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Proposed "Grassroots Lobbying" Registration and Disclosure Legislation in the House of Representatives

THE UNCONSTITUTIONALITY OF CONGRESSIONAL REGULATION OF GRASSROOTS LOBBYING[1] (April 18, 2007)

Within the next two weeks, the House leadership is expected to bring to the floor a lobbying reform bill — similar to an earlier version of S. 1, the "Legislative Transparency and Accountability Act of 2007" passed by the Senate in January of this year — which is likely to include unconstitutional provisions restricting grassroots lobbying which had been stripped out of the Senate bill.

Senate Action. Before the Senate acted favorably on S. 1, it passed the "Bennett Amendment," by a vote of 55-43, deleting Section 220 which would have regulated so-called grassroots lobbying by requiring registration of firms (and disclosure of contributors) engaged in communications with the general public urging ordinary citizens to contact their Senators or Representative on policy matters before them. (Such restrictions would have applied to a firm even if it made no direct communication to any senator or representative.)

House Action. Now, those who want to regulate citizen participation in the legislative process are back to try to undo their loss in the Senate. (Section 204 of H.R. 4682, the "Honest Leadership and Open Government Act of 2006," introduced in the House last year is virtually identical to Section 220 of S. 1 defeated in the Senate this year.)

Selective Disclosure. As of the date of this memorandum, it appears that a few favored lobbying organizations that are pressing for grassroots lobbying registration and disclosure have been "provided with a copy of revised grassroots language expected to be introduced in the House as part of that chamber's lobbying reform legislation."[2] One of these organizations, The Campaign Legal Center (CLC), has taken advantage of this privileged disclosure to send a

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[1] This analysis was prepared by attorneys Herbert W. Titus, William J. Olson, and Mark B. Weinberg.

[2] *See* M. Fitzgibbons, "'Grassroots' Lobbying Reform: What are Democrats Trying to Hide?," *Human Events.com* (April 13, 2007) http://www.humanevents.com/article.php?print=yes&id=20239.

severely flawed and misleading memorandum to the House in support of the constitutionality of the House's new lobbying disclosure proposal.[3]

In view of the outcry the Senate bill provoked from a broad range of organizations, it is expected that the secrecy on the bill language will continue until immediately before it is reported out of the House Judiciary Committee, and then rushed to the floor before another firestorm can form.

FSC Constitutional Analysis. Since the Free Speech Coalition has not been allowed to see the draft bill, this memorandum does not address the closely-guarded text of the bill, but rather is written to expose the exaggerated and false constitutional claims in the CLC memo. This memorandum demonstrates why any effort to require registration and disclosure of public communications — paid or unpaid — to the general populace urging them to contact their senators and representatives would constitute an unprecedented and unconstitutional assault upon the First Amendment freedoms of speech, press, assembly, and petition.

I. The Supreme Court Has Not Ruled in Favor of "Grassroots Lobbying" Regulation.

Relying primarily on phrases taken out of context from United States v. Harriss, 347 U.S. 612 (1954), the CLC (as well as others[4]) has **asserted** that the Supreme Court has **already decided** that appeals directed to the general public to petition their elected representatives stand on no different constitutional footing than efforts to "button-hole" those same representatives by highly paid operatives of the special interests.

In Harriss, however, **the issue of the constitutionality of lobbying regulation and disclosure was not even raised, much less contested**. The only question raised was vagueness, and it was not even clear if this claim was based on due process or the First Amendment.

In Harriss, the Court had to rewrite the statute to save it, and then **explicitly limited its First Amendment observations to disclosure requirements of paid lobbyists who are in direct communication with members of Congress**, having recognized just **one year previously** that to extend the registration and disclosure rules to **grassroots** appeals encouraging voluntary

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[3] *See* The Campaign Legal Center's March 26, 2007 "Memo to the House on the Constitutionality of New Lobbying Disclosure Proposal for Paid Communications Campaigns." http://www.campaignlegalcenter.org/press-2537.html.

[4] *See, e.g.,* Democracy 21, "Q and A on Senate Provision Requiring Disclosure of Amounts Spent on 'Astroturf' Lobbying" (Jan. 10, 2007) http://www.democracy21.org/index.asp?Type=B_PR&SEC={288FE76D-7420-413B-9ADC-AA4339D68BE7}&DE={96B09067-3EFD-4C8D-BD01-BD2BF6996E5F}.

communications to those same Senators and Representatives would raise "doubts of constitutionality in view of the prohibition of the First Amendment." *See* United States v. Rumely, 345 U.S. 41, 46 (1953), cited in Harriss, 347 U.S. at 620. Indeed, it is most remarkable that the CLC memo completely omits any reference to Rumely, especially in light of Justices Douglas and Black's concurring opinion that a law extended to grassroots lobbying would clearly violate the freedom of the press. Rumely, 345 U.S. at 56-58.[5]

Thus, Harriss is a weak reed indeed for CLC's attempt to claim that the Supreme Court has definitively resolved that there is no First Amendment problem raised by a grassroots lobbying and disclosure requirement imposed upon an organization that has **no direct contact with any member of Congress or any executive official.** Further, in light of their independent oath of office to support the Constitution of the United States — not just the Supreme Court's expected interpretation of it — the members of the House have an independent duty to determine the constitutionality of such an unprecedented requirement, one that would, after sober examination, put a dagger into the heart of full and free participation of the American citizenry in the formulation of the nation's public policy.

II. Unconstitutional Purpose: Violation of the Freedom of Speech.

According to the CLC, registration and disclosure of organizations that alert the general public to public policy measures before Congress are necessary to protect that legislative body from the corrupting influence of special interest lobbyists. According to Webster, a "lobbyist" is a person who is **employed and compensated** to regularly make personal contacts with government officials for the purpose of influencing those officials to make policy decisions in favor of the lobbyist's principal. Consistent with normal usage of this word, under current law "the term 'lobbyist' means any individual who is **employed or retained by a client for financial or other compensation**" to regularly engage in "lobbying activities," that is, to regularly make "any oral or written communication" to a policy-making or policy-influencing member of either the federal executive or legislative branches of government. *See* 2 U.S.C. Section 1602(3), (4), (7), (8)(A) and (10).

However, according to the **new** grassroots lobbying registration and disclosure requirement in the House bill, **every member of the general public** who

> (a)"voluntarily" communicates his own views on any "issue" to any "Federal official," or even

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[5] Furthermore, Congress has recognized that even the current direct lobbying registration statute could threaten "the right to petition [and] of association protected by the First Amendment to the Constitution," and must be construed to avoid that result. *See* 2 U.S.C. 1607(a).

(b) "encourages other members of the general public to do the same," is, in effect, a "lobbyist."

To be sure, the language in the House bill (as Section 220(a)(2) of S. 1 did not) **would not expressly state** this, but it would not take a rocket scientist — or even a lawyer — to infer that, if the term "grassroots lobbying means the **voluntary** efforts of members of the general public to communicate their own views on an issue to Federal officials or to encourage other members of the general public to do the same," as was expressly provided in Section 220(a)(2) of S. 1 (emphasis added), then, when so engaged, every such John Q. Public is acting as a "lobbyist," rather than the "citizen activist" that he really is.

Undoubtedly, the language of the House bill — like the terms of Section 220(a)(1) of S. 1 — would probably contain a phrase stating that "lobbying activities … do not include grassroots lobbying," but that statement constitutes a disingenuous effort to open the door to a newly-minted and convoluted definition of "lobbying activities," namely, "paid efforts to stimulate grassroots lobbying." Such efforts, by definition, decidedly do **not** include any communication whatsoever with a federal government official. Indeed, such an "Alice in Wonderland" definition turns the ordinary meaning of "lobbying activities" on its head,

(a) counting as "lobbying activities" all communications that are directed to the general public, not to their governing officials, and

(b) treating all communications to Federal officials as "lobbying activities" even if no member of the general public ever actually followed through to make such a communication.

According to the CLC description of the grassroots provision in the House bill, it — like Section 220(a)(1) of S. 1 — **conclusively presumes** that every "paid effort[] to stimulate grassroots lobbying" will be successful, requiring registration and disclosure by "Grassroots Lobbying Firms" **before, not after**, a member of the public communicates with a federal official on the issue for which that firm was "retained … to engage in paid efforts to stimulate grassroots lobbying." Indeed, as CLC admits, the House proposal would require such a firm "to disclose information regarding **good faith estimates** of amounts spent … to influence the general public to lobby Congress," without regard to success or failure of its catalytic efforts. In other words, a "grassroots lobbying firm" must register as if it were a lobbyist, even if the firm **did not succeed** in stimulating even a single member of the public to communicate his views on an issue to a federal official.

What could be the purpose of (a) requiring a "grassroots lobbying firm" to register as though it were a "lobbyist," when it clearly is not one within the ordinary meaning of the term, and of (b) treating an ordinary citizen's petition on his own behalf as if it were lobbying on behalf of a lobbying firm? The purpose can be seen as twofold:

(a) **to place the pejorative label of "lobbyist" upon grassroots efforts to influence federal policy,** equating the voluntary, unpaid petitions of members of the general public with the direct contacts by paid K Street operatives, and

(b) **to enhance the elected officials' reputations as transparent and accountable public servants**, as evidenced by the title appended to the legislation**.**

While government officials are clearly empowered to protect the executive, legislative, and judicial processes from corruption and other damage to the integrity of existing government institutions, it has long been understood that **neither the government nor its officials may protect their reputations by stigmatizing the people whom they are elected to serve**. *See* New York Times Co. v. United States, 403 U.S. 713, 723-24 (1971) (Douglas, J., concurring).

Thus, at **the heart of the freedom of speech is the prohibition** of any Congressional statute the purpose of which is to **censure the people** by laws such as **seditious libel**, which threatened with court action any member of the public whose actions called into question the reputation of the existing government. *See* New York Times v. Sullivan, 376 U.S. 254 (1964).

The freedom of speech guarantees "that debate on public issues should be uninhibited, robust, and wide-open," not constricted by **false and defamatory labels imposed upon the people by government officials**, as would be the case of any "grassroots lobbying" proposal that might be forthcoming from the House.

III. Unconstitutional Means: Violation of Freedom of the Press.

At the heart of the freedom of the press is the well-established principle that Congress has no power to require a person to obtain a **license before** he may gain entrance to the free marketplace of ideas. *See* Lovell v. Griffin, 303 U.S. 444 (1938). Thus, it has long been established that the "chief purpose" of freedom of the press is "to prevent previous restraints upon publication." Near v. Minnesota, 283 U.S. 697, 713 (1931).

As the Supreme Court observed in the Pentagon Papers case, "[a]ny system of prior restraints of expression … bear[s] a heavy presumption against its constitutional validity." New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (quoting Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963)). (Indeed, as Justice Brennan pointed out in the Pentagon Papers case, "there is a single, extremely narrow class of cases in which the First Amendment's ban on prior … restraint may be overridden … when the Nation 'is at war.'" *Id.*, 403 U.S. at 726.)

At the heart of the new rule requiring **registration** of "grassroots lobbying firms," as is true of the current law providing for the registration of K Street lobbyists, is that registration with the Secretary of the Senate and Clerk of the House of Representatives must take place **before** a grassroots lobbying firm ever engages in any paid effort to stimulate grassroots lobbying.

This registration will not only have **the effect of a prior restraint** upon those persons and entities who would like to communicate with members of the general public urging them to communicate on an issue of public policy with appropriate federal officials, but it is **deliberately designed** to discourage paid efforts to stimulate members of the general public to communicate on the issues with their elected representatives. And for what **purpose**? According to the bill's proponents, early registration — **before** any member of the public communicates with any federal official — is necessary to "expose" phony grassroots e-mails, faxes, telephone calls, and letters to members of Congress by "Astroturf entities" serving "well-heeled special interests" hiding behind "populist-sounding names."[6]

No matter how benevolent the public exposure may seem, this is a **direct attack on the freedom of the press**, imposing a prior restraint upon persons who **plan** to stimulate — but who have not yet begun to do so — their fellow citizens to communicate their views to a federal official on an issue that may or may not be of mutual concern. Accordingly, the registration rule must overcome the heavy presumption **against** its constitutionality.

The CLC Memo to the House makes absolutely no effort to demonstrate that a grassroots lobbying registration and disclosure requirement is necessary to serve a compelling government interest as required by the Pentagon Papers case. Rather it simply states that the prior restraint upon grassroots lobbying is justified because of an undefined "governmental interest of 'self-protection'" or by an equally amorphous "informational interest." Not only do these ostensibly benign claims not rise to the level of an overriding governmental interest justifying a prior restraint, such as recognized by Justice Brennan in the Pentagon Papers case, former Federal Elections Commission (FEC) chairman, Bradley A. Smith, testifying on March 1, 2007 before the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, explained that such forced disclosures "add[] little, and will often be harmful, leading to exactly the type of favoritism and/or negative pressure that the public abhors":

> [G]rassroots lobbying contacts do not pose the possibility of behind the scenes meetings or bribery or improper influence, because by definition grassroots lobbying relies on voters — constituents — to take action. Efforts to force disclosure needlessly open up that field to K Street Project-type pressure. Such forced disclosure can make seasoned professionals reluctant to assist unpopular causes or those contrary to the administration, resulting in a **chilling effect** that would deprive grassroots organizations of the services of talented consultants.... [emphasis added.]

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[6] *See* Public Citizen, "Organizing Astroturf: Evidence Shows Bogus Grassroots Groups Hijack the Political Debate; Need for Grassroots Lobbying Disclosure Requirements," p. 1 (January 2007).

Moreover, such forced disclosures of persons or entities behind the scenes **violates the principle of anonymity which lies at the very core of freedom of the press**. *See* Talley v. California, 362 U.S. 60, 62-65 (1960); McIntyre v. Ohio Elections Comm., 514 U.S. 334, 359-71 (1995) (Thomas, J., concurring). Indeed, the principle of constitutionally-secured anonymity has been endorsed repeatedly by the Supreme Court in recognition of the interest of ordinary citizens to protect their identity to avoid "economic or official retaliation, … social ostracism [or] to preserve as much of one's privacy as possible." 514 U.S. at 357 (Stevens, J.).

Some proponents of grassroots lobbying registration and disclosure assert, however, that disclosure is "not regulation," as if disclosure requirements begin and end with a simple act of revelation. That is not the case, as former FEC chairman Smith pointed out in his House Judiciary testimony, as any person knows who has filled out government forms under threat of "civil and criminal penalties for any errors or late filings."

Indeed, S. 1, had it not eliminated the grassroots lobbying provisions, would have imposed **significant civil penalties** for failure to accurately report a "**good faith estimate of the total disbursements**," including a subtotal of "a **good faith estimate** of the total amount specifically relating to **paid advertising**." Furthermore, the Senate bill would have imposed a **civil penalty of $200,000** for a "knowing violation" proved only "by a preponderance of the evidence" of any registration or disclosure provision.

And the House bill in the 109th Congress, after which S. 1 had been patterned, would have added **two entirely new criminal penalties**, imposing significant prison terms and fines for "knowing … and wilful … fail[ures]" and "knowing…, wilful…, and corrupt… failures to comply." *See* Section 402(b) of H.R. 4682 (109th Cong.). There is, therefore, no reason to expect the House bill in the 110th Congress to ameliorate such proposed penalties.

Despite the rhetoric by politicians claiming their desire to encourage participation in the American political process, the chilling effects of these draconian penalties are obvious. Passage of the "grassroots lobbying" provisions would send a clear message to the American people:

> **Now that you have elected us, don't bother us with your views, and don't try to stir up our constituents against us; just leave legislation to the professionals, and we will do what is best for you**.

This is not the American way.

IV. Unconstitutional Intrusion on the Rights of Assembly and Petition.

Any "grassroots lobbying" registration and disclosure provision is, in the final analysis, built upon a **false and unconstitutional premise**.

According to the bills' definition of "grassroots lobbying," **communications among members of the general public** on the issues are subject to regulation by Congress if they **might** lead to communications on those issues to government officials or if they **might** lead to communications to fellow members of the public to communicate on those issues to government officials. Only if members of the public **keep their thoughts on public issues to themselves**, away from their elected representatives or other government officials, may the members of the public associate free from the watchful regulatory eye of Congress.

But the very **purpose** of the constitutionally-guaranteed **right of the people to assemble is to petition the government for redress of their grievances**. Indeed, as the people of the newly formed commonwealth of Pennsylvania put it in their August 16, 1776 Declaration of Rights: "[T]he people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition or remonstrance." The right of the people to assemble, then, was not envisioned as a kind of political "Koffee Klatch," or as an academic "bull session," but as a constitutionally guaranteed right to decide how, with whom, and for what purpose the people would assemble **independent** of the rules and regulations of the government except for one — that the assembly would be "peaceable." Thus, the First Amendment guarantee reads: "the right of the people **peaceably** to assemble, and to petition the government for a redress of grievances."

It is well-established that the right of the people to assemble and petition the government may be regulated only by laws designed **to protect the physical peace** of the community, **not for the political peace** of the governing officials. *See* Hague v. CIO, 307 U.S. 496 (1939). *See also* Terminiello v. Chicago, 337 U.S. 1 (1949). Accordingly, the courts have developed the **"time, place, and manner" doctrine**, limiting government regulations of people's assemblies to laws that protect the physical peace of the community, ever watchful of regulations that discriminate on the basis of content. *See, e.g.,* Kovacs v. Cooper, 336 U.S. 77 (1949).

The proposed regulation of "grassroots lobbying" violates this well-established principle of **content-neutrality**. It singles out "paid efforts" to stimulate members of the general public to communicate on an issue to federal officials or to encourage fellow members of the general public to do the same, not as a "time, place and manner" regulation, but as a discriminatory one based upon the content of the communication. According to current Supreme Court rulings, content-discriminatory regulations are per se unconstitutional if imposed upon the people in their own homes or in public places dedicated to free speech activities. *See* Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).

Furthermore, the regulation is **discriminatory**. According to the CLC Memo, the House bill will contain a provision similar to Section 220(a) of S. 1 which specifically exempts "communications by an entity directed to its members, employees, officers or shareholders," thereby favoring persons having memberships, employments, and other similar relationships. Further, one version of the House bill apparently includes a provision comparable to Section 220(a) of S. 1 which defined a "grassroots lobbying firm" to be one "retained by 1 or more clients

to engage in paid efforts to stimulate grassroots lobbying." Such limitations are not virtues, as the CLC would have the House believe. Rather, they **would favor large and prosperous public policy organizations, businesses, and other entities** that have no need to "retain" an outside person or entity to make a grassroots appeal to the detriment of smaller and less prosperous entities.

Finally, requiring grassroots lobbying and registration does not reach the media, giving newspapers, and television and radio stations a special privilege from having to register and to disclose before engaging in activities that stimulate the general public to communicate their views to federal officials. Granting to some, but not to others, the privileges of assemblage and petition without interference by the government is a clear denial of the right of assembly and petition. As Justice Thurgood Marshall wrote in the Mosley case, "[t]here is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Id.*, 408 U.S. at 96.

V. Conclusion.

Efforts by Congress to impede input from citizens are not new. In 1840, the U.S. House of Representatives adopted its notorious Rule XXI, banning abolitionist or anti-slavery petitions from being received or entertained. *See* Congressional Globe, 26th Congress, 1st Session (Jan. 28, 1840). Spearheaded by the efforts of Congressman John Quincy Adams, this rule was abolished on December 3, 1844, in recognition of the reciprocal duty imposed upon the House by the petition guarantee. *See* III Cyclopedia of Political Science, Political Economy, and the Political History of the United States, § 53 (J.J. Lalor, ed., New York: 1899).

Whether the year is 1840 or 2007, restrictions on input from the people have no place in a country dedicated to the freedoms of speech, press, assembly, and petition.