national RIGHT TO LIFE committee, inc.

512 10th Street, NW Washington, DC 20004-1401
(202) 626-8800 FAX: (202) 737-9189 Website: www.nrlc.org

(202) 626-8820

May 4, 2007

RE: In opposition to Meehan Amendment (to regulate grassroots "lobbying") to omnibus "lobbying reform" legislation (S. 1)

Dear Member of Congress:

When the House of Representatives takes up "lobbying reform" legislation later this month, the National Right to Life Committee (NRLC) urges you to oppose an anticipated Meehan-Shays amendment, proposing regulation of efforts "to influence the general public to lobby Congress" (sometimes referred to as "grassroots lobbying").

Mr. Meehan introduced his proposal, along with Mr. Shays, on May 1 as H.R. 2093. Certain special-interest groups pushing the proposal assert that it will be offered as an amendment to broader "lobbying reform" legislation. ("They're going to have to vote on it one way or another," said Meredith McGehee of the Campaign Legal Center, *Roll Call*, May 2, 2007.) For convenience, we will simply refer to the proposal as "the Meehan Amendment."

The groups backing the Meehan Amendment assert that the measure would require merely "disclosure" of "huge undisclosed amounts" spent to get members of the public to "lobby Congress." In reality, the Meehan Amendment would force countless individual Americans and groups to register and report as "lobbying firms," merely because they "influence" fellow citizens to contact Congress or officials of the executive branch on policy matters. **These would include individuals who are working not for profit but for causes in which they believe, vendors of direct mail and advertising services, and many others. Even persons who regard themselves as primarily social commentators, filmmakers, actors, or entertainers may face complaints that they are engaged in illegal activity if they are compensated by others and engage in attempts "to influence the general public or segments thereof to contact 1 or more covered legislative or executive branch officials (or Congress generally) to urge such officials (or Congress) to take specific action" with respect to a legislative or policy matter.**

The Senate wisely rejected an attempt to regulate "grassroots lobbying" in January, voting 55-43 to strip the "grassroots lobbying" provision from S. 1 (see Senate roll call no. 17, January 18, 2007). **As explained below, the Meehan Amendment, although it contains a higher dollar threshold than the Senate language, is in other respects even more sweeping – for example, it changes a key definition of the Lobbying Disclosure Act (2 U.S.C. Sections 1601-1612) in a way that greatly enlarges the universe of groups and persons who would be defined as "clients" because of their ties to "lobbying activities," a term that the Meehan Amendment would radically expand.**

If the Meehan Amendment is coupled to the penalty provisions already contained in the Senate-passed S. 1, the result would be that an activist (even if paid very little) who directs the spending of as little as $100,000 to "influence" citizens, in ways that might produce communications to elected representatives, risks ruinous civil fines of up to $200,000 per infraction (Section 216 of the Senate-passed bill), and even a criminal penalty of up to 10 years in prison (Section 222), if she fails to register as a "lobbying firm" or fails to report the required information regarding her attempts to "influence" citizens regarding policy issues.

On May 1, we sent you a letter expressing our opposition in principle to regulation of private communications to private citizens about what is occurring in Congress (posted at http://www.nrlc.org/FreeSpeech/NRLCLettertoHouseonMeehanproposal.html). We also discussed the potential of the "grassroots" issue to complicate or even derail the broader "lobbying reform" legislation, as has actually occurred at least four times over the past four decades. Shortly after we issued that letter, Mr. Meehan and Mr. Shays introduced H.R. 2093, which will provide the basis for the amendment that Mr. Meehan is expected to offer at the Judiciary Committee markup on S. 1. We will not reiterate here most of the constitutional and process points that we made in our May 1 letter. Suffice it to say that all of the comments made in our May 1 letter are valid as applied to the language of H.R. 2093, which we analyze in detail below.

IS IT "LOBBYING"?

In a healthy democracy, if a group hears a displeasing message on a public policy issue, it will counter with its own message, using its own argument. Under the Meehan Amendment, however, the frequent response to a displeasing message may be a complaint that so-and-so is engaged in attempts to "influence the general public to lobby Congress," that the speaker has not properly registered with Congress or has not properly reported his or her attempts to motivate a public response, that an investigation should be launched as to how much the speaker was paid and by whom, et cetera. This is not a model of political discourse consistent with the First Amendment, which says flatly that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for a redress of grievances."

The Meehan Amendment refers four times to those who "influence the general public to *lobby* Congress." [emphasis added] In our view, the act of a constituent contacting his or her elected representative is not properly described as "lobbying Congress," but rather, as representational democracy in action. A constituent should not be considered a "lobbyist" merely because he or she contacts his or her elected representative, or an official of the executive branch, on an issue of concern.

LOW DOLLAR THRESHOLD; IMPACT ON ISSUE-ORIENTED ACTIVISTS

Proponents of the Meehan Amendment say that it would apply only to big-dollar campaigns. In fact, it requires registration and reporting by *any paid person or entity* who directs spending of as little as $100,000 during a quarter on the public-influencing "lobbying activities," so-called. For a group or person concerned about an issue of national importance, this is a very low threshold,

which would be exceeded merely by purchasing one or two ads in one or two individual metro newspapers. Here are the rates for a single full-page, black-and-white ad in a group of newspapers selected more or less at random: *Atlanta Journal-Constitution*: weekdays $68,127, Sunday $89,716. *Boston Globe*: daily $72,702 (non-profit discount: $54,527), Sunday $86,310 (non-profit discount: $64,733). *Chicago Tribune*: daily: $95,130, Sunday: $143,010 ("public policy" rate). *Houston Chronicle*: daily $97,524, Sunday $116,802. *LA Times*: daily $122,937, Sunday $153,897 (main section). *Milwaukee Journal-Sentinel*: daily $40,397, Sunday $54,764. *New York Times:* weekday $181,692, Sunday $203,742. *Seattle Times*: daily $49,255, Sunday $68,013. *USA Today:* Monday-Thursday $106,400, Friday $129,900.

The registration and reporting requirements can also be triggered by a "lobbying firm" (whether a person or an entity) receiving a fee or income of over $100,000 aggregate in a quarter from one or more "clients," but no such "profit" is required to trigger the Meehan Amendment requirements. For example, an individual retained by a state or local affiliate of National Right to Life, even if she is paid only a nominal amount, and even if she never interacts directly with congressional offices, would be forced to register as a federal "lobbying firm" and file detailed reports on a quarterly basis, if she directs spending, on behalf of the organization (the "client"), of more than $100,000/quarter on public-influencing communications. When individual activists across the country learn of these requirements and the possible penalties, it will have a chilling effect on communications to motivate citizens on pending policy matters, to the detriment of the causes they serve.

THE DEVIL IS IN THE DEFINITIONS

Analysis of the Meehan Amendment requires careful attention to key definitions. After all, if a member of Congress proposes a bill that states, "The operation of motorcycles in Yellowstone National Park is hereby prohibited," the effect might seem clear enough – *but* if the same bill also says, "In this Act, the term 'motorcycle' includes any vehicle or device operated by an internal combustion engine," that definition radically changes the scope of the regulation.

It is the same here. The Meehan proposal begins by taking pains to assert twice that its requirements apply only to "a lobbying firm," and it is true – but the kicker is the amendment's definition of what would constitute a "lobbying firm." The amendment would radically alter how "lobbying firm" has been defined in current law. Under current law (2 U.S.C. Section 1602), "lobbying firm" means "a person or entity that has 1 or more employees who are lobbyists on behalf of a client other than that person or entity" or "a self-employed individual who is a lobbyist." Under current law, "lobbyist" is defined as a person who is paid by a client, and spends more than 20% of his time spent on behalf of that client planning or making one or more direct "lobbying contacts" with members of Congress or their staffs, or covered executive branch officials, to urge action on specified types of legislative or policy matters.

Thus, under current law, a "lobbying firm" consists of one or more persons who actually lobby officeholders. But the Meehan Amendment would depart drastically from that common-sense definition. **Under the Meehan Amendment, a so-called "lobbying firm" need have no**

connection at all to anyone who actually engages in any "lobbying contacts" with members of Congress, congressional staff, or executive branch officials.

The Meehan Amendment defines a "lobbying firm" as any "person or entity," who on behalf of a "client" (which can be any *other* person or entity), "receives income of, *or spends or agrees to spend*, an aggregate of $100,000" in a quarterly period "to engage in paid communications campaigns to *influence the general public* to lobby Congress." [emphasis added] It is further specified that this means "any efforts . . . to influence the general public or segments thereof to contact 1 or more covered legislative or executive branch officials (or Congress generally) to urge such officials (or Congress) to take specific action" with respect to legislative or policy matters.

So, a single paid individual who directs the spending of as little as $100,000 (from any number of sources) on public-influencing activities would become, by definition, a "lobbying firm," and would be required to register and report its public-influencing activities for each "client." **As discussed on page 7, once the registration requirement is triggered, the so-called "lobbying firm" would be required to file quarterly reports on their registered clients, detailing the public-influencing work undertaken on behalf of each such client, no matter how little the "client" spends during any given calendar quarter.**

THE SCOPE OF ACTIVITY COVERED BY THE MEEHAN DEFINITIONS

By reference to existing law [paragraph (8)(A) of 2 U.S.C. Section 1602], the Meehan Amendment applies its registration and reporting requirements to those who are paid or who pay to communicate to the public anything that might "influence" citizens to contact their representatives on any of the following topics: "(i) the formulation, modification, or adoption of Federal legislation (including legislative proposals); (ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government; (iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or (iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate."

Although Mr. Meehan has adopted these four broad topical categories from current law, please note that he has *not* incorporated *any* of the 19 exceptions that immediately follow the four categories in current law [see 2 U.S.C. 1602 (8)(B)] – exceptions that limit the universe of persons to whom lobbying disclosure requirements currently apply, and that limit the types of topics on which communications must be reported. For example, Mr. Meehan has not incorporated the exception that currently applies to those involved in the news media, or the exception for churches and associations of churches.

Lacking such exceptions, you can anticipate future complaints against people such as filmmaker Davis Guggenheim (hired to direct the Al Gore movie about global warming), and against commentator-advocates like Rush Limbaugh, Bill Maher or Bill O'Reilly, when they engage in public advocacy regarding matters pending in Congress. It will be asserted (by persons

displeased with a given message) that such individuals are paid more than $100,000 per quarter by various corporations or advocacy organizations, in whole or in part for the purpose of issuing communications that will "influence the general public or segments thereof to contact 1 or more covered legislative or executive branch officials (or Congress generally) to urge such officials (or Congress) to take specific action . . .". Surely, their broadcast communications *result* in many bona fide contacts by grassroots citizens to members of Congress and the executive branch on pending legislative and policy matters. Under the Meehan Amendment, it matters not at all whether a given individual *regards himself* as a "lobbying firm" or as something else – what matters are the definitions in the law.

Proponents of the Meehan Amendment will respond that such a person, although he exhorts and "influences" members of the general public to express themselves to officeholders on policy matters, is not "retained" by a "client" to do so. We will now address each of those key terms.

"Client." The Meehan Amendment technically does not change the current Lobbying Disclosure Act (LDA) *definition* of the term "client," defined [in 2 U.S.C. Section 1602(2)] as "any person or entity that employs or retains another person for financial or other compensation to conduct *lobbying activities* on behalf of that person or entity." [emphasis added] However, the Meehan Amendment *does* radically expand the universe of "clients" by changing the definition of "*lobbying activities*" to include for the first time "paid communications campaigns to influence the general public to lobby Congress." Therefore, under the Meehan Amendment, if a person – entertainer, commentator, or whoever – is compensated by a corporation for work that includes "campaigns" (another undefined term) "to influence the general public to lobby Congress," *that corporate payer becomes a "client," like it or not*.

"Retained." It is significant that the Meehan Amendment does not define the word "retained," a term that is also not defined in the current LDA. Ultimately, then, "retained" would be defined in interpretative rules and in court decisions. In common usage, the word "retain" generally means to "keep engaged in one's service" (*see Compact Oxford English Dictionary of Current English, 2005*). Those who receive pay for work for advocacy organizations or media corporations, whether they are thought of as employees or as contractees, are "retained" in this sense, and may well be considered to be "retained" under the Meehan Amendment. For example, an in-house employee of an organization could be required to register as a "lobbying firm" if he or she helps direct the spending of as little as $100,000 per quarter on "paid communications campaigns to influence the general public to lobby Congress."

(In some cases, such an in-house individual is already a registered "lobbyist," but under the Meehan Amendment, he would now be required to also register as a "lobbying firm" for the purposes of reporting attempts "to influence the general public." It must be reemphasized: the Meehan Amendment's new definition of "lobbying firm" and the new requirement for reporting efforts to "influence the public," are separate and in addition to the current registration and reporting requirements of the LDA regarding direct "lobbying contacts.")

Some of the groups supporting the Meehan Amendment (such as Public Citizen), who may now argue that the words "client" and "retained" in the Meehan Amendment should be understood in

very narrow and technical senses, have also vigorously argued that "grassroots lobbying disclosure" legislation is needed precisely to reveal the names of large donors to various nonprofit organizations that engage in what these groups call "fake 'grassroots' lobbying campaigns." These so-called "watchdog" organizations cannot have it both ways. **If the terms "client" and "retained," as used in the Meehan Amendment, are to be construed broadly enough to require a nonprofit organization (now re-defined as a "lobbying firm") to report the names of donors (now redefined as "clients"), then that effect should be openly acknowledged.** And, if mere donors to nonprofits' grassroots campaigns are to be regarded as "clients" under the Meehan Amendment, then how can the terms "client" and "retain" be interpreted to exclude application to other entities that compensate persons to engage in other types of advocacy on public policy issues?

EDUCATIONAL ACTIVITIES THAT MAY "INFLUENCE" THE PUBLIC

The Meehan Amendment is not limited to communications that actually request citizens to contact their elected representatives or other officeholders. Rather, it covers attempts "to *influence* the general public or segments thereof to contact 1 or more covered legislative or executive branch officials . . . to urge such officials . . . to take specific action . . . ." [emphasis added]

Thus, someone who disseminates value-laden commentary regarding legislation may fall under this reporting requirement, even if the communications do not contain a specific call to action, because they "influence" persons to take such action. **For example, the dissemination of a brochure that describes the brutal partial-birth abortion method, and that then reports that Congress is considering a bill (the "Freedom of Choice Act") that would once again legalize this abortion method, could be deemed to "influence" readers to contact their elected representatives to oppose the "Freedom of Choice Act," even if the brochure does not actually urge the reader to take that action. Likewise, advocacy presentations on domestic and foreign policy issues by those paid by media corporations might be deemed to "influence" viewers or listeners to contact policymakers to express agreement with what they have heard, even if the speaker did not explicitly call for such action.**

This is the very type of activity that the U.S. Supreme Court was concerned about protecting in *United States v. Rumely*, 345 U.S. 41 (1953), when the Court said: "Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment."

COMMUNICATIONS TO MEMBERS

Defenders of the Meehan Amendment emphasize that communications to *members* of an organization are exempt. As we discussed in our May 1 letter, this exception is an attempt to stack the deck in favor of organizations with large "captive" memberships (e.g., labor unions), at the

expense of organizations that speak effectively to broader segments of the public. It also should be noted that the amendment contains no definition of "members."

REPORTING ON "CLIENTS" WHO EXPEND UNDER $50,000

In addition to the problems summarized above, it should be noted that even organizations that engage in very small public-influencing campaigns would be affected by the Meehan Amendment, if they use outside vendors to help them with direct mail, phone banks, ad campaigns, or other public-motivating activity. That is because the $100,000 threshold proposed by Mr. Meehan is an aggregate figure. If a vendor receives $10,000 from 10 "clients," he must register and report as a "lobbying firm" for each client.

In a May 2 letter in support of the Meehan proposal, Public Citizen and six other groups asserted, "The provision requires a retained lobbying firm to report for each client the name of the client, the issues involved in the paid communication campaigns for the client, and one number: a *good faith* estimate of the total amount of income received from the client during the period to conduct paid communication campaigns to influence the general public to lobby Congress, but *only if that total amount of income from the client exceeds $50,000 during the quarterly reporting period*." [emphasis added] That assertion is mistaken; those making it have apparently overlooked that once a person or entity is required to register as a "lobbying firm" – and the Meehan Amendment would multiply the number of persons and entities designated as "lobbying firms," as discussed above – that "firm" must file an "interim report" (currently twice annually, but four times a year under the Senate-passed bill) *for each client*, listing (among other information) all issues on which "lobbying activities" were undertaken, and "a good faith estimate of the total amount of all income from the client . . . other than income for matters that are unrelated to lobbying activities." **These requirements will apply to information on *all* of the registered "clients" of the newly designated "lobbying firms," not only to those clients that make expenditures that exceed the $50,000 threshold during a calendar quarter.**

CONCLUSION

In summary, we urge you to oppose the Meehan Amendment, which is a poorly drafted and ill-considered proposal. If enacted, it will chill free speech by citizen activists and other voices on the issues of the day, and become a textbook example of the Law of Unintended Consequences. Those who argue that "disclosure" does not constitute a "restriction" are ill-informed or

disingenuous. It is indeed a restriction when citizens who devote themselves to a cause in which they believe are told they risk ruinous fines, or even criminal penalties, if they fail to properly report to the government the details of their efforts to motivate fellow citizens to communicate with their elected representatives.

If the Meehan Amendment or anything along the same lines comes to a vote before the full House of Representatives, NRLC will include the vote in its scorecard of key roll calls for the 110th Congress. If the Meehan Amendment becomes embedded in the broader "reform" legislation, NRLC will urge that the broader legislation not advance and not be enacted into law.

Thank you for your consideration of our strong views on this issue.

Sincerely,

Douglas Johnson
NRLC Legislative Director

Susan Muskett, J.D.
Congressional Liaison

202-626-8820
Legfederal@aol.com

Additional information and documentation at: http://www.nrlc.org/FreeSpeech/index.html