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MEMORANDUM FOR: FSC MEMBERS AND FRIENDS

FROM: WILLIAM J. OLSON & HERBERT W. TITUS

SUBJECT: United States Congress: Pending Grassroots Lobbying Disclosure and Registration Bills

DATE: JANUARY 12, 2006

Introduction

Senators **John McCain** (R-AZ) and **Russell Feingold** (D-WI) and Congressmen **Christopher Shays** (R-4th-CT) and **Martin Meehan** (D-5th-MA) — major sponsors of the recent Bipartisan Campaign Finance Reform Act of 2002 ("BCRA") — are once joining forces, this time to push for "reform" of the nation's **lobbying registration and disclosure** measures, the major feature of which is to "out" organizations engaged in "grassroots lobbying."

Feingold and Meehan

Initially, in the spring and summer of 2005 and in response to allegations of House rule violations — particularly about lobbyists paying for congressional travel by then House **Majority Leader Tom DeLay** (R-22nd-TX) — Democrats **Feingold** and **Meehan** took the lead in the Senate and House respectively, introducing their bills entitled the "**Lobbying and Ethics Reform Act of 2005."** *See* **S. 1398** and **H.R. 2412**; "House Members to Offer Bill to Expand Lobbying Disclosure," http://www.ombwatch.org/article/articleprint/2841/-1/342.

McCain and Shays

In December 2005, as the Jack Abramoff scandal began to emerge, Republicans **McCain** and **Shays** introduced their version of lobbying and ethics reform with bills entitled the **"Lobbying Transparency and Accountability Act of 2005."** *See* **S. 2128** and **H.R. 4575.**

Republican Leadership

By the first week of January 2006, as the Abramoff issue continued to spread, Congressman **Roy Blunt** (R-7th-MO), aspiring to Congressman DeLay's vacated position as Majority Leader, staked out his campaign with a commitment to tighten the ethics and lobbying rules. Soon thereafter, the House Speaker, **Dennis Hastert**, announced that he had decided to

meet with Senator McCain and his fellow reformers to discuss the need for change. *See* "Washington Shuffle," (*New York Times*: Jan. 10, 2006), http://www.nytimes.com/2006/01/10/opinion/10tue3.html?n=Top%2fReference%2fTimes.

Features of the Four Bills

The four bills contain provisions designed to keep a closer watch on face-to-face lobbying activities, including:

(a) more frequent reporting of direct contacts between lobbyists and members of Congress and their staffs, and members of the executive branch;

(b) more specific disclosure of such lobbying contracts: and

(c) more public exposure of such activities via the Internet.

The central feature of all four bills, however, is the various provisions that extend the disclosure and reporting requirements to "**grassroots lobbying**," that is, efforts by persons and organizations to encourage the "**general public**" to write, telephone, fax, and e-mail their elected representatives on issues of public policy of mutual concern, even if the organization or person has not hired or employed any person to communicate directly with any member of Congress or his or her staff or any executive officer or his or her staff. *See, e.g.,* S. 2128, Section 105.

To comply with the registration requirements proposed by the McCain bill (S. 2128), for example, such organizations or persons, within 20 days after a "grassroots lobbying firm" is retained to engage in grassroots lobbying, the person or organization must register as a "lobbyist" with the Secretary of the Senate and the Clerk of the House of Representatives, disclosing:

(a) the name, address, telephone number, and a general description of the person's or organization's business or activities;

(b) if different from the lobbyist, the name, address of the principal place of business of the client, and a general description of the client's business or activities;

(c) the name, address and principal place of business of any organization, other than the client, that contributes more than $5,000 to the lobbying activities of the registrant in a quarterly period, and in whole or in major part plans, supervises, or controls such lobbying activities;

(d) the name, address, principal place of business, amount of contribution of more than $5,000 to the lobbying activities of the registrant; and

(e) a statement of the general issue areas in which the registrant expects to engage in lobbying activities; and to the extent practicable, specific issues that have (as of the date of the registration) already been addressed or are likely to be addressed in lobbying activities and the name of each employee of the registrant who has acted or who is expected to act as a lobbyist on behalf of the client.

In addition to these registration requirements, a person or organization engaged in grassroots lobbying would be required to file **quarterly reports** providing, among other things:

(a) updated information concerning matters set forth in the initial registration;

(b) a list of the specific issues upon which a lobbyist employed by the registrant engaged in grassroots lobbying activities, including, to the maximum extent practicable, a list of the bill numbers and references to specific executive branch actions;

(c) the total disbursements made for grassroots lobbying and a subtotal of disbursements made for grassroots lobbying through paid advertising;

(d) identification of each person or entity who received a disbursement of funds for grassroots lobbying of $10,000 or more during the period and total amount each person or entity received; and

(e) if disbursements are made through an intermediary or conduit, the identification of such intermediary or conduit who receives such funds and the total amount received.

Finally, the grassroots lobbyist would be required to file a report, 20 days after receiving, spending, or agreeing to spend $250,000 or more on grassroots lobbying for a client or a group of clients, and to file an additional report within 20 days after each time such a lobbyist receives or spends, or agrees to spend, an aggregate of $250,000 or more on grassroots lobbying.

True Legislative Purpose

Even without the provisions extending the registration and disclosure requirements to grassroots lobbying, there is serious question whether either more "transparency" or more public "accountability" of traditional lobbyists who directly communicate with policy makers will change the way that the nation is governed.

As one reporter has observed, the **growth of the "lobbying industry" has simply "tracked the growth of the federal government,"** and that "the [continuing] rise of government regulation" will see a corresponding rise in "the private sector's efforts to master the new

system." *See* Todd S. Purdum, "Go Ahead, Try to Stop K Street" (*New York Times*: Jan. 8, 2006) http://www.nytimes.com/2006/01/08/weekinreview/08purdum.html?oref=login.

None of the four "reform" bills addresses this problem. Rather, the increased disclosure requirements are, in fact, designed to create the **appearance that Congress is doing something** about the scandal of special interest politics and thereby, as the "1995 Lobbying Disclosure Act" that the bills would amend, states to "increase public confidence in the integrity of Government." *See* 26 U.S.C. section 1601(3).

In other more frank words, **Congress is really only interested in protecting its own reputation** and the reputation of the government, lest the people rise up and throw them out of office. In the old days, people who criticized the government were prosecuted for **seditious libel**, as they still are in modern Cambodia.[1] But that weapon is not available to the United States Congress. *See* New York Times v. Sullivan, 376 U.S. 254 (1964). So, nowadays, Congress protects its reputation by bringing its critics into disrepute, forcing the name of "lobbyist" upon them, knowing full well the "pejorative sting" the label brings in the eyes of their fellow citizens. *See* Purdom, "Go Ahead, Try to Stop K Street" (*New York Times*: Jan. 8, 2006) ("Jack Abramoff's trading room was his Signatures restaurant, not the front of the old Willard Hotel, where favor seekers so besieged Grant that he helped popularize the label — lobbyist — that still clings to their descendants with a pejorative sting.")

Grassroots Lobbying

Not only are these four bills **designed primarily to protect the reputation of incumbent office holders**, and **impugn the reputation of their critics,** but they also are designed to **insulate** those incumbents from the views and petitions of their constituents. This can readily be seen from the burdens being imposed on Grassroots Lobbying, as catalogued above.

_____This is not the first time that Congress has attempted to control "grassroots lobbying" by financially burdensome registration regulations and chilling disclosure requirements. To the contrary, in the interest of "self-protection," the **Federal Regulation of Lobbying Act of 1946** attempted to require registration and disclosure by organizations that stimulate the general public to contact their elected representatives on the ground that such efforts were "artificially stimulated letter campaign[s]" manipulated by the special interests. *See* United States v. Harriss, 347 U.S. 612, 620 and n. 10 (1954). Congress was thwarted in that effort by the **United States Supreme Court** which narrowly construed the broad language of the statute to reach only those organizations who employed persons who engaged in "'lobbying in its commonly accepted sense'

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[1] In Cambodia, the current regime is maintaining its power with the appearance of democracy by having the opposition arrested under charges of defamation. Many of the opposition leaders are either in jail or have fled the country. *See* http://www.nytimes.com/2006/01/09/international/asia/09cambodia.html.

— to **direct communication with members of Congress** on pending or proposed federal legislation." *Id.* at 620 (emphasis added).

The Court's narrow construction of the 1946 Act was prompted, in part, by its concern that a registration and disclosure act that reached grassroots lobbying would violate the **First Amendment guarantees of speech, assembly and petition**. *See* United States v. Rumely, 345 U.S. 41, 46 (1953). Indeed, in a concurring opinion written by **Justices Black and Douglas** in Rumely warned that any effort to extend the registration and disclosure requirements to beyond ordinary "lobbying activities" to include actions designed to shape public opinion would violate the freedom of the press. *See* Rumely, 345 U.S. at 57. And, as **Justice Robert Jackson**, dissenting from the majority's ruling narrowly construing the 1946 Federal Lobbying Act, efforts to control grassroots lobbying through registration and disclosure requirements would intrude upon the right of the people to petition the Government for redress of grievances:

> [The right of petition] confers a large immunity upon activities of persons, organizations, groups and classes to obtain what they think is due them from government. Of course, their conflicting claims and propaganda are confusing, annoying and at times, no doubt deceiving and corrupting. But we may not forget that our constitutional system is to allow the greatest freedom of access to Congress, so that the people may press for their selfish interest, with Congress acting as arbiter of their demands and conflicts. [United States v. Harriss, 347 U.S. at 635.]

Conclusion

If enacted into law, the provisions of these four bills — **extending** the registration and disclosure requirements of the **current law** governing persons and entities paid to have direct contact with members of Congress and their staffs and officials of the executive department and their staffs **to grassroots lobbying** — would, as Justice Jackson observed, **"protect" members of Congress from having to perform their job**, and thereby, risking being voted out of office at the next election.

These bills constitute **incumbent protection legislation** at its worst. And it should be vigorously opposed and publicly exposed as a fraud upon the people, as well as a deprivation of their precious liberties of speech, press, assembly, and petition.