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ON THE
CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Prepared
Testimony of

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re
S. 1, The Senate Approach to Lobbying Reform
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House Judiciary Committee , Subcommittee on the Constitution
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Mr. Chairman, Ranking Member Franks, and members of the Committee:

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

The Center for Competitive Politics ("CCP") is a non-profit educational organization operating under Section 501(c)(3) of the tax code, with offices in Arlington, Virginia. Through studies, reports, conferences, and assistance in litigation, CCP seeks to educate the public and lawmakers on the operation and effects of money in the political and legislative systems. In light of the comments to follow, I also note that neither CCP nor Vorys Sater or Capital University engage in what is called "grassroots lobbying."

As the House considers lobbying reform, it is important to balance carefully targeted regulations that address real abuses, while minimizing the burden on the vast majority of lobbyists who are honest, dedicated individuals helping citizens to exercise their fundamental Constitutional Rights of Free Speech and the Right to Petition the Government for Redress of Grievances. These are among the most important rights guaranteed by our Constitution. Yet all too often in the past, we have allowed isolated incidents of improper behavior - scandal – to stampede us to hastily conceived, ill-considered measures that restrict these important Constitutional rights while doing little to address the abuses that allegedly justify the restrictions. All of us here know that lobbyists can provide a valuable function, providing members with useful, important information on public opinion, and also with the information needed to craft wise, beneficial, effective legislation. We know that abuses exist, but that they are the exception, not the rule.

We must also recognize that whatever steps Congress takes, there will be a substantial element of popular distrust of the government in general and Congress in particular. This is normal in every democracy – around the world, even at the peaks of confidence in government in the societies most trustful of government, there is typically one-quarter to one-third of the electorate that believes that government cannot be trusted to pursue the public good. This is normal and indeed it can be healthy – it is this skepticism that enables the public to serve as a watchdog against government corruption, and as a guardian of its own rights against government overreach. There is no legislation you can pass, no magic wand you can wave, that will make all Americans trust their government, and it would be a mistake to try. Thus, it is important to pass serious,

balanced legislation, that addresses specific and real problems, rather than to engage in populist grandstanding or pass measures merely because they "send a message."

The problem, as I see it, based on my travels around the country and my conversations with lobbyists, officeholders, civic leaders, and ordinary citizens, is that lobbyists have access to information, and to legislators, that is not known to the general public. In a small number of isolated cases, lobbyists have used their access, outside of the public eye, to bribe or improperly influence members. More commonly, the simple lack of transparency, even absent any improprieties, has resulted in the public being closed out of decisions made by the government. I have never heard it expressed, however, that the problem is too much involvement by the American people, or that the people are contacting members of Congress, or that citizens and groups are attempting to provide information to the people at large. Thus, the Senate approach is quite right to focus on *legislative* transparency, and avoid the efforts by some to use lobbying reform to pursue other agendas that aim to limit, rather than enhance, popular checks on government.

In particular, the Senate was quite correct in removing from the bill, as it was originally introduced, Section 220, pertaining to the regulation and in particular the disclosure of grassroots lobbying. As a matter of constitutional law, the Supreme Court has repeatedly recognized a right to engage in anonymous political speech. These cases include *Thomas v. Collins*, 323 U.S. 516 (1945) (striking down a statute requiring labor organizers to register and disclose to the government prior to speaking); *NAACP v. Alabama*, 357 U.S. 449 (1958) (guaranteeing the NAACP the right to protect the identities of its members and financial supporters); *Talley v. California*, 362 U.S. 60

(1960) (protecting anonymous speech to the public); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (upholding the right to anonymous speech on political issues during the course of a campaign); and *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150 (2002) (striking down a statute requiring prior registration with government). Only in the narrow circumstances of political advertisements directly related to a candidate election and either expressly advocating the election or defeat of a candidate or involving substantial expenditures for broadcast ads mentioning a candidate within 60 days of an election has the Court ever upheld restrictions on anonymous speech. *See Buckley v. Valeo*, 424 U.S. 1 (1976); *McConnell v. Federal Election Commission,* 540 U.S. 93 (2003). Regulation of grassroots lobbying through mandatory disclosure of funding sources directly violates the Constitution, as repeatedly interpreted by the Supreme Court.

Moreover, as a policy matter, regulation of grassroots lobbying makes little or no sense in addressing the problem of government corruption. Contact between ordinary citizens and members of Congress, which is what "grassroots lobbying" seeks to bring about, is the antithesis of the "lobbying" at the heart of the recent congressional scandals. It is citizens expressing themselves to fellow citizens, and citizens to members of Congress. That they are engaged or "stimulated" to do so by "grassroots lobbying activities" is irrelevant. Regulation that would hamper efforts to inform and motivate citizens to contact Congress will increase the power of professional lobbyists inside the beltway. Regardless of what lobbying reform is passed, not even the most naïve believe it will mean the end of the professional, inside-the-beltway lobbyist. Thus, grassroots voices remain a critical counterforce to lobbying abuse.

Disclosure of the financing, planning, or timing of grassroots lobbying activities adds little, and will often be harmful, leading to exactly the type of favoritism and/or negative pressure that the public abhors. I want to stress that I have first hand experience with being on the receiving end of grassroots lobbying campaigns. As a Commissioner on the Federal Election Commission, I was the target of several such campaigns, one of which generated over 100,000 citizen communications. I found it helpful to hear from the public, even if in the form of mass generated campaigns. I know that these campaigns were easily detected and appropriately discounted (but not ignored or resented). No member of Congress even remotely in touch with his district will be unaware that a sudden volume of similar calls, letters, or emails coming from his or her district is possibly, if not probably, part of an orchestrated campaign to generate public support. But because the callers themselves are real, there is little to be gained by knowing who is funding the underlying information campaign that has caused these constituents to contact their Members. The constituent's views are what they are; the link between lobbyist and Congress is broken by the intercession of the citizen herself.

Various Washington-based organizations, many of which employ registered lobbyists and many of which have no membership base, have attempted to denigrate this citizen activity by referring to it as "Astroturf" lobbying, implying that it is somehow fake or fraudulent. But there is nothing fake about real citizens – that is, voters and constituents – having views on issues and calling their representatives in Washington. It simply does not matter if those views were stimulated by a newspaper editorial, a conversation with a friend, a speech at the local Rotary Club, or a paid communication. These are real people with real concerns, not "fake" or "Astroturf" constituents.

Moreover, there are many valid reasons for preferring anonymity. Anonymous speech is not illegitimate in some way. Remember that the Federalist Papers were published anonymously, in order to force readers to deal with the arguments put forth rather than engaging in *ad hominem* attacks against the authors. As the Supreme Court put it in *McIntyre,* in an opinion written by Justice Stevens, "[t]he decision to favor anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." 514 U.S. at 357.

Many members of this Committee have expressed deep concern about what was called the "K Street Project," in which it is believed that pressure was placed on organizations in Washington to hire lobbyists on the basis of partisan considerations. Of course, the identity of lobbyists is necessarily known, and the public can benefit from knowing who lobbyists are and with whom members are meeting. That is how the public can provide a check on undue influence exercised behind the scenes. But grassroots lobbying contacts do not pose the possibility of behind the scenes meetings or bribery or improper influence, because by definition grassroots lobbying relies on voters – constituents - to take action. Efforts to force disclosure of grassroots lobbying needlessly open up that field to K Street Project-type pressure. Such forced disclosure can make seasoned professionals reluctant to assist unpopular causes or those contrary to the current administration, resulting in a chilling effect that would deprive grassroots organizations of the services of talented consultants who make their livings, in part, on Capitol Hill. Indeed, those consultants most likely to abandon the field will often be

those most motivated by ideology. Those motivated by pecuniary gain will have an added incentive to bear the cost of disclosure and carry on.

Finally, let me note that I have heard, in ways that cause me to believe it to be true, that some members have said that “disclosure” is, “not regulation.” How absurd! If you honestly believe that, then I urge you to begin filling out the forms yourselves and imagine that you face civil and criminal penalties for any errors or late filings. Clearly, disclosure is regulation, and often the most intrusive regulation.

In summary, the Senate wisely stripped regulation of grassroots lobbying from the bill, and this House would be wise to similarly reject opportunistic efforts by various Washington-based interest organizations to stifle citizen speech. As further explication of the points raised above, I have attached to this statement a copy of CCP’s Policy Primer, “Grassroots Lobbying Proposals Seem Not to Further Congress’ Interest in Correcting Lobbying Abuses.”

Let me now address just a few specifics of what was retained in Senate Bill 1. First, a Section 212 of S. 1 requires that registrants must file quarterly reports "Not later than 45 days after the end of the quarterly period beginning on the 20th day of January, April, July and October of each year . . . ." Accordingly, the quarterly reporting period for the first quarter of the year will be January 20th through April 19th - not January 1st through March 31st. Needless to say, using a different quarterly reporting period for Lobbying Disclosure Act purposes than is used for FEC reporting purposes will create unnecessarily burdensome accounting problems for separate segregated funds whose contributions now have to be reported to the FEC, the Clerk of the House and the Secretary of the Senate. I have been told that this was not intended, but it appears to be

the law as passed out of the Senate. I urge you to bring this provision into harmony with FEC reporting dates.

More substantively, § 212 is one of the key sections of the Senate bill, requiring added disclosure of lobbyists political contributions. However, I would note that many of the terms in that section are vague and left undefined. For example, reporting is required whenever a "fundraising event was hosted, co-hosted, or sponsored." The FEC has no definition of any of these terms. An individual might raise money for an event but not be listed as a "host" or "sponsor" of the event; another person might be listed as a "host" but play no role in raising funds. Indeed, there is no clear definition even of what constitutes an "event." What is an event? Any gathering? Must it be a physical gathering, or is a video or virtual gathering sufficient? If all that is targeted is "events," will anything have been accomplished? If these terms are left vague, they subject honorable people to civil and even potential criminal penalties for honest efforts to engage in political activity, while at the same time they may not even address the issues you seek to address. I would urge you to make sure you know what the purpose this regulation is, and to see that it is appropriately targeted.

Section 116 of S. 1 would deny COLA adjustments to members who vote against them. I am one of the few people – sometimes I think the only person – in the country willing to go on record and say that I believe members of Congress ought to be paid more – substantially more – than they are currently paid. During the last campaign, I spoke publicly against the tireless demagoguery about members "voting themselves pay raises," a charge usually made by challengers who fully expected, if victorious, to receive the benefits of these past COLA adjustments. Nevertheless, I believe it very bad policy to

hold a member's own income hostage to his voting in a particular way on any bill or resolution, and equally bad to create several classes of members receiving different levels of pay. Further, I do not see what this provision has to do with lobbying reform.

I would urge you to reject the Senate approach of establishing a "Commission to Strengthen Confidence in Congress." The Commission's mission, as defined in S. 1, seems to suggest partisan retaliation for legislation in some cases long past. I believe it will be destructive of efforts to create genuine, nonpartisan ethics reform, or to increase public confidence in Congress, to inform the public that you have created another "commission" with a specific mission to focus on a few laws – some passed as long as 5 years before we can expect the Commission to meet – apparently chosen for partisan reasons. Some members will no doubt draw satisfaction from such an approach, but frankly it mocks the entire ethics and lobbying reform project.

Let me conclude, generally, by urging moderation. Aim for real problems, not appearances. For example, § 212 of S. 1 requires added disclosure of contributions arranged as small as $200. There is some logic here, as $200 is the threshold for full disclosure of contributions under the Federal Election Campaign Act. Yet I doubt that any of us in this room really believe that $200 in campaign contributions is going to corrupt anybody. Such low thresholds lead to voluminous reports that can actually make it harder to find larger volumes of money.

Similarly, it is easy to dictate voluminous reporting requirements for members and staff. But be careful. Complying with formalistic reporting requirements should not become the major function of Congress. Congress must operate ethically, to be sure, but it must exist for reasons other than to comply with ethics rules as well.

There are changes, such as earmark reform, that can and should be done, many of which are included in the Senate bill. But understand that nothing you do will eliminate or prevent every episode of corruption – there simply are some corrupt people in the world – and trying to do so burdens good, ethical people and can even hinder efficient, effective government. Similarly, it is normal and healthy that the public have some skepticism of what its government is doing – nothing you can do can eliminate all such skepticism. Finally, remember that the problem is “insider” abuses, not participation by the public at large, and avoid those who, in pursuit of their own insider agendas, urge regulation of grassroots activities.

Thank you.