Prohibit lobbyists, lobbying firms and lobbying organizations from paying or arranging payments for events “honoring” members of Congress and political parties, such as parties at national conventions, and from contributing or arranging contributions to entities established or controlled by members of Congress, such as foundations.

*The Senate bill does nothing to break the lobbyist-money-lawmaker nexus. It does not impose any new limits on campaign contributions from lobbyists or fundraising done by lobbyists for Members, or any new limits on the various ways lobbyists or their employers provide financial benefits to Members, such as paying for parties to “honor” Members, or for Members’ retreats, conferences and other events. GRADE: F*

### 2. Prevent private interests from financing trips and from subsidizing travel for members of Congress and staff, and executive branch officials and federal judges.

Corporations and others should be prohibited from making privately-owned planes available for Members to travel at the cost of a first class air ticket rather than the cost of a chartered plane.

*The Senate bill does nothing on this. It adds no new restrictions on privately-funded trips for Members and other federal officials and does not require Members to pay fair market value, or charter rates, for the use of corporate planes. GRADE: F*

### 3. Ban gifts to members of Congress and staff.

The gift ban should close the existing loophole in the gift rules that allow lobbyists and others to pay for parties held to “honor” or “recognize” specific Members, such as the lavish parties held at the national party conventions.

*The Senate bill bans gifts from lobbyists, including meals, but the ban does not apply to the organizations that employ the lobbyists and does not prevent lobbyists from paying for lavish parties to “honor” Members. GRADE: C*

**4. Oversee and enforce ethics rules and lobbying laws through an independent congressional Office of Public Integrity and increase penalties for violations.**

**Establish an independent Office of Public Integrity in Congress and provide sufficient resources for the Office to effectively carry out its responsibilities.**

*The proposal to establish an Office of Public Integrity sponsored by Senators Collins, Lieberman, Obama and McCain was defeated on the Senate floor. The legislation does nothing to improve enforcement of congressional ethics rules. GRADE: F*

**5. Slow the revolving door.**

**Prohibit members of Congress and senior executive branch officials from making lobbying contacts or conducting lobbying activities for compensation in either branch for two years after leaving their positions.**

**Prohibit senior congressional staff from making lobbying contacts for compensation with their former offices or committees for two years after leaving their positions.**

*The bill extends the current revolving door ban on direct lobbying of Congress from one to two years, but does not broaden the scope of the ban for Members to include "lobbying activities" – organizing and directing a lobbying campaign. GRADE: C*

**6. Place sunshine on lobbying activities and financial disclosure reports.**

**Require lobbying reports and Members' financial disclosure reports to be filed in an electronic format and made fully searchable on the Internet; lobbying reports to be filed on a quarterly basis; lobbyists and lobbying firms to disclose grassroots lobbying activities; lobbyists to file a list of the Members' offices and congressional committees they lobbied during the quarter; and reports to be filed disclosing the financial backers of stealth lobbying coalitions.**

*The bill improves disclosure by requiring quarterly reporting by lobbyists, and requiring the creation of an electronic database on the Internet. The bill requires, for the first time, disclosure of grassroots lobbying requirements and improves disclosure by stealth lobbying coalitions. The bill requires lobbyists to disclose on an annual basis the contributions they make to federal candidates, leadership PACs and political parties, and to disclose the fundraising events they hold for Members. The bill does not require disclosure, however, of numerous other ways that lobbyists provide financial benefits to Members, such as paying for parties to "honor" Members, or contributions to foundations or other entities controlled by Members and does not include any requirement to list the offices contacted by a lobbyist. GRADE: B*

Mr. CHABOT. Thank you.

And, Professor Smith, you're our next witness. You've already been introduced, and I already said nice things about you. You weren't here, however, when we swore the panel in, so if you wouldn't mind standing and raising your right hand.

[Witness sworn.]

Mr. CHABOT. The witness has indicated in the affirmative.

I welcome you here, Professor Smith. Have you testified before Committees before

Mr. SMITH. I have.

Mr. CHABOT. So you're probably familiar with the 5-minute rule then, and that the clock will be on. Yellow light comes on when you got 1 minute remaining, and a red light means 5 minutes are expired. So you are recognized for 5 minutes.

**TESTIMONY OF THE HONORABLE BRADLEY A. SMITH, PROFESSOR OF LAW, CAPITAL UNIVERSITY LAW SCHOOL, ON BEHALF OF CENTER FOR COMPETITIVE POLITICS**

Mr. SMITH. Very good. Thank you, Mr. Chairman, Ranking Member Nadler and Members of the Committee. I apologize for arriving late. We had a delay in our flight out of Columbus due to mandatory rest time for the crew. In any case, I'm pleased to be here and back in this beautiful room.

I do believe that what Members of Congress do is an honorable profession, and I think it's important that as policy is made we begin with the understanding and the recognition that perception is not necessarily reality, and just as a good guide in the desert doesn't take people to the mirage, he takes them to where there's actually water, good policymaking begins with focusing on reality and not losing track of reality for perception.

We have a number of scandals that have been wracking this city. They're loosely dubbed "the Abramoff scandals." They cover a number of things which are unrelated to Abramoff and some that are related to Abramoff, the common basis being that they're scandal. The last I looked, all the people at the heart of these scandals have in fact been sentenced or under investigation. So the fact that people broke the law and are being punished for doing it, does not suggest, generally speaking, that a vast new web of law is necessary. And for that reason, I think 4975 deserves credit as a bill that seeks to improve the system without panicking, without taking sort of panicky measures or infringing on the rights of citizens to petition their Government for redress, an important constitutional right.

It is, for example, easy to complain about Members flying on corporate aircraft, including even rotten, little crummy turboprops. But it is easy to say that travel like this should be banned. That's an easy thing to do. But making it more difficult for Members to visit their districts, making it more difficult for Members to attend multiple functions in sprawling rural districts, and placing added demands on a Member's time, something that we are repeatedly told, I think correctly, is the most valuable commodity that Members have. It's hard to explain, if we want to think about what is really substantively good policymaking.

So along those lines, I think that this bill wisely takes an approach of improving the disclosure system, not only through more frequent disclosure, but through a disclosure system that citizens can use more frequently.

The key to disclosure is that citizens should have information about their Government. It is not necessary for the Government to collect information about the citizens. For that reason I think that 4975 also wisely resists requests that have been made to limit grass roots lobbying, which is efforts to get citizens involved in contacting Members of Congress, and that grass roots lobbying is really exactly the kind of thing we ought to be encouraging. It doesn't really matter in the end why a citizen decides to contact a Member of Congress, the point is, a citizen has to decide that the issue is important to him or her, and take the step to actually call or contact the Member. And in that respect, grass roots lobbying therefore breaks the nexus between lobbyists and between Members of Congress that makes some people concerned that certain interests get special favors.

So I think that 4975 has taken the right approach there, and I urge the Committee to reject any attempt to go beyond that. I think it's a good bill that's balanced, that makes the improvements that are necessary, and that will help to make sure that the types of scandals that have gone on and that are already in fact generally being punished and investigated, are discovered more quickly and investigated more quickly.

Thank you very much. I look forward to any questions from the Committee.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF THE HONORABLE BRADLEY A. SMITH

Mr. Chairman and members of the Committee:

Thank you for inviting me here to testify today on the important issue of lobbying reform. By way of introduction, I am currently Professor of Law at Capital University in Columbus, Ohio; Senior Advisor to the Center for Competitive Politics, a non-profit 501(c)(3) organization formed to educate the public on the political process and the benefits of political competition; and Of Counsel to the law firm of Vorys, Sater, Seymour & Pease. From 2000 to 2005 I served as Commissioner on the Federal Election Commission, including a term as Chairman in 2004. In this latter capacity, I was privileged to travel and speak throughout the country with ordinary Americans concerned about corruption in government and the perceived remoteness of Washington to their everyday concerns. Although Vorys, Sater, Seymour and Pease represents many clients before the government, I am not a registered lobbyist. I address the Committee today on my own behalf and that of the Center for Competitive Politics, and not the law firm of Vorys, Sater, Seymour & Pease or Capital University.

I want to begin by congratulating the drafters of H.R. 4975 for producing a carefully targeted bill that aims to restore public trust, and prevent lobbying abuses, while minimizing the burden on the vast majority of lobbyists who are honest, dedicated individuals helping citizens to exercise their fundamental Constitutional Rights of Free Speech and the Right to Petition the Government for Redress of Grievances. These are among the most important rights guaranteed by our Constitution. Yet all too often in the past, we have allowed isolated incidents of improper behavior—scandal—to stampede us to hastily conceived, ill-considered measures that restrict these important Constitutional rights while doing little to address the abuses that allegedly justify the restrictions. All of us here know that lobbyists can provide a valuable function, providing members with useful, important information on public opinion, and also with the information needed to craft wise, beneficial, effective legislation. We know that abuses exist, but that they are the exception, not the rule. Thus, it is important to pass serious, balanced legislation, that addresses



specific and real problems, rather than to engage in populist grandstanding. I think that H.R. 4975 largely achieves that goal.

In particular, H.R. 4975 wisely avoids restrictions on efforts to encourage citizens to be in contact with members of Congress—citizen political participation sometimes referred to as “grassroots lobbying.”—that is vital to reducing the types of scandals at issue in the Abramoff and Cunningham cases. The attached Policy Primer, written by myself and Stephen Hoersting for the Center for Competitive Politics, lays out general principles that we hope will guide Congress in this area. In particular, we focus on the important role of disclosure in preventing abuses of the right to petition the government. H.R. 4975 largely adopts that approach. It is important to remember that the purpose of disclosure is to provide information to citizens about their government—not to provide government with information about the activities of its citizens, which raises serious First Amendment issues and may discourage contact between ordinary citizens and congress.

Thus, in my view H.R. 4975, by carefully tailoring added disclosure, accompanied by added penalties for violations, to the type of activity that created has created the current situation, has hit the mark. H.R. 4975 is particularly beneficial in requiring improvements to disclosure that make the information about government more readily available and useful for ordinary citizens around the country.

Thank you.

## ATTACHMENT



## POLICY PRIMER: Grassroots Lobbying Proposals Seem Not to Further Congress' Interest in Correcting Lobbying Abuses

By

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and  
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### *Abstract*

Of the several policy proposals circulating Capitol Hill to correct lobbying abuses, strengthen the relative voice of citizens, and add accountability to the earmarking process, one policy prescription seems oddly out of place. Proposals for so-called “grassroots lobbying disclosure” do nothing either to sever the link between lobbyist cash and lawmakers’ pecuniary interests, or to strengthen the relative voice of citizens. Grassroots lobbying—encouraging or stimulating the general public to contact lawmakers about issues of general concern—is citizen-to-citizen communication that fosters citizen-to-lawmaker communication. It correspondingly weakens the relative strength of lobbyist-to-lawmaker communications, in furtherance of Congress’ objective in seeking lobbying reform.

Efforts to limit grassroots lobbying, require disclosure of donors, or compel lobbyists to register with the government to assist groups in contacting fellow citizens, strips donors and consultants of constitutionally guaranteed anonymity, and would deprive organizations championing unpopular causes of skilled representation. This anonymity, long recognized and protected by the Supreme Court, fosters political association, guards against unwarranted invasions of privacy, and protects the citizens who fund or assist groups such as Progress for America or People for the American Way from calumny, obloquy, and possible retribution—including retribution by public officials.

Disclosure is not always a good thing. The rationale for requiring disclosure of contributions to candidate campaigns, and disclosure of direct lobbying activity, is the same for protecting anonymity in the discussion of policy issues: to protect citizens from retribution by abusive officeholders. History demonstrates that while such retribution may be uncommon, it is real. Indeed, even today we read of a Texas prosecutor who has subpoenaed donor records for a group after the group ran grassroots lobbying ads that took a position contrary to that of the prosecutor.

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The abuse of non-profit entities by a handful of lobbyists to host golf trips or entertain lawmakers with donations from lobbyist clients can be cured in other ways, without enacting disclosure measures too attenuated to the problem Congress seeks to correct, and that could damage or diminish America's system of information exchange for years to come.

### **Introduction**

Senator Dianne Feinstein recently captured public sentiment when she said that there should “be a wall” between registered lobbyists and the pecuniary interests of Members of Congress.<sup>1</sup> The problem is not the technical and professional information lobbyists provide lawmakers, nor is it information on the opinions of the American people that honorable and ethical lobbyists provide lawmakers everyday. Indeed, it is the relative voice of the average citizen that the Senator wants to strengthen. This is why Senator Feinstein and Senate Rules Committee Chairman Trent Lott have proposed bringing sunlight to the earmarking process and other measures that would weaken the link between lobbyist cash and lawmaker policy.<sup>2</sup> Senators Lott and Feinstein are not alone. Other proposals include gift bans, travel restrictions, other types of earmark reform, revoking floor privileges of former lawmakers, slowing the “revolving door,” and limiting lobbyist donations to charities affiliated with Members, to name a few. What all of these proposals seek to do is to limit the direct pecuniary exchange between lobbyists and lawmakers.

Circulating among these provisions, however, is another recommendation that is oddly out of place. It has little or nothing to do with reducing the coziness between lobbyists and lawmakers. These are the so-called “grassroots lobbying disclosure” provisions now under consideration in various quarters, which require organizations and

associations to disclose in detail their efforts to run issue-oriented advertising aimed at fellow citizens, and in some cases, to identify donors.

In proposals to disclose grassroots lobbying, we are witnessing two canons of political law on an apparent collision course: that government corruption is cured by disclosure; and that the right of individuals to speak and associate freely depends upon their ability to do so anonymously. But the conflict is a false one—a byproduct of fuzzy thinking—because both canons achieve the same purpose when each is applied to its proper context. Both protect citizens from abusive officeholders. Disclosure regimes for campaign contributions protect citizens from officeholders who have free will and can confer benefits on large contributors (and pain on opponents) by passing future legislation. Disclosure regimes for true lobbying activities, that is, consultants engaged in face-to-face meetings with officeholders, protects citizens in a similar manner.

Regimes that protect the right to speak anonymously with fellow citizens about issues, even issues of official action or pending legislation, also protect citizens from abusive officeholders by reducing an officeholder's ability to visit retribution on those who would oppose his policy preferences. Citizens learn much about the relative merits of a candidate by knowing who supports him. They learn about the legislative process by knowing who is paying consultants to meet with officeholders directly. But citizens learn little about the relative merits of a clearly presented policy issue by knowing who supports it. Grassroots lobbying registration and disclosure regimes that would provide honest citizens and abusive officeholders alike with knowledge of which groups and individuals support which issues, including the timing and intensity of that support, impose too high a cost for too little benefit in a constitutional democracy.

### **The Value of Grassroots Lobbying**

Far from being part of the current problem, grassroots lobbying is part of the solution to restoring the people's faith in Congress. Polls show that Americans are fed up with what is increasingly seen as a corrupt Washington way of business. Ninety percent of Americans favor banning lobbyists from giving members of Congress anything of value. Two-thirds would ban lobbyists from making campaign contributions. More than half favor making it illegal for lobbyists to organize fundraisers.<sup>3</sup> Seventy six percent believe that the White House should provide a list of all meetings White House officials have had with lobbyist Jack Abramoff.<sup>4</sup> But there is no evidence whatsoever that the public views grassroots lobbying activity as a problem.

Indeed, even the name grassroots "lobbying" (as opposed to "activism," "communication," or other term) is in some sense a misnomer. "Grassroots lobbying" is merely the effort to encourage average citizens to contact their representatives about issues of public concern. It is not "lobbying" at all, as that phrase is normally used outside the beltway, meaning paid, full-time advocates of special interests meeting in person with members of Congress away from the public eye. What the public wants is what Senator Feinstein and others have recognized—they want to break the direct links between lobbyists and legislators, thus enhancing the voice and influence of ordinary citizens. They do not want restrictions on their own efforts to contact members of Congress, or on the information they receive about Congress.

Contact between ordinary citizens and members of Congress, which is what "grassroots lobbying" seeks to bring about, is the antithesis of the "lobbying" at the heart of the Abramoff scandals. It is ordinary citizens expressing themselves. That they are

engaged or “stimulated” to do so by “grassroots lobbying activities” is irrelevant. These are still individual citizens motivated to express themselves to members of Congress.

Regulation that would hamper efforts to inform and motivate citizens to contact Congress will increase the power of professional lobbyists inside the beltway. Regardless of what lobbying reform is passed, not even the most naïve believe it will mean the end of the professional, inside-the-beltway lobbyist. Thus, grassroots voices remain a critical counterforce to lobbying abuse. Recently one member of Congress expressed his concern that Jack Abramoff’s Indian Tribal clients were used to contact Christian Coalition members, “to stir up opposition to a gambling bill.”<sup>5</sup> But it cannot be denied that the individuals who responded to that grassroots lobbying were ordinary citizens who were, in fact, opposed to a gambling bill. They are precisely the type of people that Congress ought to hear from, rather than or in addition to inside-the-beltway lobbyists. Regardless of how they learned about the issue, they had to make the decision that the issue was important to them, and take the time to call Congress.

Disclosure of the financing, planning, or timing of grassroots lobbying activities adds little, and will often be harmful, leading to exactly the type of favoritism and/or negative pressure that the public abhors. No member of Congress even remotely in touch with his district will be unaware that a sudden volume of calls coming from his or her district is possibly, if not probably, part of an orchestrated campaign to generate public support. But because the callers themselves are real, there is little to be gained by knowing who is funding the underlying information campaign that has caused these constituents to contact their Members. The constituent’s views are what they are; the link between lobbyist and Congress is broken by the intercession of the citizen herself.

Disclosure, however, comes with a price. The most obvious is that it re-establishes the link between the lobbyist and the officeholder. When the source behind the grassroots campaign is anonymous—either a donor or consultant—the opportunity for favoritism, and for retaliation, is gone. Mandatory disclosure reintroduces that link. It is true that many financiers of grassroots lobbying campaigns are happy to be publicly identified—for example, George Soros and Steve Bing make no bones about their efforts to educate the public. Unions, and some trade associations, such as the Health Insurance Association of America (HIAA) in its 1994 ads urging citizens to oppose a national health plan, are more often than not open about their activities. But others prefer anonymity, and there are many reasons for wanting anonymity and for providing it protection.

To use the example of HIAA, under the national health plan proposed by the Clinton Administration in 1994, private insurance companies were to have a major role in administering the plan. But it would be a role achieved through a bidding process. A company donating money or expertise to an HIAA ad campaign against adoption of the plan might sincerely believe that the plan was bad for America, but be prepared to bid to administer the plan had it passed. And even if the plan failed, companies in such a highly regulated industry might wish to avoid retaliation from disappointed lawmakers who had supported the plan. Such a company might therefore prefer anonymity. Anonymity would protect it and its lobbyists from retaliation, favoritism and government pressure—precisely the result that Congress is seeking to achieve in lobbying reform.

Others will have other reasons for anonymity. A prominent Democrat may not want to be identified as having consulted on ads urging citizens to support the nomination

of Samuel Alito to the Supreme Court; a prominent Republican consultant may not want to be identified as being on the other side. Some donors simply don't want to have their donations to grassroots lobbying known so that they will not be approached for added donations. In each case, anonymity not only protects the donor or consultant, it prevents favoritism, retaliation, and improper pressure by government officials.<sup>6</sup> As Justice Stevens stated for the Supreme Court in *McIntyre v. Ohio Elections Commission*, anonymous speech, “exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression.”<sup>7</sup>

Anonymous speech aimed at rousing grassroots opinion is a long and honored tradition in American politics. Alexander Hamilton, James Madison, and John Jay authored the Federalist Papers anonymously. Most of the opposition to the ratification of the Constitution was also published anonymously by such distinguished Americans as Richard Henry Lee, then New York governor George Clinton, and New York Supreme Court Justice Robert Yates.<sup>8</sup> Other famous Americans known to have engaged in anonymous “grassroots lobbying” include Thomas Jefferson, Abraham Lincoln, Winfield Scott, Benjamin Rush, and New Jersey Governor William Livingston.<sup>9</sup>

### **Grassroots Lobbying Disclosure Provisions Are Unrelated to the Purpose of Lobbying Reform**

Grassroots lobbying disclosure proposals amend the Lobbying Disclosure Act of 1995 to reach any employment of paid lobbyists to urge the general public to contact a Federal official about an issue of general concern. Proposals require “grassroots lobbying firms” (or organizations that employ lobbyists) to register with the Secretary of



the Senate or Clerk of the House of Representatives not later than twenty days after being retained by a client. Most proposals require reporting of all amounts paid for grassroots lobbying activities, or amounts paid to “stimulate” grassroots lobbying, including separate disclosure for all paid advertising. This typically includes monies spent for preparation, planning, research, and background work, as well as monies spent coordinating lobbying activities with other organizations. One approach would expose nonmembers of an organization who donate above a certain level—typically \$10,000—as a separate “client” listed on the lobbying disclosure form. Such changes would dangerously expand the scope of an understandable reform effort into uncharted and unconstitutional territory. They would drive many publicly spirited persons on either side of an issue—those who care passionately about nothing more than the proper administration of justice, for example, in the case of the recent Samuel J. Alito confirmation hearings—out into the open, and perhaps, therefore, out of future debates altogether. They would make seasoned lobbyists reluctant to assist unpopular causes or causes contrary to the current administration. Compelled disclosure robs such donors or consultants of constitutionally protected anonymity, often subjecting them to calumny, obloquy and possible retribution by entrenched interests fighting on the other side, especially when the other side is the government itself. This would have a chilling effect on donors to issues organizations on both sides of the aisle, and deprive organizations of the services of talented consultants who make their livings, in part, on Capitol Hill. Indeed, those most likely to abandon the field will often be those motivated by ideology. Those motivated by pecuniary gain will have an added incentive to bear the cost of disclosure and carry on.

To clean up the Abramoff mess there is no reason to smoke out the more generous donors to groups like Progress for America or Alliance for Justice, or to make consultants fearful to assist those organizations with controversial issues. Even if those groups hired lobbyists for any purpose, including as consultants who know best how to craft a message, donations to those groups for grassroots lobbying do not support direct lobbyist-to-lawmaker contact—the source of public concern. (Nobody cares if a lobbyist flies on a corporate jet—what they object to is his giving rides to congressmen on a corporate jet!). Grassroots lobbying fosters citizen-to-citizen communication, and later, citizen-to-lawmaker communication. The message consists of information for citizens, and an appeal to those citizens to take part in a public discussion. Some citizens will get involved because they agree with the message and share its concern; others because they disagree; and still others will not get involved at all. With even the most effective grassroots lobbying, however, there is always an intervening decision made by the citizen to get involved or not to get involved, and to decide on which side of the issue to get involved, to what degree, and in what capacity. The aggregate of those individual decisions is itself critically important and valuable information to the lawmaker. Lawmakers are, after all, representatives of the people. No matter how citizens first hear of a pending legislative issue, when they engage they are engaging in citizen-to-lawmaker communication; the citizens making the calls are not registered lobbyists. With the decision to contact lawmakers, from whatever side of the debate, citizens reduce the relative power of lobbyist-to-lawmaker communication, which is precisely the power shift the public wants to see, and is the shift most needed in an era of unlit, undisclosed earmarking and lobbying scandal.

### **Grassroots Lobbying Disclosure Provisions May Be Unconstitutional**

In addition to complex policy questions surrounding society and its information exchange, regulation of grassroots lobbying raises constitutional concerns. The Supreme Court has recognized that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."<sup>10</sup> In *Buckley v. Valeo*, the Supreme Court held that regulation of political speech and association is constitutionally justified only to prevent corruption or the appearance of corruption in government, by preventing the exchange of favors that flows from an inordinate connection or nexus between campaign donors and lawmakers.<sup>11</sup> In *McConnell v. FEC*, the Supreme Court extended the rationale to guard against the appearance of corruption created by "access" to politicians.<sup>12</sup> Neither grassroots lobbying aimed at citizens, nor any ensuing contact by citizens to members of Congress, creates the reality or appearance of corruption. And both work to alleviate the problem of unequal access noted in the *McConnell* decision.

Anonymous grassroots lobbying has received unwavering First Amendment protection from the Supreme Court.<sup>13</sup> As recently as 2002, the Supreme Court invalidated a "village ordinance making it a misdemeanor to engage in door-to-door advocacy [with fellow citizens] without first registering with the mayor" as a violation of "the First Amendment protection afforded to anonymous ... discourse."<sup>14</sup> And there is no doubt that retribution is real. It is not hard to imagine, for example, why the State might have wanted to know the names of all members of the NAACP in 1950s Alabama, and why the Supreme Court said in response to Alabama's desire to learn those names that "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups

engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action.”<sup>15</sup> It is also easy to imagine the leverage Alabama could have put on the NAACP, and the potential damper on the civil rights movement, if 1950s Alabama knew about the NAACP what the twenty-first century Congress proposes to learn about grassroots organizations. What could Alabama have done had it known: when the NAACP engaged in preparation, planning, research, or background work; when it coordinated activities with like minded organizations; when the organization proposed to engage its fellow citizens with advertising and in what quantity; or knew the names of the consultants that would assist them in the effort?

Nor are these merely episodes of the past. In what many consider a blatant attempt at intimidation, a Texas county prosecutor recently subpoenaed the donor records of a group called the Free Enterprise Fund after it ran grassroots lobbying ads critical of his behavior in office.<sup>16</sup> It is easy to forget when rushing to correct lobbyist excess, even excess covered by current law, that citizens can be intimidated and harassed by officials. In *McIntyre v. Ohio Elections Commission*, Margaret McIntyre, a local anti-tax activist who distributed fliers opposing a school levy, was warned she was not properly identified on them. Nonetheless, she distributed fliers at the Middle School, where her children faced potential retaliation from school officials. An assistant schools superintendent who learned McIntyre’s identity filed a complaint with the Ohio Elections Commission in what one Ohio Justice characterized as “retribution against McIntyre for her opposition.”<sup>17</sup> The Supreme Court of United States invalidated the Ohio statute, stating that “[t]he decision to favor anonymity may be motivated by fear of economic or official

retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."<sup>18</sup>

Requiring even the most grizzled or politically connected lobbyists to register and report their attempts to solicit citizens on behalf of an organization is also suspect. In *Thomas v. Collins*, the Supreme Court struck down a Texas statute that required labor organizers—defined as “any person who for . . . financial consideration solicits [citizens] for membership in a labor union”—to register with the Secretary of State, provide his name and union affiliations, and wear a State-issued organizer’s card before soliciting membership in a labor union.<sup>19</sup> The State claimed the statute affected only the right to engage in business as a paid organizer. The Court, however, held there was a “restriction upon the right [of the organizer] to speak and the rights of the workers to hear what he had to say,”<sup>20</sup> and stated that it is “in our tradition to allow the widest room for discussion, and the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly.”<sup>21</sup> The potential that elite firms and private consultants will avoid unpopular causes to protect their long-range economic interests is not implausible. And, in protecting those interests, it is equally likely that unpopular organizations, or those with interests otherwise contrary to the current administration, will be denied competent representation. Indeed, this is largely the basis for reformers’ concerns about the “K Street Project”; a project wherein it is suggested to businesses and other interests that they obtain lobbyists who better understand where the GOP is taking the country.<sup>22</sup>

### **Lobbyist Abuse of Non-Profit Organizations Can Be Addressed in Other Ways**

Jack Abramoff allegedly abused non-profit organizations to cozy up to lawmakers, shelter income, bankroll golf junkets, or bolster the bank account of his Washington restaurant.<sup>23</sup> Some cite this abuse of outside organizations as demonstrating a need to require disclosure of citizen donations to issue campaigns. But Congress may prevent lobbyists from hiding gifts or bribes, or financing golf trips to Scotland in more direct ways. Congress could require disclosure by lobbyists, or perhaps even by non-profit organizations themselves, when the non-profit makes direct contact with a lawmaker, that is, when a non-profit organization hosts or entertains lawmakers with donations from or directed by lobbyists, or when the non-profit accepts gifts from lobbyists with instructions to lavish a portion of it on lawmakers. But the passing of pecuniary interests from lobbyists to lawmakers through non-profit organizations is not a justification for requiring citizens who donate to issue campaigns, or the recipient organizations, to disclose the amount of those donations, the timing of those donations, or the name and home address of the donor.

### **Conclusion**

Anonymous grassroots lobbying is a long and honored tradition, engaged in by many of the greatest Americans, including Lincoln and Jefferson. The United States Supreme Court has recognized that anonymous grassroots lobbying is entitled to the fullest protection of the First Amendment.

The problem of lobbying abuses is one of lobbyist influence outside the light of scrutiny. It is not a problem of citizen influence. Grassroots lobbying encourages

citizens to get involved, and the involvement of citizens breaks the link between lobbyists and lawmakers. Hence, grassroots lobbying should be encouraged in every way possible, not discouraged, as a way to restore the trust of the American people in Congress.

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*The Center for Competitive Politics seeks to educate the public on the benefits of free competition, fairness, and dynamic participation in the political process.*

*Nothing in this primer should be construed as advocacy for or against any legislation.*

<sup>1</sup> Tory Newmeyer, *Hill Eyes a Treasure Trove*, ROLL CALL, Feb. 13, 2006.

<sup>2</sup> Spotlight, *Politics: F earmark Debate Starting to Focus on Transparency, not Reduction*, ENVIRONMENTAL AND ENERGY DAILY, Feb. 9, 2006.

<sup>3</sup> ABC News Washington Post Poll, *Majorities See Widespread Corruption, Want Tougher Lobbying Restrictions*, Jan. 9, 2006, available at <http://abcnews.go.com/Politics/PollVault/story?id=1487942>.

<sup>4</sup> ABC News Washington Post Poll, *Majorities Disapprove of Bush on Ethics, Favor Release of Abramoff Meeting Records*, Jan. 27, 2006, available at <http://abcnews.go.com/Politics/PollVault/story?id=1547685>.

<sup>5</sup> Congressional Quarterly, *Transcript of Hearing, Senate Committee for Homeland Security and Governmental Affairs*, Jan. 25, 2006 (comments of Senator Durbin).

<sup>6</sup> See e.g. James Nash, *Political Ties Costs Law Firms*, COLUMBUS DISPATCH, Feb. 15, 2006 at B1.

<sup>7</sup> *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995).

<sup>8</sup> *Id.* at 343.

<sup>9</sup> Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform* 7, 18 (2001); *McIntyre*, 514 U.S. at 361, 363 (Thomas, J., *concurring in the judgment.*)

<sup>10</sup> *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

<sup>11</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>12</sup> *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

<sup>13</sup> See *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1956). See also *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (non-anonymous corporate speech on public issues protected by First Amendment).

<sup>14</sup> *Watchtower Bible v. Village of Stratton*, 536 U.S. 150 at 153, 160 (2002).

<sup>15</sup> *NAACP v. Alabama*, supra note 13, 357 U.S. at 462 (1956).

<sup>16</sup> Robert Novak, *DeLay Prosecutor Subpoenas Critics*, HUMAN EVENTS ONLINE, Dec. 16, 2005.

<sup>17</sup> Duane St. Clair, *Campaign Pamphlets Must Bear Source, Court Says*, COLUMBUS DISPATCH, Sep. 26, 1993 at 5B.

<sup>18</sup> *McIntyre*, supra note 7, 514 U.S. at 341-342 (1995).

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<sup>19</sup> Thomas v. Collins, 323 U.S. 516, 519, n1 (1945)

<sup>20</sup> *Id.* at 524

<sup>21</sup> *Id.* at 530.

<sup>22</sup> Richard Dunham, Eamon Javers, and Lorraine Woellert, *Shakedown on K Street*, BUSINESS WEEK, Feb. 20, 2006, Vol. 3972, p.34.

<sup>23</sup> Chuck Neubauer and Richard B. Schmitt, *Abramoff's Charity Began at Home*, LOS ANGELES TIMES, Feb. 11, 2006, at A1.



Mr. CHABOT. Thank you, Professor. We will now take 5 minutes each to answer questions—or ask questions ourselves, and I'll begin with myself. I'm recognized for 5 minutes to ask questions.

I'll address this to the whole panel so you can all take a few moments to comment on it if you'd like to. Would you comment on the potential benefits created by the legislation's enhanced disclosure? Anybody that would like to comment upon that, I'd be happy to take them. Mr. Graham?

Mr. GRAHAM. Well, I think two aspects. Number one, moving from semi-annual to quarterly, I think, increases transparency, and I think moving to electronic allows, as it does with 990's in terms of tax reform—in terms of tax reports for nonprofit exempt organizations. It increases transparency and the ability of the public to access those disclosures.

Mr. CHABOT. Thank you.

Mr. Gross?

Mr. GROSS. One of the more interesting provisions in this bill is the disclosure of gifts. Up till now we really had no disclosure of gifts. If you entertained a congressman, you were under a \$50 or \$100 annual limit, but it was just the part of an aggregate disclosure on a semiannual report that may say \$840,000 spent on lobbying. Here, this identification of any entertainment, lunch, meal of over \$10 or more showing up on the report should be interesting information, and I think would be helpful in the disclosure process, along with the political contributions, which is already on the FEC reports, but this will put it right on the lobby report, not only contributions made by the lobbyists, but probably more importantly, by a political action committee connected to the employer of the lobbyist. So that is a meaningful improvement right there.

Mr. CHABOT. Let me ask a second question then, and again, I'll leave this open to anybody that would like to comment on it. Are there other provisions within the jurisdiction of the Judiciary Committee that any of the panel members think would improve the legislation that's perhaps not in here now that they think should be considered?

Mr. GROSS. Well, this may be Chellie's province more, but I think that these reports would be helped with even more breakdown of the information. You're still having an aggregate number. I think it would be, perhaps, helpful if you had the portion of the number that was for in-house lobbying, and the portion of the number that represented trade association dues for lobbying, and the portion of the number that reflected payments to outside lobbyists. You're already going to have the travel and entertainment. It would be just an additional breakdown of information that's on there that I think would help promote compliance and would be more—more information, I think, is always helpful.

Mr. CHABOT. Thank you.

Do any of the other panel members want to touch on that?

[No response.]

Mr. CHABOT. Okay. I'll go to my next question then. H.R. 4975 will require greater disclosure, as we've mentioned, on the part of lobbyists, and grant the independent Inspector General's Office the authority to author—excuse me—to audit those disclosures and check for compliance, and refer potential violations to the Depart-

ment of Justice. How will these further reforms in H.R. 4975 help authorities spot potential corruption earlier than they might have otherwise, or help them with investigations generally? Ms. Pingree?

Ms. PINGREE. Well, we certainly applaud the idea of random audits, and in fact, more disclosure, because those are two concerns that we think will help to provide more information to organizations like ours and then the public generally, Members, constituents and others. I will say though, again without sounding like a broken record, that a random audit, in our opinion, doesn't do as much as an external office of public integrity, or some sort of functioning body that does a more thorough investigation, both of what's contained in these reports, and some level of oversight.

There was some suggestion that the Department of Justice was adequate to do this, and again, I would argue that this is a function of the Congress itself, and that the current system has not been functioning in such a way that's provided enough oversight. You know, many of the scandals, Professor Smith has talked about, they've been taken to a certain level, and we're probably likely to hear more about them, should have come to light far before they had to go to the Department of Justice. And so I would just suggest that there's far more need for enforcement than just a random audit process.

Mr. CHABOT. Mr. Graham, did you want to comment?

Mr. GRAHAM. Just to support that and build on those previous comments, I think, clearly, the devil's in the detail. And I use the example of the IRS enforcement and their use of a similar mechanism, random audits, et cetera, in terms of policing the exempt organizations, and, you know, that system just is not very effective. And so I would really encourage if we're going to go to an enforcement system, that the resources be put forward to make sure that we can have effective enforcement.

Mr. CHABOT. Thank you. My time has expired.

The gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you. I have a number of questions. I'm not sure who will take the first one. The bill before us restates current rules that Members may not condition official acts based on the employment decision of an outside entity. The Democratic bill makes the same thing a criminal offense, as well as a violation of the House rules. Now, both bills are referring to the actions of Mr. DeLay and Mr. Blunt, Mr. Boehner, and various others. The admitted actions, for example, a number of years ago when a former Democratic Congressman named Dave McCurdy was announced to be the new president of the Electronics Industry Association, DeLay and company got up and said, "This is an insult. How dare you hire a Democrat. You better not." They threatened him, and they ultimately said, "If you insist on hiring him, we will take two bills that you're interested in off the House floor that were going to pass, and kill them," and they did.

Now, my question is first—now, the Republican bill here is suggesting that we ought to restate current House rules again, and that that action by the House Republican leadership was a viola-

tion of House rules. The Democratic bill is suggesting that it ought to be a criminal offense.

My question is, isn't that already a criminal offense? If you take official action, pulling two bills off the floor, conditioned on a promise of somebody doing something else, hiring somebody, not hiring somebody, making a campaign contribution, whatever, isn't that bribery if you do that, if you demand that someone take an official action and threaten to do that? Isn't that extortion?

Professor Smith?

Mr. SMITH. Well, now, first, you promise that you didn't know that he was going to take—no, I appreciate it.

I won't venture a particular legal opinion without knowing all of the details. Certainly, an argument can be made that express quid pro quos in some circumstances.

Mr. NADLER. Can an argument be made that express quid pro quos are not bribery or extortion?

Mr. SMITH. Well, the point is, what I'm saying is I don't know all of the details as to what was said or what was done or—

Mr. NADLER. Well, never mind the details of that instance. The legislation before us, I mean that—one of my criticisms of the Clinton administration is that they should have prosecuted Mr. DeLay and everybody else involved when they bragged about doing that, but that's in the past. My question now is, if someone were to do what the bill talks about, if someone were to say that I will condition an official act based on who you hire or don't hire, isn't that a crime?

Mr. SMITH. Mr. Nadler, what I think you've really landed on is that it's often not necessary again to add a web of added laws. Many things that we're concerned about, again, are already against the law, and people are already being prosecuted and so on.

At the Center for Competitive Politics, on whose behalf I am testifying this morning, we really think this effort to criminalize political activity is bad. There are certain types of things, as you suggest, may rise to the level of criminal activity under traditional bribery laws, and we don't need to pass sort of vague, expansive—

Mr. NADLER. Well, I'm sort of interested in that this bill restates current rules against what the definition says are clearly crimes. I hope it doesn't imply that they're no longer crimes, merely rules violations.

Let me change the topic. Somebody said a few minutes ago—I don't remember who—that you're against the grass roots provisions or—not in this bill but in some other bills. Now, if someone—when we had the debates on a number of—increasingly, it's a tactic, I should say, to set up organizations, Citizens for Honest Government, completely controlled by—well, let's put it this way, Citizens for the Clean Environment, completely controlled and bankrolled by some oil company, let's say. And they lobby in favor of an oil company. But of course, they don't admit that they're lobbying in favor of an oil company. And you have hearings where someone is sitting there and saying, "Well, on behalf of Citizens for a Clean Environment, the best environmental thing to do is A, B and C," where really they're saying that the best thing to do is on behalf

of the oil companies, A, B and C. Shouldn't that be disclosed, Ms. Pingree?

Ms. PINGREE. Absolutely. We have supported proposals where there's increased disclosure. The public has a right to know the difference between a consumer organization and a public advocacy organization with members, and one whose support significantly comes from one industry attempting to—

Mr. NADLER. And by the same token, if we are suddenly inundated with a lot of post cards or phone calls because some oil company—and I don't want to demonize the oil companies, they're just ones that come to mind—but some oil company, let's say, or if you can think of some other company, let me know, but some oil company, let's say decides to form Citizens for a Clean Environment, and Citizens for a Clean Environment calls up 10,000 people and says, "In order to have a clean environment, support the Clean Water legislation," that in fact pollutes everything. Shouldn't we know who's financing that?

Ms. PINGREE. Yes. And, again, you know, we just published a report on astroturf lobbying around the Telecom Act, so we're watching this in a variety of venues, and we do think the public has the right to know some disclosure about where the funds come from.

Mr. NADLER. That's the grass roots lobbying that Professor Smith said we shouldn't do anything about.

Why shouldn't the public, Professor, know, or why shouldn't Congress, frankly, know that this outpouring of support for this legislation is paid for by somebody?

Mr. CHABOT. The gentleman's time has expired, but the gentleman can answer the question.

Mr. SMITH. Thank you, Mr. Chairman. Thank you, Mr. Nadler.

I would think two things. First, again, as I suggested earlier, ultimately people, average citizens, are calling you. Now, that's an average citizen and he's decided this is important to him and he's going to call. He may be misinformed. He may be misinformed because of a campaign by a union which is going on in central Ohio where I live, or a big oil company which may be going on someplace in America that I haven't heard of. But either way, it's an average citizen who's taking that step—

Mr. NADLER. Right, but shouldn't we know if someone is informing him or misinforming him?

Mr. SMITH. Mr. Nadler, I cannot—

Mr. NADLER. It's his judgment and our judgment whether he's being informed or misinformed, but if someone's paying for that campaign, why shouldn't we know that?

Mr. SMITH. I cannot imagine—

Mr. CHABOT. The gentleman's time has expired, but the gentleman can answer the question.

Mr. SMITH. I cannot imagine that there is a Member of this Committee who doesn't know whether there's an orchestrated grass roots lobbying campaign going on in his district, and I would think that anybody who doesn't, needs to get back to their district more often. From what I can tell, everybody knows who's paying for these ads that are going around in central Ohio now. Everybody knows who's doing these things.

Mr. CHABOT. The Chair recognizes himself for a point of personal privilege for just a moment. I might note that there are groups with names like America Working and We the People, and a number of other motherhood and apple pie names, which are, as we speak, making phone calls in the districts of certain Members of this Committee, who are distorting their records and saying they voted for the Medicare Prescription Drug Bill when they actually voted against it, and some other things. So I would argue that the campaigns out there, where one does not disclose the true nature of calls being made, for example, are unfortunately, or fortunately on both sides, and there are abuses which are occurring which aren't necessarily, unfortunately, remedied in this bill, but we're trying to make an effort here to clean up something which is long overdue to be cleaned up in this city.

Mr. NADLER. Mr. Chairman?

Mr. CHABOT. Yes?

Mr. NADLER. I appreciate your pointing out the necessity of what I was just saying. I gather you would agree with me that the true sponsorship ought to be disclosed, rather than with Professor Smith, who assumes that everybody in the Congress knows the true sponsorship or that everybody in the public knows the true sponsorship.

Mr. CHABOT. Yeah. I would say, as one Member of Congress, I definitely agree that it's good for the public to know how is behind ads or phone calls so that there's true disclosure, whether it's a corporation or whether it's a labor union or whomever. I think public—we ought not to shut off free speech, and there ought to be both sides, but people ought to know where the calls are coming from and who's paying for the calls, whether it's George Soros, or whether it's a particular oil company or whomever.

Mr. NADLER. Exactly. I appreciate the Chairman agreeing on this point, and maybe we'll have an amendment tomorrow on this point.

Mr. CHABOT. We're going to listen very intently and closely to every amendment offered by both sides, and I appreciate the gentleman, Mr. Nadler's input on everything, as usual. We actually agree on some things.

The gentleman from Arizona is recognized for 5 minutes.

Mr. FRANKS. Thank you, Mr. Chairman. Thank you all for being here.

As you probably know, the bill that we're discussing here today is a little broader than some of the things that are specifically before you because of the jurisdiction limitations of this Committee.

Having said that, I'd like to get a reaction from each of you as to whether you think that there are any significant flaws in the overall bill, and whether or not you feel like there are any significant omissions that you think are of particular consequence. I'll start with you, Mr. Gross.

Mr. GROSS. Are you talking about the provisions that are in the jurisdiction of this Committee?

Mr. FRANKS. Yes, sir. I would like for you to go ahead and be, if you're comfortable, be as broad as you like. What do you think that we're—are we failing to address something here that needs to be addressed, or are we addressing something improperly?

Mr. GROSS. Well, you know, to focus on the provisions of the Committee, I do think the bill is a significant advancement on the current law. We could debate grass roots. I think if you do get into grass roots, you really have to define what it is. You know, we're not talking about people just expressing their rights, whether it's a concerted, sophisticated effort, there may be ways to define professional grass roots, if you will. In fact, 30 States have some disclosure of grass roots lobbying. When it comes to, I think, the law-making process itself, which is what I was suggesting in my opening comments, that this is a piece of the puzzle, what is before this Committee today, and I certainly support the provisions that are before this Committee today.

But when we get into the earmarking provisions, which are outside of this Committee's jurisdiction, that is where the rubber meets the road. That is the lawmaking process itself. The transparency of that process is, I think, probably the most critical provision in the bill, and where I would, you know, be focusing my attention if it were in that Committee's jurisdiction.

Mr. FRANKS. Thank you.

Mr. Graham?

Mr. GRAHAM. Well, as I indicated in my comments, we're very concerned about even a temporary travel ban. You know, we think that a preapproval process is a much better and a much more effective method to be disclosive about Member travel. We think that the vast majority of Member travel is very appropriate. You know, getting on a train and going to Philadelphia for a convention of the American Diabetes Association, for example, my previous role, you know, to me is not an abuse, and more to the point, really enables constituents to interact with Members of Congress, or the administration, for that matter, and really understand better the fight against diabetes in that case.

So I think that, you know, Members of Congress should be encouraged to travel. I think they should be out there visiting with constituencies. Clearly, a disclosure about where they're going and preapproval to go there, I think is very appropriate, and just encourage you to be very, very careful about even a temporary ban and what slope that takes us down.

Mr. FRANKS. Thank you.

Ms. Pingree?

Ms. PINGREE. Thank you, Mr. Franks. I guess the concern from Common Cause in terms of the overall bill is that it doesn't go far enough in the areas that we are particularly worried about. Kind of going back to my original remarks, I think the goal here is to restore the faith of the American public in the behavior of Congress, and we don't see this as a significant enough step.

A couple of the points that are particularly important to us, as I mentioned before, the significance in the House can't be overlooked of an Ethics Committee that just has not been functioning, and many of the concerns that people have already suggested, might have been illegal, might have been unethical, not being brought to life early enough—brought to light early enough. And we believe there should be an independent office of public integrity, and there are a variety of ways of structuring that.

A second point for us is doing more to break this nexus between lobbyist money and lawmakers. There are 79 Members of Congress who have a lobbyist who serves as their treasurer, a registered lobbyist, and it just doesn't pass the straight-face test on the part of the public, the influence of money in the political process.

Mr. FRANKS. Ms. Pingree, with your permission, I'm going to have to stop you right there. I'm about out of time.

Ms. PINGREE. I don't want to use it up.

Mr. FRANKS. But I appreciate the viewpoints.

Professor Smith, let me go ahead and broaden my question just a little bit to you. I was intrigued by the name of your group being Competitive Politics. One of the experiences we've had in Arizona, in adopting a clean elections process, is that that process itself became very politicized and very kind of difficult to really ascertain for the public. They just really didn't know what was going on. It became, in my judgment, a terrible mistake for us, and we've seen that in some of the appointed politics. So can you address—related to the whole independent ethics commission, do you think that that may cause more problems for us in the long run in terms of actually helping the public know what their public officials are doing?

Mr. CHABOT. The gentleman's time's expired, but you can answer the question.

Mr. SMITH. I would just suggest that I think people in both parties have come to realize that the idea of the independent counsel was not a very good idea, and it sounds to me an awful lot like you're talking about setting up a permanent, ongoing, never-ending independent counsel for all 435 Members of the House and 100 Senators.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Speaker.

Ms. Pingree, you know, sometimes we state a problem and then pass a bill and forget to recognize that the bill really didn't address the problem. What problems are we curing with this legislation?

Ms. PINGREE. Well, I think that's a very good question.

Mr. SCOTT. Okay. Well, let me ask Mr. Gross. [Laughter.]

What would this legislation do to the K Street Project?

Mr. GROSS. Well, the K Street Project is something that I think really played a negative role in what's going on in Congress today. I do think that the provisions that are in here that address it—and again, they're not part of the jurisdiction of our discussion today, but the provisions will, hopefully, break that bond or that back and forth between—

Mr. SCOTT. What in the bill will adversely affect the K Street Project?

Mr. GROSS. Well, the 1-year cooling off is the same. The provisions that Congressman Nadler talked about are somewhat of a tightening of those provisions. I mean if you're talking about extortion, that is a crime today. You don't need an additional law. If someone says, "I will not pass"—

Mr. SCOTT. Which provision in the bill will adversely affect the K Street Project?

Mr. GROSS. Well, I think the—what is it, 30—the provisions that were discussed before, 303 or 304, the section there about Members—well, there's two provisions, one, first of all, about making it clear to people when they leave Congress as to what their responsibilities when they're outside of Congress; and the other provision concerning the duties on Members not to intimidate people concerning lobbyists who they hire?

Mr. SCOTT. Is that in the bill?

Mr. GROSS. Well, it's in the section that we discussed.

Mr. SCOTT. You mentioned transparency on earmarks. Do any lobbyists charge percentage-contingent fees to get earmarks in bills?

Mr. GROSS. Contingency fee lobbying is something that goes on. It is—

Mr. SCOTT. Is there anything in the bill which exposes that practice?

Mr. GROSS. No, there is no contingency fee prohibition in this bill.

Mr. SCOTT. And there's no transparency about a contingent fee in the bill.

Mr. GROSS. You would not have to specially disclose a contingent fee. You would disclose the amount you were paid to lobby, but it wouldn't be identified as a contingent fee, that's correct.

Mr. SCOTT. What's the going rate for contingent fees on getting earmarks in bills?

Mr. GROSS. I don't know. The worst example of it, obviously, was in the Cunningham case.

Mr. SCOTT. That was a contingent crime. That wasn't—

Mr. GROSS. Contingent bribe. In my experience, many of the contracts out there are not contingent fee contracts.

Mr. SCOTT. But there are some?

Mr. GROSS. Certainly there are some, yes.

Mr. SCOTT. Is there anything—now, for Members, when you're negotiating to try to get a job with a firm, is there anything that prohibits getting a job for Members or staff if the job is not lobbying?

Mr. GROSS. No. The restrictions here are on lobbying.

Mr. SCOTT. So if you're negotiating a job that does not include lobbying, that's not covered by the bill.

Mr. GROSS. I don't recall any provision in the bill specifically in there to that effect. You would have certain responsibilities, ethical responsibilities beyond the bill if you are negotiating for a job while you had legislation from that entity before you.

Mr. SCOTT. Mr. Graham, when your organizations have conventions, do you routinely pay the expenses of people who are speaking at the convention?

Mr. GRAHAM. Yes.

Mr. SCOTT. Including travel, hotel and meals?

Mr. GRAHAM. Typically, yes.

Mr. SCOTT. Whether they are an elected official or not?

Mr. GRAHAM. Typically, yes. Obviously, we're not paying honorariums to elected officials.

Mr. SCOTT. Right. And these conventions are generally held in exotic places to get the attendance, not just the speakers?



Mr. GRAHAM. The vast majority of these conventions are held in cities across the United States like Chicago, Detroit, St. Louis.

Mr. SCOTT. New York City, Virginia Beach, Williamsburg?

Mr. GRAHAM. Yes.

Mr. SCOTT. But certainly not Cincinnati, Ohio?

Mr. GRAHAM. There's a lot of meetings held in Cincinnati, Ohio.

[Laughter.]

Mr. CHABOT. The gentlemen's time has expired. The gentleman yields back.

The gentleman from Iowa, Mr. King, is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I want to thank the witnesses for their testimony. I was out of the room for most of it, but I have gone through your testimony prior to your presentation. I sit here and listen to the testimony, and what we're seeking to accomplish here, and I'm a little bit undecided as to what we're trying to accomplish. But I look back at my morning this morning, and I had a meeting this morning that lasted for an hour in my office with about six bankers from different areas of the banking industry. And I left and came in what would be normally earlier than one would on a Tuesday morning to do that, so that they could have access to me and I could have access to the information that we would exchange.

I would say that we can't function around this Congress if we don't have real good solid reliable information that's readily available and presented to us on a voluntary basis from the members of the lobby.

And so it would occur to me that if I had the chance—the choice between being on a plane ride for an hour, going somewhere and expediting my time, or perhaps on a train and expediting my time, and at the same time having a meeting while I'm traveling, if that could be facilitated by a lobbyist, I'm wondering what kind of influence, unnecessary influence that might be, why the travel becomes part of it rather than the access. I have often thought that a \$50 meal or a \$50 gift, why is that a limit, and why would anyone even want to have a debate on whether one's vote were for sale for 50 bucks of anything, when the same person that's there perhaps buying the meal or presenting the gift, could also hand a check over for that election cycle for \$2,100 bucks or maybe he even controls a PAC. They could attach a check to that for \$5,000. How far off base are we on this being influential? Isn't money more influential than a grueling ride in travel to go somewhere to an event that may be a repetition of something we've done in the past?

So I guess I'd like to direct my question first to Mr. Graham because I think the tone of your testimony probably fits more closely with my attitude about this. But is there anything wrong with private travel? Could you give an example, perhaps of when—just that question itself. What's the philosophy on private travel?

Mr. GRAHAM. We don't think there's anything wrong with private travel. We think it's very appropriate for Members of Congress to visit with representatives from various constituencies, industries, professions, about concerns that they have with their Government and their representatives. And so we don't see any problem with that at all. In fact, our concern would be if the travel were banned, that the travel that would be permitted is the very travel you just

alluded to, that is, fund raising travel. So the same Member could be invited to go to the same meeting, call it a fund-raising trip, receive contributions and come back again. So we are concerned about that. That, we believe, would be an unintended consequence of legislation that would ban travel.

Mr. KING. What would your comments then be, Mr. Graham, on transparency?

Mr. GRAHAM. Transparency ought to be fully—everything should be fully disclosed. I think that travel could be preapproved if the body so thinks so, and we don't have any problem with preapproval of travel, and that should be a very transparent process. So-and-so is going to X meeting to talk to X number of people about these issues, and to me, that's pretty clear.

I think there's a very big distinction between somebody who's flying to the Caribbean Islands for a 5-minute speech and a 2-day trip, than somebody who's flying to Cincinnati—I'll use Cincinnati as an example—for a convention of physicians. To me they're very, very different.

Mr. CHABOT. I would just take note that many people fly to Cincinnati for glorious vacations, and I would encourage them to do so. [Laughter.]

See the Reds, opening day yesterday.

Mr. GRAHAM. I was responding to Mr. Scott's comment. [Laughter.]

Mr. KING. I thank the Chairman for his intervention there, that levity that he brought into this process. Let me see if I can reshape my question then.

Would it be your judgment that the voters would be able to discern appropriate travel from inappropriate travel if we had transparency?

Mr. GRAHAM. Absolutely.

Mr. KING. Thank you.

I'd direct my next question to Mr. Gross, and you have some testimony about transparency, and in your testimony, as I pull it out, it seems to reference searchable, sortable databases, and the way I read that—and I would ask if you would agree with me—will that information that would be presented by the—by filed by the lobbyist in that electronic searchable, sortable, and downloadable database, would that be something could be indexed to the FEC reports to check the—to check our filing to match up to the lobbyist's filing?

Mr. GROSS. You could certainly create a link right to the FEC report, and if there were discrepancies, they would be ascertainable, because as I read this legislation, much of the information that would be going on the lobby report would mirror what's on the FEC report, but it would just be in a more convenient, accessible format right there on the lobby report.

Mr. KING. If I might ask for—

Mr. CHABOT. The gentleman's time is expired.

Mr. KING.—one more minute?

Mr. CHABOT. Without objection, the gentleman is granted an additional minute.

Mr. KING. Thank you, Mr. Chairman.

Just quickly, the follow-up question then is, would you be of the opinion that a searchable, sortable electronic filing for Members of Congress and the FEC under the same type of format would be an appropriate solution as well?

Mr. GROSS. Absolutely.

Mr. KING. Thank you.

Thank you, Mr. Chairman. I yield back.

Mr. CHABOT. Thank you. The gentleman's time has expired.

The gentleman from Maryland, Mr. Van Hollen, is recognized for 5 minutes.

Mr. VAN HOLLEN. Thank you very much, Mr. Chairman.

Let me also thank all the witnesses here this morning, and as Ms. Pingree and others have said in their statements, I think what we're trying to do here is begin to restore the faith and confidence of the American people in the process we have here for making the laws that govern the Nation.

If that's the test, I have to say I do think this bill falls way short. I think it's an anemic bill in many ways. And I think the questions on both sides of the aisle have really exposed the primary weakness of this bill, which is that it does not address the fundamental issue of the nexus between the campaign finance system and lobbying. I don't think anywhere in this bill, regardless of what Committee of jurisdiction we're talking about, do we seriously address campaign finance reform issues. And I would like to associate myself with the comments in that regard by Mr. Nadler at the outset, because I do think that is a fundamental piece of this, and I think ultimately our system needs a healthy dose of a public finance system.

And I think that if—we've heard the example, the fact that a lobbyist can't fly on the jet, and at the same time that lobbyist could be chairman of the leadership PAC. Is that right? I mean, there's nothing that would bar that same lobbyist from being the chairman of the leadership PAC, nothing in this legislation does this.

But let me just delve a little bit into an issue that is in the jurisdiction of this Committee that does involve the nexus between lobbying and the fund raising piece. This bill has a provision that simply says that the lobbyists now must disclose their contribution, not only with the FEC, but as part of their filing report. But how about getting at the issue that lobbyists do play a role in essentially bundling contributions? I mean, lobbyists hold fund raisers. They invite their friends. They invite their colleagues. They invite their business associates. Why not have a provision in this bill that in addition to requiring the disclosure by the lobbyist of his or her individual contribution, also discloses that lobbyist's role in the bundling process in the holding of a fund raise.

If we could begin with Ms. Pingree? But I would like to get everyone's view on that.

Ms. PINGREE. We would certainly be in favor of that, and again, you kind of got to the heart of what the question is here. I would just say that we are very anxious to see Congress move forward on those things that really will be able to restore the faith in the public, and a lot of it has to do with nexus between the influence of money and the political process.

And many of these things, like a gift ban and a travel ban, it's true will not go far enough to making a significant difference. Some of it has to do with the fact that people are negotiating for fund raising when they're having a meal, when they're having a trip, and that's why this alliance and association is so important.

So we would be in favor of things that look much more closely at the role that lobbyists play in fund raising, bundling, soliciting contributions, holding campaign events. You know, any hour of the day in this city you can pretty much find an event somewhere where someone's trying to raise money for their next election, and that's part of what needs to change.

Mr. VAN HOLLEN. Right.

Mr. Graham? In the interest of full disclosure, everyone say the more disclosure the better. Why not add a provision to this bill that gets at that issue?

Mr. GRAHAM. We would have no problem with that. We're interested in full disclosure as well.

Mr. VAN HOLLEN. Good, thank you.

Mr. GROSS?

Mr. GROSS. I don't oppose the provision. However, this is regulated conduct already under the Federal Election Commission rules, and not widely understood in this city, as a matter of fact. If you are a lobbyist for a corporation, you're not permitted to bundle contributions on behalf of others in your company. The PAC makes a contribution, but collecting checks and handing them over in a bundle is not allowed unless you're somehow acting as an agent of a candidate. So, obviously, these provisions go together. The campaign finance provisions and the lobby provisions go together. When you try and regulate one area, they're going to manifest themselves in another. But if we're going to start to regulate the movement of political contributions in this lobby bill, it is going to complicate things. I think that probably is more in the province of the Federal Election Commission.

Mr. VAN HOLLEN. Well, as you pointed out, I think that many people in this town would be surprised to find out exactly what you said, because I think this has been a little enforced provision, and probably a very little understood provision. I think—and wouldn't you agree though—that from the lobbyist's perspective, if you move that requirement to the Lobbying Disclosure Report, where the lobbyist then has an obligation to report his or her activities, you're going to be much more likely to get compliance in reporting than if you have to just deal with the FEC process.

Mr. GROSS. You know, it sounds good. It's just a tough thing to start to regulate at this place, because the movement of money is supposed to be regulated by the Federal Election Commission. There have been a few recent cases in this area. If you hold a fund raiser, I suppose you could identify on the bill, "I held a fund raiser on April 15th at the Sheraton." Now, trying to track the contributions that came in as a result of that fund raiser may be a difficult thing to do.

Mr. VAN HOLLEN. No, I understand the issue, and there are details here that would need to be worked out. But I think, I mean, I think the comments on both sides of the aisle, again, reflect the fact that, you know, when you try and look at one particular area

and ignore the whole campaign finance component, we are really doing a disservice to the public to suggest that we're really dealing with the issue in a serious way, because the campaign finance piece, I think as everybody up here knows, is the big dog in the room, and I would look forward to working with you to try and develop something that addresses this issue.

Mr. CHABOT. The gentleman's time has expired.

Mr. VAN HOLLEN. Thank you, Mr. Chairman.

Mr. CHABOT. I would just note, however, the Chair would note that we did pass campaign finance reform not too long ago, which was, I think, made things in many ways worse than they were now—they were prior to that time.

The gentleman from—

Mr. NADLER. I would simply point out that that's an opinion.

Mr. CHABOT. The gentleman from Florida, Mr. Feeney, is recognized for 5 minutes.

Mr. FEENEY. Thank you, Mr. Chairman.

Professor Smith, I guess I'll start with you. You know, you focused on a couple things, and you alluded to the ambiguity of some of the rules, and that's a big problem I have. I mean, I want to see universal open disclosure by everybody involved in the process as early as possible, put on the Internet within 24 hours. But the other thing that concerns me is the lack of black and white lines at times. I mean the whole travel situation that—we've had the witnesses talk about how critical it is that Members not be here in the dark and in ignorance. There's so much and this is a—we're the one superpower on the globe right now, and to be honest with you, if Members are going to sit here in the dark and try to make guesses about what's the best for America's future, then I'm really worried about the future of Congress. A very different world than when our Founding Fathers were protected by 6 or 8 weeks between what it took on a boat to get from England or Europe, for example, to the shores of the United States. We have threats that are potentially devastating to American way of life that can get to us within a matter of seconds or minutes or at least hours.

So what type of bright lines can we do with respect to gifts, dinners, travel, that would be helpful in giving the public confidence that we're not running around selling our votes, but we are doing everything we can to get information from executives with different types of businesses in terms of how they'll be affected by a complicated bill. Nurses and doctors when we deal with a hospital issue, or funding formulas. These are very complicated. How do we draw those bright lines so that Congressmen can actually make intelligent decisions, and yet give the American people confidence that their Members are not being unduly influenced by relationships or dealings that they may have with the folks out in the lobby?

Mr. SMITH. Thank you, Mr. Feeney. Let me start with something I was thinking about in the context of Representative Van Hollen's last question. One thing that I saw in the bill that's moving through the other house is language talking about requiring disclosure of fund raisers that lobbyists or others may host. And by the way, I echo everything that Mr. Gross said on that. But one bit of language in there is something to the effect of "or otherwise spon-

sored,” which is the kind of what the heck does that mean? Did the person host it or co-host it? What’s it mean “or otherwise sponsored?”

And so I think one of the first things you simply need to do is, as you look at language in this bill, look at amendments to this bill or amendments that are offered to add to the bill, think about each thing, do you know what it means? Do the Members sitting up here on this panel feel like they know what it means? Are you comfortable that somebody won’t accuse you of doing something along those lines? I think having the disclosure function will serve some role there because it will keep things in the public eye, and that always plays a role in, I think, making sure that people decide simply not to cut corners, and it makes sure that the cases get discussed enough if nothing else.

What happens when law falls into sort of desuetude, is that people begins to lose track of what the accepted definitions are. So this is a very weak answer, I feel. I don’t have a good clear one for you. What I would have to say is we need to look at specific provisions of the bill, say what is it that you want to accomplish, and then look at that exact language and make sure that it doesn’t have the kind of gray area that can be used by an independent prosecutor, essentially, to just start going after whomever he or she wants.

Mr. FEENEY. I want to talk about some gray areas. Maybe Ms. Pingree is the best—you know, we talk about disclosure for people that want to contribute \$100 or \$1,000 to my campaign, but there are entities out there spending hundreds of thousands, in fact, millions of dollars, that are very shadowy and are not very accountable. One of the things that we’ve done is to disempower the major parties in the country. They’ve got all sorts of limits now and restrictions, what they can accept, what they can spend in specific areas, and yet you’ve got these 527 groups, after McCain-Feingold, that are totally unaccountable. And as the Chairman said, I happen to be victim of the same call—although they might have done me a favor—telling people in my district that I voted for the Medicare Bill. In fact, I had voted against the Medicare bill.

And yet, this group can establish a nice-sounding name, The Committee to Save the Children of the World, or whatever. Nobody knows who they are. They can start a new corporation for every election cycle. There’s totally no accountability.

If the Democratic Party wants to attack Tom Feeney, people in my district will take with a grain of salt some of the things that they say. Some people will tend to believe what the Democratic Party wants to say, some people will tend not to believe them. But the 527 loophole is really embarrassing.

And then finally, Ms. Pingree, if you can also address the education loophole. Common Cause, for example, for the first time in 100 years, Republicans were in the majority when we did redistricting in Florida in 2002. All the Democratic leadership, all the Democratic leaders in the House and the Senate, all the Democratic Party apparachiks, they opposed what we did; naturally, it’s a part of the political process.

Common Cause actually—talk about bundling money—bundled money from their Washington affiliate, sent it to their Florida affiliate. And so what type of responsibilities do you think you have as

a so-called educational—I mean in that case Common Cause is going up against all of the Republican leadership of the House, the Senate, the Governor and the party, and they're taking a partisan side, and yet, they tend to be immune from the types of constraints that we're trying to put on other participants in the process.

Ms. PINGREE. All very good questions, and I'll try to give you some answers. First off, on the issue of redistricting in Florida, we tackle the questions around redistricting and our belief that there should be panels outside of the legislative process to make it a non-partisan process. We do this on a nonpartisan basis. We were just as active in California where the Democrats didn't like what we were doing, as we were in Ohio last year where the Republicans didn't like what we were doing. The same in Florida. We believe this is a process issue, and we are supported by hundreds of thousands of members from around the country, and did our best to disclose where our sources of income came from in the State of Florida, and work in a seamless way with our State organizations, as well as our national organizations.

On the issue of campaign finance reform, I'd be thrilled to come back anytime and talk about a whole variety of issues. I think you do make a good point, and others have, about whether or not we can solve all the problems of the influence of money in politics through regulation, or whether we need to look at more publicly financed systems, as we have in Maine and Arizona. And I may disagree with Mr. Franks, in Maine, we think that's been a very successful process.

I'd also like to say that, generally, I think on the questions that you were asking earlier, we also think that there should be some significant change. I know my time is running out, but I'd be happy to come back any time and talk more thoroughly about some of these other issues.

Mr. CHABOT. The gentleman's time has expired. Did any of the other panel members want to touch that?

[No response.]

Mr. CHABOT. All the Members at this point have asked their 5 minutes, and so we want to thank the members of the witness panel for their testimony here this afternoon. As was mentioned, there is a markup on this topic in the full Committee tomorrow. You have helped us in many ways in thinking about this and considering the ramifications of this legislation.

I want to thank all the Members for their attendance here today.

If there's no further business to come before the Committee, we're adjourned. Thank you.

[Whereupon, at 11:26 a.m., the Subcommittee was adjourned.]





# A P P E N D I X

## MATERIAL SUBMITTED FOR THE HEARING RECORD

TESTIMONY OF MARK J. FITZGIBBONS, PRESIDENT OF CORPORATE AND LEGAL AFFAIRS,  
AMERICAN TARGET ADVERTISING, INC.

### PROPOSED GRASSROOTS REPORTING REGULATION

#### FAR FROM WHAT PROPONENTS REPRESENT IT TO BE

The purpose of this testimony is to refute the public justifications of attempts to include regulation of the grassroots as part of lobbying reform legislation. I am president of corporate and legal affairs of a direct marketing agency specializing in direct mail and other means of public policy communications. I thank the Subcommittee on the Constitution for the opportunity to submit these comments.

The press releases of some Members of Congress and certain proponents of regulating the grassroots as part of congressional ethics and lobbying reform tout their attempts as targeted at paid professionals and what's been called "Astroturf" lobbying (professionally created grassroots efforts supporting K Street lobbying efforts).

The stated justifications for regulating the grassroots are not true because:

1. the legislation would apply to speech by small, low-funded, community based causes, even those that rely on volunteers;
2. those who do not employ Washington lobbyists nor make political contributions would be required to report;
3. the legislation would make "accidental" lobbyists out of those who publish books, blogs and many other publications;
4. the legislation would result in punishment of innocent political and faith-based speech and publication;
5. the legislation would actually foster more Jack Abramoff-style corruption.

Senate-passed legislation (S. 2349, the Lobbying Transparency and Accountability Act (LTA)) and sister attempts in the House would likely create the most expansive and inclusive regulation of political and faith-based speech and publication in history. Intent to publish books and blogs would trigger requirements to register and report, and would create accidental lobbyists. Such publication would be in violation of law unless congressional "permission" is obtained. Failures to register and report would be punishable as "committing lobbying" through speech and publication to the general public.

Even editorials in newspapers, such as the one from the Committee to Defend Martin Luther King, the subject of one of the great civil rights and First Amendment cases in U.S. history (*New York Times v. Sullivan*, 376 U.S. 254 (1964)), would be regulated and subject to quarterly disclosure and reporting to Congress.

All of the various legislative proposals to regulate the grassroots expressly target non-harmful, core political and faith-based speech and publication to the general public, which is an unconstitutional restraint on First Amendment rights.

Proposals to regulate the grassroots would amend the Disclosure of Lobbying Activities Act, 2 USC 1601 "et seq." (DLA), which was passed to regulate professional lobbying conducted in Washington. The DLA regulates professional lobbyists retained or employed by clients. In addition to regulating what have come to be known as "K Street" lobbyists, the DLA regulates the in-house lobbying efforts of the many associations representing trade and industry groups. Such employees of associations are lobbyists under the DLA. 2 USC 1602(5).

The DLA regulates lobbying defined most simply as (1) lobbying "contacts," which are oral or written communications with Members of Congress, their staff, and certain government agency and White House officials ("covered" government officials)

(2 USC 1602(8)), combined with (2) lobbying “activity,” which is the research, strategy and other background support for the lobbying efforts. 2 USC 1602(7).

A “lobbyist” is someone employed by a client, who has more than one lobbying contact, and who spends at least 20 percent of his/her time on lobbying activities for the client. 2 USC 1602(10). A lobbying client is any person or entity who retains professional lobbyists or who employs in-house lobbyists. 2 USC 1602(2).

I shall reference provisions of the Senate-passed bill (S. 2349) because legislative proposals in the House have nearly identical provisions, and the effects and consequences would be nearly identical as well.

Proposals to regulate the grassroots turn the formula of what is “lobbying” subject to registration and reporting on its head by making communications to the public a lobbying “activity.” Proposed 2 USC 1602(7) amended.

Communications to as few as 500 people would meet the threshold of lobbying activity if the communications are intended to “stimulate” citizens to contact covered government officials to urge policy actions. Proposed 2 USC 1602(18)(A) and (B). Communications prepared in-house do not need to meet the \$25,000 threshold applicable to what would be “grassroots lobbying firms.” Therefore, communications subject to proposed regulation of grassroots lobbying need not be prepared by professionals, nor need to come from (or be prepared on behalf of) large clients who already retain Washington-based lobbyists.

The proposals to regulate the grassroots would result in startling consequences. Claims that efforts to regulate professional and Astroturf lobbying are easily refuted. Examples may best demonstrate these conclusions.

#### 1. COMMUNICATIONS PREPARED IN-HOUSE BY SMALL, COMMUNITY BASED CAUSES

The following example disproves that proposals to regulate the grassroots would apply only to professional efforts.

A local animal rescue operation has a staff of five paid employees and relies mainly on volunteers. They barely makes ends meet, and certainly can’t afford to hire a lawyer, let alone pay for a lobbyist. A low-paid staffer in charge of communications and community outreach spends 50% of his time managing their web site and blog. On behalf of the rescue group, he writes two letters to Congress urging Congress to pass an animal protection law. Those are lobbying “contacts.” He continues to do research, and heavily promotes the legislation online. That would be lobbying “activity” subject to reporting and compliance. Also, he is now a “lobbyist.” Failure to track his time, register, and report quarterly to Congress could result in fines up to \$100,000. Proposed 2 USC 1606 amended.

These local, community based causes need not spend \$25,000 in a three-month period to be subject to the lobbying disclosure laws under the legislative proposals to regulate so-called “paid” grassroots communications. The in-house efforts of many such small, community based and under-funded causes cannot afford the adverse publicity and stigma of violating federal law, but S. 2349 would surely create many examples such as this.

#### 2. CREATING “ACCIDENTAL” LOBBYISTS FROM PUBLICATION OF BOOKS

Not just community-based blogs, but books and other press publications can trigger the registration and reporting rules under the LTA. For example:

A doctor affiliated with a medical university specializes in treating autistic children. She discovers a link between instances of autism and a medication used commonly by pregnant and nursing women. She writes to the Food and Drug Administration and several Members of Congress that the medication must either be banned or come with a warning not to be prescribed to pregnant or nursing women. Those are lobbying “contacts.”

The pharmaceutical company that manufactures the medication has its lobbyists oppose the doctor’s efforts. One congressman writes back telling the doctor that there is not enough evidence to ban the medication.

As part of her university job, the doctor writes a book about autism that also demonstrates the link between the medication and autism, and “influences” the general public to contact Congress to urge a ban on the medication. Publication of that book is a lobbying “activity,” and the doctor is now a “lobbyist.”

The university retains and pays a copy editor \$25,000 to help the doctor write the book, and retains a publicist who agrees to spend \$25,000 over

three months publicizing the book. These paid efforts make the copy editor and publicist “grassroots lobbying firms” under proposed 2 USC 1602(19), and they must register and report to Congress as such.

In promoting her book over the next six months, the doctor makes appearances on television and radio talks shows. Since that is part of her salaried employment with the university, these are “paid” communications to more than 500 people, thus lobbying “activity.” The doctor must log her time, and report the expenses and income from her publicity tour.

### 3. PROPOSALS TARGET MORE THAN ASTROTURF LOBBYING, AND WILL PROMOTE WASHINGTON-STYLE CORRUPTION

Regulation of grassroots speech and publication is not only unconstitutional, but also would help protect corruption in Washington. Regulation would have the effects of blunting and even censoring citizen-critics of government through expense of regulation compliance, fines and fear of fines. But the following example will help demonstrate how such regulation will even foster the culture of corruption in Washington.

The medical university in the example above does not hire lobbyists. The doctors and administration there are politically aloof, and none makes political contributions.

Lobbyist “Jack” has been soliciting the medical university as a client for years, with no success. Jack raises money for many Members of Congress, and has an informal information-sharing arrangement with several. From his home, Jack has an “unpaid,” anonymous blog called The Good Citizen, which provides gossip-like information about Washington. The Congressman from the university’s district and Jack are angry that the university’s administration won’t “pay to play” the Washington game.

The Good Citizen blog chooses to take sides with the pharmaceutical company, and opposes the ban on the medication. Since the medical university does not hire lobbyists, neither the administrators nor the autism doctor even thinks that the doctor’s book publication activity required them to register under the DLA. The Good Citizen blog reports that the university and doctor are apparently violating the lobbying laws.

The U.S. Attorney sees the blog, investigates and concludes that a violation occurred. No penalties are assessed since this is a first-time violation, but the U.S. Attorney issues a press release that the university and doctor violated the law in urging a ban on the medication. That results in the program losing funding from private sources.

### 4. THE GRASSROOTS PROPOSALS WOULD REGULATE FAITH-BASED SPEECH

The grassroots provisions would even apply to faith-based communications, as the following example demonstrates.

A Catholic priest has a weekly talk show with a substantial audience. He comes to Washington to meet with White House and congressional leaders. He expresses the Catholic Church’s views urging action against stem-cell research legislation and against certain immigration restrictions included in legislation being pushed by the White House. Those are lobbying contacts. In his weekly show, in his sermons, and in written editorials for newspapers and faith-based publications, the priest expresses the Church’s views on these faith and policy matters, and “influences” his audience to write Congress and urge action consistent with the Church’s positions. Those are lobbying activities subject to tracking, registration and reporting with Congress.

None of the activities in the above-stated examples come anywhere near what proponents of grassroots lobbying legislation describe as the targeted activity subject to the lobbying reporting and disclosure laws.

The proposed regulation of the grassroots targets low-paid speech and publication under \$25,000, not the highly paid lobbying efforts described by proponents. The legislation would regulate communications prepared in-house by those who do not use Washington-based lobbyists and who do not make political contributions, thus claims of targeting merely high-paid “Astroturf” lobbying and those who influence elections are false. The legislation would regulate faith-based communication, and

would even foster more Jack Abramoff-style corruption, while making innocent publication a violation of law for “committing lobbying.”

These attempt to regulate the grassroots manage to turn the definition of lobbying on its head by regulating speech and publication to the general public, and are unconstitutional. Even in describing so-called congressional ethics reform, some Members of Congress and certain Washington-based special interest proponents of “reform” have managed to portray their proposals incorrectly. The lobbying reform bills must not include efforts to regulate the grassroots.

Respectfully submitted,  
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