(A) means anything of value given to, on behalf of, or for the benefit of a covered legislative branch official, including—

(i) a gift;

(ii) payment for local or long-distance transportation, entertainment, food, or lodging, whether provided in kind, by purchase of a ticket, by payment in advance or by reimbursement, or otherwise;

(iii) a contribution or other payment made to a third party in lieu of an honorarium on the basis of a designation, recommendation, or other specification made by the covered legislative branch official;

(iv) reimbursement of an expense;

(v) a loan; and

(vi) an expenditure made for a conference, retreat, or other event benefiting a covered person, but

(B) does not include—

(i) a contribution, as defined in the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.), that is required to be reported under that Act, unless the contribution is in the form of participation in a fundraising activity on behalf of a covered legislative branch official, including the solicitation of contributions, hosting or cohosting of a fundraising event, or service on a campaign steering committee or its equivalent;

(ii) a modest item of food or refreshments, such as a soft drink, coffee, or doughnut, offered other than as part of a meal;

(iii) a greeting card or other item of little intrinsic value, such as a plaque, certificate, or trophy, that is intended solely for presentation;

(iv) financial benefits given under circumstances which make it clear that the benefits are motivated by a family relationship rather than the position of the recipient;

(v) financial benefits which are not used and which are promptly returned to the donor; or

(vi) widely attended receptions to which covered legislative branch officials are invited, other than events described in paragraph (1)(B) of this subsection.

(d) ESTIMATES OF INCOME OR EXPENSES.—For the purpose of this section, estimates of income or expenses shall be made as follows:

(1) Income or expenses of $200,000 or less shall be estimated by the following categories:

(A) At least $1,000 but not more than $10,000.

(B) More than $10,000 but not more than $20,000.

(C) More than $20,000 but not more than $50,000.

(D) More than $50,000 but not more than $100,000.

(E) More than $100,000 but not more than $200,000.

(2) Income or expenses in excess of $200,000 shall be estimated and rounded to the nearest $100,000.

(3)(A) Any registrant whose total income (in the case of an organization described under subsection (b)(3)) or total expenses (in the case of an organization described under subsection (b)(4)) in connection with lobbying activities do not exceed—

(i) $1,000 in a semiannual period on behalf of a particular client, or

(ii) $5,000 in a semiannual period on behalf of all clients,

(as estimated under this section), or who does not make any lobbying contacts on behalf of a particular client, is deemed to be inactive during such period with respect to such client or clients and may comply with the reporting requirements of this section by notifying the Director, in such form as the Director may prescribe.

(B) The reporting thresholds established under this paragraph shall be adjusted on January 1 of each year divisible by 5 to the amount equal to $1,000 and $5,000, respectively, in constant 1995 dollars (rounded to the nearest $100).

(4) In the case of registrants that are required to report or identify lobbying income or expenses under sections 6033 and 6104 of the Internal Revenue Code of 1986, regulations developed under section 6 shall provide that the amounts required to be disclosed under such sections, or a good faith estimate of such amounts, may be reported (by category of dollar value) to meet the requirements of subsection (b) (3) or (4) of this section.

(5) In estimating total income or expenses under this section, a registrant is not required to include—

(A) the value of contributed services for which no payment is made; or

(B) the expenses for services provided by an independent contractor or agent of the registrant who is separately registered under this Act.

(e) CONTACTS WITH CONGRESSIONAL COMMITTEES.—For purposes of subsection (b)(2), any contact with a member of a congressional committee, an employee of a congressional committee, or an employee of a member of a congressional committee regarding a matter within the jurisdiction of such committee is a contact with the committee.

(f) EXTENSION FOR FILING.—The Director may grant an extension of time of not more than 30 days for the filing of any report under this section, on the request of the registrant, for good cause shown.

SEC. 6. ADMINISTRATIVE DUTIES OF THE OFFICE OF LOBBYING REGISTRATION AND PUBLIC DISCLOSURE.

(a) ESTABLISHMENT.—(1) There is established within the Department of Justice an Office of Lobbying Registration and Public Disclosure, which shall be headed by a Director. The Director shall be appointed by the President, by and with the advice and consent of the Senate. The Director shall be an individual who, by demonstrated ability, background, training, and experience, is especially qualified to carry out the functions of the position.

(2) Section 5316 of title 5, United States Code, is amended by adding at the end thereof the following:

"Director of the Office of Lobbying Registration and Public Disclosure, Department of Justice.".

(b) DUTIES.—The Director of the Office of Lobbying Registration and Public Disclosure shall—

(1) after notice and an opportunity for public comment, and consultation with the Secretary of the Senate, the Clerk of the House of Representatives, and the Administrative Conference of the United States, prescribe such rules, forms, penalty schedules, and procedural regulations as are necessary for the implementation of this Act;

(2) provide guidance and assistance on the registration and reporting requirements of this Act, including, to the extent practicable, the issuance of published decisions and advisory opinions;

(3) review and make such supplemental verifications or inquiries as are necessary to ensure the completeness, accuracy, and timeliness of registrations and reports;

(4) develop filing, coding, and cross-indexing systems to carry out the purposes of this Act, including computerized systems designed to minimize the burden of filing and maximize public access to materials filed under this Act;

(5) ensure that the computer systems developed pursuant to paragraph (4)—

(A) allow the materials filed under this Act to be accessed by the name of the client, the lobbyist, and the registrant;

(B) are compatible with computer systems developed and maintained by the Federal Election Commission, and that information filed in the two systems can be readily cross-referenced; and

(C) are compatible with computer systems developed and maintained by the Secretary of the Senate and the Clerk of the House of Representatives;

(6) make copies of each registration and report filed under this Act available to the public in electronic and hard copy formats as soon as practicable after the date on which such registration or report is received;

(7) preserve the originals or accurate reproduction of registrations until such time as they are terminated, and of reports for a period of no less than 2 years from the date on which the report is received;

(8) maintain a computer record of the information contained in registrations and reports for no less than 5 years after the date on which such registrations and reports are received;

(9) compile and summarize, with respect to each semiannual period, the information contained in registrations and reports filed during such period in a manner which clearly presents the extent and nature of expenditures on lobbying activities during such period;

(10) make information compiled and summarized under paragraph (9) available to the public in electronic and hard copy formats as soon as practicable after the close of each semiannual filing period;

(11) provide, by computer telecommunication or other transmittal in a form accessible by computer, to the Secretary of the Senate and the Clerk of the House of Representatives copies of all registrations and reports received under this Act and all compilations, cross-indexes, and summaries of such registrations and reports, as soon as practicable (but not later than 3 working days) after such material is received or created; and

(12) transmit to the President and the Congress an annual report describing the activities of the Office and the implementation of this Act, including—

(A) a financial statement for the preceding year;

(B) a summary of the registrations and reports filed with the Office in the preceding year;

(C) a summary of the registrations and reports filed on behalf of foreign entities in the preceding year; and

(D) recommendations for such legislative or other action as the Director considers appropriate.

SEC. 7. INFORMAL RESOLUTION OF ALLEGED NONCOMPLIANCE.

(a) ALLEGATION OF NONCOMPLIANCE.—Whenever the Office of Lobbying Registration and Public Disclosure has reason to believe that a person may be in noncompliance with the requirements of this Act, the Director shall notify the person in writing of the nature of the alleged noncompliance and provide an opportunity for the person to respond in writing to the allegation within 30 days or such longer period as the Director may determine appropriate in the circumstances.

(b) INFORMAL RESOLUTION.—If the person responds within 30 days or other time limit set by the Director, the Director shall—

(1) take no further action, if the person provides adequate information or explanation to determine that it is unlikely that such person is in noncompliance with the requirements of this Act;

(2) if the person admits that there was a noncompliance and corrects such noncompliance—

(A) in the case of a minor noncompliance, take no further action; or

PHOTOCOPY PRESERVATION

Mitchell	Pressler	Simon
Moseley-Braun	Reid	Simpson
Moynihan	Riegle	Specter
Muskowski	Robb	Stevens
Murray	Rockefeller	Thurmond
Nickles	Roth	Warner
Nunn	Sarbanes	Wellstone
Packwood	Sasser	Wofford
Pell	Shelby	

NAYS—2

Smith Wallop

NOT VOTING—3

Helms Kruegel Tryor

So the bill, S. 349, as amended, was passed as follows:

S. 349

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lobbying Disclosure Act of 1993".

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

(1) responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decisionmaking process in both the legislative and executive branches of the Federal Government;

(2) existing lobbying disclosure statutes have been ineffective because of unclear statutory language, weak administration and enforcement provisions, and an absence of clear guidance as to who is required to register and what they are required to disclose; and

(3) the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government.

(b) PURPOSE.—The purposes of this Act are to—

(1) provide for the disclosure of the efforts of paid lobbyists to influence Federal legislative or executive branch officials in the conduct of Government actions; and

(2) afford the fullest opportunity to the people of the United States to exercise their constitutional right to petition their Government for a redress of grievances, to express their opinions freely to their Government, and to provide information to their Government.

SEC. 3. DEFINITIONS.

As used in this Act:

(1) The term "agency" has the same meaning as such term is defined under section 551(1) of title 5, United States Code.

(2) The term "client" means any person who employs or retains another person for financial or other compensation to conduct lobbying activities on its own behalf. An organization whose employees act as lobbyists on its behalf is both a client and an employer of its employee lobbyists. In the case of a coalition or association that employs or retains persons to conduct lobbying activities on behalf of its membership, the client is the coalition or association and not its individual members.

(3) The term "covered executive branch official" means—

(A) the President;

(B) the Vice President;

(C) any officer or employee of the Executive Office of the President other than a clerical or secretarial employee;

(D) any officer or employee serving in an Executive level I, II, III, IV, or V position, as designated in statute or executive order;

(E) any officer or employee serving in a Senior Executive Service position, as defined under section 3132(a)(2) of title 5, United States Code;

(F) any member of the uniformed services whose pay grade is at or in excess of O-7 under section 201 of title 37, United States Code; and

(G) any officer or employee serving in a position of a confidential or policy-determining character under Schedule C of the excepted service pursuant to section 7511 of title 5, United States Code.

(4) The term "covered legislative branch official" means—

(A) a Member of Congress;

(B) an elected officer of Congress;

(C) any employee of a Member of the House of Representatives, of a committee of the House of Representatives, or on the leadership staff of the House of Representatives, other than a clerical or secretarial employee;

(D) any employee of a Senator, of a Senate Committee, or on the leadership staff of the Senate, other than a clerical or secretarial employee; and

(E) any employee of a joint committee of the Congress, other than a clerical or secretarial employee.

(5) The term "Director" means the Director of the Office of Lobbying Registration and Public Disclosure.

(6) The term "employee" means any individual who is an officer, employee, partner, director, or proprietor of an organization, but does not include—

(A) independent contractors or other agents who are not regular employees; or

(B) volunteers who receive no financial or other compensation from the organization for their services.

(7) The term "foreign entity" means—

(A) a government of a foreign country or a foreign political party (as such terms are defined in section 1 (e) and (f) of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611 (e) and (f)));

(B) a person whose principal place of residence is outside the United States, other than a United States citizen or an organization that is organized under the laws of the United States or any State and has its principal place of business in the United States; or

(C) a partnership, association, corporation, organization, or other combination of persons that is organized under the laws of or has its principal place of business in a foreign country.

(8) The term "lobbying activities" means lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended for use in contacts, and coordination with the lobbying activities of others. Lobbying activities include grass roots lobbying communications and communications with members, as defined under section 4911 (d)(1)(A) and (d)(3) of the Internal Revenue Code of 1986 and the regulations implementing such provisions, to the extent that such activities are made in direct support of lobbying contacts.

(9)(A) The term "lobbying contact" means any oral or written communication with a covered legislative or executive branch official made on behalf of a client with regard to—

(i) the formulation, modification, or adoption of Federal legislation (including legislative proposals);

(ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy or position of the United States Government; or

(iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license) except that it does not include communications that are made to covered executive branch officials in the agency responsible for taking such action who serve in the Senior Executive Service, or who are members of the uniformed services whose pay grade is lower than O-9 under section 201 of title 37, United States Code.

(B) The term shall not include communications that are—

(i) made by public officials acting in their official capacity;

(ii) made by representatives of a media organization who are primarily engaged in gathering and disseminating news and information to the public;

(iii) made in a speech, article, publication or other material that is widely distributed to the public, or through the media;

(iv) made on behalf of a foreign principal and disclosed under the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611 et seq.);

(v) requests for appointments, requests for the status of a Federal action, or other similar ministerial contacts, if there is no attempt to influence covered legislative or executive branch officials;

(vi) made in the course of participation in an advisory committee subject to the Federal Advisory Committee Act;

(vii) testimony given before a committee, subcommittee, or office of Congress, or submitted for inclusion in the public record of a hearing conducted by such committee, subcommittee, or office;

(viii) information provided in writing in response to a specific written request from a covered legislative or executive branch official;

(ix) required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of Congress or a Federal agency;

(x) made in response to a notice in the Federal Register, Commerce Business Daily, or other similar publication soliciting communications from the public and directed to the agency official specifically designated in the notice to receive such communications;

(xi) not possible to report without disclosing information, the unauthorized disclosure of which is prohibited by law;

(xii) made to agency officials with regard to judicial proceedings, criminal or civil law enforcement inquiries, investigations or proceedings, or filings required by statute or regulation;

(xiii) made in compliance with written agency procedures regarding an adjudication conducted by the agency under section 554 of title 5, United States Code, or substantially similar provisions;

(xiv) written comments filed in a public docket and other communications that are made on the record in a public proceeding;

(xv) a formal petition for agency action, made in writing pursuant to established agency procedures; and

(xvi) made on behalf of an individual with regard to such individual's benefits, employment, other personal matters involving only that individual, or disclosures by that individual pursuant to applicable whistleblower statutes.

(10) The term "lobbyist" means any individual who is employed or retained by another for financial or other compensation to perform services that include lobbying contacts, other than an individual whose lobbying activities are only incidental to, and are not a significant part of, the services provided by such individual to the client.

(11) The term "organization" means any corporation (excluding a Government corporation), company, foundation, association, labor organization, firm, partnership, society, joint stock company, or group of organi-

PHOTOCOPY PRESERVATION

(B) in the case of a significant noncompliance, treat the matter as a minor noncompliance for the purpose of section 9; or

(3) make a determination under section 8, if the information or explanation provided indicates that such person may be in noncompliance with the requirements of this Act.

(c) FORMAL REQUEST FOR INFORMATION.—If the person fails to respond in writing within 30 days or other time limit set by the Director, or the response is not adequate to determine whether such person is in noncompliance with the requirements of this Act, the Director may make a formal request for specific additional documentary information (subject to applicable privileges) that is reasonably necessary for the Director to make such determination. Each such request shall be structured to minimize the burden imposed, consistent with the need to determine whether the person is in compliance, and shall—

(1) state the nature of the conduct constituting the alleged noncompliance which is the basis for the inquiry and the provision of law applicable thereto;

(2) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be readily identified; and

(3) prescribe a return date or dates which provide a reasonable period of time within which the material so requested may be assembled and made available for inspection and copying or reproduction.

(d) NONDISCLOSURE OF INFORMATION.—Information provided to the Director under this section shall not be made available to the public, or to any legislative or executive branch official outside the Office of Lobbying Registration and Public Disclosure (except as required for the enforcement of this Act), without the consent of the person providing the information, except that—

(1) any new or amended report or registration filed in connection with an inquiry under this section shall be made available to the public in the same manner as any other registration or report filed under section 4 or 5; and

(2) written decisions issued by the Director under sections 8 and 9 may be published after appropriate redaction by the Director to ensure that confidential information is not disclosed.

SEC. 8. DETERMINATIONS OF NONCOMPLIANCE.

(a) NOTIFICATION AND HEARING.—If the information provided to the Director under section 7 indicates that such person may be in noncompliance with the requirements of this Act, the Director shall—

(1) notify the person in writing of this finding and, if appropriate, a proposed penalty assessment and provide such person with an opportunity to respond in writing within 30 days; and

(2) if requested by such person within such 30-day period, afford the person—

(A) in the case of a minor noncompliance, an informal hearing at which additional evidence may be presented; and

(B) in the case of a significant noncompliance, an opportunity for a hearing on the record under the provisions of section 556 of title 5, United States Code.

(b) DETERMINATION.—The Director shall review the information received under this section and section 7 and make a final determination whether there was a noncompliance and a final determination of the penalty, if any. If no written response or request for a hearing was received under this section within the 30-day period provided, the determination and penalty assessment shall constitute a final and nonappealable order.

(c) WRITTEN DECISION.—If the Director makes a final determination that there was a noncompliance, the Director shall issue a public written decision—

(1) requiring that the noncompliance be included in a publicly available list of noncompliances, to be reported to the Congress on a semiannual basis;

(2) directing the person to correct the noncompliance; and

(3) assessing a civil monetary penalty in an amount determined as follows:

(A) In the case of a minor noncompliance, the amount shall be no more than $10,000, depending on the nature and extent of the noncompliance.

(B) In the case of a significant noncompliance, the amount shall be more than $10,000, but no more than $200,000, depending on the nature and extent of the noncompliance and the extent to which the person may have profited from the noncompliance.

(d) CIVIL INJUNCTIVE RELIEF.—If a person fails to comply with a directive to correct a noncompliance under subsection (c), the Director shall refer the case to the Attorney General to seek civil injunctive relief.

(e) PENALTY ASSESSMENTS.—(1) No penalty shall be assessed under this section unless the Director finds that the person subject to the penalty knew or should have known that such person was not in compliance with the requirements of this Act. In determining the amount of a penalty to be assessed, the Director shall take into account the totality of the circumstances, including the extent and gravity of the noncompliance and such other matters as justice may require. The Director shall not assess a penalty in an amount greater than that recommended by an administrative law judge after a hearing on the record under subsection (a)(3) unless the Director determines that the recommendation of the administrative law judge is arbitrary and capricious or an abuse of discretion.

(2) Regulations prescribed by the Director under section 6 shall define minor and significant noncompliances. Significant noncompliances shall be defined to include a knowing failure to register and any other knowing noncompliance that is extensive or repeated.

(f) LIMITATION.—No proceeding shall be initiated under this section unless the Director notifies the person who is the subject of the proceeding of the alleged noncompliance, pursuant to section 7, within 3 years after the date on which the registration or report at issue was filed or required to be filed.

SEC. 9. OTHER VIOLATIONS.

(a) LATE REGISTRATION OR FILING; FAILURE TO PROVIDE INFORMATION.—If a person registers or files more than 30 days after a registration or filing is required under this Act, or fails to provide information requested by the Director under section 7(c), the Director shall—

(1) notify the person in writing of the noncompliance and a proposed penalty assessment and provide such person with an opportunity to respond in writing within 30 days; and

(2) if requested by such person within such 30-day period, afford the person an informal hearing at which additional evidence may be presented.

(b) DETERMINATION.—Unless the Director determines that the late filing or failure to provide information was justified, the Director shall make a final determination of noncompliance and a final determination of the penalty, if any. If no written response or request for a hearing was received under this section within the 30-day period provided, the determination and penalty assessment shall constitute a final and unappealable order.

(c) WRITTEN DECISION.—If the Director makes a final determination that there was a noncompliance, the Director shall issue a public written decision—

(1) in the case of a late filing, assessing a civil monetary penalty of $200 for each week by which the filing was late, with the total penalty not to exceed $10,000; or

(2) in the case of a failure to provide information—

(A) directing the person to provide the information within a reasonable period of time; and

(B) except where the noncompliance was the result of a good faith dispute over the validity or appropriate scope of a request for information—

(i) including the noncompliance in a publicly available list of noncompliances, to be reported to the Congress on a semiannual basis; and

(ii) assessing a civil monetary penalty in an amount not to exceed $10,000.

(d) CIVIL INJUNCTIVE RELIEF.—In addition to the penalties provided in this section, the Director may refer the noncompliance to the Attorney General to seek civil injunctive relief.

SEC. 10. JUDICIAL REVIEW.

(a) FINAL DECISION.—A written decision issued by the Director under section 8 or 9 shall become final 60 days after the date on which the Director provides notice of the decision, unless such decision is appealed under subsection (b) of this section.

(b) APPEAL.—Any person adversely affected by a written decision issued by the Director under section 8 or 9 may appeal such decision, except as provided under sections 8(b) or 9(b), to the appropriate United States court of appeals. Such review may be obtained by filing a written notice of appeal in such court no later than 60 days after the date on which the Director provides notice of the Director's decision and by simultaneously sending a copy of such notice to the Director. The Director shall file in such court the record upon which the decision was issued, as provided under section 2112 of title 28, United States Code. The findings of fact of the Director shall be conclusive, unless found to be unsupported by substantial evidence, as provided under section 706(2)(E) of title 5, United States Code. Any penalty assessed or other action taken in the decision shall be stayed during the pendency of the appeal.

(c) RECOVERY OF PENALTY.—Any penalty assessed in a written decision which has become final under this Act may be recovered in a civil action brought by the Attorney General in an appropriate United States district court. In any such action, no matter that was raised or that could have been raised before the Director or pursuant to judicial review under subsection (b) may be raised as a defense, and the determination of liability and the determination of amounts of penalties and assessments shall not be subject to review.

(d) ATTORNEYS' FEES.—In any appeal brought under this section, in which the person who is the subject of such action substantially prevails on the merits, the court may assess against the United States attorneys' fees and other litigation costs reasonably incurred in the administrative proceeding and the appeal.

SEC. 11. RULES OF CONSTRUCTION.

(a) PROHIBITION OF ACTIVITIES.—Nothing in this Act shall be construed to prohibit, or to authorize the Director or any court to prohibit, lobbying activities or lobbying contacts by any person, regardless of whether such person is in compliance with the requirements of this Act.

(b) AUDIT AND INVESTIGATIONS.—Nothing in this Act shall be construed to grant general

PHOTOCOPY PRESERVATION

(6) A list of the salaries and other compensation (including the present value of stock options) and benefits paid to the officers and board members of the GSE.

(7) A list of all GSE employees who have been employed by either the Congress or the Federal Government in the 5 years preceding the report, and such employees' salary prior to being hired by the GSE and their current salary.

(b) DEFINITION OF GOVERNMENT-SPONSORED ENTERPRISE.—For the purposes of this section, the term "government-sponsored enterprise" means—

(1) the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Student Loan Marketing Association, and

(2) a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 (20 U.S.C. 1085(j)).

SEC. 21. LIMITS ON ACCEPTANCE OF GIFTS, MEALS AND TRAVEL.

It is the sense of the Senate that, as soon as possible during this year's session, the Senate should limit the acceptance of gifts, meals and travel by Members and staff in a manner substantially similar to the restrictions applicable to executive branch officials.

SEC. 22. DISCLOSURE OF FOREIGN CONTRIBUTIONS.

It is the sense of the Senate that the conferees on this Act should seek to draft and add to this Act a constitutionally acceptable provision requiring additional disclosure of the contributions of foreign entities to the lobbying activities of registrants, as defined in this Act.

SEC. 23. EFFECTIVE DATES.

(a) IN GENERAL.—Except as otherwise provided in this section, the provisions of this Act shall take effect 1 year after the date of the enactment of this Act.

(b) ESTABLISHMENT OF OFFICE.—The provisions of sections 6 and 17 shall take effect on the date of the enactment of this Act.

(c) REPEALS AND AMENDMENTS.—The repeals and amendments made under sections 12, 13, and 14 of this Act shall take effect as provided under subsection (a), except that such repeals and amendments—

(1) shall not affect any proceeding or suit commenced before the effective date under subsection (a), and in all such proceedings or suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and with the same effect as if this Act had not been enacted; and

(2) shall not affect the requirements of Federal agencies to compile, publish, and retain information filed or received before the effective date of such repeals and amendments.

(d) REGULATIONS.—Proposed regulations required to implement this Act shall be published for public comment no later than 270 days after the date of the enactment of this Act. No later than 1 year after the date of the enactment of this Act, final regulations shall be published.

(e) PHASE-IN PERIOD.—No penalty shall be assessed by the Director for any noncompliance with this Act which occurs during the first semiannual reporting period after the effective date of this Act.

Mr. LEVIN. Mr. President, I move to reconsider the vote.

Mr. COHEN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. LEVIN. Mr. President, first I wish to thank Senator COHEN, the majority leader, the Republican leader, and all those who made possible the passage of this bill. From my staff, Linda Gustitus and Peter Levine have been incredibly involved, and we could not have moved the bill this far without them. Senator COHEN'S staff and the Governmental Affairs members, including the chairman, Senator GLENN, and Senator ROTH and others have all played a very important role.

If we could get this bill enacted, it would put to rest one of Washington's oldest problems and that is the patchwork of loopholes and exceptions that currently pass for lobbying laws. There are going to be some bumps on this road to passage. We have to get a bill passed in the House and probably to conference. But I am optimistic, because the country demands reform in the way we operate here in Washington, that we have at least of fighting chance to get a bill passed finally after four failed attempts since 1948.

Again, my thanks to my colleague, Senator COHEN, the majority leader, and others who worked hard so we could get to this point.

Mr. COHEN. Mr. President, let me take must a moment to offer my congratulations to the Senator from Michigan. Without his prodigious and, I must say, persistent effort, this bill would not have received passage today. While we labored several days, without his intelligent and guiding hand, ably assisted by the majority leader's big stick, I might say that we would still be here tonight and possibly tomorrow, or well into next week.

This measure is a major step on the road to reform. I am not persuaded that this bill in itself is going to restore the public's confidence in and the integrity of the political process, but it will be one small step toward that end.

I, too, wish to commend Linda Gustitus and Peter Levine of Senator LEVIN'S staff and Kim Corthell of my staff for all the work they have put into this effort.

Mr. MITCHELL. Mr. President, I offer my congratulations to Senators LEVIN and COHEN for a very successful, difficult, and vigorous effort on this important legislation.

They have worked at this for a number of years. It is significant reform. It would not have occurred but for their combined thoughtful and bipartisan leadership. And I thank them both in behalf of all Members of the Senate for the effective way in which they managed the bill.

MORNING BUSINESS

Mr. MITCHELL. Mr. President, I now ask unanimous consent that there be a period for morning business to extend until the hour of 5:30 p.m. with Senators permitted to speak therein for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BOND addressed the Chair.

The PRESIDING OFFICER. The Senator from Missouri [Mr. BOND] is recognized.

Mr. BOND. Mr. President, I thank the Chair. I thank the majority leader.

(The remarks of Mr. BOND pertaining to the introduction of S. 917 are located in today's RECORD under "Statements on Introduced Bills and Joint Resolutions.")

Mr. FORD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. KENNEDY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Massachusetts is recognized.

NATIONAL SERVICE TRUST FUND ACT OF 1993 AND THE STUDENT LOAN REFORM ACT OF 1993

Mr. KENNEDY. Mr. President, it is a privilege to introduce two bills with bipartisan support that represent a new approach to community service and educational opportunity in this country: The National Service Trust Fund Act of 1993 and the Student Loan Reform Act of 1993. These measures, proposed by President Clinton, combine two types of Federal support to tap the energy and the ideals of our greatest resource, the young men and women of America.

Under the direct lending bill; student loans for education will be cheaper and simpler to obtain, and easier to repay. Because students will be able to repay loans as a percentage of their income, it will be possible for many of them to pursue careers and to take lower paying jobs they prefer, including careers in public service and community service.

Under the national service bill, individuals will be encouraged to direct their energy, ideals, and talents into their communities.

I am particularly pleased that service learning is a key element of the national service bill. Service learning is a genuine innovation in K-12 education. It enables teachers to take the classroom into the community. It makes their projects a laboratory for both learning and service.

The National Service Trust Act of 1993 builds on the fabric of national and community service programs that already exist and provides a range of service opportunities for young and old alike.

The fashion today is for too many Americans to blame the problems of their communities on others. We must empower citizens to look within themselves, and develop their individual and collective capacity to solve vexing local issues. Participation and involvement of citizens are the touchstones of democracy, and this legislation is designed to develop innovative ways to encourage such service and transform the life of the community.

PHOTOCOPY PRESERVATION

THE HOUSE LAW LIBRARY

[JOINT COMMITTEE PRINT]

LOBBYING AND POLITICAL ACTIVITIES OF TAX-EXEMPT ORGANIZATIONS

SCHEDULED FOR HEARINGS

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT

OF THE

COMMITTEE ON WAYS AND MEANS

ON MARCH 12 AND 13, 1987

PREPARED BY THE STAFF

OF THE

JOINT COMMITTEE ON TAXATION

MARCH 11, 1987

U.S. GOVERNMENT PRINTING OFFICE

79-119 WASHINGTON : 1987 JSC-5-87

AMERICAN BAR ASSOCIATION
GOVERNMENTAL AFFAIRS OFFICE • 1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2200

STATEMENT OF

THOMAS M. SUSMAN

CHAIR, SECTION OF ADMINISTRATIVE
LAW AND REGULATORY PRACTICE
AMERICAN BAR ASSOCIATION

ON THE LOBBYING DISCLOSURE ACT OF 1992 (S. 2279)

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT
COMMITTEE ON GOVERNMENTAL AFFAIRS
U.S. SENATE

March 26, 1992

Mr. Chairman and members of the Subcommittee, I am pleased to appear today in response to the Subcommittee's invitation to testify on the Lobbying Disclosure Act of 1992 (S. 2279). My name is Thomas M. Susman, a partner in the law firm of Ropes & Gray in Washington, D.C. I am chair of the Section of Administrative Law and Regulatory Practice of the American Bar Association.

I will specifically identify in my testimony those matters on which my comments reflect the views of the American Bar Association, by virtue of their having been adopted by Resolution of the House of Delegates of the ABA. As to those matters, my comments reflect the views of the ABA, and I appear here on behalf of the ABA's President, Sandy D'Alemberte. Otherwise, these views are being presented only on behalf of the Section of Administrative Law and Regulatory Practice; they have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the position of the ABA.

I commend Chairman Levin for his introduction of S. 2279, which represents a very important step forward toward remedying the weaknesses in the Federal Regulation of Lobbying Act of 1946 (the "Lobbying Act"). As this Subcommittee knows, Congress has from 1950 to the present periodically attempted to address the many failures of the Lobbying Act, but to no avail. For the Subcommittee's convenience, I have appended a brief history of

1. Congress should not expand coverage of laws governing contacts with the Executive branch, particularly the Foreign Agents Registration Act, in ways that would needlessly burden the practice of law and undermine fulfillment of lawyers' professional responsibilities.

2. Congress should broaden the coverage of activities falling under the reporting requirements of the Federal Regulation of Lobbying Act to encompass --

   (a) lobbying contacts with congressional staff;

   (b) lobbying by in-house or staff lobbyists of trade associations, corporations, and others; and

   (c) lobbying on nonlegislative matters such as nominations and congressional intercession in administrative proceedings.

3. Congress should require under the Federal Regulation of Lobbying Act the disclosure of --

   (a) only the aggregate expenditures incurred and fees collected by lobbyists, in incremental categories; and

   (b) the identities of members of associations or coalitions, unless the membership lists of these organizations are otherwise publicly available, only where the members (i) are not individuals, (ii) have contributed a substantial amount of funds to the organization, and (iii) are likely to benefit directly if the lobbying is successful.

4. Congress should provide for the issuance of authoritative advisory opinions and other guidance by a single, nonpartisan entity for lobbyists inquiring about compliance with the Federal Regulation of Lobbying Act.

5. Congress should simplify the reporting process under the Federal Regulation of Lobbying Act by:

   (a) eliminating the need for separate reports to be filed by both the organization hired to lobby and the individuals from that organization doing the lobbying (for example, a law firm and its lawyers);

   (b) permitting the filing of lobbying reports in a single location;

regulation in ways that burden the practice of law does not derive from a parochial view that lawyers should be treated specially. Rather, it stems from the conviction that legal representation of individuals and entities before federal agencies serves the indispensable function of facilitating the effective administration of federal laws and regulations, promoting public confidence in government, and protecting rights guaranteed by both the Constitution and statutes.

How?

Plainly, S. 2279 attempts to remain sensitive to these concerns in its exclusion from the definition of "lobbying contact" in Section 8(8)(G) of

> communications with regard to ongoing judicial proceedings, criminal law enforcement proceedings, and any other proceedings that are required by statute to be conducted on a confidential basis, provided that such communications are limited to matters that are subject to the proceedings.

Additionally, subsection (8)(I) excludes communications made in certain agency adjudicatory and rulemaking proceedings and communications that involve compliance and enforcement activities and on-the-record communications, if made to officials below the Executive levels I-V.

This attempt to exclude from disclosure requirements certain areas of traditional legal advocacy and representation falls short. It leaves subject to the requirements of the proposed new law many, many areas involving routine activities by lawyers on behalf of clients before federal agencies. The Antitrust Section of the ABA has prepared a report detailing the primary areas of concern; this report is now undergoing the necessary clearance

from the statute's scope. However, a number of factors argue for amending the Lobbying Act to apply expressly to lobbying contacts with congressional staff. These factors include: the broad disclosure policy underlying the Lobbying Act; the Supreme Court's treatment of legislative aides as "alter egos" of Congressmen, see Gravel v. United States, 408 U.S. 606, 617 (1972) (Speech and Debate Clause); the existence of other lobbying regulatory schemes that include staff contacts within the meaning of the term "lobbying," see, e.g., the "Ethics Reform Act of 1989," Pub. L. No. 101-194, 103 Stat. 1716 (1989), the Internal Revenue Code, 26 U.S.C. § 501 (1982); and the routine practice of many in the lobbying community of complying with the Lobbying Act even when only contacting staff. Most important, perhaps, is the fact that, as a practical matter, most lobbying on Capitol Hill is conducted through staff contacts.

(b) Lobbying contacts by in-house or staff lobbyists.

Under the "principal purpose" test of Harriss, business organizations and trade associations need not register under the Lobbying Act where their lobbying communications can be construed as incidental to the organization's purpose. The Congress has documented numerous instances where organizations appear to have spent tens of thousands of dollars for lobbying activities without registering under the Lobbying Act because the amount spent was only a very small part of the organizations' budgets and thus the lobbying was considered not to be a "principal purpose" of the organizations' activities overall.

3. Refining the type of information to be disclosed.

Chairman Levin has delighted audiences over the past months with anecdotal material about lobbyists' Quarterly Reports showing $17.42 for salaries or $9.11 for meals attributed to lobbying activities during a reporting period. While the need to report these picayune details now burdens lobbyists unmercifully, these data provide absolutely no useful information for Congress or the public about just how much lobbying is actually occurring. At the same time, use of lobbying coalitions can shield against disclosure of real parties in interest in legislative battles. S. 2279 addresses both of these problems.

(a) Reporting aggregate receipts and expenditures.

The Lobbying Act requires lobbyists to file statements reporting "the total sum" of all moneys received and expended for the purpose of influencing or attempting to influence legislation. 2 U.S.C. § 264. The Clerk of the House and the Secretary of the Senate currently request that registrants report these receipts and expenditures by categories, of which there are eighteen. The laborious process of reporting in minute detail receipts and expenses provides too much of the wrong kind of information.

For purposes of informing the public of the sums of money that are being expended to influence congressional action, it is sufficient to have registrants report the aggregate amount of receipts or fees received and the aggregate amount of expenses incurred. This can be done in incremental categories analogous

4. Providing uniform, authoritative guidance on lobbying regulation.

While two separate congressional officials -- the Secretary of the Senate and Clerk of the House -- administer the filings lobbyists make under the Lobbying Act, neither of them authorizes staff to provide official advice or otherwise instruct the public in an authoritative way on interpretations of the Act's provisions. Thus lobbyists are unable to obtain the kind of guidance that persons who fall under regulatory schemes obtain from the agencies that implement the laws and regulations, or that Members of Congress and their staff obtain from the congressional ethics committees about compliance with the ethics rules. This situation makes it impossible for law firms, lobbying firms, or trade associations to obtain authoritative advice on how to establish a uniform procedure that will satisfy the administrators of the Lobbying Act. This problem is exacerbated by the fact that the Clerk of the House and the Secretary of the Senate administer their filings separately and may, on occasion, give conflicting advice.

The Lobbying Act should be amended to establish a single, nonpartisan entity that would provide lobbyists with authoritative guidance. This could be accomplished without creating a separate agency by, for example, assigning this responsibility to the Office of Government Ethics, as proposed by S. 2279, or to the General Accounting office or the Federal Election Commission. Each of these entities is nonpartisan and is experienced in monitoring and advising persons on issues

administration, guidance, and enforcement responsibilities for the Act and assign them to a single, nonpartisan entity. Again, the OGE, GAO, or the FEC would be good candidates among existing entities for assuming these consolidated responsibilities: They are nonpartisan, have experience in giving advice and enforcing laws, and are traditionally identified with public disclosure.

(c) Expanding the definition of timely filing.

The Lobbying Act requires that reports be filed before a lobbyist begins his or her lobbying activities, and within 10 days of the close of the previous reporting period. Reports filed outside of these time periods are considered to be late filings.

To permit lobbyists to collect the requisite data for filing, and ensure a higher degree of accuracy, S. 2279 properly permits a 60-day grace period for the filing of registrations and reports.

(d) Requiring reports semiannually.

The Lobbying Act currently requires the filing of quarterly reports. The same disclosure could be made with only half of the paperwork for lobbyists and the government if the reports were required semiannually instead of quarterly; S. 2279 takes this approach.

6. Establishing a civil enforcement mechanism.

A civil enforcement mechanism with the following provisions would help facilitate better compliance with the Lobbying Act than exists now.

Conclusion

At the hearings last summer before this Subcommittee, witnesses identified a number of problems with the scope, application, administration, and enforcement of the Lobbying Act as it relates to lobbying activities before the U.S. Congress. S. 2279 does an excellent job of solving these problems in connection with the lobbying of Congress. I have included some additional technical comments on specific provisions of the bill in an attachment to this testimony, which I hope the Subcommittee will find helpful.

As to lobbying activities before the Executive branch, there is unquestionably a need to consolidate, rationalize, and revise the diverse laws now in place. The Subcommittee's hearings pointed up serious shortcomings with the FARA and Byrd Amendment. The case has not been made, however, for a general extension of the Legislative Branch lobbying disclosure rules to communications with the Executive Branch. The failure of S. 2279 adequately to exclude from disclosure requirements communications made in connection with civil law enforcement activities and routine lawyering are serious deficiencies, as will be discussed in the report we will soom submitted to the Subcommittee.

I appreciate having the opportunity to present these views to the Subcommittee on S. 2279. I look forward to continuing to work with you and your staff on this very important legislation.

LOBBY REFORM LEGISLATION

HEARINGS

BEFORE THE

COMMITTEE ON GOVERNMENT OPERATIONS UNITED STATES SENATE

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

S. 774

TO REGULATE LOBBYING AND RELATED ACTIVITIES

S. 815

TO PROVIDE FOR THE PUBLIC DISCLOSURE OF LOBBYING ACTIVITIES WITH RESPECT TO CONGRESS AND THE EXECUTIVE BRANCH, AND FOR OTHER PURPOSES

S. 2068

TO PROVIDE FOR PUBLIC DISCLOSURE OF LOBBYING ACTIVITIES TO INFLUENCE DECISIONS IN THE CONGRESS AND THE EXECUTIVE BRANCH, AND FOR OTHER PURPOSES

S. 2167

TO PROVIDE FOR THE RECORDING AND PUBLIC DISCLOSURE OF LOBBYING ACTIVITIES DIRECTED AT THE CONGRESS AND THE EXECUTIVE BRANCH, AND FOR OTHER PURPOSES

S. 2477

TO PROVIDE MORE EFFECTIVE PUBLIC DISCLOSURE OF CERTAIN LOBBYING ACTIVITIES TO INFLUENCE ISSUES BEFORE THE CONGRESS AND THE EXECUTIVE BRANCH, AND FOR OTHER PURPOSES

APRIL 22, MAY 14, 15, NOVEMBER 4, 5, AND 6, 1975

Printed for the use of the Committee on Government Operations

U.S. GOVERNMENT PRINTING OFFICE

56-476 O WASHINGTON : 1976

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402 - Price $6.20

S402-14

APPENDIX I

to

Statement of

Harold R. Tyler, Jr.
Deputy Attorney General

Before the

GOVERNMENT OPERATIONS COMMITTEE
UNITED STATES SENATE

May 15, 1975

HEARINGS ON LOBBY REFORM LEGISLATION

Appendix

S. 774 and S. 815

1. Section 2(1) of S. 774 defines the term "person" as used in the Act. We suggest adding to this definition after the word "individual" (p. 1, line 10 of S. 774), the words "and any other organization or group of persons". After the words "other organization" at the end of section 3(a) of S. 815, we suggest adding the words "or group of persons".

2. The prohibition against lobbying would apply to "the policymaking process", as defined by section 2(2) of S. 774 to mean "any action taken by a Federal officer or employee with respect to any bill, resolution, or other measure in Congress, or with respect to any rule, adjudication, or other policy matter in the executive branch."

As section 2(2) relates solely to legislative matters, it is too vague and narrow. We suggest including more specific language such as "effecting or preventing the introduction, passage, defeat or amendment of legislation, including any bill, resolution, proposed constitutional amendment, nomination, hearing, report, and other matters pending or proposed in either House and any other matter which may be the subject of action by either House."

As section 2(2) relates to matters ("rule, adjudication, or other policy matter in the executive branch"), it is too

vague and broad as possibly encompassing matters which are not confined to legislation, but rather to the discharge of functions and duties of the executive branch having no connection whatever with, or relationship to, legislation. In our opinion, the language "or with respect to any rule, adjudication, or other policy matter in the executive branch" (p. 2, lines 2-3) should either be entirely deleted or clarified so as to be restricted to lobbying intended to enlist the support of officers and employees in the executive branch for or against a legislative program or otherwise to influence the legislative process.

The definition of section 3(b) of S. 815 of "policymaking process" is more satisfactory up to the words, "or other action in Congress," (lines 11-12 of p. 3). The remainder of that sentence "or with respect to any pending or proposed rule, adjudication, hearing, investigation, or other action in the executive branch" should be dealt with as suggested regarding the same language in S. 744, discussed above.

3. The definition of "income" in section 2(4) of S. 774 is inadequate. We prefer the broader definition of income in section 3(d)(1),(2) of S. 815.

4. The definition of "expenditure" in section 2(5) of S. 774 is too narrow. While the definition of "expenditure" in section 3(e) of S. 815 is an improvement, it does not go far enough. We prefer the following definition:

> The term "expenditure" includes a payment, distribution, loan, advance, deposit or gift of money or anything of value made, disbursed or furnished; or a promise, contract, or agreement, whether or not legally enforceable, to make an expenditure, and includes expenditures by any other persons to further activities of the person filing a statement, and not separately reported by such other persons.

5. The term "lobbying" is defined and the exemptions from that term are set forth in section 2(9) of S. 774 and section 3(i) of S. 815. We prefer the provision in section 2(9)(A) of S. 774 which would provide an exemption if an appearance or testimony is given "at the request of such department, agency, or entity." In our opinion, the exemption, otherwise available, should not be forfeited or lost merely because it is <u>not</u> "made a matter of public record by the committee. . . or agency," as provided by section 3(i)(1) of S. 815. There are matters heard in executive session or in confidence, which for reasons of security or safety could not be made a matter of public record.

6. Section 2(9)(B) of S. 774 provides an exception from the definition of "lobbying" for "any communication or solicitation by a Federal officer or employee". This exception is narrower than the one included in existing 2 U.S.C. 267, which is available to "any public official acting in his official capacity". The term "public official" reasonably construed, embraces not only officers and employees of the Federal Government but also those representing the States and their political subdivisions. Section 3(i)(2) of S. 815 uses clearer and broader language as a basis for exception, as follows:

> a communication or solicitation by a Federal officer or employee, or by an officer or employee of a State or local government, acting in his official capacity.

We support the idea of exempting from the Act lobbying communications between State or local officials (or their immediate staffs) acting in their official capacity, with their Federal counterparts. On that basis section 3(i)(2) of S. 815 might be more appropriate than section 2(9)(B) of S. 774. On the other hand, we oppose the notion that a paid, professional lobbying organization which represents a State or local government should enjoy the same exception as the

State or local officials themselves. For example, in Bradley v. Saxbe, 387 F. Supp. 53 (D.C.D.C. 1974), it was held that the National League of Cities was entitled to an exemption under 2 U.S.C. 267. In order to avoid a similar result, the language of section 3(i)(2) of S. 815 should be tightened by adding this proviso:

> Provided, however, that this exception shall not apply to a "lobbyist" as defined by subsection (j), acting on behalf of such State or local government.

7. We prefer the tighter exemption language in section 3(i)(3)(C) of S. 815, "a book published for the general public" to section 2(9)(C)(3) of S. 744, "a book publisher", since the latter's resources may more readily be utilized solely for lobbying purposes than in a case where a communication appears in a "book published for the general public."

We also assume that the words "in the normal course of business" in section 2(9)(C) of S. 774 and section 3(i)(3) of S. 815 are intended to make available the exemption if the various communications are carried by media in the performance of their functions that are part of the public communications media generally, but that the exemption will not apply where the material relates to the direct economic interests of the media rather than to the dissemination of public information.

8. The term "lobbyist" is defined by section 2(10) of S. 774 to mean among other things "any person" who engages in lobbying during any quarterly period and who "receives" a specified income attributable to lobbying, or who "makes" an expenditure of $250 or more for that quarter or an expenditure "of $500 or more for lobbying during a total of four consecutive quarterly filing periods. . . ." This objective monetary standard is designed to clarify the ambiguous concept of "principle purpose" employed in the present lobbying act. In defining the term "lobbyist," section 3(j)(1) of S. 815 adds another condition -- "when lobbying is a substantial purpose of such employment or activity. . . ." In this respect we think that S. 815 may be introducing a subjective test that is as difficult to administer and enforce as the existing provision.

Section 3(j)(3) of S. 815 provides a definition of "lobbyist" (which is not included in S. 774), as follows:

> a person who engages in lobbying <u>and</u> who "in the course of lobbying during a quarterly filing period communicates orally on eight or more separate occasions with one or more Federal officers or employees."

It will be noticed that this definition would come into play regardless of whether or not any expenditure is made. On

34-078 O - 78 - 24

its face, the language used is vague unless the communications with Federal officers or employees were related to influencing legislation. Moreover, why the number "eight or more" is selected as the cut-off is puzzling. On balance the problems this subsection could raise in policing communications may be so difficult, confusing and burdensome that we believe that it should be deleted.

9. In United States v. Harriss, supra, 347 U.S. at 619-620, the Court rejected the Government's contention that under section 305 of the Federal Regulation of Lobbying Act, a person must report his expenditures to influence legislation even though he does not solicit, collect or receive contributions as provided by section 307 of that Act, but merely expends his own funds for that purpose. The Court suggested that if the Government's construction is to become law, "that is for Congress to accomplish by further legislation." Id. at 620. We assume that the language used in section 2(10)(C),(D) of S. 774 and section 3(j)(2) of S. 815 is intended to cover a person who expends his own funds to influence legislation. It seems to us, however, that this intention would be clarified if there were added a new subsection at the end of section 2(10) of S. 774 and section 3(j) of S. 815, as follows:

( ) the term "lobbyist" as defined in this section shall also include any person who engages himself to influence legislation, in person or through any other person.

10. S. 815, Sec. 4(a)(4), p. 8, line 5.

Prior to the word "committee", you may wish to add the words, "Federal Government."

11. As regards "Notice of Representation", section 4(b) of S. 815 contains a provision (not found in section 3 of S. 744), which we favor. It provides that each notice of representation filed by a lobbyist under section 4(a) shall be amended by the lobbyist "at such interval of time as the Commission shall prescribe to reflect the current activities of the lobbyist."

In order to avoid possible constitutional objection, the Committee may also wish to consider a provision in the section on filing of notices of representation to this effect:

Section 4 shall not be construed to require the disclosure of the membership rolls or the organizational dues structure of any voluntary membership organization or similar organization.

12. Section 4(4) of S. 744 contains a record-keeping provision not included in S. 815, which appears to be desirable. It requires record-keeping of

> (4) Each expenditure made directly or indirectly to or for any federal officer or employee.

13. We prefer the more specific and detailed reporting requirements in section 6 of S. 815 to those of section 5 of S. 744.

14. Section 6 of S. 774 and section 7 of S. 815 are virtually identical provisions. Section 7 of S. 815 provides as follows:

> Compliance with the requirements of section 4, 5, or 6 of this Act shall not be taken into consideration in determining, for purposes of the Internal Revenue Code of 1954, whether a substantial part of the activities of an organization is carrying on propaganda or otherwise attempting to influence legislation.

We understand that this provision is intended to prevent tax-exempt organizations and charitable organizations from losing their special tax status under certain provisions of the Internal Revenue Code of 1954, merely because they comply with the disclosure requirements of the Act (e.g., section 4 of S. 815, notice of representation; section 5, maintenance of records; section 6, filing of reports). For example, section 501(c)(3) of the Internal Revenue Code of 1954 lists certain tax exempt organizations "no substantial part of the

activities of which is carrying on propaganda, or otherwise attempting, to influence legislation. . . ."

We can readily understand that mere compliance with disclosure requirements of the Act should not be regarded by the Internal Revenue Service as presumptive or conclusive evidence that a "substantial part" of that organization's activities consists of carrying on propaganda or otherwise attempting to influence legislation. On the other hand, registration could be some indication that an exempt organization is engaging in, or expects to engage in, attempts to influence legislation. In any case which brings the propriety of the exemption into question, all the actual activities of the registering organization would normally have to be established in determining whether it is engaged in lobbying to a substantial degree.

We assume that this is the extent to which section 6 of S. 774 and section 7 of S. 815 is intended to go. As the provision reads, however, it may be construed as precluding the Government from considering materials filed in compliance with the Act which are known to the public at large. We oppose any provision that does not permit the Government "to consider", and use, information furnished under oath or

affirmation and intended to be made public. Indeed it would be an anomaly not to do so here. We do not think section 6 of S. 774 and section 7 of S. 815 in their present form represent wise policy.

15. Section 7(a) of S. 744 would require all officials and employees of the executive branch in Grades GS-15 or above, as those responsible for making or recommending decisions affecting the policymaking process in the executive branch, to prepare a record of each oral or written communication received directly or by referral from outside parties expressing an opinion or containing information with respect to such process.

It may be noted that S. 815 does not contain this burdensome requirement, which may relate to decisions affecting the policymaking process in the executive branch that do not involve legislative lobbying.

If the requirements of the bill relating to the executive branch are eliminated, or clarified as we suggest in our discussion of section 2(2) of S. 744, a corresponding change should be made in section 7(a). Apart from that, it may be noted that the character and operations of administrative agencies and departments vary greatly. You may wish to

consider whether a desirable substitute for section 7(a) might require all agencies and departments to establish their own reporting machinery where attempts are made to enlist the support of executive branch employees regarding a legislative program. A self-policing requirement of this kind should suffice to discourage outside attempts to influence the judgment of executive employees in such matters.

In addition to these objections, section 7(a) is literally, so broad, that it would seem to apply to the most casual type of citizen-complaint concerning any affairs of the federal government. Any federal officer or employee who, "knowingly and wilfully" inter alia fails to file any record of such complaint as required by such section could be fined up to $5,000 or imprisoned for two years, or both. We think that this provision is so vague as to leave many Government employees in great jeopardy or possible harassment. Since section 7(a) of S. 744 is not readily susceptible of application, compliance or enforcement, we oppose it.

16. Section 11 of S. 815 grants authority to the Commission in the first instance to endeavor to correct violation by informal methods of conference, conciliation, and persuasion. If these methods fail, the Commission is authorized to

institute a civil action for injunctive relief. Sec. 11(a)(5). Paragraph "(7)," of the same section 11(a) would provide that whenever in the judgment of the Commission, any person has engaged in unlawful conduct, "upon request by the Commission," the Attorney General on behalf of the United States "shall" institute a civil action for an injunction or other appropriate relief.

It is not clear whether under section 11(a)(5) and (7) the Commission or the Attorney General will have the primary enforcement responsibility. Apart from that, we would urge that the word "shall", (line 25, p. 21) be changed to "may", making clear the intention that the Attorney General retains discretion whether to bring suit for an alleged violation. It is true that in some cases depending on the setting, the word "shall" in a federal statute has been construed to be "may". See Hecht Co. v. Bowles, 321 U.S. 321 (1944). But needless litigation can be avoided by use of more precise language. Above all, it is important that the Attorney General not be divested of discretion in the enforcement area. As

one Court of Appeals has stated:*/

> The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause.

In exercising enforcement powers under the Lobbying Act, the Attorney General should not be a "rubber stamp." The decision whether to bring an action involves the exercise of judgment. Among other elements that go into a decision to sue, is whether the Government litigation will promote the ends of justice, instill respect for the law, and advance the national policy involved in the federal statute. These aims can best be achieved if the Attorney General is able to exercise discretion in initiating suit under the Act, a power customarily granted to, and exercised by him under other federal statutes.

---

*/ United States v. Cox, 342 F. 2d 167, 171 (5 Cir. 1965), cert. denied 381 U.S. 935. See also United States v. Brown, 481 F. 2d 1035, 1042-43 (8 Cir. 1973); Inmates of Attica Correctional Facility v. Rockefeller, 477 F. 2d 375, 379-80 (2 Cir. 1973); United States v. Bland, 472 F. 2d 1329, 1335-36 (D.C. Cir. 1973).

APPENDIX II

to

Statement of

Harold R. Tyler, Jr.
Deputy Attorney General

Before the

GOVERNMENT OPERATIONS COMMITTEE
UNITED STATES SENATE

May 15, 1975

HEARINGS ON LOBBY REFORM LEGISLATION

Appendix II

Constitutional Issues Raised by Placing Litigating Authority to Enforce the Lobbying Act in the Federal Election Commission

Article II, § 1 of the Constitution vests the executive power of the United States in the President. Article II, § 3 commands the President to "take care that the laws be faithfully executed." The plain language of the Constitution, the history of these sections, and the case law compel the conclusion that: First, the enforcement of the laws is an inherently executive function; and second, the executive branch has the exclusive constitutional authority to enforce the laws, except in the rare circumstance where Congress has authorized an independent establishment to exercise limited enforcement power as "incidental" to its delegated quasi-legislative or quasi-judicial power.

A. Enforcement of Federal law is inherently an executive function.

Every proposal at the Constitutional Convention placed the power to execute the national laws in the Chief Executive. 1/ No delegate dissented from the statement of James Wilson, one of the foremost participants in the framing of the Constitution,

---

1/ See, 1 M. Farrand, The Records of the Federal Convention of 1787 (1937 Ed.), 21, 63, 65-66, 226, 244, 292 (hereinafter "Farrand"); 2 id. at 23, 116, 185, 404-405, 597.

that the "only powers he conceived strictly Executive were those of executing the laws . . . ." 2/ James Madison stated in the First Congress "that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 3/

In the Federalist No. 77, Hamilton wrote that no objection had been made to the provision giving the President the duty to faithfully execute the laws.

The reason for separating the power to enact laws from the power to execute them was explained by Montesquieu, and quoted with approval by Madison in the Federalist No. 47:

> When the legislative and executive powers are united in the same person or body there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.

Because the Federal Election Commission is basically a legislative body, 4/ to provide it litigating authority would combine

---

2/ Id. at 65-66.

3/ 1 Annals of Congress 481-482 (1789). Madison also stated during the Constitutional Convention that "certain powers were in their nature executive, and must be given to that department . . . ." Madison then urged that the Convention enumerate these inherently executive powers in the Constitution. Madison himself proposed as one of these enumerated executive powers the "power to carry into effect the national laws . . . ." (2 Farrand 66-67).

4/ Four of the six members of the Commission are nominated and confirmed by Congress. The two other members are nominated by the President and confirmed by both the Senate and the House of Representatives.

legislative and executive powers in violation of the constitutional separation of powers doctrine.

The Founding Fathers thus clearly intended that the execution of the laws be constitutionally entrusted solely to the President. In accord with that constitutional intent, the courts have consistently reaffirmed the proposition that the authority to enforce the laws is an executive function.

In Springer v. Philippine Islands, 277 U.S. 189, 202 (1922), the Supreme Court, in a general discussion of the separation of powers principle, observed, "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.

Applying this principle, the Fifth Circuit in United States v. Cox, 342 F. 2d 167, cert. denied, 381 U.S. 935 (1965), ruled that the judiciary could not encroach upon the purely executive function of law enforcement. There, a federal grand jury returned an indictment for perjury against blacks who had testified in a civil rights case. The presiding judge directed the United States Attorney to sign the indictment. At the direction of the Attorney General, however, the United States Attorney refused to comply. Upon appeal, a contempt citation issued against the recalcitrant U. S. Attorney was reversed.

Sitting en banc, the Court of Appeals held that the Attorney General is the hand of the President in taking care that the laws of the United States, through the prosecution of offenses, are faithfully executed. Although recognizing that as a member of the bar, the attorney for the United States is an officer of the court, the court ruled that nevertheless he is "an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows," said the court, that "as an incident of the constitutional separation of powers, . . . the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." Judge Wisdom, concurring specially, noted: "The prosecution of offenses against the United States is an executive function within the exclusive prerogative of the Attorney General." 5/ He further observed that "the functions of prosecutor and judge are incompatible." 6/

5/ 342 F. 2d at 190.

6/ 342 F. 2d at 192.

The principle that the Executive alone has under the Constitution the duty and the power to enforce the laws through prosecution before the courts has been restated on many occasions.[7/]

District Judge Richey of the United States District Court for the District of Columbia denied an application for the appointment of an independent special prosecutor to investigate the Watergate incident. Judge Richey viewed such action as both an unwarranted interference with the prosecutorial discretion of the Executive and a violation of the doctrine of Separation of Powers.[8/]

7/ See, e.g., Ponti v. Fessenden, 258 U.S. 254, 262 (1922); Neisberg v. Department of Justice, No. 71-1026, decided on rehearing en banc October 24, 1973 ("Functions in this area [prosecutorial discretion] belong to the Executive under the Constitution, Article II, Sections 1 and 3 . . . ."); Parker v. Kennedy, 212 F.Supp. 594, 595 (D.D.C. 1963) (Determinations whether prosecutions should be commenced are within the ambit of the Attorney General's executive discretionary power); Pugach v. Klein, 193 F.Supp. 630 (D.D.C. 1961) ("The prerogative of enforcing the criminal law was vested by the Constitution, not in the Courts, nor in private citizens, but squarely in the executive arm of the government.") See also Nader v. Kleindienst, Civ. No. 243-72 (D.D.C. 1973); and Moses V. Kennedy, 219 F.Supp. 762 (D.D.C. 1963).

8/ Findings of Fact and Order No. 7 at 2, O'Brien v. Finance Comm. to Re-elect the President, Civ. No. 1233-72 (D.D.C., decided Sept. 25, 1972).

B. Through an ultimate power of removal, the President is constitutionally entitled to control all officers performing purely executive duties.

When establishment of a Department of Foreign Affairs was under consideration in the First Congress, extensive debate was provoked by a provision purportedly granting the President the right to remove the Secretary of Foreign Affairs. Several Members of the House, led by James Madison, contended that the President alone had the constitutional power to remove executive officials and that Congress could not impinge upon that power. Ultimately, a bill was enacted which did not purport legislatively to "grant" the President the power to remove the Secretary of Foreign Affairs,[9] on the theory that the President already possessed a constitutionally-conferred power of removal. In 1807 John Marshall eloquently summarized the debate over the "removal" clause. As Marshall put it, during the last stage of the discussion in the House of Representatives, Congressman Benson moved to amend the bill to establish a Department of Foreign Affairs--

> so as clearly to imply the power of removal to be solely in the President. He gave notice that, if he should succeed in this, he would move to strike out the words which had been the subject of debate. If those words continued, he said, the power of removal by the President might hereafter appear to be exercised by virtue of a legislative grant only.

9/ 1 Stat. 28, 29.

> and consequently to be subjected to legislative instability; when he was well satisfied in his own mind, that it was, by fair construction, fixed in the Constitution. The motion was seconded by Mr. Madison, and both amendments were adopted. As the bill passed into a law it has ever been considered as a full expression of the sense of the legislative on this important part of the American Constitution. 10/

The views of the First Congress are entitled to great weight in interpreting the Constitution because it was, in the words of Charles Warren, an "almost adjourned session" of the Federal Convention. 11/ The First Congress "contained sixteen members . . . fresh from the Convention, and a considerable number who had been members of the State Conventions which had adopted it . . . ." 12/ The Supreme Court has properly adhered to the view expressed by the First Congress that the President constitutionally may remove, and thereby control, all purely executive officers, notwithstanding any legislation to the contrary.

In Myers v. United States, 272 U.S. 52 (1926), a landmark case, the Supreme Court held that the President had the constitutional power to remove a postmaster of the first class, without

---

10/ 5 J. Marshall, Life of George Washington, 231-232 (London, 1807).

11/ C. Warren, Congress, the Constitution, and the Supreme Court 99 (Boston, 1925).

12/ 3 Farrand 518.

54-078 O - 76 - 25

the advice and consent of the Senate as was required by statute. In concluding that under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed with the advice and consent of the Senate, the Court reasoned (at 163-164):

> "[A]rticle II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers -- a conclusion confirmed by his obligation to take care that the laws be faithfully executed; . . . that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed."

The Court suggested that the determination of whether Congress had the power to limit the President's normal unfettered right to remove an executive officer depended upon an analysis of how fundamental that officer's duties were to the functioning of the Executive branch (at 127):

> A reference of the whole power of removal to general legislation by Congress is quite out of keeping with the plan of government devised by the framers of the Constitution. It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it. It would be a delegation by the Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government.

Some of the broad language in Myers was limited by the Supreme Court's subsequent decision in Humphrey's Executor v. United States, 295 U.S. 602 (1935). There, a statute limiting the power of the President to remove members of the Federal Trade Commission for "cause" was challenged as unconstitutionally interfering with the executive power of the President. The members were appointed by and with the advice and consent of the Senate. Upholding the constitutionality of the challenged restriction on the President's removal power, the Court drew a distinction between "purely executive officers" and other officers for purposes of analyzing the President's constitutional removal power. Regarding "purely executive officers," including postmasters, the Court stated that the Myers decision established the constitutionality of the President's illimitable power of removal. (295 U.S. at 627-628):

> "The office of a postmaster is so essentially unlike the office now involved that the decision in the Myers case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the Myers case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is . . . . [T]he necessary reach of the decision goes far enough to include all purely executive officers.

The Court observed that F.T.C. Commissioners exercised mainly quasi-legislative and quasi-judicial powers and that their executive powers were only incidental and necessary to the effectuation of their main powers. Accordingly, the Court concluded that those Commissioners were not "purely executive" and held that Congress could constitutionally place restrictions upon the President's power to remove them. 13/

The Myers and Humphrey's Executor cases therefore establish the proposition that the President's constitutional power to remove purely executive officers is absolute, at least when those officers are appointed by the President with the advice and consent of the Senate. 14/

13/ See also, Wiener v. United States, 357 U.S. 349 (1958) (War Claims Commission performs quasi-judicial functions and thus its members may be placed outside the President's power of removal).

14/ United States v. Perkins, 116 U.S. 483 (1885) does not suggest anything to the contrary. There a statute vested the appointment of cadet-engineers in the Secretary of the Navy, but another statute, section 1229 of the Revised Statutes, restricted his power of removal. Section 1229 was challenged as unconstitutional on the ground that it encroached upon the Secretary's removal power. In rejecting that contention, the Supreme Court concluded that when Congress vests the appointment of inferior officers in the heads of Departments under Art. II, § 2 of the Constitution, it may limit and restrict the power of removal as it deems best in the public interest. The Court did not reach the question of whether Congress could similarly restrict the President's power of removal, or whether the President himself could have removed cadet-engineers without limitation. In fact, in Blake v. United States, 103 U.S. 227 (1880), the Supreme Court held that notwithstanding section 1229, the President had the power to discharge a military officer by appointment of another in his place, by and with the advise

Footnote continued.

Conclusion

Conferring litigating authority upon the Federal Election Commission to enforce the Lobbying Act would raise very serious constitutional questions for two related reasons. First, it would combine legislative and executive authority in violation of separation of powers principles. Second, it would place the executive power to enforce the Lobbying Act in Commissioners beyond the President's absolute removal power. The Commission's power to enforce the Act would be primary and not merely incidental to the exercise of quasi-legislative or quasi-judicial powers.

14/ Footnote continued
and consent of the Senate. The Court observed that a constitutional question would be raised if the power of the President and Senate in this regard was subject to restriction by statute (103 U.S. at 236). Section 1229 was one of a series of statutes enacted by the Reconstruction Congress, culminating in the Tenure of Office Act, which was declared unconstitutional in Myers v. United States, 272 U.S. at 176.

Furthermore, whatever restrictions were placed upon the power of the Secretary of the Navy to remove cadet-engineers under section 1229, it is notable that they exercised no significant executive discretion comparable to that exercised by the Attorney General.

Department of Justice

Supplemental Information Requested by the Senate Subcommittee on Intergovernmental Relations Senate Government Operations Committee

on

June 12, 1975

Question:

1. Could you explain for the Committee how the Justice Department regulations regarding the recording of *ex parte* contacts now works and how they compare with the provisions of the pending bills?

Response:

On August 8, 1973, [then] Attorney General Elliot Richardson issued Order No. 532-73 providing for "Departmental Records of Outside Contacts." A copy of the Order, which is self-explanatory in terms of its procedures, is attached. Changes are contemplated, however, although none has yet been made. As he stated in his letter to you on April 7, 1975, the Attorney General will furnish a copy of any new directive to the Subcommittee should the present regulations be superseded.

The procedures established in Order No. 532-73 are more specific and well-defined than those proposed in Section 7 of S. 774. The Order's provisions differ from those contained in Section 7 of S. 774 in the following respects:

(1) The Order was promulgated by the Attorney General in response to specific needs for recording ex parte conversations in which Department of Justice attorneys or other employees are involved. The language in the Order attempts to balance the need for recording such contacts with the equally compelling needs for Department personnel to perform their duties in an efficient and expeditious manner. As such, the Order stipulates specific types of conversations which the employee should record by memorandum. The employee is given some discretion in determining whether a given conversation is of a sort which must be recorded, but he must be guided by the general principles spelled out in the Order. These principles and definitions recognize the unique nature of the Department's responsibilities. For example, an employee need only record contacts with "non-involved" parties, that is, those "with whom the employee would not in the routine handling of the case or matter normally have contact."

(2) In contrast to the Department Order, the provisions of Section 7 of S. 774 are so broad that they would seem to apply to virtually every conversation which a Federal employee, GS-15 or above, has concerning government affairs. Section 7 requires a record of any conversation in which the outside party is "expressing an opinion" regarding the "policymaking process" or which contains information relating to that process. Moreover, that section leaves the employee little discretion as to how a record is to be made of the conversation. The record must contain five specific types

of information about the conversation, in such form as the Federal Elections Commission shall specify. In our judgment, this requirement is needlessly specific and overly burdensome. We also believe it would apply in a totally inappropriate manner to certain legal matters which the Department handles.

Finally, Subsections 7(b) and(c) of S. 774, which contain requirements for maintaining and making available the records of conversations required by § 7(a), are similarly inappropriate.

Question:

2. You are critical of the IRS disclaimer for tax-exempt organizations. Would you in turn support a reform of the Code which would permit the 501(c)(3) organizations to engage in lobbying?

Response:

It is the Department's view that we should oppose any legislation which does not permit the Government to "consider", and use, any information furnished under oath or affirmation and originally intended to be made public. We therefore do not think that Section 6 of S.774 and Section 7 of S. 815 represent wise policy. As to our position on permitting 501(c)(3) organizations to engage in lobbying, we defer to the Treasury Department.

Question:

3. Would you support the placement of enforcement authority in another independent,