"Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to . . . petition the Government for a redress of grievances."
– The First Amendment to the Constitution of the United States

Congressman Waxman advances grave new threat to citizens' 'right to petition' government officials

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When a citizen expresses herself directly to an important federal government official – perhaps by sending an e-mail or a fax, or even in a direct conversation – should the name of that citizen and the topic of her communication be reported into a government-maintained database, accessible to the public?

Will the Executive Branch of government best serve the public interest when a member of the President's Cabinet must report into a public government database even the policy advice he or she receives from a spouse? When important policymakers get confidential advice only from other government officials?

Congressman Henry Waxman thinks so – and he is serious about making that the law.

Mr. Waxman, a Democrat who represents part of Hollywood, is the new chairman of the powerful Committee on Oversight and Government Reform of the U.S. House of Representatives. He is also the chief sponsor of the so-called "Executive Branch Reform Act" (H.R. 984), a bill approved 28-0 by his committee on February 14. The ranking Republican on the committee, Congressman Tom Davis of Virginia, is the lead cosponsor of the bill.

According to some reports, Mr. Waxman will ask House Democratic leaders to fold the bill into a much broader "ethics reform" bill, on which the House may act during March. (The Senate passed its version of "ethics reform" legislation, S. 1, in January; the Senate bill did not contain any provision comparable to H.R. 984.)

Waxman says that his bill "promotes openness and accountability in government by banning secret meetings between lobbyists representing special interests and senior government officials." (*CQ Today*, February 15, 2007) But, while some journalists were happy to simply paraphrase Mr. Waxman's characterization of the bill, examination of the legislation makes it plain that Mr. Waxman must regard virtually any citizen as a "lobbyist" if she is so bold as to express herself directly to a government official on a policy matter.

"Any Significant Contact"

Under H.R. 984, thousands of Executive Branch officials would be required to file quarterly reports containing the timing and substantive details of "any significant contact" they receive on a policy matter – not only from lobbyists, but from any "private party" – *a term defined in the bill to include "any person or entity" other than other government officials, or representatives of such officials such as congressional staff persons.*

The bill defines a "signficant contact" as any "oral or written communication (including electronic communication) . . . in which such private party seeks to influence official action by any officer or employee of the executive branch of the United States." The requirement would apply to communications whether they were one-way or two-way, and whether they were solicited or unsolicited. Every *e-mail, fax, letter, or voicemail* expressing a view on a policy matter would have to be reported. Every *conversation* in which any "private party" expressed herself to an official on a policy matter would have to be reported – whether the conversation took place in a formal meeting, or on the phone, or in a random encounter at a church or synagogue, or in a private conversation with a spouse.

For each such "significant contact," the covered official would be required to report "a summary of the nature of the contact," which would include at least the following information (and this list might be expanded in subsequent implementing regulations):

– "the name of each private party who had a significant contact with that official"

– "the date of the contact"

– "the subject matter of the contact and the specific executive branch action to which the contact relates"

The scope of topics to which this reporting requirement would apply – "official action by any officer or employee of the executive branch of the United States" – could hardly be more sweeping. This language is not even limited to the actions that are within the discretionary authority of the contacted official and his subordinates. So, if you mistakenly contact an official within the Department of the Interior about a matter that is actually handled by the Department of Homeland Security, no matter – the Interior Department official must dutifully report this "significant contact" anyway.

An extensive universe of officials and officers would be covered by these requirements. The covered categories are described in five numbered paragraphs of the bill, some of which are rather technical. Coverage includes positions of "policy-determining, policy-making, or *policy-advocating* character" (emphasis added) character throughout the Executive Branch, which would sweep in a substantial portion of the more than 9,000 political appointment slots that exist in current law. In addition, senior military officers down to one-star rank are covered (there are more than 900 of them).

Also covered are the entire "policy" staffs of the President and Vice President, except for their respective chiefs of staff. The President and Vice President themselves also are exempt. (See Appendix A for additional details on the covered categories.)

The reports would be filed with the Office of Government Ethics, which would be mandated to establish "computerized systems designed to minimize the burden of filing and maximize public access to reports filed under this title" and make "a publicly available list of all private parties who made a significant contact." The director of the Office of Government Ethics would be required to "where necessary, verify the accuracy, completeness, and timeliness of reports," and to notify the U.S. attorney for the District of Columbia of any official who fails to comply.

H.R. 984 contains substantial penalties for failure to report a "significant contact" from a "private party" on a policy matter: administrative sanctions "up to and including termination of employment" for any violation, and for anyone who "deliberately attempts to conceal a significant contact," a civil fine of up to $50,000 per infraction. Covered officials will also be mindful of the anticipated costs of mounting a legal defense against even an erroneous charge of noncompliance ("the process is the punishment," as they say).

What Would Change

With these severe penalties hanging over their heads, Executive Branch officials would rationally change their behavior in a number of ways – none of which would serve the cause of good government.

First, Executive Branch officials will begin spending a lot of time maintaining copious running records of names, dates, and subject matter of all communications that they receive on official actions, regardless of where they occur – whether it be in the official's office, at a public event, at a friend's Christmas party, or pillow talk with a spouse. Every substantive phone call, e-mail, or other contact from a "private party," solicited or unsolicited, would have to be logged, unless it fell into one of the narrow exceptions provided in the bill. (See Apprendix B for an explanation of the exceptions.)

This record keeping would prove to be so burdensome that it can be expected that officials would seek to reduce contact as much as possible with "private parties" – which is to say, from individual private citizens or representatives of organized groups of private citizens. Telephone calls would go unreturned, requests for meetings would be declined, e-mail addresses will be unpublished, and contact with outside individuals at events would be avoided as much as possible. As a result, executive branch officials charged with making national public policy would become ever more insulated from the people who their policies most directly affect.

Officials would take special pains to minimize contacts with representatives for politically controversial causes. Most Americans exercise their right to petition the government by joining like-minded citizen groups. The staff persons for such groups, particularly those associated with positions disfavored by the institutional news media or disfavored by powerful congressional

committee chairmen like Congressman Waxman, will find government officials less likely to communicate with them, for fear that the contact reports will be perceived as showing them too close to persons or groups who represent the disfavored cause.

One predictable effect of imposing this isolation on government officials will be to impede countless Americans from exercising their right to petition government officials on policy matters – a right guaranteed by the First Amendment. It would no longer be possible for a private citizen or representative of a group of private citizens to enjoy any degree of privacy when they send a communication on a policy matter to a government official, because the official will be required to report the contact. Once this is generally understood, many citizens will become more reluctant to exercise their constitutional right to petition as freely as they did before. The chilling effect will be especially severe for those Americans who privately advocate for causes disfavored by their own professional peers, social peers, family members, employers, or customers.

Cui Bono?

Another predictable effect would be to enhance the already considerable influence wielded by congressional committee chairmen such as Chairman Waxman – an influence often exercised entirely outside of the public eye. Contacts from Congressman Waxman or from any of his scores of staff persons are exempted by H.R. 984, even when they contain heavy-handed suggestions or demands as to the policy course the official should take.

Then too, the law is intended to generate information that *certain* “special interests” can use to browbeat public officials, generally for the purpose of advancing their own policy agendas. Politicians, advocates, and journalists with political axes to grind would comb through reports, impugning the actions of government officials based on who had sent them communications and how often, in order to shape public policy along the lines they prefer.

The bill would also hamstring government officials when they feel the need to actively seek advice from outside their own bureaucracies. Currently, a federal official is free to pick up the phone and consult anybody he wishes on a policy matter – perhaps his one-time college professor, or a scientist who heads a research laboratory in the city where he lived before joining the government, or someone who wrote an opinion piece that caught his attention, or his personal physician. But any such contact would be reportable under H.R. 984, unless the advice or information sought and received is already “publically [sic] available information.” The individual contacted by the official would be aware that their conversation would now become a matter of public record. If any controversial matter is involved, the citizen might be unwilling to offer candid advice to the official, fearing negative ramifications for his business, his tenure prospects, or his family relationships, to cite just a few ways in which a “chilling effect” would occur.

(It should be noted here that certain Executive Branch officials at times operate in a manner parallel to judges, first receiving formal input from various parties and then making an administrative decision about a particular case or policy. But federal agencies already require that officials who are operating in such a quasi-judicial capacity must record and report *ex parte*

communications – that is, communications by which someone improperly tries to influence them outside of the formal administrative process. Outside of these special cases, senior federal officials are generally free to actively seek advice where they see fit, and to receive and consider unsolicited advice as they see fit. Mr. Waxman's bill is based on the dubious premise that such confidential advice is inherently suspect – unless, of course, it comes from a Member of Congress such as himself, or some other government official.)

Spouses Not Exempt

Even advice from spouses would be covered. In 1993, soon after President Clinton took office, the Hyde Amendment (the law that prohibits federal funding of most abortions) was up for renewal in Congress. The president was on record in support of re-establishing federal funding of abortion, so his policy advisors presented him with a memo suggesting different degrees of assertiveness in pursuing his policy in Congress. Rather than check off any of the options presented by his paid staff advisors, however, the President scrawled, "What does Hillary think [?]" We don't know what advice Hillary subsequently gave her husband on this matter, but it is very likely that the advice was given some weight. Yet, although Mr. Waxman's bill contains an explicit exception for the President and the Vice President, any other political appointee or high-ranking military officer who did what Mr. Clinton did in this case would be forced to list the "significant contact" with his wife, and the topic on which she gave the policy advice, on his next quarterly disclosure report.

In fact, the plain language of the bill would lead to any number of such patently absurd results. For example, if protestors were to wait patiently outside the State Department for the Secretary's limousine to drive by, so that they could hold up signs that succinctly convey to her their views on some aspect of American foreign policy (such as "U.S. Out of Iraq" or "Bomb Nuclear Reactors Now"), the Secretary would be well advised to log and report this "significant contact," even if she must report the communicators as "John and Jane Doe." After all, the communicators are clearly "private parties," they are clearly using "written communication . . . that . . . seeks to influence official action . . .," and their communication is directed specifically to a covered official, not to the general public.

Despite officials' efforts to reduce the volume of "substantial contacts," the law would open the door to all manner of manipulation and mischief. For example, if an advocacy group

anywhere on the ideological spectrum could obtain the voicemail or e-mail address of a covered government official, the group could essentially paralyze the official's office by using the Internet to generate tens of thousands of unsolicited "significant contacts," each voicing boilerplate disagreement with an agency's policy on any matter – each of which would have to be individually logged and reported. A big enough campaign of this type might nearly paralyze an official's office. At a minimum, the staff and time needed to accomplish the record keeping would be a huge waste of the taxpayer's money.

Congressman Waxman wants to sell his bill as an expansion of "government in the sunshine"– but what he really wants is the political equivalent of a tanning salon: a structure in which Executive Branch officials would be isolated from the real world, and then exposed to intense, artificial, and unhealthy radiation generated by privileged inside players such as himself.

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APPENDIX A

WHAT OFFICIALS WOULD BE COVERED BY H.R. 984?

The list of "covered executive branch officials" under H.R. 984 is expansive. It includes:

(A) those covered by the Executive Schedule at levels I through V ($131,400 to $180,100 annually as of Jan. 2005). It is not entirely clear to us how many of the over 9,000 federal political appointment slots would be covered under this salary-level criteria. (Many political appointees hold Senior Executive Service positions – these do not require Senate confirmation – that are paid at level IV or level V.) This issue may not be too important, because (C) and (D) below which would probably "capture" most political appointees, anyway.

(B) officers of the uniformed military of one-star general/admiral rank or above (of whom there are currently over 900);

(C) all executive branch "policy" jobs which fall within the description in 5 U.S.C. § 7511(b)(2)(B) of "[a] position [that] has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by . . . the Office of Personnel Management for a position that the Office has excepted from the competitive service;" and

(D) any "noncareer appointee," as defined by section 3132(a)(7) of Title 5, United States Code ("an individual in a Senior Executive Service position who is not a career appointee, a limited term appointee, or a limited emergency appointee"); and

(E) all "policy-determining, policy-making, or policy-advocating" employees in the Executive Office of the President and the Office of the Vice President, except the President, Vice President, and their respective chiefs of staff.

APPENDIX B

WHAT ARE THE EXCEPTIONS TO THE REQUIREMENTS OF H.R. 984?

H.R. 984 generally requires reporting of any "oral or written communication (including electronic communication)" in which any "private party" (defined as a person or entity, other than a government official) "seeks to influence official action by any officer or employee of the executive branch of the United States." Thus, this requirement applies not only to communications that urge the official himself to undertake some official action, but also to any call that is intended to influence any official action by anybody in the Executive Branch.

In further defining what this means, H.R. 984 incorporates most of the same exceptions that currently apply to registered federal lobbyists (under the Lobbying Disclosure Act of 1995). However, the Lobbying Disclosure Act applies only to persons who are paid to lobby federal officials and who spend more than 20% of their time on such lobbying contacts – but under H.R. 984, as explained above, the reporting requirements would apply to any contact received by a covered official from any "private party." The exceptions are for any communication that is:

(I) made by a public official acting in the public official's official capacity;

(ii) made by a representative of a media organization if the purpose of the communication is gathering and disseminating news and information to the public;

(iii) made in a speech, article, publication or other material that is distributed and made available to the public, or through radio, television, cable television, or other medium of mass communication;

(iv) made on behalf of a government of a foreign country or a foreign political party and disclosed under the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.);

(v) a request for a meeting, a request for the status of an action, or any other similar administrative request, *if the request does not include an attempt to influence a covered executive branch official or a covered legislative branch official* [emphasis added]*;*

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

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

(viii) publicly available information provided in writing in response to an oral or written request by a covered executive branch official or a covered legislative

branch official for specific information [*but this exception applies "with respect to publically [sic] available information only*" – *on this point, the exception in H.R. 984 is actually narrower than the exception currently provided for registered federal lobbyists*];

(ix) required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency, including any communication compelled by a Federal contract, grant, loan, permit, or license;

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

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

(xii) made to an official in an agency with regard to—
(I) a judicial proceeding or a criminal or civil law enforcement inquiry, investigation, or proceeding; or
(II) a filing or proceeding that the Government is specifically required by statute or regulation to maintain or conduct on a confidential basis,
if that agency is charged with responsibility for such proceeding, inquiry, investigation, or filing;

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

(xiv) a written comment filed in the course of a public proceeding or any other communication that is made on the record in a public proceeding;

(xv) a petition for agency action made in writing and required to be a matter of public record pursuant to established agency procedures;

(xvi) made on behalf of an individual with regard to that individual's benefits, employment, or other personal matters involving only that individual, except that this clause does not apply to any communication with --
(I) a covered executive branch official, or
(II) a covered legislative branch official (other than the individual's elected Members of Congress or employees who work under such Members' direct supervision),
with respect to the formulation, modification, or adoption of private legislation for the relief of that individual;

(xvii) a disclosure by an individual that is protected under the amendments made by the Whistleblower Protection Act of 1989, under the Inspector General Act of 1978, or under another provision of law;

(xviii) made by --
(I) a church, its integrated auxiliary, or a convention or association of churches that is exempt from filing a Federal income tax return under paragraph 2(A)(I) of section 6033(a) of title 26, or
(II) a religious order that is exempt from filing a Federal income tax return under paragraph (2)(A)(iii) of such section 6033 (a); and

(xix) between --
(I) officials of a self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act [15 U.S.C. 78c (a)(26)]) that is registered with or established by the Securities and Exchange Commission as required by that Act [15 U.S.C. 78a et seq.] or a similar organization that is designated by or registered with the Commodities Future Trading Commission as provided under the Commodity Exchange Act [7 U.S.C. 1 et seq.]; and
(II) the Securities and Exchange Commission or the Commodities Future Trading Commission, respectively; relating to the regulatory responsibilities of such organization under that Act.

In addition to the exceptions quoted above, which are drawn from the Lobbying Disclosure Act, H.R. 984 says that the required reports need not contain any information that is exempt from disclosure under the Freedom of Information Act [5 U.S. Code 552(b)]. The FOIA exemptions apply to information classified for national security reasons, information about law enforcement investigations, medical records and other personal information about agency personnel, and other matters that have no bearing on typical contacts from citizens and representatives of citizen groups in which opinions are expressed on policy matters. Moreover, H.R. 984 does not say that "significant contacts" about such sensitive matters are exempt from the bill's reporting requirement, but only that the covered official's report on such contacts need not include the specific information that is exempt from disclosure under FOIA.