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S. 1 - Legislative Transparency and Accountability Act of 2007

**THE UNCONSTITUTIONALITY OF SECTION 220 —
THE SO-CALLED "GRASSROOTS LOBBYING" REGISTRATION AND DISCLOSURE PROVISIONS[1]
(January 16, 2007)**

Despite claims to the contrary, the so-called **"grassroots lobbying" provision** — Section 220 of Title II of S. 1, the "Legislative Transparency and Accountability Act of 2007"[2] — constitutes an unprecedented and unconstitutional assault upon the First Amendment.

Relying primarily on phrases taken out of context from United States v. Harriss, 347 U.S. 612 (1954), the legislation's proponents have **asserted** that the Supreme Court has **already decided** that appeals directed to the general public to petition their elected representatives stand on no different constitutional footing than efforts to "button-hole" those same representatives by highly paid operatives of the special interests.[3] In Harriss, however, **the issue of the constitutionality of lobbying regulation and disclosure was not even raised**. The only question raised was vagueness, and it was not even clear if this claim was based on due process or the First Amendment. The Court had to rewrite the statute to save it, and then **explicitly limited its First Amendment ruling and observations to disclosure requirements of paid lobbyists who are in direct communication with members of Congress**, having just **one year previously** recognized that to extend the registration and disclosure rules to **grass roots** appeals encouraging voluntary communications to those same Senators and Representatives would raise "doubts of constitutionality in view of the prohibition of the First Amendment." *See* United States v. Rumely, 345 U.S. 41, 46 (1953), and cited in Harriss, 347 U.S. at 620.

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

[2] Section 220 of S. 1 is virtually identical to Section 204 of Title II of H.R. 4682 of the "Honest Leadership and Open Government Act of 2006," introduced in the last Congress.

[3] *See, e.g.,* The Campaign Legal Center's January 10, 2007 Memorandum on Astroturf Lobbying sent to all Senators. http://www.campaignlegalcenter.org/press-2342.html.

Indeed, after a careful examination of the purpose, means and scope of Section 220, there is no question that its several provisions unconstitutionally abridge all four of the First Amendment's guarantees of freedom of expression — the freedoms of speech and of the press, as well as upon the rights of the people to assemble and to petition their government for redress of grievances.

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

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

However, under Section 220(a)(2) of S. 1, **every member of the general public** who

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

(b) "encourages other members of the general public to do the same,"

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

To be sure, by its terms Section 220(a)(1) states that "lobbying activities ... do not include grassroots lobbying," but that statement constitutes a disingenuous effort to open the door to a newly-minted and convoluted definition of "lobbying activities," namely, "paid efforts to stimulate grassroots lobbying." But such efforts, by definition, decidedly do **not** include any communication whatsoever with a federal government official. Indeed, this "Alice in Wonderland" definition turns the ordinary meaning of "lobbying activities" on its head, counting as "lobbying activities" communications that are (a) directed to the general public, not to their governing officials, and (b) counted as if they are communications to Federal officials, without regard to whether any member of the general public actually ever made such a communication!

Because Section 220(a)(1) **conclusively presumes** that every "paid effort[] to stimulate grassroots lobbying" will be successful, 220(b)(2) requires registration and disclosure by "Grassroots Lobbying Firms" **before, not after**, a member of the public communicates with a federal official on the issue for which that the firm was "retained … to engage in paid efforts to stimulate grassroots lobbying." Indeed, such a firm is required, within "45 days … after first … retained," to register with the Secretary of the Senate and the Clerk of the House of Representatives. *See* Section 220(b)(2). In other words, a "grassroots lobbying firm" must register as if it were a lobbyist, even if the firm was unsuccessful in stimulating any member of the public to communicate his views on an issue to a federal official.

What could be the purpose of (a) requiring a "grassroots lobbying firm" to register as though it were a "lobbyist," when it clearly is not one within the ordinary meaning of the term, and of (b) treating an ordinary citizen's petition on his own behalf as if it were lobbying on behalf of a lobbying firm? It is twofold: (a) **to place the pejorative label of "lobbyist" upon grassroots efforts to influence federal policy,** equating the voluntary, unpaid petitions of members of the general public with the direct contacts by paid K Street operatives, and (b) **to enhance the elected officials' reputations as transparent and accountable public servants**, as evidenced by the title appended to the legislation**.**

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

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

Rather, the freedom of speech guarantees "that debate on public issues should be uninhibited, robust, and wide-open," not constricted by **false and defamatory labels imposed upon the people by government officials**, as would be the case if the "grassroots lobbying" section of S. 1 is enacted.

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

At the heart of the freedom of the press is the well-established principle that Congress has no power to require a person to obtain a **license before** he may gain entrance to the free marketplace of ideas. *See* Lovell v. Griffin, 303 U.S. 444 (1938). Thus, it has long been

established that the "chief purpose" of freedom of the press is "to prevent previous restraints upon publication." Near v. Minnesota, 283 U.S. 697, 713 (1931).

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

At the heart of the new rule requiring **registration** of "grassroots lobbying firms," as provided in Section 204(b) of S. 1, is that registration with the Secretary of the Senate and Clerk of the House of Representatives must take place 45 days "after a grassroots lobbying firm first is **retained** by a client to engage in paid efforts to stimulate grassroots lobbying."

This registration will not only have **the effect of a prior restraint** upon those persons and entities who would like to communicate with members of the general public urging them to communicate on an issue of public policy with appropriate federal officials, but it is **deliberately designed** to discourage paid efforts to stimulate members of the general public to communicate on the issues with their elected representatives. And for what **purpose**? According to the bill's proponents, early registration — **before** any member of the public communicates with any federal official — is necessary to "expose" phony grassroots e-mails, faxes, telephone calls and letters to members of Congress by "Astroturf entities" serving "well-heeled special interests" hiding behind "populist-sounding names."[4]

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

Not only does **forced exposure of the "publisher"** not rise to the level of an overriding governmental interest justifying a prior restraint, such as recognized by Justice Brennan in the Pentagon Papers case, such forced disclosure of the person or entity behind the scenes **violates the principle of anonymity which lies at the very core of freedom of the press**. *See* Talley v. California, 362 U.S. 60, 62-65 (1960); McIntyre v. Ohio Elections Comm., 514 U.S. 334, 359-71 (1995) (Thomas, J., concurring).

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

Furthermore, the failure to observe the specified time period within which to register, coupled with the failure to accurately report a "**good faith estimate of the total disbursements**," including a subtotal of "a **good faith estimate** of the total amount specifically relating to **paid advertising**," as required by Section 220(c) of S. 1, exposes the grassroots lobbying firm to the risk of **significant civil penalties**.

Remarkably, the Senate bill, after an amendment by Senator Vitter (R-LA) last week, would impose a **civil penalty of $200,000** for a "knowing violation by a preponderance of the evidence" of registration or disclosure provision. *See* Section 216 of S. 1 and 2 U.S.C. Section 1606(2). Furthermore, the House bill would have added **two entirely new criminal penalties**, imposing significant prison terms and fines for "knowing … and wilful … fail[ures]" and "knowing…, wilful…, and corrupt… failures to comply." *See* Section 402(b) of H.R. 4682 (109th Cong.).

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

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

This is not the American way.

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

The "grassroots lobbying" provisions of both the Senate and the House bills are built upon a **false and unconstitutional premise**.

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

But the very **purpose** of the constitutionally-guaranteed **right of the people to assemble is to petition the government for redress of their grievances**. Indeed, as the people of the newly formed commonwealth of Pennsylvania put it in their August 16, 1776

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

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

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

Furthermore, the regulation is **discriminatory**. Section 220(a) specifically exempts "communications by an entity directed to its members, employees, officers or shareholders," thereby favoring persons having memberships, employments and other similar relationships. Further, Section 220(a)'s definition of a "grassroots lobbying firm" is limited to only those persons or entities "retained by 1 or more clients to engage in paid efforts to stimulate grassroots lobbying." This limitation would favor public policy organizations, businesses, and other entities that are large enough not to need to "retain" an outside person or entity to make a grassroots appeal. Finally, this limitation would favor organizations, such as the media, who participate regularly in stimulating the general public to communicate their views to federal officials without doing so on behalf of any "client."

Granting to some, but not to others, the privileges of assemblage and petition without interference by the government is a clear denial of the right of assembly and petition. As Justice Thurgood Marshall wrote in the Mosley case, "[t]here is an 'equality of status in the

field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Id.*, 408 U.S. at 96.

IV. Conclusion.

For the reasons stated, the Bennett amendment to strike Section 220 from S. 1 should be supported.