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001. letter	March 31, 1993 letter re: Lobbying Reform (2 pages)	3/31/93	P5

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rs51

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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

File:
Lobbying
Reform

Bruce -

Do you want
to sign on to
this?
Let's talk ASAP.

- MW
(Have
me
paged)

→ Make copy for Donski -
ask her to take a look.

MEMORANDUM FOR GEORGE STEPHANOPOULOS
DAVID GERGEN
MACK MCLARTY
HOWARD PASTER
JACK QUINN

FROM: MICHAEL WALDMAN
BRUCE REED

SUBJECT: POLITICAL REFORM

As you know, the House plans to act on political reform next month.

There are some outstanding issues that need to be resolved regarding the White House's posture toward reform.

- What do we do, if anything, to keep the House from watering down the campaign finance reform bill (and thus tarring us in the process)?

- What do we do regarding the legislation requiring disclosure of gifts by lobbyists, which passed the Senate and has been praised by the President, but which we officially have no position on?

- What, if anything, do we do about limiting or banning gifts to lawmakers (NOTE: we believe that our current posture of having no position is correct).

The President needs to decide these matters soon. We would like to meet today or tomorrow for 15 minutes to discuss these issues and get your signoff on the attached decision memorandum.

DRAFT DRAFT

September 26, 1993

MEMORANDUM FOR THE PRESIDENT

THROUGH: MACK MCLARTY
GEORGE STEPHANOPOULOS
DAVID GERGEN
HOWARD PASTER
JACK QUINN

FROM: MICHAEL WALDMAN
SPECIAL ASSISTANT TO THE PRESIDENT
FOR POLICY COORDINATION

BRUCE REED
DEPUTY ASSISTANT TO THE PRESIDENT
FOR DOMESTIC POLICY

(DONSIA STRONG
POLICY ANALYST
DOMESTIC POLICY COUNCIL) (?) Yes

SUBJECT: POLITICAL REFORM ISSUES

I. ACTION FORCING EVENT

As you know, the House leadership has scheduled a "reform week" in October to deal with several political reform issues, including campaign finance reform and lobby disclosure legislation.

This past week, House members have begun to formulate their substantive positions on these issues, and we may be uncomfortable with some of the directions in which they are heading. In particular, many House members want to move away from the PAC proposal included in the May proposal, moving even further from your campaign proposal to cut PAC gifts to $1000. To date, we have not signaled our bottom line, if any, on these matters.

In addition, because of desire not to antagonize the Hill, and because of the budget focus, the President has not been identified with the political reform agenda (e.g., it has gotten little press attention). We may wish to continue this posture.

On the other hand, we may want to publicly position ourselves as somewhat more reformist than the Congress, since the public is willing to believe that the President genuinely is fighting for reform, more than they are willing to believe that of the Hill.

II. CAMPAIGN FINANCE REFORM - BACKGROUND

The White House proposal unveiled in May had several features:

- Voluntary spending limits
- Cap on the amount of PAC money a candidate can receive of 1/3 of spending limit ($200,000 plus inflation). The amount a PAC can give is $5000, the amount under current law.
- Communications vouchers for candidates who comply with the spending limits. These would be funded b an increase in the checkoff and/or by the repeal of the deductibility of lobbying.
- A ban on use of soft money in federal campaigns
- Restrictions on contributions and fundraising by lobbyists (the administration's proposal)

Now, as the time of reckoning approaches, the House is skittish about the White House/leadership bill.

- Most significantly, there is sentiment to back off from the PAC limits in the bill -- perhaps moving to a limit of 1/2 of the spending limit from PACs (again, in $5000 increments).
- In addition, Speaker Foley last week expressed the view that it was politically impossible to include public funding in the legislation. Support for the legislation by editorial boards and reform groups was predicated on some form of public benefits for challengers, since the PAC provisions are weak.

In part, this is because House Democrats continue to fear the electoral consequences of loss of PAC funds. This is compounded by the Senate's deletion of most public funding from the bill. If the House does not include public funding or some similar set of public benefits for candidates, some labor-oriented Democrats (e.g., David Obey) argue that reform paradoxically tilts the system more toward

wealthy individuals than it is now.

Common Cause has informed the leadership that it has three requirements for the legislation: a) no movement from the compromise PAC proposal; b) some form of public benefit (e.g., communications vouchers, but with no funding source specified; free TV time; communications vouchers funded by a tax on campaign contributions); c) the administration's soft money proposal, which passed the Senate.

It will be difficult to round up the votes for any particular campaign reform proposal. It would be hard to pass our plan. At the same time, if the House leadership proposes legislation that is derided as a sham, it would lose freshman and reform votes. The White House runs a risk of being tarred with the House's retreat from our proposal, if we do not indicate that we want to stick with our plan (or something considered real reform).

To date, the White House has not signaled our view of how the House should proceed.

IV. CAMPAIGN FINANCE REFORM - OPTIONS

There are four options; please indicate which direction you wish us to take:

_____ *Do nothing, let the House work its will, and when asked, say we will see what happens in conference.* (In point of fact, especially given the numerous unconstitutional or destructive provisions inserted in the Senate bill, this legislation will have to be rewritten in conference anyway.)

_____ *Privately -- but clearly -- signal our position:*

> ___ *that we have a problem with a move away from our PAC position, and indicate that we would have to publicly differ with such a move.* (It would also be possible to engage in more detailed negotiation with them over the plan.)
>
> ___ *that we continue to support some form of "opening up the airwaves" as a part of reform.* The political department and DNC believe that legislation that limits PACs and soft money but does not include some form of public financing tilts the system toward the wealthy -- and away from Democrats.

_____ *Publicly restate our commitment to our overall proposal, which will have*

the effect of pinning in the House -- and steering clear from the inevitable criticism that will follow the House's weakening our proposal. This could be done in the form of a letter to the Speaker and Majority Leader, for example, broadly reaffirming our support for the May proposal.

_____ *Publicly, and more strongly, stake out a bottom line position on PACs or any other particular issue.* We may conclude that our primary purpose is to position the President as being "for reform," "independent," and "fighting to change Washington." This may involve a public statement or background briefing on PACs or some other issue.

V. LOBBY DISCLOSURE – BACKGROUND

The administration supported, and the Senate passed, noncontroversial legislation expanding the disclosure of lobbying activities. The House is considering similar legislation. One provision will be the subject of significant debate, however.

This provision would require lobbyists to itemize what gifts, travel, and meals they provide to Members of Congress. This proposal was offered by Senator Wellstone as an amendment on the Senate floor, and passed 97-0. It will be offered in the relevant Judiciary subcommittee by Rep. Dan Glickman.

The provision is similar to the proposal that you advocated as Governor of Arkansas. After the Senate passed the bill, you publicly supported this particular provision in statements (such as in an Oval Office radio address).

VI. LOBBY DISCLOSURE – OPTIONS

Should the administration support the provision requiring lobbyists to disclose travel, meals and gifts provided to legislators?

One school of thought holds that since you have already publicly endorsed the provision, that there is no harm in the administration doing so, too. It will offer the administration an opportunity to weigh in on the pro-reform side of an issue that will almost certainly eventually result in a favorable outcome. In addition, if Chairman Rostenkowski is indicted, the issue of gifts, meals and travel from lobbyists will undoubtedly attain new prominence.

You did it in Arkansas

On the other hand, the legislative staff believes that the provision will alienate Members of Congress who do not wish to have such gifts disclosed. They argue that this provision will merely embarrass lawmakers, magnifying an innocent meal or trip to give a speech into a scandal. For this reason, the administration did not weigh in before the Senate vote (before your public comments).

___ Agree ___ Agree as amended ___ Reject ___ No action

VI. GIFT RESTRICTIONS – BACKGROUND

The House is also considering changing its rules to restrict or bar gifts, travel, meals, etc., from lobbyists or any other source to Members of Congress. Same rules as us

You made no campaign commitments on these issues, and the legislative department strongly believes that this is seen by Members as the purview of Congress. On the other hand, if you wish to stake out a comprehensive position on reform, this would possibly be part of it.

VII. GIFT RESTRICTIONS - RECOMMENDATION

The administrations will not take a position on banning gifts from lobbyists and other sources to Members of Congress.

___ Agree ___ Agree as amended ___ Reject ___ No action

Senate Passes Bill, 95-2, to Overhaul Lobbying Laws

A1

By Helen Dewar
Washington Post Staff Writer

The Senate yesterday overwhelmingly approved the most far-reaching overhaul of lobbying laws in a half-century, including provisions to tighten loophole-ridden registration laws and require lobbyists to publicly disclose meals, entertainment, trips and other gifts to lawmakers and their staffs.

Gripped by the fear of appearing insufficiently sensitive to voters' anger over special interest influence in Washington, senators also pledged to pass legislation later this year to ban virtually all gifts from lobbyists on Capitol Hill.

The bill now goes to the House, where the election of 110 new members in last year's anti-status quo atmosphere has provided impetus for change on a variety of fronts, including lobbying abuses. House action is expected later this year.

"Public disgust was a welcome motivating factor" in overcoming decades of resistance to major reform of lobbying laws, Sen. Carl M. Levin (D-Mich.), chief sponsor of the measure, told reporters after passage of the bill on a 95 to 2 vote. Sens. Malcolm Wallop (R-Wyo.) and Robert C. Smith (R-N.H.) dissented.

The non-binding resolution urging passage of a prohibition on gifts worth more than $20 from lobbyists to lawmakers or their aides was approved, 98 to 1, with only Wallop voting no. "It's an absolute acknowledgement that no one in the Senate can hold his head straight in the face of a $20.10 lunch . . . and I don't accept that," Wallop protested.

But other senators indicated by their votes that they would go to almost any length to avoid the appearance of kowtowing to special interests and their lobbyists, even if it meant changing the decades-old habits of life in official Washington. Several cited the impact of Ross Perot's criticism of lobbyists' influence during his presi-

See LOBBY, A20, Col. 1

Senate Passes Bill To Overhaul Laws On Lobbying

LOBBY, From A1

idential campaign as well as the example set by President Clinton in pushing for lobbying revisions in the executive branch.

At the heart of the Senate legislation are provisions to assure that all lobbyists are registered and file semiannual reports disclosing who they represent, on what issue, who they contact and how much money is spent. A new Office of Lobbying Registration and Public Disclosure would be set up within the Justice Department to administer the new rules and ensure compliance.

Now, only about 5,000 to 6,000 lobbyists are registered out of a total Washington lobbyist population that has been estimated to be as high as 80,000—largely because of antiquated rules that have not been thoroughly overhauled since basic lobbying controls were adopted in 1946, according to Senate aides.

While backing the new registration rules, critics of lobbying practices said they did not go far enough. In a solo performance by one of the Senate's leading mavericks, Sen. Paul D. Wellstone (D-Minn.) challenged his colleagues to force lobbyists to disclose any gifts to lawmakers or their staffs worth more than $20 a piece or gifts adding up to a total of $50 in one year—from meals to weekend golf outings.

Despite initial resistance, Wellstone's proposal was slightly modified and approved Wednesday by voice vote as part of the lobbying registration bill after it became clear that any senator voting to scuttle it would appear to be voting in favor of hiding gifts from lobbyists.

Wellstone's proposal goes far beyond existing rules that require disclosure of trips but permit lawmakers to accept other gifts, without disclosure, as long as they do not add up to more than $250 from one source in one year. Meals in Washington do not now have to be disclosed.

The way was cleared for passage of the bill when senators agreed to modify a controversial proposal to force disclosure of contributions to charitable, public advocacy and other organizations that engage in lobbying. They proposed that the final version of the bill include a narrower provision requiring disclosure of such contributions from foreign sources.

At the White House, spokesman George Stephanopoulos—who on Wednesday said the administration did not have a position on the amendment because it was an internal housekeeping matter for Congress—said Clinton "thought it was a good idea. He said it was a good thing that they passed it."

Meanwhile, the Associated Press reported that lobbyists, a target of Clinton rhetoric about the problems of special interest gridlock in Washington, are grumbling about being asked at a recent breakfast to sell $1,500 tickets for a Democratic National Committee fund-raising dinner on June 28. The AP quoted one lobbyist at the breakfast as saying, "Somebody spoke up and said, 'You guys are kickin' the [expletive] out of Washington lobbyists. How do you expect us to try and sell tickets for you?' " Lobbyists also were prominent ticket sellers for Tuesday's Democratic Congressional Dinner.

THE WASHINGTON POST

FRIDAY, MAY 7, 1993

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THE WALL STREET JOURNAL MONDAY, JULY 19, 1993

Lobbyists Threaten to Use Leverage to Protect A Very Special Interest: Their Prized Tax Break

By JILL ABRAMSON
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON – In an inside-the-Beltway irony, lobbyists are about to be clobbered over the most special of interests: their own.

As part of the negotiations over President Clinton's deficit-reduction plan, Senate and House conferees are likely to eliminate the business tax deduction for lobbying expenses.

The likely end of deductions for lobbying not only has lobbyists seeing red, but has some of them threatening to withhold green – their campaign contributions. "Some have made this a litmus test for PAC (political action committee) donations," says Robert Boege, vice president of the American Society of Association Executives, a lobby group that represents more than 9,000 Washington-based trade associations, including such political behemoths as the Realtors and the homebuilders.

Bang for the Buck?

If Congress, as expected, closes the tax deduction for lobbying expenses, it will be jabbing a finger in the eye of some big contributors.

TOP TRADE ASSOCIATION PACS	Campaign Contributions 1991-92	TOP LAW-LOBBYING FIRM PACS	Campaign Contributions 1991-92
American Medical Assoc.	$2,936,086	Akin, Gump, Strauss, Hauer & Feld	$304,656
Nat'l Assoc. of Realtors	2,950,138		
Assoc. of Trial Lawyers of Amer.	2,366,135	Jones, Day, Reavis & Pogue	176,072
Nat'l Auto Dealers Assoc.	1,784,375	Verner, Liipfert, Bernhard, McPherson & Hand	175,192
American Institute of CPAs	1,542,851		
American Bankers Assoc.	1,458,388	Powell, Goldstein, Frazer & Murphy	123,285
Nat'l Assoc. of Life Underwriters	1,371,600		
Nat'l Assoc. of Home Builders	1,072,926		

Source: Center for Responsive Politics

Tough Times in Gucci Gulch

For the denizens of Gucci Gulch, this latest blow comes on the heels of such earlier insults as a proposed campaign finance reform bill that would cut down lobbyists' clout as party fund-raisers, and a Senate-passed bill to impose tough new disclosure rules requiring them to reveal, in excruciating detail, all the goodies they dispense to lawmakers.

But nothing hits closer to home than the deductibility issue, which explains why Mr. Boege's group – whose members will be hit hardest by the measure – the American League of Lobbyists and a coalition of companies led by O'Connor & Hannan, a Democratic law firm, are leading the charge against it. So far, though, that charge has been largely ineffectual.

Recently, in two tense encounters with Democratic Party officials, lobbyists' anger exploded into the open.

The first was a luncheon for top Democratic money men hosted by Washington lawyer-lobbyist Thomas Boggs. At the session, a number of lobbyists led by real estate specialist R. Duffy Wall complained loudly to Democratic National Committee Chairman David Wilhelm that the party shouldn't be asking lobbyists for political contributions while bashing them with rhetoric and legislation.

'I Want You With Us'

According to one participant, Mr. Wall exchanged heated words with both Mr. Wilhelm and Scott Faurick, a prominent lobbyist and DNC fund-raiser helping to mobilize the lobbying community to contribute to two major DNC fund-raising events in New York and Washington. Mr. Wall and Mr. Faurick decline to discuss the episode; Mr. Wilhelm, according to his spokeswoman, Catherine Moore, urged the lobbyists not to make a litmus test of the deductibility issue and to put their party loyalty above their own self-interest. "He told them, 'I want you with us,'" Ms. Moore reports.

Then, late last month, lobbyists vented their anger again, this time at Mandy Grunwald, one of President Clinton's top political advisers. Ms. Grunwald was the featured speaker at a meeting of several dozen Washington lawyers and lobbyists who were supposed to sell tickets to the President's Dinner, the fund-raising dinner that pumped more $4 million into the DNC's coffers in late June.

"Many people said they objected to the president attacking lobbyists and special interests," says Ms. Grunwald. "I told them that he had been clear throughout the campaign that he wanted to limit the role of lobbyists and increase the participation of people.

"It shouldn't come as a surprise to them," she adds. "I emphasized that although the party appreciated their support, I had to be candid that he'd continue to speak that way." According to one lobbyist who attended the meeting, several money men left the encounter vowing to end their fund-raising activities for the party.

Uneven Impact

Closing the lobbying-expenses deduction would raise as much as $1.2 billion over five years if a broader, Senate version of the measure is adopted; the narrower House version would raise $800 million. The society of association executives has sent a letter to all senators arguing that lobbying is important to the flow of information; should be considered an ordinary business expense akin to legal, marketing or communications costs (which are deductible); and is part of the constitutionally protected right to petition the government. "We are demonizing a very essential function in the representative process," asserts Mr. Boege.

Not all lobbyists would be affected evenly by the proposed change. Those who practice at big law firms, for example, probably wouldn't suffer much. That's because legal expenses would still be deductible, and only certain activities by lawyers would be disallowed as lobbying. But the provision would fall much harder on the more than 9,000 trade associations and businesses that have Washington offices that mainly lobby.

Additionally, trade groups probably won't be able to claim a tax deduction for any portion of their dues devoted to lobbying activities, even those aimed at lobbying on the state and local levels. In many cases, tax-exempt organizations will also be required to furnish the Internal Revenue Service with membership lists and to specify the amount of dues directed to nondeductible lobbying activities.

"The paperwork will be terribly onerous," says Timothy Jenkins of O'Connor & Hannan. Wade Williams, past president of the American League of Lobbyists and director of Deloitte & Touche's Washington office, estimates that new record-keeping requirements could cost businesses as much as $300,000 annually. "You could end up where the cost of compliance outweighs the revenue gain," he argues.

Yet lobbyists lobbying to preserve the tax breaks are resigned that the ax is going to fall. As a result, most are currently focusing their efforts on narrowing the reach of the legislation, trying to lift some of the paperwork requirements and to exempt certain activites, such as furnishing members of Congress and staff with technical information. Many also expect that the legislation will face a court challenge on the grounds that it infringes on the constitutional right to petition the government.

"The president promised he was going after Gucci Gulch," says Mr. Jenkins. "This is viewed as a special-interest deduction; that's the phrase that has caught on."

"We're an easy target," sighs Mr. Williams.

Lobby Reform

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Senate to Take Up Lobbying Measure, But Some Say Bill Isn't Strong Enough

By JOHN HARWOOD
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON – The Senate, responding to public hostility toward influence peddling, plans to take up a lobbying disclosure bill this week that isn't likely to muffle the controversy.

The proposed legislation, sponsored by Sen. Carl Levin (D., Mich.), would strengthen the loophole-ridden laws governing who must register as a lobbyist in Washington. But public interest groups complain that it would still permit lobbyists to skirt disclosure by not requiring them to list financial benefits provided to individual members of Congress.

"The sunshine of disclosure is a necessity," Pamela Gilbert of Congress Watch wrote in a letter to senators recently. Along with Common Cause, Congress Watch is urging the Senate to amend the bill to require itemized disclosure of lobbyists' favors.

The specter of special-interest lobbyists has fed an anti-incumbent mood in recent congressional elections, and both President Clinton and Ross Perot scored points attacking influence peddling in their 1992 campaigns. In the most recent Wall Street Journal/NBC News poll, 26% of those surveyed said reducing the influence of lobbyists and campaign contributors should be one of the federal government's top priorities.

Adding fuel to the argument was a broadcast last week on ABC-TV's "Prime Time Live" depicting lawmakers on Florida's Captiva Island at a getaway paid for by lobbyists for the electronics industry. Under Mr. Levin's bill, the lobbyists wouldn't be required to list the members they took on the trip.

Lawmakers themselves are required to list such trips on their annual financial disclosure forms. But tracking a lobbying interest's activities requires checking all 535 members' reports. Common Cause President Fred Wertheimer argues that public-interest watchdogs can get a clear, timely picture only if lobbyists list gifts to individuals on their own disclosure statements. Lobbyist statements currently are filed quarterly, though Mr. Levin's bill would permit lobbyists to file semiannually.

Public interest groups agree with Mr. Levin's assessment that the current disclosure law is "useless and toothless." Passed nearly a half-century ago, the law requires registration only by paid lobbyists whose "principal purpose" is to influence the course of legislation in Congress. It doesn't cover executive branch lobbying, and courts have interpreted it to apply only to lobbying of lawmakers themselves, not congressional staffers.

As a result, a General Accounting Office study found that nearly 10,000 of 13,500 individuals and organizations listed in one directory of Washington lobbyists hadn't registered. Mr. Levin's bill, which has bipartisan support, would plug those loopholes by requiring all lobbyists to register, regardless of whom they lobby in the legislative or executive branches.

Still, floor consideration of the bill promises to set erstwhile allies – Mr. Levin and the public interest groups – at odds. The Michigan Democrat is opposing a Common Cause-backed amendment by Sen. Paul Wellstone (D., Minn.) that would require itemized disclosure of financial gifts to members. While praising Mr. Levin's bill for making "significant improvements" in lobby registration, Mr. Wellstone said it doesn't achieve "credible and complete lobby disclosure."

The amendment could complicate prospects for passage in the House, and Mr. Levin contends it is superfluous because he and four other senators – including Mr. Wellstone – are seeking separate legislation to ban altogether most junkets such as the Captiva Island trip, as well as gifts from lobbyists that are valued at more than $20. Common Cause supports a ban as well, but meanwhile urges defeat of Mr. Levin's bill unless the gift disclosure provisions are strengthened.

PRESERVATION PHOTOCOPY

Call me.
Thanks,
CURasco

May 12, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: BRUCE REED
DONSIA STRONG

SUBJECT: Lobbying Disclosure Bill

As you know, the Senate voted last week to pass the Levin lobby reform bill, including a Lautenberg amendment to bring Congressional gift rules in line with those of the executive branch, and a Wellstone amendment to require lobbyists to disclose gift, travel, and entertainment benefits to Members, as your ethics law required in Arkansas.

We believe the Administration should support these provisions when the measure moves to the House, and assume from your public comments over the last few days that you think so, too.

Howard Paster still contends that despite your personal support for these measures, these rules are Congress's business, and the Administration should not appear to be telling Congress what to do.

We believe that lobbyists are the villain here, not Congress. We think the Administration should support these measures because 1) they're good policy; 2) the Administration is going to be asked to take a position, and if we don't support these provisions in the House, we will look like we're not serious about political reform; 3) public pressure is so great that the House will vote for these measures anyway; and 4) you've said publicly you're for these ideas, so that should be the Administration's official position.

Please let us know whether we can say the Administration supports the Levin bill as amended.

Campaign-Finance, Lobbying Overhaul Picks Up Steam After Years of Hot Air

By JEFFREY H. BIRNBAUM
And JOHN HARWOOD
Staff Reporters of THE WALL STREET JOURNAL

WASHINGTON – After years of talk but little action, efforts are now under way to rein in the much-reviled system of campaign financing and to force the secretive world of lobbyists into the open.

President Clinton today will unveil his plan to overhaul the campaign-finance laws, and its chance of passage is high. Designed to reduce the influence of private-interest money on federal elections, the plan is expected to include at least one little-noticed addition: a provision requiring presidential candidates who take federal funds to participate in public debates.

The Senate, meanwhile, passed a bill to require professional lobbyists to disclose more of what they do. The bill now moves to the House, where its tough disclosure provisions will be agonized over, but probably passed in some form.

The movement on both fronts reflects the belief that the voting public is fed up with the way Washington works. Both the campaign-finance and lobbying disclosure bills are priorities with President Clinton and the Democratic majorities that control both chambers of Congress.

Republicans Threaten Filibuster

Still, difficulties lie ahead. Senate Republicans have vowed to filibuster the campaign-finance bill because it contains some public funding for congressional elections. Republicans and Democrats will seek other changes as well, including an effort to allow more private money to be funneled into the campaign committees that support candidates for Congress.

The lobbying-disclosure bill also is controversial. An amendment included in the Senate bill to require lobbyists to disclose relatively small gifts and gratuities to lawmakers is viewed as overkill even by many House members sympathetic to the measure.

Democratic leaders in the Senate are confident they can persuade enough moderate Republicans to side with them to end – or even avert – a filibuster and pass the campaign-finance measure. Five GOP senators are circulating a letter that enumerates their demands in a way that suggests they might accept such a proposal. And House leaders acknowledge that, given the public's antipathy toward lobbyists, almost any bill that forces further disclosure, no matter how stringent, is likely to pass.

Revolving Door

Yesterday the Senate passed the lobbying legislation in a 95-2 vote. The bill, which was sponsored by Sen. Carl Levin, (D., Mich.), is intended to plug loopholes that permit most of Washington's lobbyists to avoid registering. The bill also requires lobbyists to itemize financial benefits or gifts valued at more than $20 to lawmakers or their staff members.

Before final passage, the Senate went even further. It adopted, by a 98-1 vote, a nonbinding resolution that signaled its intent to ban such gifts altogether. This would be in line with current laws that cover officials in the executive branch.

In addition to the gift ban, Democratic senators plan to follow up the lobbyist registration bill with legislation intended to close the "revolving door" through which lawmakers leave to lobby for private interests. A proposal by Sen. David Boren (D., Okla.) would bar former lawmakers from lobbying sitting members of Congress or their staffs for two years. In addition, it would bar them from lobbying the committees on which they served for five years and bar them permanently from lobbying on behalf of foreign clients.

Mr. Clinton's campaign-finance legislation will offer vouchers for television air time, print advertisements, and postage to candidates as an incentive to limit their spending. The limits are $600,000 for House races, and $1.2 million to $5.5 million for Senate races, depending on a state's population. For House races, the federal subsidy could be as large as one-third of total spending, matching the total contributions from individuals of $250 or less.

Contributions from political action committees would be limited to the remaining one-third of total outlays in House races. Senate candidates could accept as much as one-fifth of their spending limit from PACs.

The president's plan repeals the corporate tax deduction for lobbying expenses and, in effect, prevents registered lobbyists from making or soliciting campaign contributions – a provision that some House leaders argue may be unconstitutional. Mr. Clinton has backed away from his campaign promise to lower the cap on how much a PAC can give to $1,000 from $5,000. But he will suggest ways to restrict the unlimited contributions that corporations and rich individuals can give to political parties.

Tucson Electric Power Co.

Tucson Electric Power Co., Tucson, Ariz., said it agreed to sell part of the real estate and related assets of its Tucson Resources Inc. and Sierrita Resources Inc. units for $29 million.

The sale agreement is with SVP Investment Managers L.P., a closely held entity in Scottsdale, Ariz. The properties include the Warner Center Hilton and Towers in Woodlands, Calif.; the Holiday Inn-Hurstbourne, in Louisville, Ky.; and two notes secured by properties in Phoenix, Ariz., and Tucson.

Tucson Electric said it expects to complete the transaction in the third quarter, subject to certain conditions. The sale won't have any effect on the company's income statement, an official said.

Tucson Electric has to date taken about $200 million in write-downs against the assets of Tucson Resources and Sierrita Resources, which acquired properties and other investments in the 1980s in a failed diversification program.

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Senate Passes Stringent New Rules for Lobbyists

By MICHAEL WINES

Special to The New York Times

WASHINGTON, May 6 — The Senate moved en masse today to haul this city's tens of thousands of lobbyists to public account for the first time, voting to make them report on who hires them to sway public policy and what they spend doing it.

The 95-to-2 vote was the first serious attempt to overhaul controls of lobbying since 1946, when Congress passed a lobbying-disclosure act that was almost immediately circumvented and ignored.

The issue now must survive a vote in the House, but its eventual passage seems likely since a nearly identical measure there is reported to have broad support.

Senator Carl Levin, a Michigan Democrat who was the measure's chief sponsor, said today that past attempts to reform lobbying laws had been "stymied repeatedly," but that this year's effort had bipartisan support.

Stiffer Disclosure Rules

"It has been a long time coming," Mr. Levin said.

The measure would require most professional lobbyists to register with the Government and to file reports every six months disclosing, in general terms, what they are doing. Among other data, the reports would list the policies and legislation they seek to influence, the Federal agencies and Congressional committees they have contacted, the identities of their employers and the overall cost of each lobbying campaign.

The reporting requirement would cover not only private lobbyists, like members of law firms, but also companies, trade and advocacy groups that employ in-house lobbyists, like the Sierra Club and the National Association of Manufacturers.

The bill includes a surprise amendment adopted on Wednesday that would require lobbyists to disclose any gifts or other financial benefits worth more than $20 that they have provided to senators or their staffs.

Pressure From Voters

The bill's swift and fairly painless approval reflected in part the Capitol's dawning awareness that many voters subscribe to the adage likening lawmaking to sausage-making, and that they want the process cleaned up.

Mr. Levin, as well as the bill's chief Republican sponsor, Senator William S. Cohen of Maine, said today that a spate of unusually lurid ethical scandals and a whirlwind of populist attacks by Ross Perot, the third-party Presidential candidate last fall, had been a consciousness-raising experience for legislators. Indeed, even the lobbyists' trade association supported the measure passed today.

"Public disgust is a motivating, and indeed a welcome factor" behind Senate support for the bill, Mr. Levin said.

The two Senators who voted against the measure, both Republicans, Robert C. Smith of New Hampshire and Malcolm Wallop of Wyoming.

No one knows how many people are paid to influence legislation and Government policies, but recent estimates range from 12,000 to about 80,000. Only about 6,000 try to comply with the 1946 lobbying law, which requires them to report their expenses to Congress, and the bulk of those reports are so incomplete as to be useless.

The 1946 law is so strewn with loopholes, Senate aides noted this spring, that many of the Capitol's best-known and most powerful lobbyists have not bothered to register and do not appear legally bound to do so.

Aims of Proposed Bill

Mr. Levin and Mr. Cohen said today that their legislation would close those gaps and force far broader disclosure of lobbying activities. And although the bill does exempt some lobbyists from reporting on their work, Senate aides asserted today that any significant lobbying effort, either in Congress or the executive branch, was covered.

The bill would create a new office in the Justice Department to collect and compile lobbying records and to enforce the law. As first written, the bill provided for fines of up to $100,000 for lobbyists who deliberately violated the law. An amendment approved on Wednesday raised that figure to $200,000. Minor violations would carry fines of up to $10,000.

The most difficult task, aides said, was to cast a disclosure net that captured professional lobbyists but spared the average citizen who writes an angry letter to a member of Congress, or the business executive who visits the Capitol one week a year to air grievances.

The measure defines lobbying broadly, ranging from efforts to influence legislation and regulations to attempts to win Federal contracts for clients. And it appears to require disclosure by most professionals, including any person who is paid at least $2,000 a year to lobby or any organization whose lobbying expenses exceed $10,000 a year.

People and groups passing that threshold would be required to file reports listing not just their employers, activities and expenses, but also a host of other potentially revealing information. This would include the names of all employees in a corporation or organization who engage in lobbying, and information on whether they have held jobs in Congress or much of the executive branch in recent years and an accounting of those jobs.

The bill also demands disclosure of any foreign entities that have direct involvement or financial interests in either a lobbying effort or an American company that is reporting its lobbying activities.

The measure also takes aim at one of the capital's most common lobbying techniques: the massing of anonymous firms and organizations into innocuous-sounding coalitions, with names like Citizens for Good Government, that then lobby for specific but undisclosed interests.

Under the bill, any group or firm that gives at least $5,000 to such a coalition in a six-month period must be identified in the coalition's lobbying report.

THE NEW YORK TIMES, FRIDAY, MAY 7, 1993

Clinton Ties Deficit Cut To Trade Negotiations

Special to The New York Times

WASHINGTON, May 6 — President Clinton used a speech on international trade today to lobby for the passage of his deficit-reduction plan, saying that the United States will be in no position to press for open markets abroad if it does not address its own domestic problems first.

Mr. Clinton, who lost an important Congressional battle last month over a $19.5 billion package that he said would stimulate the economy and create jobs, pointed to a reduction in long-term mortgage interest rates as proof that his overall budget plan had been well received in the financial markets. As proposed, the deficit-reduction plan would cut the yearly deficit in half in four years through spending cuts and tax increases.

The President said reducing the deficit was the key to domestic economic revival. "This is the ultimate stimulus for the American economy if we can pass the budget that reduces the deficit and keep these rates down," he said in an address to the Export-Import Bank.

Bruce, —

Howard & Stacy T. suggest that the Republicans will be able to use the underline language to support their amendments. Therefore, the underlined language should be deleted. —

The underlined lang is the same that was used in the Leg. letter.

B/C the Bryant bill is the same as Lewis (introduced) we don't want to give the impression that this is all we want. In addition,

while we can't quite support Lautenberg/Wellstone, a blanket support statement suggests we are happy as is.

Advise —

File: Lobbying

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 4, 1993
(Senate)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

S. 349 - Lobbying Disclosure Act of 1993
(Levin (D) Michigan and 9 others)

The Administration supports S. 349, and will continue to work with Congress to strengthen and clarify the legislation.

Pay-As-You-Go Scoring

S. 349 would increase receipts; therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990. OMB's preliminary scoring estimate of this bill is that it would increase receipts by less than $500,000 annually. Final scoring of this legislation may deviate from this estimate.

* * * * *

(Do Not Distribute Outside Executive Office of the President)

This Statement of Administration Policy was developed by the Legislative Reference Division (Ratliff), in consultation with the Departments of Justice (Evans/Grapensberger), HHS (White), Transportation (Donelan), Education (Heindel), Agriculture (Imhof), Commerce (Powell), Defense (Brick), HUD (Moran), Labor (Taylor), State (Keppler), Transportation (Donelan), the Treasury (McGivern), VA (Lawson), and Energy (Honick), GSA (Simms), NASA (Costanza), OPM (Woodruff), SBA (Deane), OGE (Ley), the NEC (Seidman), the White House Offices of Legislative Affairs (Carey) and Communications (Waldman), DPC (Strong), BAS (Balis), OFPP (Burman), OIRA (Hill/Veeder/Weiss), and TCJ (Silas).

On April 1st, the Senate Governmental Affairs Committee reported S. 349 with one amendment and the legislation was placed on the Senate calendar. (The Committee ordered S. 349 reported by voice vote on February 25th.) The legislation has five Democratic co-sponsors: Glenn, Boren, Campbell, DeConcini, and Bryan.

WH DPC (Strong) advises that Sen. Levin will offer a "managers' amendment" to S. 349 on the Senate floor. The amendment is expected principally to address technical issues. In addition, DPC advises that the amendment will increase the threshold amount for triggering the registration requirement from $1,000 to $5,000. The amendment also could contain language to: (1) exempt from the registration and reporting requirements any lobbyist whose total income or expenses in connection with lobbying on

behalf of all of its clients do not exceed $5,000 in a semiannual period; and (2) require lobbyists to identify third-party payers and coalition connections to covered officials, upon request.

Description of S. 349, as Reported

S. 349 would provide for the disclosure of lobbying activities to influence Federal Legislative or Executive branch officials. The term "lobbyist" would not include an individual whose lobbying activities are "only incidental to, and are not a significant part of," the services provided by the person to the client.

Lobbying contacts would include certain communications regarding: (1) the formulation, modification, or adoption of Federal legislation or regulations; or (2) the administration of Federal programs or policies, including the award and administration of contracts and grants. Lobbying contacts would not include communications such as those that are: (1) Congressional testimony, (2) required by subpoena, (3) made in response to a Federal Register notice, (4) made in compliance with agency administrative adjudicatory procedures, or (5) made on behalf of an individual regarding that individual's benefits or other personal matters.

Contacts with Executive agency officials would have to be reported specifically as to each agency. Covered Executive branch officials would include the President, Vice President, any nonclerical employee in the Executive Office of the President, and any Senior Executive Service employee. Contacts with specific members of Congress would have to be reported as a contact with the House, the Senate, or a Congressional committee. Covered Legislative branch officials would include Members of Congress and nonclerical Congressional employees on personal staffs, committees, or leadership staffs.

An Office of Lobbying Registration and Public Disclosure would be established within the Department of Justice. Lobbyists generally would be required to register with the Office within 30 days of first making, or agreeing to make, a lobbying contact. Registrants would have to report to the Office semiannually on their lobbying activities. These reports would contain the names of the registrant and the client, a list of the specific issues upon which the lobbyist engaged in significant lobbying, and a good faith estimate of the total amount of all income from the client during the semiannual period for lobbying activities.

Initially, the Office would have to attempt to resolve alleged noncompliance with the bill informally. If a person admitted that there was a noncompliance and corrected it, no further action would be taken on minor noncompliances and significant violations would be treated as minor. The penalty for minor compliances would be no more than $10,000. For cases of

significant violations, the penalty would be more than $10,000 but no more than $100,000. A person could appeal a final determination of noncompliance to a Federal court of appeals.

Administration Position To Date

On February 4th, the Vice President stated that he supported S. 349. In his February 17th address to Congress, the President endorsed "the lobbying registration bill." In a March 31st letter to Congressman Bryant (the sponsor of H.R. 823, the House companion legislation), the President stated that he strongly supported the Lobbying Disclosure Act of 1993. The President also stated that the Administration looks forward to working with the House Judiciary Administrative Law subcommittee to "strengthen and clarify the bill."

A DOJ draft report on H.R. 823 currently is being circulated by LRD for comments. The draft report states that the Administration has four major concerns with the legislation: (1) the bill should cover all attempts, without regard to their frequency or magnitude, to influence any officer or employee of the Executive and Legislative branches; (2) more accurate and specific financial disclosure should be required; (3) violators of the Act should not profit from their wrongdoing; and (4) fees paid to lobbyists that are contingent on the success of any lobbying activities should be prohibited. Justice also notes other possible problems with provisions of the legislation including those regarding registration, enforcement, penalty-setting powers of the administrative law judges (which raise an Appointments Clause question), and the definition of "foreign principal".

Pay-As-You-Go Scoring

The scoring in this SAP was approved by TCJ (Silas) and BAS (Balis). CBO agrees (final).

Legislative Reference Division
May 4, 1993 -- 1:30 p.m.

PG 1 of 9 File: Lobbying

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503

April 30, 1993

LEGISLATIVE REFERRAL MEMORANDUM

LRM #I-357

TO: Legislative Liaison Officer -

COMMERCE - Michael A. Levitt - (202)482-3086 - 324
DEFENSE - Samuel T. Brick, Jr. - (703)697-1305 - 325
HUD - Edward J. Murphy, Jr. - (202)708-1793 - 215
STATE - Bill Keppler - (202)647-2137 - 225
TREASURY - Richard S. Carro - (202)622-1146 - 228
OGE - Jane Ley - (202)523-5377 - 261

FROM: JAMES J. JUKES (for)
Assistant Director for Legislative Reference

OMB CONTACT: GERRI RATLIFF (395-3883)
Secretary's line (for simple responses): 395-3454

SUBJECT: JUSTICE Proposed Report RE: HR 823, Lobbying Disclosure Act of 1993

DEADLINE: C.O.B. May 4, 1993

OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or receipts for purposes of the the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:
Donsia Strong
Bruce Reed
Jack Quinn
Cheryl Mills
Melanne Verveer
Michael Waldman
Chris Edley
Bob Damus
Bernie Martin
Richard Loeb
Adrien Silas
Cora Baebs
Lorraine Miller
Sally Katzen
Jeff Hill
Thurgood Marshall
Al Burman

LRM #I-357

RESPONSE TO LEGISLATIVE REFERRAL MEMORANDUM

If your response to this request for views is **simple** (e.g., concur/no comment) we prefer that you respond by **faxing** us this response sheet. If the response is **simple** and you prefer to call, please **call the branch-wide line** shown below (NOT the analyst's line) to leave a message with a secretary.

You may **also respond** by (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); (2) sending us a memo or letter; or (3) if you are an OASIS user in the Executive Office of the President, sending an E-mail message. Please **include** the LRM number shown above, and the **subject** shown below.

TO: GERRI RATLIFF
Office of Management and Budget
Fax Number: (202) 395-3109
Analyst/Attorney's Direct Number: (202) 395-3883
Branch-Wide Line (to reach secretary): (202) 395-3454

FROM: _____ (Date)

_____ (Name)

_____ (Agency)

_____ (Telephone)

SUBJECT: JUSTICE Proposed Report RE: HR 823, Lobbying Disclosure Act of 1993

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No objection

_____ No comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of _____ pages, attached to this response sheet

U.S. Department of Justice

Office of Legislative Affairs

Draft

Office of the Assistant Attorney General Washington, D.C. 20530

The Honorable Jack Brooks
Chairman
Committee On The Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter requesting comment on H.R. 823, the "Lobbying Disclosure Act of 1993."

The Administration strongly supports the purpose of this legislation. We are committed to insuring that all citizens are aware of the influence brought to bear on the development of government policies, regulations, laws and legislation. H.R. 823 establishes uniform lobby disclosure requirements for Executive and Legislative Branch lobbying. It repeals the patchwork of existing lobby disclosure statutes and streamlines the entire disclosure process for those who must comply.

In addition, the new Office of Lobbying Registration and Public Disclosure would be established within the Department of Justice. We believe that the Department of Justice, with its experience in administering and enforcing the Foreign Agents Registration Act (FARA) since 1942, and its experience in enforcing the Federal Regulation of Lobbying Act is uniquely qualified for the responsibility of administering and enforcing the provisions of the bill. The Department has established, over its 51-year FARA history, a reputation for administering and enforcing that Act in an evenhanded manner, and encouraging maximum disclosure while preserving the right of all parties to disseminate their message.

As the President stated in his letter to the Subcommittee, dated March 31, 1993, the Administration is anxious to work with you to strengthen and clarify H.R. 823. Accordingly, we strongly recommend, based on the experience of various Executive Branch departments and agencies in implementing, administering and

enforcing the various disclosure statutes, that Congress go beyond the language of the present bill and adopt legislation that will be more effective than the provisions of H.R. 823 as introduced, and that will compel disclosure in a timely manner.

The Administration has four major concerns with the bill as presently drafted. Our concerns and a section-by-section analysis follow:

Our first concern is that the bill cover all attempts, without regard to their frequency or magnitude, to influence any officer or employee of the Executive and Legislative Branches. This is based on the belief that a host of preliminary decisions are made at every level -- some that never reach the review of the ultimate decision maker. Any effort to exclude all but the highest ranking officials or employees could have the unintended effect of increased and undue lobbying pressures on officers and employees not covered by Section 3, since contacts with such individuals would not subject lobbyists to the registration requirements of the bill.

The bill's definition of lobbyist in Section 3(10), excluding those whose lobbying activities are "only incidental" and "not . . . significant", is, in our view, imprecise and creates a loophole that will undermine meaningful lobbying disclosure. We recommend that a bright line test of what constitutes a lobbyist be crafted. For example, a threshold amount expended for lobbying, e.g., $5,000 in a six-month period, could trigger the obligation to register, or a test that focuses on the client's overall lobbying efforts rather than the lobbyist might be fashioned (cf. the Federal Election Campaign Act, 2 U.S.C. § 431 et seq.). An alternative approach would be to make any exemption explicit and precise in its scope.

This bill provides for a potentially significant loophole in that it fails to require the disclosure of individuals who pay a lobbyist to lobby on behalf of another. The real party in interest, the individual paying the bill, could remain undetected and undisclosed from the public and other interested parties. The Administration believes that any third party that pays for lobbying activities ought to be disclosed.

Organizations that participate in coalitions are excluded from disclosure if their payments do not exceed $5,000 over a six month period, they do not significantly participate in the supervision or control of the lobbying activities and they do not have a direct financial interest in the outcome of the lobbying activities. Terms such as "significantly participate", "supervision or control", "direct financial interest", and the "outcome" are so ambiguous that ensuring that this exception is not abused will be virtually impossible. In addition, the bill provides no mechanism for disclosing the existence or participation in ad hoc coalitions where lobbyists for different organizations or clients

work in concert on an issue or goal of common concern. Such ad hoc coalitions often take on a deceptive or unassuming name to hide the identity of the real players. This bill should insure that this type of activity is disclosed by requiring each registrant to name any ad hoc coalition and/or participants with which it participates, irrespective of whether the coalition pays any of the participants. The Administration believes it is critical that any reform address all modes and structures by which influence is peddled. As we indicated above, the disclosure of all the principals in all lobbying efforts is essential to public awareness of all factors influencing governmental decisions.

Second, more accurate financial disclosure than that provided in Section 5 of the proposed bill should be required. Presumably, a paid lobbyist is capable of maintaining financial records adequate to meet his or her obligations to the Internal Revenue Service. The public gains little if these exact numbers are converted to estimates ranging from tens of thousands to hundreds of thousands of dollars.

In addition, lobbyists, at the very least, should be required to disclose specific amounts for expenditures in certain crucial areas, such as, gifts, entertainment and travel and advertising. Moreover, H.R. 823 should provide for complete disclosure of grassroots activities. Very often, public servants are faced with a host of artificially generated correspondence and telephone calls. Many lobbyists expend substantial amounts of money in an attempt to suggest to those in public service that their cause or position has substantial support. There should be separate line item disclosure of sums expended on grassroots activities and the issues advanced.

Third, while H.R. 823 provides civil monetary penalties for violations of the Act, the bill could be substantially strengthened by insuring that violators never profit from their wrongdoing. Lobbyists who continuously fail to comply with the provisions of the bill should forfeit their fee. This could be accomplished by adopting provisions based on the HUD Reform Act, which provide a civil money penalty at the greater of a fixed amount or the amount paid to the lobbyist with respect to the violation.

Fourth, there should be a prohibition against any fee paid to a lobbyist that is contingent, in whole or in part, on the success of any lobbying activities. Similar provisions are contained in the HUD Reform Act and FARA. Contingent fees for soliciting or obtaining Government contracts have long been considered contrary to Public Policy because such arrangements may lead to attempted or actual exercise of improper influence. Commissions paid on sales would not be prohibited under this provision.

We also note possible problems with respect to what constitutes an inactive registration and with the timeliness of the initial registration as provided for in Section 5. Inactive registrants, in our view, should be defined as those whose total receipts and (not "or") total costs are less than $5,000 in a semi-annual period. To use the disjunctive is to invite the structuring of payments so as to avoid disclosure.

Section 7(b)(1) of H.R. 823 requires the Department to close out a possible enforcement action, if the party submits information showing a violation was "unlikely". Coupled with the Department's lack of authority to investigate, this will allow violators to submit just enough information to meet the "unlikely" test and evade the disclosure required by H.R. 823. Therefore, the Department suggests that the provision be clarified to make plain that the registrant is required to show he or she is in compliance with the Act.

Both HUD and FARA provisions require registrants to keep and preserve records relating to their activities, the disclosure of which is required by the respective statutes. H.R. 823 should also so provide; otherwise, those seeking to evade the law or enforcement efforts may claim that relevant records of lobbying activities are "non existant". To insure that the Department is able to obtain relevant information and to pursue instances of noncompliance, authority should be given to the Attorney General to issue civil investigative demands where a possible violation is indicated.

Section 7(b)(2) requires the Department to treat a "substantial noncompliance" as a "minor noncompliance" if the person admits there was a noncompliance and corrects it, without any regard as to the egregiousness of the noncompliance. This allows the person to engage in a deliberate course of conduct designed to evade disclosure and, if caught, to say, "I'm sorry, I'll disclose"; and pay a smaller penalty. In fact, this provision serves as an incentive to noncompliance. The Administration recommends that the bill be revised to treat significant noncompliance, admitted or not, as provided in Section 8.

The enforcement mechanisms provided in the bill also need to be strengthened. The bill fails to afford the Director sufficient investigative authority to insure that all those register who should, and that those who do register make full and accurate disclosure. We favor the informal resolution of disputes whenever possible, but there must also be the tools such as administrative fines, civil investigative demands and, as a last resort, criminal sanctions for those who choose to avoid the bill's registration and disclosure requirements. Experience has shown that the informal resolution process is greatly enhanced by the presence of more severe penalties.

Section 8(a)(1) of the bill would prohibit the Director of the Office of Lobbying Registration and Public Disclosure from imposing a civil penalty for violations of the act:

> "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."

The Appointments Clause of the Constitution, art. II, sec. 2, cl. 2, authorizes the President, by and with the advice and consent of the Senate, to appoint officers of the United States. The clause further provides that Congress may vest the appointment of "such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." (Emphasis added.) We believe that giving administrative law judges the authority to make decisions binding on the Director, and thus ultimately on the Attorney General, subject only to review under the arbitrary and capricious or abuse of discretion standards, raises constitutional concerns. Officers who make decisions without being subject to the supervision and control of superiors cannot meaningfully be considered inferior officers.

Since the bill appears to permit the appointment of administrative law judges in a manner reserved for the appointment of inferior officers, while at the same time effectively insulating their decisions from review, we believe that the limitation on the reviewability of their decisions raises a substantial question under the Appointments Clause.

We do not believe that the limited review available to the Director is sufficient to obviate this constitutional problem. The arbitrary and capricious and abuse of discretion standards, devices with long histories in administrative law, do not permit the Director (nor, by extension, the Attorney General) to substitute his judgments for those of the administrative law judge. Review under the arbitrary and capricious standard, for example, is limited to only "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The (Director) is not empowered to substitute (his) judgment for that of the (ALJ)" Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (citations omitted). Because the ALJs' judgments would therefore still be beyond the Director's supervision and control, we are not persuaded that administrative law judges may be appointed in the manner that the Constitution reserves for the appointment of inferior officers. Cf. Statement on Signing the Omnibus Budget Reconciliation Act of 1989, 25 Weekly Compilation of Presidential Documents 1970, 1971 (December 19, 1989) (objecting to imposition of an arbitrary and capricious standard of review for review of special master

decisions by Claims Court judges as inconsistent with the requirements of Article II). Accordingly, we recommend that the bill be changed to authorize the Director to overturn any civil penalty imposed by an administrative law judge under this bill if the decision is not supported by substantial evidence.

Another concern involves the bill's proposed revision of FARA in Section 13. By restricting the definition of foreign principal to foreign governments and foreign political parties, the bill (contrary to current law) would allow foreign individuals, associations and corporations to attempt to influence American public opinion and United States policy without making any disclosure under FARA. Only if they also engaged in lobbying contacts as defined by this bill would they be required to make any disclosure of their activities, and such disclosure would be significantly less than is now required under FARA. This would allow agents of entities supporting terrorist activities to attempt to influence American public opinion and United States policy without making any disclosure under either FARA or the Lobbying Disclosure Act of 1993. Further, this would impose on the Government the burden to prove in any litigation that the agent represents an entity meeting the Act's definition of a foreign government or foreign political party, a difficult, if not insurmountable, obstacle in cases involving covert agents and clandestine foreign organizations. The Administration recommends that the present definition of "foreign principal" in Section 1 of FARA be retained in its entirety, and a provision be added stating that registration and disclosure by commercial entities under the Lobbying Disclosure Act satisfies the reporting obligations of FARA.

We point out that the bill establishes within the Department an "Office of Lobbying Registration and Public Disclosure" to administer and enforce its provisions. Such an office would require funding, it is estimated, in the range of eight to ten million dollars a year, as well as several million dollars in start-up costs for personnel and equipment, including a computer system which is compatible with that of the Federal Election Commission.

Finally, the Byrd Amendment requires yearly reports evaluating the effectiveness and compliance of the existing disclosure program. However, H.R. 823 removes the requirement for agencies to collect and compile the information that is the basis of the report. Therefore, in keeping with the information and streamlining goals of H.R. 823, the Administration suggests striking the remaining provisions of the Byrd Amendment that relate to the yearly disclosure certification report.

In summary, we support the laudable goals of H.R. 823, and believe that the bill should be modified as suggested above so as to meet its stated objectives.

Sincerely,

N. Faith Burton
Acting Assistant Attorney General

File: Lobbying

FYI

May 3, 1993 11:00
Senator Frank R. Lautenberg

SUMMARY
CONGRESSIONAL ETHICS REFORM ACT

GIFTS [Based largely on Executive Branch rules]

Under the bill, no Member of Congress or congressional employee may accept any item of value, subject to these exceptions:

1) De minimus: Members/staff may accept gifts of $20 or less at any one time, provided the aggregate value of all gifts received from any one person may not exceed $50 in a calendar year.

2) Gifts based on personal relationship: Members/staff may accept gifts based on a personal relationship, under circumstances that make it clear the gift is motivated by a family relationship or personal friendship.

3) Discounts and similar benefits: Members/staff may accept discounts and similar benefits that are generally available to the public or government employees.

4) Greeting cards/items of little intrinsic value: Members/staff may accept greeting cards and items with little intrinsic value, such as plaques and trophies, which are intended solely for presentation.

5) Honorary degrees: Members/staff may accept honorary degrees.

6) Widely attended gatherings/speaking: Members/staff may accept invitations to speak or to participate in widely attended gatherings, such as conferences, seminars and receptions. In such situations, Members/staff may accept food, refreshments, entertainment and materials provided to all attendees as an integral part of the event. [Note: this exception does not apply to travel expenses, which are covered below.]

7) Political events: Members/staff may accept meals, lodging and other benefits provided by a political organization in connection with participation in political events.

8) Protocol exception: The Ethics Committees would establish rules under which Members/staff could accept meals, refreshments and entertainment in foreign areas in the course of official travel to such areas, or at events sponsored by foreign governments.

9) Informational materials: There would be no limit on the acceptance of books, audio or video tapes, and other informational materials.

10) Items primarily for free distribution to constituents: A Member or employee may accept food or other items of minimal value intended primarily for free distribution to visiting constituents.

MEALS AND ENTERTAINMENT

Under the bill, meals, beverages and entertainment are considered as gifts. However, there is an exception for modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal.

TRAVEL

Reimbursed travel expenses are treated as gifts and thus generally cannot be accepted directly by Members/staff beyond the strict limits noted above.

The Senate or House may accept reimbursement of expenses associated with travel related to the official duties of Members/staff [e.g. attendance at a meeting, conference or similar function], if the travel is approved in writing in advance by the Ethics Committee. The Committee must find that acceptance under the circumstances would not cause a reasonable person with knowledge of all the facts relevant to a particular case to question the integrity of the Member, the Congress or congressional operations.

Reimbursement is not permitted for items beyond those reasonably necessary for the Member to participate in the event. Thus, for example, if a Member participates in a conference only one day, hotel expenses for more than one night generally will not be reimbursable.

SOLICITATIONS OF LOBBYISTS

The bill would prohibit Members/staff from knowingly soliciting contributions from registered lobbyists to 501(c) organizations (nonprofits). The bill stipulates that a Member/staff would not violate this section simply because his/her name appears on the letterhead of a solicitation.

HONORARIA

The bill would prohibit Members from directing to charities honoraria received for speaking engagements.

CONGRESSIONAL RETREATS

The bill prohibits the private financing of congressional retreats.

5/3 1 PM

O:\JEN\JEN93.342 S.L.C.

103D CONGRESS
1ST SESSION

S. _____

IN THE SENATE OF THE UNITED STATES

Mr. LAUTENBERG (for himself, Mr. BOREN, Mr. LEVIN, Mr. WELLSTONE, and Mr. FEINGOLD) introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To limit the acceptance of gifts, meals, and travel by Members of Congress and congressional staff, and for other purposes.

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 "Congressional Ethics Reform Act".

SEC. 2. GENERAL STANDARDS.

(a) GENERAL PROHIBITIONS.—A Member or employee shall not, directly or indirectly, solicit or accept a gift from any source except as provided in this Act.

1 (b) RELATIONSHIP TO ILLEGAL GRATUITIES STAT-
2 UTE.—Unless accepted in violation of subsection (c)(1),
3 a gift accepted under the standards set forth in this Act
4 shall not constitute an illegal gratuity otherwise prohibited
5 by section 201(c)(1)(B) of title 18, United States Code.
6 (c) LIMITATIONS ON USE OF EXCEPTIONS.—A Mem-
7 ber or employee shall not—
8 (1) accept a gift in return for being influenced
9 in the performance of an official act;
10 (2) solicit or coerce the offering of a gift;
11 (3) accept gifts from the same or different
12 sources on a basis so frequent that a reasonable per-
13 son would be led to believe the Member or employee
14 is using his public office for private gain;
15 (4) accept a gift in violation of any statute; or
16 (5) accept vendor promotional training contrary
17 to any applicable regulations, policies, or guidance
18 relating to the procurement of supplies and services
19 for the Congress.
20 **SEC. 3. DEFINITIONS.**
21 For purposes of this Act—
22 (1) EMPLOYEE.—The term "employee" means
23 an employee of the legislative branch.
24 (2) GIFT.—The term "gift" includes any gratu-
25 ity, favor, discount, entertainment, hospitality, loan,

1 forbearance, or other item having monetary value. It
2 includes services as well as gifts of training, trans-
3 portation, local travel, lodgings and meals, whether
4 provided in-kind, by purchase of a ticket, payment in
5 advance, or reimbursement after the expense has
6 been incurred. It does not include—
7 (A) modest items of food and refresh-
8 ments, such as soft drinks, coffee, and donuts,
9 offered other than as part of a meal;
10 (B) greeting cards and items with little in-
11 trinsic value, such as plaques, certificates and
12 trophies, which are intended solely for presen-
13 tation;
14 (C) loans from banks and other financial
15 institutions on terms generally available to the
16 public;
17 (D) opportunities and benefits, including
18 favorable rates and commercial discounts, avail-
19 able to the public or to a class consisting of all
20 Government employees, whether or not re-
21 stricted on the basis of geographic consider-
22 ations;
23 (E) rewards and prizes given to competi-
24 tors in contests or events, including random
25 drawings, open to the public unless the Mem-

1 ber's or employee's entry into the contest or
2 event is required as part of his official duties;
3 (F) pension and other benefits resulting
4 from continued participation in a Member or
5 employee welfare and benefits plan maintained
6 by a former employer;
7 (G) anything which is paid for by the Gov-
8 ernment or secured by the Government under
9 Government contract;
10 (H) any gift accepted by the Congress
11 under specific statutory authority;
12 (I) anything for which the market value is
13 paid by the Member or employee; and
14 (J) any books, written materials, audio
15 tapes, videotapes, or other informational mate-
16 rials.
17 (3) MARKET VALUE.—The term "market
18 value" means the retail cost the Member or em-
19 ployee would incur to purchase the gift. A Member
20 or employee who cannot ascertain the market value
21 of a gift may estimate the market value by reference
22 to the retail cost of similar items of like quality. The
23 market value of a gift of a ticket entitling the holder
24 to food, refreshments, entertainment, or any other
25 benefit shall be the face value of the ticket.

1 (4) MEMBER.—The term "Member" has the
2 meaning given such term in section 109(12) of the
3 Ethics in Government Act of 1978 (5 U.S.C. App.
4 6 sec. 109).
5 (5) SOLICITATION OR ACCEPTANCE.—(A) A gift
6 is solicited or accepted because of the Member's or
7 employee's official position if it is from a person
8 other than a Member or employee and if a reason-
9 able person with knowledge of all relevant facts
10 would conclude that it would not have been solicited,
11 offered, or given had the Member or employee not
12 held his position as a Member or employee.
13 (B) A gift which is solicited or accepted indi-
14 rectly includes a gift—
15 (i) given with the Member's or employee's
16 knowledge and acquiescence to his or her par-
17 ent, sibling, spouse, child, or dependent relative
18 if a reasonable person with knowledge of all rel-
19 evant facts would conclude that the gift was
20 given because of that person's relationship to
21 the Member or employee; or
22 (ii) given to any other person, including
23 any charitable organization, on the basis of des-
24 ignation, recommendation, or other specification
25 by the Member or employee, except as per-

1 mitted for the disposition of perishable items by
2 section 5(a)(2).
3 (6) ETHICS COMMITTEE.—The term Ethics
4 Committee with respect to the House means the
5 Committee on Standards of Official Conduct and
6 with respect to the Senate means the Select Com-
7 mittee on Ethics.
8 (7) VENDOR PROMOTIONAL TRAINING.—The
9 term "vendor promotional training" means training
10 provided by any person for the purpose of promoting
11 its products or services. It does not include training
12 provided under a congressional contract or by a con-
13 tractor to facilitate use of products or services it fur-
14 nishes under a congressional contract.
15 **SEC. 4. EXCEPTIONS.**
16 The prohibitions set forth in section 2 do not apply
17 to a gift accepted under the circumstances described in
18 paragraphs (1) through (10) of this section and a gift ac-
19 cepted in accordance with one of those paragraphs will not
20 be deemed to violate section 2 of this Act.
21 (1) GIFTS OF $20 OR LESS.—A Member or em-
22 ployee may accept unsolicited gifts having an aggre-
23 gate market value of $20 or less per occasion, pro-
24 vided that the aggregate market value of individual
25 gifts received from any one person or entity under

1 the authority of this paragraph shall not exceed $50
2 in a calendar year. This exception does not apply to
3 gifts of cash or of investment interests such as
4 stock, bonds, or certificates of deposit. Where the
5 market value of a gift or the aggregate market value
6 of gifts offered on any single occasion exceeds $20,
7 the Member or employee may not pay the excess
8 value over $20 in order to accept that portion of the
9 gift or those gifts worth $20. Where the aggregate
10 value of tangible items offered on a single occasion
11 exceeds $20, the Member or employee may decline
12 any distinct and separate item in order to accept
13 those items aggregating $20 or less.

14 (2) GIFTS BASED ON A PERSONAL RELATION-
15 SHIP.—A Member or employee may accept a gift
16 given under circumstances which make it clear that
17 the gift is motivated by a family relationship or per-
18 sonal friendship rather than the position of the
19 Member or employee. Relevant factors in making
20 such a determination include the history of the rela-
21 tionship and whether the family member or friend
22 personally pays for the gift.

23 (3) DISCOUNTS AND SIMILAR BENEFITS.—In
24 addition to those opportunities and benefits excluded

1 from the definition of a gift by section 3(2)(D), a
2 Member or employee may accept—
3 (A) reduced membership or other fees for
4 participation in organization activities offered
5 to all Government employees by professional or-
6 ganizations if the only restrictions on member-
7 ship relate to professional qualifications; and
8 (B) opportunities and benefits—
9 (i) offered to members of a group or
10 class in which membership is unrelated to
11 congressional employment; or
12 (ii) offered to members of an organi-
13 zation, such as an employees' association
14 or congressional credit union, in which
15 membership is related to congressional em-
16 ployment if the same offer is broadly avail-
17 able to large segments of the public
18 through organizations of similar size.
19 A Member or employee may not accept for personal
20 use any benefit to which the Government is entitled
21 as a result of an expenditure of Government funds.
22 (4) HONORARY DEGREES.—(A) A Member or
23 employee may accept an honorary degree from an in-
24 stitution of higher education (as defined in section
25 1141(a) of title 20, United States Code) based on a

1 written determination by the Ethics Committee that
2 the timing of the award of the degree would not
3 cause a reasonable person to question the Member's
4 or employee's impartiality in a matter affecting the
5 institution.

6 (B) A Member or employee who may accept an
7 honorary degree pursuant to subparagraph (A) may
8 also accept meals and entertainment given to him
9 and to members of his family at the event at which
10 the presentation takes place.

11 (5) GIFTS BASED ON OUTSIDE BUSINESS OR
12 EMPLOYMENT RELATIONSHIPS.—A Member or em-
13 ployee may accept meals, lodgings, transportation
14 and other benefits—

15 (A) resulting from the business or employ-
16 ment activities of a Member's or employee's
17 spouse when it is clear that such benefits have
18 not been offered or enhanced because of the
19 Member's or employee's official position; or

20 (B) resulting from his or her outside busi-
21 ness or employment activities when it is clear
22 that such benefits have not been offered or en-
23 hanced because of his or her official status.

24 (6) POLITICAL EVENTS.—A Member or em-
25 ployee may accept meals, lodgings, transportation

Calendar No. 54

103d Congress, 1st Session	SENATE	Report 103-37

LOBBYING DISCLOSURE ACT OF 1993

REPORT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 349

TO PROVIDE FOR THE DISCLOSURE OF LOBBYING ACTIVITIES TO INFLUENCE THE FEDERAL GOVERNMENT, AND FOR OTHER PURPOSES

April 1 (legislative day, March 3), 1993.—Ordered to be printed

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The Honorable Jack Brooks
Chairman
Committee On The Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter requesting comment on H.R. 823, the "Lobbying Disclosure Act of 1993."

The Administration strongly supports the purpose of this legislation. We are committed to insuring that all citizens are aware of the influence brought to bear on the development of government policies, regulations, laws and legislation. H.R. 823 establishes uniform lobby disclosure requirements for Executive and Legislative Branch lobbying. It repeals the patchwork of existing lobby disclosure statutes and streamlines the entire disclosure process for those who must comply.

In addition, the new Office of Lobbying Registration and Public Disclosure would be established within the Department of Justice. We believe that the Department of Justice, with its experience in administering and enforcing the Foreign Agents Registration Act (FARA) since 1942, and its experience in enforcing the Federal Regulation of Lobbying Act is uniquely qualified for the responsibility of administering and enforcing the provisions of the bill. The Department has established, over its 51-year FARA history, a reputation for administering and enforcing that Act in an evenhanded manner, and encouraging maximum disclosure while preserving the right of all parties to disseminate their message.

As the President stated in his letter to the Subcommittee, dated March 31, 1993, the Administration is anxious to work with you to strengthen and clarify H.R. 823. Accordingly, we strongly recommend, based on the experience of various Executive Branch departments and agencies in implementing, administering and enforcing the various disclosure statutes, that Congress go beyond the language of the present bill and adopt legislation that will be more effective than the provisions of H.R. 823 as introduced, and that will compel disclosure in a timely manner.

The Administration has four major concerns with the bill as presently drafted. Our concerns and a section-by-section analysis follow:

Our first concern is that the bill cover all attempts, without regard to their frequency or magnitude, to influence any officer or employee of the Executive and Legislative Branches. This is based on the belief that a host of preliminary decisions are made at every level -- some that never reach the review of the ultimate decision maker. Any effort to exclude all but the highest ranking officials or employees could have the unintended effect of increased and undue lobbying pressures on officers and employees not covered by Section 3, since contacts with such individuals would not subject lobbyists to the registration requirements of the bill.

The bill's definition of lobbyist in Section 3(10), excluding those whose lobbying activities are "only incidental" and "not . . . significant", is, in our view, imprecise and creates a loophole that will undermine meaningful lobbying disclosure. We recommend that a bright line test of what constitutes a lobbyist be crafted. For example, a threshold amount expended for lobbying, e.g., $5,000 in a six-month period, could trigger the obligation to register, or a test that focuses on the client's overall lobbying efforts rather than the lobbyist might be fashioned (cf. the Federal Election Campaign Act, 2 U.S.C. § 431 et seq.). An alternative approach would be to make any exemption explicit and precise in its scope.

This bill provides for a potentially significant loophole in that it fails to require the disclosure of individuals who pay a lobbyist to lobby on behalf of another. The real party in interest, the individual paying the bill, could remain undetected and undisclosed from the public and other interested parties. The Administration believes that any third party that pays for lobbying activities ought to be disclosed.

Organizations that participate in coalitions are excluded from disclosure if their payments do not exceed $5,000 over a six month period, they do not significantly participate in the supervision or control of the lobbying activities and they do not have a direct financial interest in the outcome of the lobbying activities. Terms such as "significantly participate", "supervision or control", "direct financial interest", and the "outcome" are so ambiguous that ensuring that this exception is not abused will be virtually impossible. In addition, the bill provides no mechanism for disclosing the existence or participation in ad hoc coalitions where lobbyists for different organizations or clients work in concert on an issue or goal of common concern. Such ad hoc coalitions often take on a deceptive or unassuming name to hide the identity of the real players. This bill should insure that this type of activity is disclosed by requiring each registrant to name any ad hoc coalition and/or participants with which it participates, irrespective of whether the coalition pays any

of the participants. The Administration believes it is critical that any reform address all modes and structures by which influence is peddled. As we indicated above, the disclosure of all the principals in all lobbying efforts is essential to public awareness of all factors influencing governmental decisions.

Second, more accurate financial disclosure than that provided in Section 5 of the proposed bill should be required. Presumably, a paid lobbyist is capable of maintaining financial records adequate to meet his or her obligations to the Internal Revenue Service. The public gains little if these exact numbers are converted to estimates ranging from tens of thousands to hundreds of thousands of dollars.

In addition, lobbyists, at the very least, should be required to disclose specific amounts for expenditures in certain crucial areas, such as, [gifts], entertainment and travel and advertising. Moreover, H.R. 823 should provide for complete disclosure of grassroots activities. Very often, public servants are faced with a host of artificially generated correspondence and telephone calls. Many lobbyists expend substantial amounts of money in an attempt to suggest to those in public service that their cause or position has substantial support. There should be separate line item disclosure of sums expended on grassroots activities and the issues advanced.

Third, while H.R. 823 provides civil monetary penalties for violations of the Act, the bill could be substantially strengthened by insuring that violators never profit from their wrongdoing. Lobbyists who continuously fail to comply with the provisions of the bill should forfeit their fee. This could be accomplished by adopting provisions based on the HUD Reform Act, which provide a civil money penalty at the greater of a fixed amount or the amount paid to the lobbyist with respect to the violation.

Fourth, there should be a prohibition against any fee paid to a lobbyist that is contingent, in whole or in part, on the success of any lobbying activities. Similar provisions are contained in the HUD Reform Act and FARA. Contingent fees for soliciting or obtaining Government contracts have long been considered contrary to Public Policy because such arrangements may lead to attempted or actual exercise of improper influence. Commissions paid on sales would not be prohibited under this provision.

We also note possible problems with respect to what constitutes an inactive registration and with the timeliness of the initial registration as provided for in Section 5. Inactive registrants, in our view, should be defined as those whose total receipts <u>and</u> (not "or") total costs are less than $[5,000] in a semi-annual period. To use the disjunctive is to invite the structuring of payments so as to avoid disclosure.

Section 7(b)(1) of H.R. 823 requires the Department to close out a possible enforcement action, if the party submits information showing a violation was "unlikely". Coupled with the Department's lack of authority to investigate, this will allow violators to submit just enough information to meet the "unlikely" test and evade the disclosure required by H.R. 823. Therefore, the Department suggests that the provision be clarified to make plain that the registrant is required to show he or she is in compliance with the Act.

Both HUD and FARA provisions require registrants to keep and preserve records relating to their activities, the disclosure of which is required by the respective statutes. H.R. 823 should also so provide; otherwise, those seeking to evade the law or enforcement efforts may claim that relevant records of lobbying activities are "non existent". To insure that the Department is able to obtain relevant information and to pursue instances of noncompliance, authority should be given to the Attorney General to issue civil investigative demands where a possible violation is indicated.

Section 7(b)(2) requires the Department to treat a "substantial noncompliance" as a "minor noncompliance" if the person admits there was a noncompliance and corrects it, without any regard as to the egregiousness of the noncompliance. This allows the person to engage in a deliberate course of conduct designed to evade disclosure and, if caught, to say, "I'm sorry, I'll disclose"; and pay a smaller penalty. In fact, this provision serves as an incentive to noncompliance. The Administration recommends that the bill be revised to treat significant noncompliance, admitted or not, as provided in Section 8.

The enforcement mechanisms provided in the bill also need to be strengthened. The bill fails to afford the Director sufficient investigative authority to insure that all those register who should, and that those who do register make full and accurate disclosure. We favor the informal resolution of disputes whenever possible, but there must also be the tools such as administrative fines, civil investigative demands and, as a last resort, criminal sanctions for those who choose to avoid the bill's registration and disclosure requirements. Experience has shown that the informal resolution process is greatly enhanced by the presence of more severe penalties.

Section 8(a)(1) of the bill would prohibit the Director of the Office of Lobbying Registration and Public Disclosure from imposing a civil penalty for violations of the act:

> "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."

The Appointments Clause of the Constitution, art. II, sec. 2, cl. 2, authorizes the President, by and with the advice and consent of the Senate, to appoint officers of the United States. The clause further provides that Congress may vest the appointment of "such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." (Emphasis added.) We believe that giving administrative law judges the authority to make decisions binding on the Director, and thus ultimately on the Attorney General, subject only to review under the arbitrary and capricious or abuse of discretion standards, raises constitutional concerns. Officers who make decisions without being subject to the supervision and control of superiors cannot meaningfully be considered inferior officers.

Since the bill appears to permit the appointment of administrative law judges in a manner reserved for the appointment of inferior officers, while at the same time effectively insulating their decisions from review, we believe that the limitation on the reviewability of their decisions raises a substantial question under the Appointments Clause.

We do not believe that the limited review available to the Director is sufficient to obviate this constitutional problem. The arbitrary and capricious and abuse of discretion standards, devices with long histories in administrative law, do not permit the Director (nor, by extension, the Attorney General) to substitute his judgments for those of the administrative law judge. Review under the arbitrary and capricious standard, for example, is limited to only "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The (Director) is not empowered to substitute [his] judgment for that of the [ALJ]" Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (citations omitted). Because the ALJs' judgments would therefore still be beyond the Director's supervision and control, we are not persuaded that administrative law judges may be appointed in the manner that the Constitution reserves for the appointment of inferior officers. Cf. Statement on Signing the Omnibus Budget Reconciliation Act of 1989, 25 Weekly Compilation of Presidential Documents 1970, 1971 (December 19, 1989) (objecting to imposition of an arbitrary and capricious standard of review for review of special master decisions by Claims Court judges as inconsistent with the requirements of Article II). Accordingly, we recommend that the bill be changed to authorize the Director to overturn any civil penalty imposed by an administrative law judge under this bill if the decision is not supported by substantial evidence.

Another concern involves the bill's proposed revision of FARA in Section 13. By restricting the definition of foreign principal to foreign governments and foreign political parties, the bill (contrary to current law) would allow foreign individ-

uals, associations and corporations to attempt to influence American public opinion and United States policy without making any disclosure under FARA. Only if they also engaged in lobbying contacts as defined by this bill would they be required to make any disclosure of their activities, and such disclosure would be significantly less than is now required under FARA. This would allow agents of entities supporting terrorist activities to attempt to influence American public opinion and United States policy without making any disclosure under either FARA or the Lobbying Disclosure Act of 1993. Further, this would impose on the Government the burden to prove in any litigation that the agent represents an entity meeting the Act's definition of a foreign government or foreign political party, a difficult, if not insurmountable, obstacle in cases involving covert agents and clandestine foreign organizations. The Administration recommends that the present definition of "foreign principal" in Section 1 of FARA be retained in its entirety, and a provision be added stating that registration and disclosure by commercial entities under the Lobbying Disclosure Act satisfies the reporting obligations of FARA.

We point out that the bill establishes within the Department an "Office of Lobbying Registration and Public Disclosure" to administer and enforce its provisions. Such an office would require funding, it is estimated, in the range of eight to ten million dollars a year, as well as several million dollars in start-up costs for personnel and equipment, including a computer system which is compatible with that of the Federal Election Commission.

Finally, the Byrd Amendment requires yearly reports evaluating the effectiveness and compliance of the existing disclosure program. However, H.R. 823 removes the requirement for agencies to collect and compile the information that is the basis of the report. Therefore, in keeping with the information and streamlining goals of H.R. 823, the Administration suggests striking the remaining provisions of the Byrd Amendment that relate to the yearly disclosure certification report.

In summary, we support the laudable goals of H.R. 823, and believe that the bill should be modified as suggested above so as to meet its stated objectives.

Sincerely,

M. Faith Burton
Acting Assistant Attorney General
Office of Legislative Affairs

April 26, 1993

→ other strengthening amdts?

MEMORANDUM FOR CIRCULATION

FROM: DONSIA STRONG
Domestic Policy Council

SUBJECT: LOBBYING DISCLOSURE OF 1993

The Lobbying Disclosure Act of 1993 is expected to be considered for floor action in the Senate sometime this week. The House has yet to schedule a mark-up and has no plans for further hearings. DOJ will be meeting with Senate and House staff soon to express DOJ's strong support for housing the new office within DOJ.

The non-profit sector continues to lobby for relief from the registration requirements of Levin/Bryant. Their primary objective is amend the bill to conform the bill's definitions to those found in the IRS Code as applied to non-profits.

The Department of Justice also feels strongly that the definition of lobbyist should be changed. DOJ urges deleting all qualifying language found in the definition so that after the monetary threshold has been reached anyone who contacts a "covered official" would be considered a lobbyist and required to register.

Partly in response to the concerns of the non-profits, Sen. Levin's Committee Report attempts to draw a bright line as to what is considered "only incidental to"... and "not a significant part of" services provided to a client. The Committee Report provides that individuals whose lobbying activities are less than 10% of the services provided will not have to register.

DOJ does not feel that this is a sufficiently bright line. Their proposed language is attached.

NO

Sen. Levin will never agree to a separate definition for use solely by the non-profits. He is equally unwieldy in changing the definitions to accommodate DOJ's concerns. He is open to the prospect of cutting the 10% threshold to 5%. He only objects to raising this issue on the floor.

Jack Quinn, Peter Levine of Sen Levin's staff and I have worked on alternative language that could be used to settle the issue of who is a lobbyist and whether the lobbyist need register as related to the monetary threshold. We have reached no such consensus as it

relates to DOJ's concerns.

what compromise?

According to the compromise, anyone who makes lobbying contacts is required to register EXCEPT:

--in-house lobbyists whose expenses
on behalf of a particular client exceed $1,000 semiannually or,
on behalf of all clients exceed $5,000 semiannually

--outside lobbyists whose income
on behalf of a particular client exceeds $1,000 semiannually or,
on behalf of all clients exceeds $5,000 semiannually

In reaching those threshold numbers, the non-profit sector would use its IRS filing numbers. In complying with IRS reporting requirements as to expenditures on lobbying, the non-profit sector counts only its "attempts to influence legislation" in the Legislative Branch.

Mr. Bryant's staff does not agree with the threshold numbers reached in compromise with the Senate. Mr. Bryant's staff argues that according to a GAO review requested in connection with this bill thresholds set at $5,000 will exempt 50% of the non-profit sector. Mr. Bryant's staff is urging a threshold of about $2,500.

We have not contacted the non-profit sector to determine whether the specifics of this particular proposal are acceptable. Sen. Levin's office has spoken with the non-profit sector generally about some of these ideas and has stated that every indication is that this proposal would be acceptable to the non-profit sector. Further, Sen. Levin would prefer that no notice as to the specifics be given.

9 On page 11, strike out lines 15 through 19 and insert
10 in lieu thereof the following:
11 (2)(A) Notwithstanding paragraph (1), any per-
12 son whose total income (in the case of an organiza-
13 tion described under section 5(b)(3)) or total ex-
14 penses (in the case of an organization described
15 under section 5(b)(4)) in connection with lobbying
16 activities do not exceed, or are not expected to
17 exceed—
18 (i) $1,000 in a semiannual period on be-
19 half of a particular client, or
20 (ii) $5,000 in a semiannual period on be-
21 half of all clients,

1 (as estimated under section 5), is not required to
2 register with respect to such client or clients.
3 (B) The registration thresholds established in
4 this paragraph shall be adjusted on January 1 of
5 each year divisible by 5 to the amount equal to
6 $1,000 and $5,000, respectively, in constant 1995
7 dollars (rounded to the nearest $100).

1 On page 16, strike out lines 14 through 21 and insert
2 in lieu thereof the following:
3 (3)(A) Any registrant whose total income (in
4 the case of an organization described under sub-
5 section (b)(3)) or total expenses (in the case of an
6 organization described under subsection (b)(4)) in
7 connection with lobbying activities do not exceed—
8 (i) $1,000 in a semiannual period on be-
9 half of a particular client, or
10 (ii) $5,000 in a semiannual period on be-
11 half of all clients,
12 (as estimated under this section), or who does not
13 make any lobbying contacts on behalf of a particular
14 client, is deemed to be inactive during such period
15 with respect to such client or clients and may com-
16 ply with the reporting requirements of this section
17 by notifying the Director, in such form as the Direc-
18 tor may prescribe.
19 (B) The reporting thresholds established under
20 this paragraph shall be adjusted on January 1 of
21 each year divisible by 5 to the amount equal to
22 $1,000 and $5,000, respectively, in constant 1995
23 dollars (rounded to the nearest $100).

April 26, 1993

MEMORANDUM FOR BRUCE REED

FROM: DONSIA STRONG

SUBJECT: LOBBYING DISCLOSURE ACT OF 1993

On April 7, DPC hosted a meeting of departments and agencies interested in commenting on the Lobbying Disclosure Act of 1993. HUD had the most comments and strengthening suggestions based on its experience with its own disclosure provisions. Most other agencies concurred in HUD's suggestions.

As a result of that meeting, DOJ was tasked with developing the Executive Branch's comments for transmission to Congress. Bruce and I have reviewed and provided comments on draft testimony. DOJ revised the testimony and I provided additional comments. Currently, the testimony is being approved through the DOJ process.

The testimony includes several suggestions for strengthening the bill. I have discussed them with Peter Levine of Sen. Levin's staff. He agrees that some of the suggestions are strengtheners and noncontroversial. Provided Sen. Levin agrees and the language can be worked out, Peter is willing to include such noncontroversial suggestions in Sen. Levin's amendment on the floor.

Other strengtheners are more controversial. Peter considers the first two suggestions listed below very controversial. I have not discussed the changes DOJ would like to see regarding enhancing enforcement. DOJ will be negotiating with the Hill very soon. If agreed to, DOJ's changes will have to be included in the House bill.

The various proposals are listed below:

CONTROVERSIAL

1. Include every Government employee, except clerical employees, as a "covered official" capable of triggering a registration requirement.

This suggestion is based on the belief that a host of preliminary decisions are made at every level -- some that never reach the ultimate decision maker. By excepting lobbying contact with Government employees below a certain rank the bill may inadvertently lead to

increased lobbying of those who do not make lobbyists subject to registration.

The arguments against including this provision are that by broadening the scope of "covered officials" the significance of those professional lobbyists who register is diminished. There are hundreds of federal government offices that local attorneys contact on a daily basis. Requiring all of them to register could significantly overload the system.

2. Make the definition of lobbyist more precise by deleting the qualifying language "only incidental" and "not significant."

DOJ argues that the qualifying language creates a loophole that undermines meaningful disclosure. Lobbyists will attempt to structure their time so that their work appears "only incidental."

Without the qualifying language, once the monetary threshold is reached anyone who contacts covered officials must be listed as a lobbyist on the registration form. This will result in many outside of those considered "professional lobbyists" being listed as lobbyists on the registration filing.

NONCONTROVERSIAL

3. Require disclosure of individuals who pay lobbyists to lobby on behalf of another.

4. Require disclosure of ad hoc coalitions and their participants. Ad hoc coalitions include situations where lobbyists for different clients consult and work together, sometimes under an assumed coalition name.

5. Require more precise financial disclosure. Peter will not agree to exact expenditures.

6. Require separate line item disclosure of grassroots activities.

7. Noncomplying lobbyists should forfeit their fees.

8. Make clear what is considered an inactive registration.

DOJ PROPOSALS

9. Prohibit contingent fee arrangements.

10. Make clear that noncomplying registrants have the burden of showing compliance versus merely showing a violation was unlikely.

11. Require registrants to keep records.

12. Treat a minor noncompliance as other noncompliances.

CAPLIN & DRYSDALE
CHARTERED

CHARITIES AND THE LOBBYING DISCLOSURE ACT

Special Points

April 13, 1993

In its present form the Lobbying Disclosure Act of 1993 (S. 349 and H.R. 823) would seriously deter -- or curtail altogether -- much participation by the nation's charities in the federal policymaking process. Independent Sector supports six amendments of the Act to prevent or mitigate that effect. Descriptions of the amendments and the rationale for them have already been distributed to interested parties. For convenience, a list of the amendments is attached.

As the debate over the application of the Act to charities has unfolded this year, several key points have been either misunderstood or overlooked. This memorandum is intended to clarify and underscore them.

DEFINITION OF "LOBBYING"

Most important, Independent Sector strongly believes that the Act should, for all purposes, allow charities to use the definition of "lobbying" carefully devised for them in the 1976 tax law which Congress developed to encourage robust participation by charities in the public policy arena. Stark differences between charities, on the one hand, and businesses, trade associations, labor groups, and the other organizations to which the Act would apply -- differences both in the essential laws governing the two categories and in key facts of their situations -- afford powerful justification for enabling charities to rely on the tax law definition under which they have been operating for some years and with which they have become familiar.

Unique Nature of Laws Governing Charities

The legislative history of the Act suggests that the fundamental facts precipitating the legislation were contacts with federal officials by individuals or organizations which sought to derive private financial benefit from those contacts. The scandals at HUD from 1981 through 1988 and the abuses surrounding the Wedtech Corporation are clear examples. Contacts of this sort almost invariably possess their special capacity to produce the results at which they aim by reason of the ability of the individual or organization making the contact to take active part in the political campaign process to support the federal official being contacted or the Administration of which he or she is a part.

Charities, by their nature and by the special federal tax laws governing them, are barred from producing private benefit -- financial or otherwise -- and from participation in political campaigns. To be entitled to tax exemption and qualification to receive deductible charitable contributions, they must be established for religious, educational, or other charitable purposes -- all purposes which the law has long determined to be of public, not private, benefit. To reinforce that point, the tax law specifies that "no part of the [assets of a qualifying charity may inure] to the benefit of any private [party]."

Moreover, the tax law has long prohibited charities from participating in any political campaign for or against a candidate for public office. That bar is strict and absolute. A charity may not contribute to, organize, manage, or be identified with a PAC. It may not contribute to a political campaign. It may not endorse a candidate for political office. It may not in any other way, directly or indirectly, support or oppose a political campaign.

A charity which violates any of these rules loses its exemption and qualification to receive deductible contributions. A charity which violates the political prohibition also faces special penalty excise taxes and further serious sanctions.

Charities, then, are uniquely and stringently prohibited from the kinds of abuse which underlie the need for the Act. Unsurprisingly, the explanatory Committee Report refers to no single lobbying abuse by a charity.

Private Purposes and Political Campaign Support of Business and Other Groups

Businesses, trade associations, unions and other groups to which the Act would apply suffer from no such constraints. Their overriding objective is to produce private financial benefits -- whether to their shareholders, their members, or, often not incidentally, their executives. With that fundamental goal of private benefit, they couple an ability to support political campaigns which adds critical force to their lobbying efforts. A single illustration suffices.

Medical industry PACs contributed a total of over $60 million to Congressional candidates from 1981 through June 30, 1991. Medical professional PACs, representing doctors, dentists, and other medical practitioners, contributed somewhat more than $27 million of that total. Insurance industry PACs contributed more than $19 million. Pharmaceutical company and association PACs contributed over $8 million. PACs representing hospitals and other care providers contributed close to $6 million.

These figures paint only part -- perhaps a small part -- of the picture. They do not include the doubtlessly large soft money contributions by medical industry companies and associations to Presidential and Congressional campaigns. They do not include PAC contributions to Presidential campaigns. They do not include political contributions by pharmaceutical company and other industry executives and members of their families.

The frankly stated goal of these groups was -- and is -- to lobby against health care reform. Charities lobbying for health care reform, on the other hand, such as the Kaiser Foundation Health Plan, the Catholic Health Association, and the National Mental Health Association, are entirely barred from using any part of their funds for this key support for lobbying contacts.

Differences in Resources for Lobbying and Supportive Activities

While the law presently requires no reliable report of the lobbying expenditures of businesses, trade associations, and other non-charitable organizations, review of the 1991 profits of leading multi-billion dollar U.S. corporations provides an indication of the magnitude of the financial resources which they have available for lobbying -- and such supportive activities as contributions to PACs, soft money political contributions, and the payment of very large executive salaries which make possible liberal business-related campaign contributions by the executives themselves and members of their families.

Profits
($ millions)

Exxon	5,600.0	Mobil	1,920.0
Philip Morris	3,006.0	Coco-Cola	1,618.0
Merck	2,121.7	Boeing	1,567.0
Bristol-Myers Squibb	2,056.0	Johnson & Johnson	1,461.0

Corporations whose annual profits range well above $1 billion -- and whose assets are, of course, many times that amount -- can plainly afford to spend very large amounts for lobbying. In comparison, the amounts which charities spend on lobbying are very small potatoes. Indeed, being lower by so many orders of magnitude -- and being barred from the political contributions and other campaign support which gives such force to the lobbying contacts of corporations, trade associations and other groups -- charities' lobbying expenses are essentially different in kind from those of businesses and others.

The latest available IRS data shows that charities lobbying under the 1976 law had median annual expenses for that purpose in the range of $5,500. The National Committee for Prevention of Child Abuse and the Literacy Volunteers of America were in that

class. Over 75 percent of this universe had less than $14,000 of annual lobbying expenditures. In that category were the National Hemophilia Foundation, the National Organization for Rare Disorders, and the Blinded Veterans Association.

Well under two percent of these charities spent more than $100,000 for lobbying. Substantially under one percent had lobbying expenditures over $200,000. The United Way of America, the American Heart Association, and the American Cancer Society were in the latter group.

Conclusion

The definitions of lobbying in the tax law and in the Act are similar in many respects, but they differ significantly in others.[1]

To compel charities to learn, teach their staffs, and keep the records required to comply with a complex new and different definition -- on pain of penalties up to $10,000 for "minor noncompliance" and up to $100,000 for "significant noncompliance" -- will plainly have a powerfully inhibiting impact on their willingness to conduct precisely those public policy activities which Congress, beginning in 1976, has so strongly sought to encourage through the tax laws. For smaller and mid-sized charities, the effect will often quite probably be to end policy activities at the federal level altogether. In view of the unique legal constraints which, together, govern charities alone among the individuals and organizations to which the Act applies, and the quantum difference between the financial resources which charities use for lobbying and those which businesses, trade associations, unions and other groups can bring to bear on their lobbying, it seems entirely appropriate to amend the Act to permit charities to use the tax definition of lobbying.

GREAT BULK OF LOBBYING CHARITIES ARE NOT ADVOCACY ORGANIZATIONS

The notion has become widespread that charities interested in lobbying are primarily "advocacy organizations," such as the ACLU

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1 For example: (1) Under the tax definition, discussions of a possible policy initiative become lobbying only when the concept ripens into a "specific legislative proposal." Under the Act, even the earliest of general discussions appears to constitute reportable lobbying. (2) Under the tax definition, lobbying does not include making the results of nonpartisan analysis, study, or research available to federal officials. Under the Act's definition, it does. (3) The tax law definition includes only efforts to influence legislation; it excludes efforts to influence Executive Branch decisions. The Act's definition includes both.

Foundation, some environmental organizations, and the National Abortion Rights Action League Foundation. Quite the contrary is true. The great preponderance of charities making use of the 1976 tax law for lobbying are groups such as the Alzheimers Disease and Related Disorders Association, the National, state and local Mental Health Associations, the National Council of YMCAs of the USA, the Student Loan Funding Corporation, the Arthritis Foundation, the Association of Junior Leagues International, and the March of Dimes Birth Defects Foundation.

There are, to be sure, some advocacy organizations in the group; but they constitute only a small part of the universe of charities which lobby.

LOBBYISTS FOR PRIVATE BENEFIT LARGELY SUPPORT THE ACT; CHARITIES AND GOOD GOVERNMENT GROUPS SEEK MODIFICATIONS

Paradoxically, lobbyists for private interests have expressed strong support for the Lobbying Disclosure Act, while charities and good government groups (for example, Common Cause) are the primary proponents of revising it. Tommy Boggs, perhaps the best known private lobbyist in Washington, is liberally quoted by the Senate Committee Report in support of the Act. Mr. Boggs himself represents 39 private corporations and trade associations, from MCI Communications to Westinghouse Electric. Other members of his firm represent a number of other such corporations and trade associations.

The American League of Lobbyists -- comprised of more than 400 private lobbyists -- has testified in strong support of the Act. Other prominent Washington lobbyists have urged passage of the Act. They include Lloyd Meads,[2] Thomas Sussman, of Ropes & Gray, and Howard D. Marlow. A recent article in the National Journal on this subject is attached.

Why do private lobbyists and lobbying organizations back the bill, and charities and good government groups press for significant amendments of it? One need not look far for the answer. Private lobbyists see the Act as an innocuous substitute for meaningful campaign finance reform, providing a means for Members of Congress to place themselves on record for reform while they later oppose or force seriously attenuating amendments of thoroughgoing reform of the campaign finance system. Further, the major private financial interests at stake are plainly ample to afford staffing for the recordkeeping and related responsibilities

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2 Though Mr. Meads now heads the American League of Lobbyists, he has testified in favor of the act in an individual capacity also.

which so intimidate charities with two, three, or four administrative personnel to manage their entire charitable, fundraising, and support functions.

THIS ADMINISTRATION SHOULD NOT FAVOR BURDENS ON CHARITIES' PARTICIPATION IN PUBLIC POLICY

The Clinton/Gore Campaign issued a strongly positive statement on the nonprofit sector. It affirmed that:

> A Clinton/Gore Administration will work to encourage further the role of the non-profit sector as the primary mechanism for citizen participation and as a force for empowerment of each and every individual.

It further noted that:

> We must leverage the resources of the non-profit sector and the experience of people working in the non-profit sector to help solve problems . . . .

Directly on point, it promised that "we will re-examine and clarify the lobbying restrictions placed on nonprofit organizations" -- hardly conveying the impression of substantial further tightening of those restrictions. During the Transition and since the Administration took office, Administration officials have sought -- and received -- assistance from a broad variety of charities. The Administration has worked productively and creatively with those charities. The charitable community hopes to continue and expand that collaborative role throughout both terms of the Administration.

Perhaps uniquely among Administrations in recent memory, then, this Administration should be the last to support further burdens on the public policy activities of charities -- and in the forefront of the opposition to them.

* * *

CAPLIN & DRYSDALE
CHARTERED

PROPOSED AMENDMENTS TO S. 349 AND H.R. 823

THE LOBBYING DISCLOSURE ACT OF 1993

1. Conforming the Act's definitions of "lobbying activities" and "lobbying contacts" to the Internal Revenue Code definition of "influencing legislation" for purposes of the application of the Act to organizations exempt from tax under section 501(c)(3) of the Internal Revenue Code.

2. Clarifying the incidental activity exclusion from the definition of lobbyist to cover employees spending less than 10% of their time lobbying.[1]

3. Increasing the semi-annual expenditure threshold from $1,000 to $10,000.

4. Establishing the Office of Lobbying Registration and Public Disclosure within the Office of Government Ethics rather than the Department of Justice.

5. Extending the filing deadline for initial registrations and semi-annual reports from 30 to 90 days.

6. Eliminating the requirement that semi-annual reports include an amendment of the description in the initial registration statement as to the general issue areas and specific issues with respect to which the registrant has lobbied or expects to lobby.

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[1] The Senate Committee Report released April 12 accepts this amendment.

WHAT? LOBBYISTS WANT TO BE REGULATED?

BY PETER H. STONE

Beefing up the regulation of lobbying has long been a goal of public-interest groups but anathema to most lobbyists. Now, the tables have been turned.

A pending bill that would mandate more disclosure of lobbying is coming under fire from some public-interest groups and nonprofit organizations, which say that it's too onerous. Meanwhile, the bulk of the lobbying community is backing the bill or offering only token opposition. Even Thomas Hale Boggs Jr., the quintessential Washington influence merchant, has written of the need for tougher disclosure rules in *The New York Times*.

The legislation, introduced in the Senate by Carl Levin, D-Mich., is backed by the Clinton Administration and has been approved by the Governmental Affairs Committee. A House Judiciary subcommittee will hold hearings on March 31 on a virtually identical measure by Rep. John Bryant, D-Texas.

Among other things, the bill would broaden the definition of lobbying to include contacts with the executive branch as well as Congress. It would tighten reporting requirements for lobbyists representing foreign interests. And it would create a new enforcement office in the Justice Department with the power to levy monetary fines.

But a loose-knit coalition of about three dozen nonprofit groups, including Independent Sector, the Alliance for Justice, the National Wildlife Federation and the American Civil Liberties Union, has complained that the proposed legislation would crimp its lobbying ability—hurting smaller nonprofit groups especially—by creating a heavy regulatory burden. The coalition argues that some of the new disclosure requirements would be redundant because nonprofit groups already have to provide much of the same information to the Internal Revenue Service.

"We believe that new layers of complexity will have a chilling effect on smaller groups that seek to influence policy," said Ed Osann, director of the water resources program at the National Wildlife Federation.

Further, most of the nonprofits say that disclosure of executive branch lobbying should cover only efforts to influence decisions on spending, not discussions of policy. The groups also say they would prefer to have enforcement handled by an entity other than the Justice Department, such as the independent Office of Government Ethics. The legislation now would require any group that spends $1,000 or more on lobbying during a six-month period to file a report; several of the nonprofits want that threshold raised to $10,000.

WASHINGTON INC.

Some Members of Congress have been talking to the nonprofits and seem sympathetic. "I want to ensure that the unique status of these groups is considered as we formulate legislation to reform our inadequate lobbying disclosure laws," Rep. Dan Glickman, D-Kan., said. "It is my hope that these groups will not be forced into a situation where their ability to petition government is jeopardized."

The nonprofits contend that although the bill could impede their lobbying efforts, it won't hinder big corporate lobbyists. "The corporate community loves it because it won't be any problem for them," said Robert M. Smucker, a vice president with Independent Sector, an organization that represents nonprofit groups in Washington. "They can buy their way out of it. They can come off looking like good guys."

Indeed, many leading lobbyists have voiced their backing for the proposed reforms. Earlier this month, the 400-member American League of Lobbyists gave the bill its blessings.

To be sure, there are some naysayers. The American Society of Association Executives has allied with a few other trade groups that say the bill's definition of lobbying is overly broad. Specifically, they're upset that executive branch lobbying will now have to be disclosed.

Despite such requirements, some public-interest lobby groups such as Common Cause and Public Citizen Inc. say the bill doesn't go far enough. They have been pushing provisions that would force all lobbyists to publicly itemize all gifts, entertainment and free trips that they give Members and their staffs.

"The bill doesn't disclose anything in terms of the financial benefits that come from lobbyists," said Ann McBride, senior vice president of Common Cause. Such benefits should ultimately be banned, McBride said, but until then, disclosure is the best remedy for curbing abuses. Common Cause has noted that when President Clinton was Arkansas's governor, he successfully backed a lobbying bill with curbs on gifts.

Public Citizen also supports limits on gifts from lobbyists. But the group agrees that the proposed reporting threshold for lobbying expenditures is a bit too restrictive. It says that a report shouldn't be required unless a lobbyist receives or spends more than $5,000 during a six-month period.

For their part, Administration officials say that they want the toughest bill possible but don't want to overload it with requirements that could endanger its passage. Donsia Strong, a senior policy analyst at the White House who formerly was an aide to Bryant, has met with members of the nonprofit coalition about the bill and said that the Administration is sensitive to the concerns they've raised.

Draft DRAFT

Section 4 (b) of the Lobbying Disclosure Act of 1993 is amended as follows:

by adding the following subsection at the end thereof:

(7) the name, address, and principle place of business of any person or organization, other than the client, that pays the fees or expenses of the registrant or any of its employees toward lobbying activities;

(8) the name of any organization, other than the client listed pursuant to subsection (2), on behalf of whom the registrant has engaged in lobbying [activities][contacts] in connection or in concert with the lobbying [activities][contacts] conducted on behalf the client.

Rationale:

S.349 does not require disclosure of individuals or organizations who pay a lobbyist to lobby on behalf of another. The individual or organization who may be the real party at interest --- the one paying the bill -- could remain undisclosed and undetected.

Commonly lobbyists for different clients will act in concert under an assumed innocuous coalition name without ever revealing the name of the client who has an interest in a particular issue. The ad hoc coalition may have no employees or pay no salaries or fees in connection with the lobbying effort and, therefore, fail to fall within the coalition test provided in the bill. Neither the Government nor the public has any way of knowing on whose behalf the coalition was formed.

DRAFT

Section 5(b) of the Lobbying Disclosure Act of 1993 is amended as follows:

by adding the following subsection at the end thereof:

(5) in the case in which lobbying activities conducted include grassroots lobbying communications (as described in Section 3(10)(8)), listed separately, expenditures that the registrant and its employees incurred in connection with lobbying activities during the semiannual filing period.

Rationale:

Very often a great deal of money is expended to artificially generate correspondence and telephone calls. This is done primarily to suggest to the public and those in public service that a particular cause or position has substantial support.

DRAFT

Section 8 of the Lobbying Disclosure Act of 1993 is amended as follows:

by deleting "$100,000" and by inserting "the greater of $100,000 or the total amount paid to the lobbyist to which the noncompliance relates" after the words "no more than". noncompliance.

Rationale:

Violators should never profit from their wrongdoing. Lobbyists who continually fail to comply with the provisions of S. 349 should forfeit their fee. A like provision is included in the HUD Reform Act of 1988.

File: Lobbying Reform

STATEMENT

OF

BEFORE

THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 823; A BILL TO PROVIDE FOR THE
DISCLOSURE OF LOBBYING ACTIVITIES TO
INFLUENCE THE FEDERAL GOVERNMENT

ON

APRIL __, 1993

I am pleased to have an opportunity to testify before this Subcommittee with respect to H.R. 823, the Lobbying Disclosure Act of 1993. This administration is committed to insuring that all citizens are aware of the influence brought to bear on the development of government policies, regulations, laws and legislation. With this goal in mind, we recommend that this Act be strengthened by requiring more meaningful disclosure; by providing more effective investigative and enforcement methods so as to insure complete and accurate disclosure and by providing penalties, up to and including forfeiture of all remuneration, where such disclosure is not provided. Noncompliance must not be more profitable than compliance. Further, contingent fee contracts should be prohibited or at the very least disclosed.

We believe that the Department of Justice, with its experience in administering and enforcing the FARA since 1942, and its experience in enforcing the Federal Regulation of Lobbying Act is uniquely qualified for the responsibility of administering and enforcing the provisions of the bill. The Department has established, over its 51 year FARA history, a reputation for administering and enforcing that Act in an evenhanded manner, and encouraging maximum disclosure while preserving the right of all parties to disseminate their message.

I believe I can provide the most assistance to this Subcommittee by commenting briefly on the Federal Regulation of Lobbying Act, the Byrd Amendment, the Housing and Urban Development Reform Act, and the Foreign Agents Registration Act before analyzing the Lobbying Disclosure Act. I look forward to working with this Subcommittee in its efforts to strengthen the

disclosure requirements of this bill.

FEDERAL REGULATION OF LOBBYING ACT

The Federal Regulation of Lobbying Act (hereinafter referred to as the "Act") was originally enacted in 1946. Briefly stated, it requires that individuals engaged for pay in lobbying activities register with the Clerk of the House and the Secretary of the Senate, and that they and the organizations or interests which support them, file quarterly statements disclosing the sources of their funding, the purposes of expenditures made for lobbying purposes, and the legislative objectives which they are seeking to achieve. Violations are subject to misdemeanor penalties of up to one year imprisonment and/or a fine of not more that $1,000, the enforcement of which is the responsibility of this Department. Upon conviction, an individual defendant may also be prohibited from engaging in lobbying activities for a period of three years.

To avoid infringing on the right to petition, the 1946 Lobbying Act confined its reach only to those lobbyists and the organizations for which they work, whose "principal purpose" was to engage in activities which are covered by the Act. The concept of "principal purpose," in the context of a statute whose sole enforcement mechanism is criminal prosecution, has proven to be an almost insurmountable obstacle to effective regulation.

In addition, the Act contains no provision requiring the Clerk of the House and the Secretary of the Senate, who are charged with the responsibility for receiving lobbying reports,

to audit the reports they receive. This has proven a further serious weakness in the Act's enforcement structure. In the absence of any audit and referral functions, the Department of Justice has had to rely solely on information provided by journalists, lobbyists with opposing interests, and occasionally, on Congressmen themselves for information which might indicate that the Act had been violated.

Furthermore, the lack of any administrative or civil sanction with which to address inadvertent violations has had the effect of making enforcement practically impossible since a successful criminal prosecution requires proof beyond a reasonable doubt that a knowing and willful violation of the statute occurred even in these few situations where a lobbyist's activities fall within the Act. The Administration believes that this has been a major failing of the [] Act.

THE BYRD AMENDMENT

The Byrd Amendment prohibits the use of appropriated funds to influence Executive and Legislative Branch action with respect to the awarding of contracts, grants and loans. In addition, it requires consultants to disclose to Executive Branch agencies when nonappropriated funds have been used to pay for influencing activities in order to secure a Federal contract or grant award. There is no centralized administration of this law and no mechanism for enforcement.

HOUSING AND URBAN DEVELOPMENT REFORM ACT

It became clear that during the 1980s, **the Department of Housing and Urban Development's** (HUD) assistance programs had been compromised by repeated instances of improper influence peddling and lobbying. Section 13 of the Housing and Urban Development []Reform Act (HUD Reform Act), enacted as part of the HUD Act of 1989, was designed to restore integrity to these programs by casting sunshine on outside efforts to influence the award of HUD assistance and assistance-related management actions.

FOREIGN AGENTS REGISTRATION ACT (FARA)

The Foreign Agents Registration Act [(**FARA**)], as conceived and enacted by Congress, is a disclosure statute requiring persons carrying on specified activities in the United States as agents of foreign principals to comply with certain registration requirements. It should be stressed that registration under **FARA** is required, not because the specific acts encompassed by the statute are not legitimate activities, but because the specified activities are conducted on behalf of certain types of foreign principals. Registration under **FARA** in no way places any limitation on the activities of any registrant and is not intended to, and does not, place any stigma on a person or organization required to register. Disclosure required by **FARA** does not seek to regulate expression of ideas and does not limit

or interfere with freedom of speech or impose an unconstitutional burden on the exercise of the rights of free speech.

The Act: (1) defines who must register with the Department as a foreign agent; (2) specifies how such agents are to register and report on their activities; (3) exempts certain types of foreign agents from registration; (4) has specific filing and labeling requirements for political propaganda disseminated by registered agents; (5) requires all registered agents to preserve books of account and other records on all their activities and to make these records available for inspection by the officials responsible for enforcing the Act; (6) provides for public examination of all agents' registration statements, reports, and political propaganda filed with the Department; (7) imposes penalties for willful violation of the Act or related regulations; and (8) specifies certain administrative and judicial enforcement procedures available to the Attorney General.

ANALYSIS OF H.R. 823

The Administration strongly supports the purpose of this legislation. **This legislation would strengthen and streamline lobbying disclosure, and that effectively provides the public, the media and competing interests access to information about the extent of lobbying.** However, we are concerned that the bill fails to mandate meaningful disclosure that would best afford the American public insight into the role played by lobbyists in the political process. Thus, we urge that Congress go beyond the

language of the present bill and adopt legislation that will be more effective than the provisions of H.R. 823 as introduced, and that will compel disclosure in a timely manner.

The Administration has four major concerns with the bill as presently drafted. Our concerns and a section-by-section analysis follow:

Our first concern is that the bill cover all attempts, without regard to their frequency or magnitude, to influence any officer or employee of the Executive and Legislative Branches since lobbyists would most likely exert undue influence on the officers and employees who are not covered by Section 3 of this bill.

The bill's definition of lobbyist in Section 3(10), excluding those whose lobbying activities are "only incidental" and "not. . . significant" is, in our view, imprecise and creates a loophole that will undermine meaningful lobbying disclosure. We recommend that a bright line test of what constitutes a lobbyist be crafted. For example, a threshold amount expended for lobbying, i.e., $5,000 in a six-month period, could trigger the obligation to register, or a test that focuses on the client's overall lobbying efforts rather than the lobbyist might be fashioned (cf. the Federal Election Campaign Act, 2 U.S.C. § 431 et seq.). An alternative approach would be to make any exemption explicit and precise in its scope.

This bill provides for a potentially significant loophole in that it fails to require the disclosure of individuals who pay a lobbyist to lobby on behalf of another. The real party in interest, the individual paying the bill, could remain undetected

and undisclosed from the public and other interested parties. **The Administration believes that any third party that pays for lobbying activities ought to be disclosed.**

Organizations that participate in []coalitions are excluded from disclosure if their payments do not exceed $5,000 over a six month period, they do not significantly participate in the supervision or control of the lobbying activities and they do not have a direct financial interest in interest in the outcome of the lobbying activities. Terms such as "significantly participate", "supervision or control", "direct financial interest", and the "outcome" are so ambiguous that ensuring that this exception is not abused will be virtually impossible. **In addition, the bill provides no mechanism for disclosing the existence or participation in ad hoc coalitions where lobbyists for different organizations or clients work in concert on an issue or goal of common concern. Such ad hoc coalitions often take on a deceptive or unassuming name to hide the identity of the real players. This bill should insure that this type of activity is disclosed by requiring each registrant to name any ad hoc coalition and/or participants with which it participates, irrespective of whether the coalition pays any of the participants. The Administration believes it is critical that any reform address all modes and structures by which influence is peddled.** As we indicated above, the disclosure of all the principals in all lobbying efforts is essential to public awareness of all factors influencing governmental decisions.

Second, more accurate financial disclosure than that provided in Section 5 of the proposed bill should be required.

Presumably, a paid lobbyist is capable of maintaining financial records adequate to meet his or her obligations to the Internal Revenue Service. The public gains little if these exact numbers are converted to estimates ranging from tens of thousands to hundreds of thousands of dollars.

In addition, lobbyist should, at the very least, be required to disclose specific amounts for expenditure in certain crucial areas, such as, [gifts], entertainment and travel and advertising. **Moreover, H.R. 823 should provide for complete disclosure of grassroots activities. Very often, public servants are faced with a host of artificially generated correspondence and telephone calls. Many lobbyists expend substantial amounts of money in an attempt to suggest to those in public service that their cause or position has substantial support. There should be separate line item disclosure of sums expended on grassroots activities and the issues advanced.**

Third, while H.R. 823 provides civil monetary penalties for violations of the Act, the bill could be substantially strengthened by insuring that violators never profit from their wrongdoing. **Lobbyists who continuously fail to comply with the provisions of the bill should forfeit their fee.** This could be accomplished by adopting provisions based on the HUD Reform Act, which provide a civil money penalty at the greater of a fixed amount or the amount paid to the lobbyist with respect to the violation.

Fourth, there should be a prohibition against any fee paid to a lobbyist that is contingent, in whole or in part, on the success of any lobbying activities. Similar provisions are

contained in the HUD Reform Act and FARA. **Contingent fees for soliciting or obtaining Government contracts have long been considered contrary to public policy because such arrangements may lead to attempted or actual exercise of improper influence.** Commissions paid on sales would not be prohibited under this provision.

We also note possible problems with respect to what constitutes an inactive registration and with the timeliness of the initial registration as provided for in Section 5. Inactive registrants, in our view, should be defined as those whose total receipts and (not "or") total costs are less than $[5,000] in a semi-annual period. To use the disjunctive is to invite the structuring of payments so as to avoid disclosure.

Section 7(b)(1) of H.R.823 requires the Department to close out a possible enforcement action, if the party submits information showing a violation was "unlikely". Coupled with the Department's lack of authority to investigate, this will allow violators to submit just enough information to meet the "unlikely" test and evade the disclosure required by H.R. 823. Therefore the Department suggests that the provision be clarified to make plain that the registrant is required to show he or she is in compliance with the Act.

Both HUD and FARA provisions require registrants to keep and preserve records relating to their activities, the disclosure of which is required by the respective statutes. **H.R. 823** should also so provide; otherwise, those seeking to evade the law or enforcement efforts may claim that relevant records of lobbying activities are "non existent". [To insure that the Department is

able to obtain relevant information and to pursue instances of noncompliance, authority should be given to the Attorney General to issue civil investigative demands where a possible violation is indicated.]

Section 7(b)(2) requires the Department to treat a "substantial noncompliance". as a "minor noncompliance" if the person admits there was a noncompliance and corrects it, without any regard as to the egregiousness of the noncompliance. This allows the person to engage in a deliberate course of conduct designed to evade disclosure and, if caught, to say, "I'm sorry, I'll disclose"; and pay a smaller penalty. In fact, this provision serves as an incentive to noncompliance. The Administration recommends that the bill be revised to treat significant noncompliance, admitted or not, as provided in Section 8.

The enforcement mechanisms provided in the bill also need to be strengthened. The bill fails to afford the Director sufficient investigative authority to insure that all those register who should, and that those who do register make full and accurate disclosure. We favor the informal resolution of disputes whenever possible, but there must also be the tools such as administrative fines, civil investigative demands and, as a last resort, criminal sanctions for those who choose to avoid the bill's registration and disclosure requirements. Experience has shown that the informal resolution process is greatly enhanced by the presence of more severe penalties.

Section 8(e)(1) of the bill would prohibit the Director of the Office of Lobbying Registration and Public Disclosure from

File: Lobbying Reform

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I believe I can provide the most assistance to this Subcommittee by commenting briefly on the Federal Regulation of Lobbying Act, the Byrd Amendment, the Housing and Urban Development Reform Act, and the Foreign Agents Registration Act before analyzing the Lobbying Disclosure Act. I look forward to working with this Subcommittee in its efforts to strengthen the

disclosure requirements of this bill.

FEDERAL REGULATION OF LOBBYING ACT

The Federal Regulation of Lobbying Act (hereinafter referred to as the "Act") was originally enacted in 1946. Briefly stated, it requires that individuals engaged for pay in lobbying activities register with the Clerk of the House and the Secretary of the Senate, and that they and the organizations or interests which support them, file quarterly statements disclosing the sources of their funding, the purposes of expenditures made for lobbying purposes, and the legislative objectives which they are seeking to achieve. Violations are subject to misdemeanor penalties of up to one year imprisonment and/or a fine of not more that $1,000, the enforcement of which is the responsibility of this Department. Upon conviction, an individual defendant may also be prohibited from engaging in lobbying activities for a period of three years.

To avoid infringing on the right to petition, the 1946 Lobbying Act confined its reach only to those lobbyists and the organizations for which they work, whose "principal purpose" was to engage in activities which are covered by the Act. The concept of "principal purpose," in the context of a statute whose sole enforcement mechanism is criminal prosecution, has proven to be an almost insurmountable obstacle to effective regulation.

In addition, the Act contains no provision requiring the Clerk of the House and the Secretary of the Senate, who are charged with the responsibility for receiving lobbying reports,

to audit the reports they receive. This has proven a further serious weakness in the Act's enforcement structure. In the absence of any audit and referral functions, the Department of Justice has had to rely solely on information provided by journalists, lobbyists with opposing interests, and occasionally, on Congressmen themselves for information which might indicate that the Act had been violated.

Furthermore, the lack of any administrative or civil sanction with which to address inadvertent violations has had the effect of making enforcement practically impossible since a successful criminal prosecution requires proof beyond a reasonable doubt that a knowing and willful violation of the statute occurred even in these few situations where a lobbyist's activities fall within the Act. The Administration believes that this has been a major failing of the 1946 Lobbying Act.

THE BYRD AMENDMENT

The Byrd Amendment prohibits the use of appropriated funds to influence Executive and Legislative Branch action with respect to the awarding of contracts, grants and loans. In addition, it requires consultants to disclose to Executive Branch agencies when nonappropriated funds have been used to pay for influencing activities in order to secure a Federal contract or grant award. There is no centralized administration of this law and no mechanism for enforcement.

HOUSING AND URBAN DEVELOPMENT REFORM ACT

It became clear that during the 1980s, HUD's assistance programs had been compromised by repeated instances of improper influence peddling and lobbying. Section 13 of the Housing and Urban Development (HUD) Reform Act, enacted as part of the HUD Act of 1989, was designed to restore integrity to these programs by casting sunshine on outside efforts to influence the award of HUD assistance and assistance-related management actions.

FOREIGN AGENTS REGISTRATION ACT (FARA)

The Foreign Agents Registration Act, as conceived and enacted by Congress, is a disclosure statute requiring persons carrying on specified activities in the United States as agents of foreign principals to comply with certain registration requirements. It should be stressed that registration under the Act is required, not because the specific acts encompassed by the statute are not legitimate activities, but because the specified activities are conducted on behalf of certain types of foreign principals. Registration under the Act in no way places any limitation on the activities of any registrant and is not intended to, and does not, place any stigma on a person or organization required to register. Disclosure required by the Act does not seek to regulate expression of ideas and does not limit or interfere with freedom of speech or impose an unconstitutional burden on the exercise of the rights of free

speech.

The Act: (1) defines who must register with the Department as a foreign agent; (2) specifies how such agents are to register and report on their activities; (3) exempts certain types of foreign agents from registration; (4) has specific filing and labeling requirements for political propaganda disseminated by registered agents; (5) requires all registered agents to preserve books of account and other records on all their activities and to make these records available for inspection by the officials responsible for enforcing the Act; (6) provides for public examination of all agents' registration statements, reports, and political propaganda filed with the Department; (7) imposes penalties for willful violation of the Act or related regulations; and (8) specifies certain administrative and judicial enforcement procedures available to the Attorney General.

ANALYSIS OF H.R. 823

The Administration strongly supports the purpose of this legislation. However, we are concerned that the bill fails to mandate meaningful disclosure that would best afford the American public insight into the role played by lobbyists in the political process. Thus, we urge that Congress go beyond the language of the present bill and adopt legislation that will be more effective than the provisions of H.R. 823 as introduced, and that will compel disclosure in a timely manner.

The Administration has four major concerns with the bill as

presently drafted. Our concerns and a section-by-section analysis follow:

Our first concern is that the bill cover all attempts, without regard to their frequency or magnitude, to influence any officer or employee of the Executive and Legislative Branches since lobbyists would most likely exert undue influence on the officers and employees who are not covered by this bill. The bill's definition of lobbyist in Section 3(10), excluding those whose lobbying activities are "only incidental" and "not . . . significant" is, in our view, imprecise and creates a loophole that will undermine meaningful lobbying disclosure. We recommend that a bright line test of what constitutes a lobbyist be crafted. For example, a threshold amount expended for lobbying, i.e., $5,000 in a six-month period, could trigger the obligation to register, or a test that focuses on the client's overall lobbying efforts rather than the lobbyist might be fashioned (cf. the Federal Election Campaign Act, 2 U.S.C. § 431 et seq.). An alternative approach would be to make any exemption explicit and precise in its scope. This bill also fails to require the disclosure of individuals who pay a lobbyist to lobby on behalf of another. The real party in interest, the individual paying the bill, could remain undetected and undisclosed from the public and other interested parties. Organizations that participate in ad hoc coalitions are excluded from disclosure if their payments do not exceed $5,000 over a six month period, they do not significantly participate in the supervision or control of the lobbying activities and they do not have a direct financial interest in interest in the outcome of the lobbying activities.

Terms such as "significantly participate", "supervision or control", "direct financial interest", and the "outcome" are so ambiguous that ensuring that this exception is not abused will be virtually impossible. As we indicated above, the disclosure of all the principals in all lobbying efforts is essential to public awareness of all factors influencing governmental decisions.

Second, more accurate financial disclosure than that provided in the proposed bill should be required. Presumably, a paid lobbyist is capable of maintaining financial records adequate to meet his or her obligations to the Internal Revenue Service. The public gains little if these exact numbers are converted to estimates ranging from tens of thousands to hundreds of thousands of dollars. In addition, lobbyist should, at the very least, be required to disclose specific amounts for expenditure in certain crucial areas, such as, [gifts], entertainment, public relations, advertising, travel and grass roots activities.

Third, while H.R. 823 provides civil monetary penalties for violations of the Act, a better approach would be to insure that violators never profit from their wrongdoing. This could be accomplished by adopting provisions based on the HUD Reform Act, which provide a civil money penalty at the greater of a fixed amount or the amount paid to the lobbyist with respect to the violation.

Fourth, there should be a prohibition against any fee paid to a lobbyist that is contingent, in whole or in part, on the success of any lobbying activities. Similar provisions are contained in the HUD Reform Act and FARA. Commissions paid on

sales would not be prohibited under this provision.

We also note possible problems with respect to what constitutes an inactive registration and with the timeliness of the initial registration. Inactive registrants, in our view, should be defined as those whose total receipts and (not "or") total costs are less than $5,000 in a semi-annual period. To use the disjunctive is to invite the structuring of payments so as to avoid disclosure.

Section 7(b)(1) of H.R.823 requires the Department to close out a possible enforcement action, if the party submits information showing a violation was "unlikely". Coupled with the Department's lack of authority to investigate, this will allow violators to submit just enough information to meet the "unlikely" test and evade the disclosure required by H.R. 823. Therefore the Department suggests that the provision be clarified to make plain that the registrant is required to show he or she is in compliance with the Act.

Both HUD and FARA provisions require registrants to keep and preserve records relating to their activities, the disclosure of which is required by the respective statutes. The Lobbying Disclosure Act should also so provide; otherwise, those seeking to evade the law or enforcement efforts may claim that relevant records of lobbying activities are "non existent". [To insure that the Department is able to obtain relevant information and to pursue instances of noncompliance, authority should be given to the Attorney General to issue civil investigative demands where a possible violation is indicated.]

Section 7(b)(2) requires the Department to treat a

"substantial noncompliance", as a "minor noncompliance" if the person admits there was a noncompliance and corrects it, without any regard as to the egregiousness of the noncompliance. This allows the person to engage in a deliberate course of conduct designed to evade disclosure and, if caught, to say, "I'm sorry, I'll disclose"; and pay a smaller penalty. In fact, this provision serves as an incentive to noncompliance. The Administration recommends that the bill be revised to treat significant noncompliance, admitted or not, as provided in Section 8.

The enforcement mechanisms provided in the bill also need to be strengthened. The bill fails to afford the Director sufficient investigative authority to insure that all those register who should, and that those who do register make full and accurate disclosure. We favor the informal resolution of disputes whenever possible, but there must also be the tools such as administrative fines, civil investigative demands and, as a last resort, criminal sanctions for those who choose to avoid the bill's registration and disclosure requirements. Experience has shown that the informal resolution process is greatly enhanced by the presence of more severe penalties.

Section 8(e)(1) of the bill would prohibit the Director of the Office of Lobbying Registration and Public Disclosure from imposing a civil penalty for violations of the act:

> "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."

The appointments Clause of the Constitution, art. II, sec. 2, cl. 2, authorizes the President, by and with the advice and consent of the Senate, to appoint officers of the United States. The clause further provides that Congress may vest the appointment of "such inferior officers, as they think proper, in the President along, in the Courts of Law, or in the Heads of Departments." (Emphasis added.) We believe that giving administrative law judges the authority to make decisions binding on the Director, and thus ultimately on the Attorney General, subject only to review under the arbitrary and capricious or abuse of discretion standards, raises constitutional concerns. Officers who make decisions without being subject to the supervision and control of superiors cannot meaningfully be considered inferior officers. Since the bill appears to permit the appointment of administrative law judges in a manner reserved for the appointment of inferior officers, while at the same time effectively insulating their decisions from review, we believe that the limitation on the reviewability of their decisions raises a substantial question under the Appointments Clause.

We do not believe that the limited review available to the Director is sufficient to obviate this constitutional problem. The arbitrary and capricious and abuse of discretion standards, devices with long histories in administrative law, do not permit the Director (nor, by extension, the Attorney General) to substitute his judgments for those of the administrative law judge. Review under the arbitrary and capricious standard, for example, is limited to only "whether the decision was based on a

consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The (Director) is not empowered to substitute [his] judgment for that of the [ALJ]" Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971) (citations omitted). Because the ALJs' judgments would therefore still be beyond the Director's supervision and control, we re not persuaded that administrative law judges may be appointed in the manner that the Constitution reserves for the appointment of inferior officers. Cf. Statement on Signing the Omnibus Budget Reconciliation Act of 1989, 25 Weekly Compilation of Presidential Documents 1970, 1971 (December 19, 1989) (objecting to imposition of an arbitrary and capricious standard of review for review of special master decisions by Claims Court judges as inconsistent with the requirements of Article II). Accordingly, we recommend that the bill be changed to authorize the Director overturn any civil penalty imposed by an administrative law judge under this bill if the decision is not supported by substantial evidence.

Another concern involves the bill's proposed revision of FARA in Section 13. By restricting the definition of foreign principal to foreign governments and foreign political parties, the bill (contrary to current law) would allow foreign individuals, associations and corporations to attempt to influence American public opinion and United States policy without making any disclosure under FARA. Only if they also engaged in lobbying contacts as defined by this bill would they be required to make any disclosure of their activities, and such

disclosure would be significantly less than is now required under FARA. This would allow agents of entities supporting terrorist activities to attempt to influence American public opinion and United States policy without making any disclosure under either FARA or the Lobbying Disclosure Act of 1993. Further, this would impose on the Government the burden to prove in any litigation that the agent represents an entity meeting the Act's definition of a foreign government or foreign political party, a difficult, if not insurmountable, obstacle in cases involving covert agents and clandestine foreign organizations. The Administration recommends that the present definition of "foreign principal" in Section 1 of FARA be retained in its entirety and a provision be added stating that registration and disclosure by commercial entities under the Lobbying Disclosure Act satisfies the reporting obligations of FARA.

We point out that the bill establishes within the Department an "Office of Lobbying Registration and Public Disclosure" to administer and enforce its provisions. Such an office would require funding, it is estimated, in the range of eight to ten million dollars a year, as well as several million dollars in start-up costs for personnel and equipment, including a computer system which is compatible with the Federal Election Commission.

Finally, the Byrd Amendment requires yearly reports evaluating the effectiveness and compliance of the existing disclosure program. However, H.R. 823 removes the requirement for agencies to collect and compile the information that is the basis of the report. Therefore, in keeping with the information and streamlining goals of H.R. 823, the Administration suggests

striking the remaining provisions of the Byrd Amendment that relate to the yearly disclosure certification report.

In summary, we support the laudable goals of H.R. 823 and believe that H.R. 823 should be modified as suggested above so as to meet its stated objectives.

File: Lobbying Reform

FROM THE DESK OF

Jack Quinn

cc: Donsia Strong
Bruce Reed
Cheryl Mills
Michael Waldman

13 pages

JACK

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503

April 2, 1993

LEGISLATIVE REFERRAL MEMORANDUM

LRM #I-261

TO: Legislative Liaison Officer -

COMMERCE - Michael A. Levitt - (202)482-3086 - 324
DEFENSE - Samuel T. Brick, Jr. - (703)697-1305 - 325
HUD - Edward J. Murphy, Jr. - (202)708-1793 - 215
JUSTICE - Faith Burton - (202)514-2141 - 217
STATE - Matt Winslow - (202)647-4463 - 225
TREASURY - Richard S. Carro - (202)622-1146 - 228
OGE - Jane Ley - (202)523-5377 - 261

FROM: JAMES J. JUKES (for) J.J.
Assistant Director for Legislative Reference

OMB CONTACT: GERRI RATLIFF (395-3083)
Secretary's line (for simple responses): 395-3454

SUBJECT: OMB Request for Views RE: HR 823, Lobbying Disclosure Act of 1993

DEADLINE: 4:00 TUESDAY April 6, 1993

COMMENTS: Please submit your views by the deadline in the form requested in the attached memo from Donsia Strong of the White House Domestic Policy Council staff. We request that the views be in bullet (rather than paragraph) form, and as brief as possible. The views will be handed out and discussed at an interagency meeting in room 9104 of the New Executive Office Building at 10:00 on Wednesday, April 7th. Each agency is asked to limit attendance to two people, including a policy-level official. For clearance into the building, please call Darcel Gayle (395-3454) with the names and birth dates of your agency's representatives by 4:00 TUESDAY. We intend to distribute agency responses to this request for views at the meeting. Attached for your information are: (1) a letter from th President in which he supports the bill and states the Administration's willingness to work with the subcommittee to strengthen it; and (2) two letters from the Chairman of the FEC on the bill.

OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or receipts for purposes of the the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

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P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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Freedom of Information Act - [5 U.S.C. 552(b)]

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b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]