

MEMORANDUM

TO: The Honorable David Dreier
Chairman
House Rules Committee

FROM: Mr. Ed Bethune
202-828-5852 (o)
202-309-3838 (m)
ed.bethune@bracepatt.com

DATE: November 15, 2004

**RE: Committee on Standards of Official Conduct Statement
Regarding Majority Leader Tom DeLay**

Earlier this year, Representative LaHood introduced an appropriations rider that would prevent lame-duck Members from filing ethics complaints. Effectively, this rider would have blocked consideration of a disingenuous ethics “complaint” filed by a lame-duck Member, Representative Chris Bell. It is now clear that Mr. LaHood’s well-intentioned effort should be given greater consideration, the reason why will become apparent as you read this Memorandum.

As you know, I represent the Majority Leader.

The Committee on Standards of Official Conduct (“the Committee”) informally gathered facts on the allegations filed by Representative Bell. On October 6, 2004, the Committee issued its *Statement of the Committee regarding disposition of the complaint filed against Representative Tom DeLay*. Enclosed please find a copy the Committee's Memorandum on the matter. The Committee's Memorandum does not reveal how the Majority Leader’s detractors initiated this process and used the Committee for partisan political purposes. That is what I will, for the good of the House, call to your attention in this memorandum. First, though, let me summarize the principal findings in the Committee’s Memorandum:

1. The Committee criticized Mr. DeLay for asking the Federal Aviation Administration (“FAA”) to determine the location of an aircraft that was being sought by Texas law enforcement authorities.¹ For the record, I respectfully disagree with this finding of the Committee, but we of course, accept its guidance. While the information was readily available to the public on the Internet and he could have gotten it there;² the request seemed harmless to Mr. DeLay inasmuch as he was not interfering with the

decision-making process of a federal agency or asking for anything that would impose a burden on the FAA.

2. The Committee also said a golf fundraiser in June of 2002 created an “appearance” that donors were being provided special access to Mr. DeLay regarding the then-pending energy legislation.³ I disagree with this finding because it focuses on a single event, two years after the fact, in microscopic detail, and exploits the vulnerability that all Members have to such allegations given the nature of the current campaign financing arrangement.

The net result of this decision will be an unenforceable precedent and an open invitation to use the Committee for partisan political purposes.

It is important to note that the Committee also found, correctly, that the frivolous allegations of the Bell “complaint” that have been repeated over and over again by the media were unfounded. Specifically, the Committee concluded that there was no bribery, no extortion, no illegal gratuity, no impermissible special favors, no improper solicitation, and no improper action on a legislative action.⁴ In fact, the Committee said its

review of the materials presented in the [Bell] complaint on this matter reveals a significant gap between the violations alleged against Representative DeLay, on the one hand, and the information offered in support of those allegations, on the other.⁵

Otherwise, the Committee’s Memorandum effectively dismisses the “complaint.”⁶

The Committee added, however, that it intends to deal with the scurrilous allegations made by Representative Bell in the complaint. The objection that

the complaint includes innuendo, speculative assertions or conclusory statements in violation of Committee Rule 15(a)(4) – is a matter that should be taken up separately by the Committee, and we intend to bring it before the Committee in the near future.⁷

Mr. Chairman, I am glad the Committee is going to look at the conduct of Representative Bell, but I believe his allegations should have never made it as far as they did in the process. In Mr. DeLay’s response to the complaint we raised two other objections, which were also mentioned in the Committee Memorandum:

- In view of published reports that Representative Bell accepted assistance from a private organization in the drafting of his complaint, the complaint was not properly filed under Committee Rule 14(a)(1), which addresses complaints transmitted directly to the Committee by a Member;⁸ and

- Representative Bell's acceptance of assistance from a private organization in the drafting of his complaint violated House Rule 24, which generally prohibits private subsidy of official House business.⁹

The Committee did not agree with either of these objections, and I think that was a serious error that disregards the logic and legislative history regarding "complaints" filed by outside groups. In failing to deal with these issues, the Committee is opening the door to future complaints that will be driven—as this one has been driven—by non-Members who do considerable damage to the reputation and honor of the House when they use the power of the media and their exaggerated claims as a fundraising tool.

Let me be more specific: I think the "complaint" filed by Representative Bell *did* violate Committee Rules 14 and 15, as well as House Rule 24. Second, the allegations were submitted in bad faith, and allowed non-Members to manipulate the ethics process in furtherance of their own agendas. It is clear the conduct of Representative Bell was designed to poison the atmosphere against Majority Leader DeLay, place extraordinary pressure on the Committee, and create salacious headlines that could be used to raise funds for certain non-Member groups. Finally, for such disingenuous behavior, those responsible could be subjected to a contempt proceeding in the House of Representatives.

At a minimum, this sorry episode could provoke a resolution of disapproval or a reform of the rules of the House to prevent such abuses in the future. I appreciate that the Committee has said it intends to deal with Representative Bell in the near future, but its decision that there was no violation of Committee Rule 14(a)(1) or House Rule 24 indicates the Committee has no appetite to deal with the larger issue of outside groups using the process for partisan political purposes. I believe, as you will see in the following pages, that the Committee erroneously certified the complaint (before it was aware of the involvement of the outside groups) and was unwilling to admit its error and decertify the complaint once the facts were brought to the Committee's attention. I hope I am wrong, and I hope the Committee will deal with the outside groups when it deals with Representative Bell. Simply put, this is an issue that cannot be ignored or delayed and that is why I am bringing it to your attention today.

Before addressing each of these points, it is critical for you to know that Representative Bell did not craft these allegations alone.¹⁰ He received significant aid from an outside political organization, the Citizens for Responsibility and Ethics in Washington ("CREW"), an organization that created a media frenzy around the allegations before the Committee. This media frenzy served two purposes: to fundraise for CREW and other likeminded political groups and to tarnish the reputations of the House of Representatives, the Committee, and the Majority Leader.

Since the filing of the allegations, CREW and other third-party political organizations have undertaken massive fundraising endeavors, mocking the ethics process and villainizing Majority Leader DeLay.¹¹ This is not the first time they have done this. Earlier this year, CREW's attacks intensified to such an extent that the Chairman and Ranking Member of the Committee issued a joint statement saying that they were

committed to ensuring “that the Committee and the ethics processes of the House are not again used – as they were used in the past – for partisan or political purposes.”¹² Defying that warning, and for pure political gain, Representative Bell and CREW lodged libelous and specious allegations against Majority Leader DeLay in June of this year and since then they have relentlessly attacked the Majority Leader, the Committee, the House of Representatives, and individual Members of the Committee, apparently with blatant disregard to the veracity of their statements.

For example, according an *Associated Press* story by Larry Margasak on September 21, 2004, “A group seeking an independent investigator in the case ran newspaper ads this week in Hefley's and Mollohan's home states. The ads accuse the committee members of keeping their heads in the sand and ‘choosing to play ostrich rather than investigate.’” A *Washington Post* article by Charles Babington on the same day also reports on these unscrupulous actions. Additionally, the collusion between Representative Bell and CREW continued even after the Committee released their findings, as they held a press conference to further criticize the Committee today.

Impugning the integrity of the Committee and the Majority Leader, CREW spoon fed the media a tabloid story with a compelling plot: a heroic watchdog group steps forward to “protect” the public interest against allegedly illegal conduct by a Member of Congress and a House Committee that is unwilling and unfit to stand in judgment.

I. THE ALLEGATIONS OF REPRESENTATIVE BELL AND CREW VIOLATED COMMITTEE RULE 14 AND HOUSE RULE 24.

Committee and House rules have jurisdictional and procedural consequences, for without the occurrence of certain events, the Committee cannot exercise its investigative authority. As you are aware, Committee Rule 14 provides:

- (a) Pursuant to clause 3(b) of Rule XI of the Rules of the House of Representatives, the Committee may exercise its investigative authority when:
 - (1) information offered as a complaint by a Member of the House of Representatives is transmitted directly to the Committee;
 - (2) information offered as a complaint by an individual not a Member of the House is transmitted to the Committee, provided that a Member of the House certifies in writing that he or she believes the information is submitted in good faith and warrants the review and consideration of the Committee;
 - (3) the Committee, on its own initiative, establishes an investigative subcommittee;¹³

Determining that one of these events has occurred the Committee *will* initiate “investigative authority”¹⁴ and launch a series of deadlines that will, in the absence of affirmative action by the Chairman or Ranking Member, automatically result in the formation of an Investigative Subcommittee.¹⁵ Rules with such important consequences must be strictly construed.

Committee Rule 14(a)(1) contemplates the circumstance where a Member of the House, acting in his or her official capacity, transmits information directly to the Committee, an official committee of the House. The right of a Member to make such a filing is in reality only a privilege because the filing must comport with certain standards and rules set by the Committee¹⁶ and, implicitly, the House Rules. A filing that is contrary to either should be rejected.

Committee Rule 14(a)(2) creates a way for an “individual not a Member of the House” to transmit information offered as a complaint to the Committee, provided that a Member of the House certifies in writing that he or she believes the information is submitted in good faith and warrants the review and consideration of the Committee. This rule, which drops the word “directly” from the clause describing the manner of transmission, contemplates that the information would be taken by a non-Member to a Member who, after the appropriate certification, could then transmit it to the Committee as information offered as a complaint by a non-Member.

The House, in delegating this authority to the Committee, did not intend for these threshold steps to be confused or turned into a hybrid arrangement whereby the processes of the House could be manipulated by either a Member, non-Member, or the two acting collaboratively.¹⁷

The legislative history of these provisions also proves that the House did not intend to make a distinction without a difference. The *1997 House Ethic Reform Task Force* extensively debated the question of non-Member filing.¹⁸ And, when the issue reached the House floor, the House passed, 228-193, an amendment to delete language that would have allowed non-Members to file ethics complaints directly, even under very limited circumstances.¹⁹ In the course of the debate, Representative Jim Hansen, then-Chairman of the Committee, said the following in support of deleting the provision that would have allowed non-Members to file directly:

... I rise in strong support of this amendment. ... It maintains the process as peer review, as our Founding Fathers envisioned it to be.

In Washington we have seen that if a legislator’s agenda...cannot be stopped by someone, he can succeed by attacking their ethics, their reputation. The media is often a willing partner in pursuing the scandal for ideological purposes or as a way to sell their product.

As chairman of the committee, I do not want this agenda set by outsiders who have established a fund-raiser base in Washington by writing and filing complaints against Members of Congress....²⁰

The document tendered to the Committee by Representative Bell was largely the work of an outside group, as I mentioned, CREW. Importantly, nothing in the document disclosed CREW's involvement. The filing did not meet the requirement for information offered as a complaint by an individual who is not a Member of the House because, among other things, it did not contain the requisite certification of good faith by a sitting Member of the House.²¹

Conversely, if the document was considered as information offered by a Member of the House under Committee Rule 14(a)(1), as it appears to have been, then it was done so without acknowledging that the document tendered as the official work of a Member was in fact done by or in collaboration with non-Members. This is a direct violation of House Rule 24, which prohibits the use of outside private resources to do official work.²²

In either event, the document that was filed with the Committee on June 15 violated the House Rules and the Committee Rules. At first, one might be inclined to overlook what appears to be a technicality, but it is clear that what Representative Bell and CREW were doing was a very serious matter with important jurisdictional and practical legal consequences for all Members of the House.

House Rule 24, formerly House Rule 45, prohibits House offices from accepting private support for official activities. The rule provides: "no Member may maintain or have maintained for his use an unofficial office account."²³ In *In the Matter of Representative E.G. "Bud" Shuster*, the Committee found that the prohibition extends not only to private monetary contributions, but also to in-kind support from private sources.²⁴ As a general matter, the official activities of each Member and Committee office are to be supported by official monies appropriated for those activities. The concerns regarding the acceptance of voluntary services of individuals include the fact that at times, quite obviously, an individual offering to perform such services for a Member of Congress may have his or her own agenda. Thus, even with regard to individual participation in established and acceptable intern or fellowship programs, duties that will result in any direct or indirect benefit to the sponsoring organization, other than broadening the individual's knowledge, are prohibited.²⁵

The rationale for House Rule 24 is obvious. Official activities should not be undertaken with private outside resources because an individual offering to perform such services may have his or her own agenda.²⁶

The allegations were prepared by or in collaboration with CREW, an organization that has a defined agenda and thrives on the money it raises making allegations against Members of Congress. Allowing an unofficial, private organization such as CREW, acting in collaboration with a Member, to further its self-serving agenda *via* the imprimatur of official business sets a terrible and destructive precedent. This is especially true when the official business is to be conducted before the most sensitive and

delicately balanced committee of the House: the committee that is tasked to enforce the House Rules and offer due process and fair play to Members.

An article in *The Hill* discussed how outside organizations have been attempting to insert themselves into the business of the Committee:

Breaking the ethics truce has been a high priority of good-government groups such as CREW, Public Citizen, Public Campaign, Common Cause, the Campaign Legal Center and Judicial Watch. The groups convened a meeting a month ago where they discussed strategy and divvied up tasks aimed at breaking the truce. For example, Mary Boyle of Common Cause was tasked with researching how the House had policed recent allegations of misconduct. Craig Holman of Public Citizen accepted the challenge of finding a lawmaker to file a complaint against DeLay.²⁷

Ironically, the article quoted Democrat staff, whose attempts to distance themselves from the filing bolsters the influence that the outside groups had on this process:

Democratic aides argued strenuously that the complaint was generated by outside groups and should not be seen as a Democratic-coordinated maneuver... "This is not a Democratic attack. This was done by the outside groups."²⁸

The record makes it clear that CREW, an unofficial outside organization, was significantly involved in preparing what was presented to the Committee as the work of a Member of Congress. It is replete with evidence that Representative Bell approached CREW about filing the allegations with the Committee and then allowed CREW to assist with the document's preparation.

Representative Bell and CREW openly touted one another's involvement during the period following the submission of the document to the Committee.

During his June 15, 2004 Press Conference, Representative Bell discussed how he coordinated the preparation of his filing with private entities:

Well, I started working on this complaint last year. And when you look at the complaint and see the body of exhibits that we've attached with the complaint, it's clear that it wasn't put together in just a matter of days or weeks. It took a great deal of time to put it all together.²⁹

While not mentioning CREW directly during the press conference, Representative Bell openly addressed the assistance provided by outside groups:

We got as much information as we possibly could. We also worked with some of the independent ethics groups who had been looking into some of these matters, sought their counsel and their assistance in putting the complaint together.³⁰

This coordination between Representative Bell's office and CREW was further discussed in an article appearing in *Roll Call*:

Bell's office openly admits that most of the information that the Texas Democrat will use for his filing comes from press reports, and Bell has been working with Melanie Sloan, a former aide to Rep. John Conyers (D-Mich.) who now runs a Congressional watchdog group, to draft the complaint.³¹

On the same day the document was filed, CREW issued a press release with the headline "CREW Assists Chris Bell (D-TX) in Drafting Ethics Complaint Against Majority Leader Tom DeLay (R-TX)."³² This press release boasted:

CREW assisted Congressman Bell in drafting the complaint because, as CREW's Executive Director Melanie Sloan stated, "no other member of the House has consistently shown this much disrespect for the rule of law and the honor of Congress and the country should thank Congressman Bell for his courage."³³

Perhaps most importantly, *The Hill* then reported that "Melanie Sloan, the executive director of Citizens for Responsibility and Ethics in Washington (CREW), *who drafted the complaint for Bell, said the lawmaker first approached her.*"³⁴

As a Member, I am sure you are aware that CREW sent a letter to every Member of the House on March 31, 2004 looking for someone to file the allegations that later became Count I of the document that was filed on June 15. Notably, the Committee's Memorandum recognizes the lack of factual support for the allegations.

A further review of CREW's agenda proves the wisdom of the rationale for House Rule 24. It also proves the necessity for, and the value of, the good faith certification requirement of Committee Rule 14(a)(2). Moreover, the overtly partisan conduct of the so-called independent organization undermines Representative Bell's filing and brings his motivations further into question.

According to CREW's own website, it claims to be a "nonpartisan" "watchdog group" while at the same time openly acknowledging its political goal "to counterbalance the conservative legal watchdog groups that made such a strong impact over the past decade."³⁵ In the "About Us" section, CREW lists *only one* employee, Melanie Sloan, whose resume includes tenure with prominent Democrat Congressmen and Senators including John Conyers, Charles Schumer, and Joe Biden.³⁶ The fact that Sloan, with her extensive Democrat political pedigree, is the *only* identified CREW employee is highly suggestive of a lack of impartiality within the organization.

Rather than speak from an independent, nonpartisan, and objective position, Sloan has frequently used salacious and inflammatory language to target Republicans, notably the Majority Leader. Of the 24 press releases published on its website, at least 25% mention the Majority Leader's name (with language mirroring the wording of Representative Bell's allegations).³⁷ As evidence of CREW's partisan political agenda, Sloan made the following comment in a speech given on March 2, 2004:

Congress has become Tammany Hall with Majority Leader Tom DeLay as Boss Tweed. On a daily basis, and with total impunity, Mr. DeLay proudly extorts money from lobbyists and sells legislation.³⁸

Consistent with Sloan's strongly biased rhetoric, contributions to political candidates by members of CREW's Board of Directors³⁹ and staff have been overwhelmingly targeted to the Democrat party. From 1995 until the 2004-campaign cycle, CREW Board Members and staff have contributed a total of \$125,245 to Democrats compared with only \$16,013 contributed to Republicans. A summary of these contributions is below:

- Outside Counsel Norman Eisen has contributed \$5,750 to Democrats, but only \$250 to Republicans.⁴⁰
- Board Member Louis Mayberg has contributed \$6,000 to Democrats, but only \$2,000 to Republicans.⁴¹
- Board Member Mark Penn has contributed \$4,250 to Democrats, but nothing to Republicans.⁴²
- Board Member Daniel Berger has contributed \$119,425 to Democrats, but only \$13,763 to Republicans.⁴³ Berger has also received \$109,500 in payments from the Democratic National Committee ("DNC"), including \$25,000 for DNC Redistricting in 2001.⁴⁴

Of the twenty plus investigations that CREW has called for or initiated since its formation in 2001, only one has involved a Democrat.⁴⁵

The subterfuge practiced upon the Committee by Representative Bell and CREW is not cured by the fact that the information was filed by a sitting Member of the House.⁴⁶ Such logic would put the Committee in the untenable position of being paralyzed if its investigative authority has been wrongfully invoked by the submission of an ostensibly official document, which in truth, was prepared in whole or part with private resources in violation of House Rule 24. The Committee would be allowing a Member and an outside group to do indirectly what they would be barred from doing directly.⁴⁷

The taint surrounding official business, which actually was prepared in whole or part by private resources, is an evil the Committee has fought for years. Consider the irony presented by such a circumstance: an outside private group that has wrongfully insinuated itself into the official processes of a Member's office can, by artifice, indirectly trigger the investigative authority and deadline schemes of the Committee. And, a Member in clear violation of House Rule 24,⁴⁸ who leads the Committee to believe the information he or she has provided as a complaint has been prepared solely with official resources, could trigger the same authorities and procedures. Neither the Chair nor Ranking Member of the Committee can invoke investigative authority. They can "gather information,"⁴⁹ but the only way they can obtain investigative authority,

absent a properly filed complaint, is to move the full committee, on its own initiative, to establish an Investigative Subcommittee by majority vote of the Committee.⁵⁰

The House Rules, carefully reconsidered as recently as 1997, did not mean to create a situation whereby non-Members and a Member of the House in violation of House rules would have greater power to start the process than that possessed by the Chairman and Ranking Member of the Committee.

II. THE ALLEGATIONS OF REPRESENTATIVE BELL AND CREW VIOLATED HOUSE RULE 15, WERE SUBMITTED IN BAD FAITH, AND RESULTED IN MEMBER AND NON-MEMBER CIRCUMVENTION OF HOUSE AND COMMITTEE RULES.

A. Allowing These Allegations to Achieve Complaint Status Created Legal Unfairness, Letting an Errant Member Avoid Accountability.

First, the true source of information presented to the Committee as a complaint against a Member of Congress should be disclosed in the filing documents, and the real party in interest should be required to verify under oath that the information is true and correct.⁵¹ A contrary process enables the outside private source to be sheltered from civil liability in our court system by laundering scurrilous allegations through a Member of Congress who is, for the most part, protected by the Speech and Debate clause.⁵² And, the Member who does the laundering can avoid accountability⁵³ if the information that was offered by an outside group for inclusion in the complaint was not offered in good faith. Had the outside private source followed proper procedure by taking ownership of its work product, finding a Member to certify in writing that he or she believes that information submitted is in good faith, and warranting its review and consideration of the Committee, the outside private source would not have found such a safe harbor from possible civil action. Such considerations must have been in the minds of Members when they redrafted the ethics rules.

B. The Allegations are Replete with Speculative Assertions, Innuendo, and Conclusory Statements, Violating Committee Rule 15(a)(4).

The information offered to the Committee was full of innuendo, speculative assertion, or conclusory statements in violation of Committee Rule 15(a)(4).

The allegations of Representative Bell and CREW were not only false and devoid of any actual evidence of wrongdoing, they were also laden with innuendo, riddled with speculative assertions, and rife with conclusory statements—all of which were couched as “facts.” However, the document filed contained no honest, factual allegations. While the Committee operates as a peer review process, it is instructive to review the positions

of courts regarding insufficient allegations, since the basis for Committee Rule 15(a)(4) is analogous to the well-pled complaint rule of courts: encouraging tribunal efficiency, barring frivolity, and encouraging good faith by all who come to the Committee.

All judicial tribunals abhor, and reject, speculative assertions, innuendo, and conclusory statements. It is long recognized that courts “need not swallow the plaintiff’s invective hook, line and sinker; bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited.”⁵⁴ Throughout the allegations, Representative Bell and CREW unremittingly attempt to rely on conclusions, speculation, and innuendo masquerading as facts, in an attempt to muster a valid allegation. For example, the allegations assert:

Lawrence emailed a reply to Lake, explaining that the donations were needed for Westar to “get a seat at the table,” in effect clearing the way for the passage of an amendment to the energy bill that would have saved Westar billions of dollars

Absent a factual basis, the implication—*via* innuendo—is that donations referenced in the email “clear[ed] the way for the passage of an amendment to the energy bill.” The allegations contain no evidence suggesting such a connection. Put frankly, this is because the charge is totally false and cannot be supported by facts that do not exist.

Courts also recognize that requiring the complainant to allege facts with specificity and particularity is especially important when the target of the complainant’s allegations is a federal official. For instance, in *Herbage v. Meese*⁵⁵ the Court stated:

[b]ecause conclusory allegations of...illegal conduct will not withstand a public official’s dispositive pretrial motion, and because plaintiffs cannot expect the court’s assistance in obtaining the necessary factual support, plaintiffs bringing suit against public officials generally must put forward, in their complaints or supporting materials, greater factual specificity and ‘particularity’ than is usually required.⁵⁶

This Court concluded, as the Circuit Court did in *Martin v. Malhojt*, “that this case clearly does not warrant ‘a fishing expedition in government waters on the basis of wholly unsubstantiated charges.’”⁵⁷

Through their allegations, Representative Bell and CREW attempted to undertake a prohibited “fishing expedition,” wasting the valuable time and resources of the Committee. Consider the following speculative assertion:

As a result, even without finding that Rep. DeLay solicited money in violation of 18 U.S.C. §201(b)(2) or clause 3 of House Rule XXIII of the Standards of Official Conduct, the Standards of Official Conduct Committee should still find that Rep. DeLay was “dispensing special favors” in violation of the House Rules. . . Thus, the Westar “get a seat the table” e-mail, together

with the temporal proximity of the contributions and the legislative action taken regarding the “Westar amendment” establishes a prima facie case that Rep. DeLay violated both federal statutes and House rules . . .⁵⁸

I also direct your attention to the use of innuendo and even falsification of fact undertaken by Representative Bell and CREW in their allegations regarding the contact that the Majority Leader’s staff had with executive agencies, *see infra*.

C. Non-Members Attempted to Manipulate the Committee System, Acting in Bad Faith.

The Members of the House expect that those who approach the Committee will do so in good faith and with clean hands. Those offering information to the Committee should respect the difficult assignment of the Committee as it undertakes to administer fair play to Members while protecting the integrity and honor of the House. Members or non-Members approaching the Committee should be able to show that their conduct is fair, equitable, and honest as to the particular controversy in issue.

There have been many times when the peer review process has worked well, but it doesn’t work well when someone attempts to use the Committee for partisan political purposes. Personal animus and hatred must be weeded out of the system, and the Committee should never allow itself to be used to promote the growth of private outside groups and media interests who profit when they promote an “ethics scandal.”

On March 2, 2004, CREW released a Statement of Melanie Sloan, its Executive Director which included the following comments:

Never in the history of our country has corruption in the nation’s capitol been so rampant and so unchecked, yet the House Standards of Official Conduct Committee sits back and does nothing, a veritable paper tiger....Members of the House of Representatives are committing federal crimes and getting away with it. Bribery, extortion and money laundering are commonplace in the Ethics Free Zone that the House has become....Not only is the Ethics Committee responsible for this deplorable state of affairs, the Department of Justice shares the blame....The House Standards of Official Conduct Committee and the Department of Justice are charged with maintaining the integrity of our government and its high time they both started doing their jobs.

Then, on March 10, 2004 CREW, in collaboration with other outside groups, issued a statement urging the Speaker and Democratic Leader to overhaul the House ethics oversight process, which the groups described as “effectively dead.”

In response to these diatribes, discussed *supra*, the Committee circulated a well-reasoned and thoughtful Dear Colleague on March 11, 2004. Footnote 3 of that letter states that failure of a filer of a complaint to “publicly disclose his or her action, and, indeed, the

decision of a complainant to refrain from making a public statement may be taken as an indication that the action is not motivated by political considerations.”⁵⁹ In stark contrast to the letter’s wisdom, Representative Bell and CREW undertook activities for the sole purpose of creating an “ethics scandal,” using the Committee as a foil. Neither could see beyond their political goals to recognize the impact such negative publicity could have on your institution or the peril in which their activities place the reputation and integrity of the House. Nor do their subsequent actions show that they have any concern whatsoever about those issues. This is *exactly* why the House limited the outside groups and created the good faith certification.

These individuals and organizations were strictly in pursuit of their own agendas. The ideals of fair play for the accused or the sanctity of the process were lost on them. These entities, which along with CREW include Judicial Watch, Campaign Legal Center, Center for Responsive Politics, Common Cause, Democracy 21, Public Campaign, and Public Citizen, continued their attempts to insert themselves into the ethics process by characterizing anything less than the formation of an investigative subcommittee as an abdication of responsibility on *the Committee's* part.⁶⁰ They ignored and insulted the Committee's mandate to do its work in an impartial manner, uninfluenced by bias. They blatantly disregarded the Committee's obligation to provide a fair procedural framework for the conduct of the Committee’s business.

CREW and their allies did not approach the Committee with clean hands, and they did not act in good faith. As *The Hill* described it,

the filing by Representative Bell and CREW “follows a month of concerted activity by a self-described ethics coalition, a network of mostly left-leaning good-government groups that has tried to spur lawmakers to pursue more vigorously allegations of wrongdoing by their colleagues.”⁶¹

Notwithstanding the Committee's previous attempts to stop this harmful activity, Representative Bell and CREW drove the ethics allegations in the press through frivolous conflict of interest objections. In its July 15, 2004 media advisory, CREW accused the Committee of being incapable of making an impartial decision:

Appointment of an Outside Counsel is particularly crucial due to some Ethics Committee Members’ serious conflict-of-interest. Four out of the five Republican Committee Members have received campaign contributions from one of DeLay's political action committees, totaling \$28,504 over the past seven years, as reported by the Austin American-Statesman, according to documents obtained from the Federal Election Commission.⁶²

In a July 15, 2004 *Roll Call* article, Sloan accused the Committee of being unable of making a nonpartisan ruling:

No matter what decision the ethics committee makes, it’s going to be seen as a political decision.⁶³

In an effort to pressure the Committee, CREW involved other third party groups. I am sure you know that DriveDemocracy.org boasted about getting 10,000 signatures on petitions, which they delivered to the Committee, calling on the Committee to investigate the allegations made by Representative Bell and CREW.⁶⁴ Like all of the organizations coordinating in this endeavor, its composition bears some scrutiny, as would the identity of the “10,000 signatures” used in their petitions. DriveDemocracy.org has prominent links on its website to MoveOn.org, an Internet-based advocacy organization that runs advertisements critical of the Bush Administration and the affiliated DemocracyforTexas.org.⁶⁵ According to DriveDemocracy.org:

The grant from MoveOn.org comes from the remaining proceeds of MoveOn’s powerful Defending Democracy campaign, which raised \$1 million in 2003 to educate voters about Republican U.S. Rep. Tom DeLay’s unprecedented mid-decade Congressional redistricting plan for Texas. DeLay’s plan disenfranchised millions of Texas voters by radically altering Congressional district lines. MoveOn’s leadership believed the remaining proceeds from the campaign should be used in Texas in ways that pay ongoing dividends to ordinary citizens.⁶⁶

For the record, the “plan that disenfranchised millions of Texas voters” was certified by the Justice Department on December 19, 2003 as not violating the Voting Rights Act.⁶⁷ In addition, Glenn Smith, the head of DriveDemocracy.org, is a former political consultant and spokesman for MoveOn.org.⁶⁸ Perhaps most concerning, Nathan Wilcox, named by DriveDemocracy.org as one of two staffers for the web site, appears to also be the spokesperson for candidate Richard Morrison, the Majority Leader’s opponent in the upcoming 2004 election.⁶⁹

Then, another so-called independent watchdog group attempted to again insert itself into the machinations of the Committee by questioning its comments about the appointment of an outside counsel.⁷⁰ Democracy 21, an organization that is partly funded by George Soros,⁷¹ argued that the Committee misunderstood the standard for whether or not an outside counsel should be appointed.

Even in mid-September when the Committee was completing its investigation of the unfounded charges and finalizing its deliberations, CREW and others continued to publicly disparage the Members of the Committee, the Committee, and the House. Prior to any Committee public statement or decision, Melanie Sloan spewed insinuations about the Committee's processes and the outcome. In *Roll Call*, Sloan was quoted as saying,

“It is incredible that they managed to manipulate the system to keep it from ever being investigated,” Sloan said. “It is just astonishing that the process can be manipulated that way. The rules are already bad enough as they are.”⁷²

Responding to the attacks of Sloan and inaccurate reporting, the Committee leadership immediately issued a public statement noting that the “fact-gathering process is

continuing and may not be completed” for another five days.⁷³ Furthermore, the Committee specifically stated that “[w]hile we have been reviewing and discussing the information that has been obtained to date, we have not yet made any determinations regarding disposition of the complaint.”⁷⁴

Following up on the Committee's public statement, Chairman Hefley categorically dismissed⁷⁵ the published report that claimed the probe could end on a “procedural technicality” because of a disagreement between him and Ranking Member Mollohan. Notwithstanding this very public correction, CREW and others ignored the statements of the Committee and charged ahead with additional baseless allegations and comments that insult the integrity of the Committee’s Members, the Committee and the House as an institution.⁷⁶ Once again, Sloan took aim at the entire Committee and the House:

They might as well disband the ethics committee and call it a day. The House has no interest in policing its members, despite its constitutional duty to do so. They clearly don't care about ethics. If DeLay can go unchecked, this is just encouragement that they'll never face any consequences. Democrats and Republicans alike don't want ethics complaints filed. It would be really unpopular, cover up rather than uncover bad conduct.

All of this rhetoric was issued prior to any decision of the Committee.

If Representative Bell and these outside organizations had truly acted in good faith and without political motivation, then they would have allowed the Committee to do its work without the public attempts to unduly influence and pressure it and its Members.

Finally, House Rules provide:

A Member, officer, or employee of the House of Representatives shall conduct himself at all times in a manner which shall reflect creditably on the House of Representatives.⁷⁷

I am certain you will all agree that attempts to abuse the Committee and its processes for overtly political purposes displays disdain for the House, casting discredit on it and violating the letter and spirit of its rules.⁷⁸

In this vein, the bipartisan staff of the House Commission on Congressional Mailing Standards (commonly known as the “Franking Commission”) recently blocked Representative Bell from distributing two “Dear Colleague” letters concerning his allegations.⁷⁹ As Chairman of the House Administration Committee, which oversees the Franking Commission, Chairman Ney stated that Representative Bell “is blatantly sending over-the-top, political, partisan ‘Dear Colleagues’ and he knows it...[A Dear Colleague letter] may not be political, and our rules say it may not be personal.”⁸⁰ As you are aware, the *Congressional Member’s Handbook* states that “inside mail service may not be used to circulate letters which are personal or campaign-related.”⁸¹

I am informed that Representative Bell also abused guidelines related to the Franking Commission by sending letters on official letterhead and under the government frank that included Dear Colleague letters deemed by the House Administration Committee as political and partisan.

III. CONGRESS HAS THE POWER TO FIND MEMBERS AND NON-MEMBERS IN CONTEMPT.

Contempt is a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceeding by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.⁸²

A. Legal Standard for Contempt of Congress.

The Constitution, Article I § 5 expressly confers upon each house of Congress the power to punish its members. Congress also has the power to punish non-Members for contempt. Congress has held non-Members in contempt for a range of violations, including intimidation and assault on a Member,⁸³ attempted bribery of a Member,⁸⁴ libeling of a Member,⁸⁵ and – in the majority of the instances – for refusal to obey the commands of a Congressional committees.⁸⁶

The non-Member test for contempt is whether the contemptuous conduct is of the nature to obstruct the performance of the duties of the legislature, having occurred in connection with proceedings of a legislative character or in the course of an inquiry that was within the legitimate scope of the legislative functions of the body.⁸⁷ This implied power to deal directly with non-Member contempt reaches “as far as is necessary to preserve and exercise the legislative authority expressly granted.”⁸⁸

While Congressional power to punish for contempt may not be extended to slanderous attacks that present no immediate obstruction to the legislative process,⁸⁹ historical precedent exists demonstrating that Congress may find non-Members in contempt when their actions – such as libel, intimidation or assault – do obstruct legislative duties or the integrity and dignity of Congress.⁹⁰ No recent authority exists to suggest that Member or non-Member conduct that obstructs the legislative process, including violations of House or Committee rules or libel against a Member, is immune from a contempt finding.⁹¹

Furthermore, the House has the power to punish a Member or non-Member solely as punishment for a past and completed act.⁹² As the Supreme Court noted, “the function of the contempt process by a legislative body is perhaps more related to deterrence of those disposed to create disorders than to restoring order.”⁹³

B. Representative Bell and CREW May Be Found In Contempt of Congress For Conduct Before The Committee.

As a Member, Representative Bell is clearly subject to sanction for contempt of Congress by the House. He violated House and Committee rules in invoking the investigative authority of the Committee, and may be dealt with accordingly.

Similarly, CREW is subject to the contempt power of the Committee.⁹⁴ Representative Bell and CREW violated House and Committee rules by failing to disclose CREW as the drafter and real party in interest of this complaint. Had CREW not instigated the House process, CREW arguably would be outside of the Committee's jurisdiction. However, CREW became the driving force behind this complaint by soliciting Members to bring the complaint on its behalf, drafting and researching the complaint, effectively bringing the complaint before the Committee all the while violating House and Committee rules, and then publicly admitting its involvement and flaunting its violations.⁹⁵ Having insinuated itself into the system, CREW has brought its complaint – and itself – before the investigatory authority and jurisdiction of the Committee and the House of Representatives. Accordingly, CREW may not avoid sanctioning for disregard and abuse of House processes for what it has done and for what it continues to do.⁹⁶

IV. REPRESENTATIVE BELL AND CREW'S ACTIONS VIOLATE HOUSE AND COMMITTEE RULES AND CONSTITUTE LIBEL.

The violations and defamatory statements discussed above improperly impede and obstruct the legislative duties and processes of the House, the Committee, and the legislative process.

A. The Violations of House Rule 24 and Committee Rules 14 and 15 Constitute Contempt of Congress by Representative Bell and CREW.

As discussed above, Representative Bell and CREW attempted to initiate the investigative authority of the Committee without adhering to the jurisdictional and procedural requirements set forth in House or Committee rules.

Together, Representative Bell and CREW devised a scheme whereby the work of CREW could be injected into the House processes. Utilizing a privilege, Representative Bell represented the information offered in the complaint to be his efforts and his grievance. Given the public statements of Representative Bell and CREW, Representative Bell appears to have violated House Rule 24, use of in-kind support from private sources.

Representative Bell's violation of House Rule 24 is not without consequences. By accepting private outside resources – but not disclosing such sources – Representative Bell perpetrated a fraud upon the Committee. The false allegations of a private outside group were presented to the Committee as the official work of a Member.⁹⁷

Concealing the identity of CREW as a party in interest allowed Representative Bell and CREW to avoid the necessity of swearing the complaint was brought in good faith.⁹⁸ The Committee, therefore, was not informed that the complaint was drawn up by a group that promotes an agenda that includes the disparagement of the House, its Members, the

Standards of Official Conduct processes, the existing campaign finance laws, the rules of the House, and the rules of the Committee.⁹⁹ In fact, these allegations, which diminish public confidence in the House, are frequently found in the fundraising letters circulated by CREW and other similar outside groups.

This improper circumvention of procedural and jurisdictional rules disrupts and obstructs the Committee's duties, as delegated to it by the House. By violating Committee Rule 14(a)(2), CREW's complaint sought to invoke the legislative authority of the Committee, without exposing itself or Representative Bell to the Committee's prerogative to enforce the "good faith" rule and otherwise honor the carefully drawn rules regarding filings by outside groups. The Task Force, in creating the sponsorship system, specifically required the good faith certification to "increase Member accountability."¹⁰⁰ Representative Bell and CREW's concealment squanders legislative resources in that the Members of the Committee and its staff must investigate the true source of the overtly partisan allegations to determine procedural propriety. It is this very use and abuse of House resources for partisan gain that the Task Force sought to end in 1997.¹⁰¹

B. The Malicious, Libelous Statement That Majority Leader DeLay Committed a Crime by Violating the Illegal Gratuity Statute Constitutes a Contempt of Congress by Representative Bell and CREW.

Representative Bell and CREW misstated the illegal gratuity statute by failing to include the word "personally" in the legal standard, and then alleged that Majority Leader DeLay violated the illegal gratuity statute. In so doing, Representative Bell and CREW falsely accused Majority Leader DeLay of a felony. The malicious accusation that he committed a crime is a blatant lie and constitutes libel *per se*.¹⁰²

A statement is libelous *per se* if, on its face, it imputes criminal conduct, moral turpitude, or is damaging to a business or profession.¹⁰³ If the libel had been committed outside the Congress a public official would have to show: (1) the accused made statements concerning the public official; (2) those statements were published; (3) the statements were of provable fact; (4) the statements of fact were false; and (5) the statements were published with actual malice, which is legally defined as knowledge of the falsity or with a reckless disregard for their falsity.¹⁰⁴

The rule that requires proof of actual malice does not necessarily apply to libels committed before Congress. A congressional proceeding to adjudge contemptuous conduct committed before the Congress is a prerogative of the legislative process;¹⁰⁵ therefore, the standard for determining a libel is the exclusive province of Congress. Even so, in this case, the libel committed by Representative Bell and CREW easily meets the higher standard for proving a libel in a court of law.

Consider, for example, that in cases of third-party publishers,¹⁰⁶ the clear and convincing evidence that a false statement of fact was made with knowledge of its falsity or with a reckless disregard for its falsity may be established by showing: (1) the false statements

were so highly improbable under the circumstances that the publisher was placed on notice of their falsity; (2) the source had a known bias toward the public official; (3) the source was a political opponent of the public official; (4) the source had animosity towards the public official; (5) the publisher knew the source had no personal knowledge of the information relayed; (6) the publisher bore ill-will against the public official; (7) the publisher grossly deviated from acceptable professional standards; (8) the publisher inadequately investigated under the circumstances, knowing that damage would occur if the statements were false; (9) verifying the accuracy of the statements would have been easy but was unexplored; or (10) the publisher had a preconceived idea for story which was adhered to in spite of substantial contradictory evidence.¹⁰⁷

The actions of Representative Bell and CREW fulfill each and every one of the foregoing elements for proving libel with actual malice. The libelous nature of the allegations is obvious from the face of the complaint. Representative Bell and CREW asserted in the complaint that:

[Majority Leader DeLay] also violated the federal gratuity statute, 18 U.S.C. 201(c), which provides that a public official who demands, seeks or agrees to receive anything of value for or because of any official act performed or to be performed by such official is guilty of an offense.¹⁰⁸

The actual provision of 18 U.S.C. § 201(c), 18 U.S.C. § 201(c)(1)(B), provides:

being a public official...[who]...accept[s]...anything of value *personally* for or because of any official act performed or to be performed by such official ...shall be fined under this title or imprisoned for not more than two years, or both.¹⁰⁹

The complaint misstates the language of the illegal gratuity statute, by dropping the word “personally” from the legal standard.¹¹⁰ The complaint also gratuitously cites, and attaches as exhibits,¹¹¹ the cases of Representative Biaggio and Representative Flood, which were cases where the Members of Congress were charged with receiving money personally, an indispensable element of the crime of receiving an illegal gratuity. The “personally” element should not, in fact cannot, be overlooked, because the illegal gratuity law is not violated by the receipt of campaign funds unless it is established that the money has gone to the accused *personally*.¹¹²

But here, Majority Leader DeLay did not receive the contributions for his personal benefit;¹¹³ that cardinal fact being not only stated in the complaint itself, but also proven by the Federal Election Commission and other governmental disclosures and filings.¹¹⁴ Despite those indisputable facts, the complaint asserts in two places that Majority Leader DeLay committed the crime of receiving an illegal gratuity. These accusations of crime and the references to Biaggio and Flood were intentional. They were made for the express purpose of making it seem that Majority Leader DeLay had received money personally and was therefore guilty of the crime of receiving an illegal gratuity.

Since Representative Bell and CREW drafted the complaint, they knew that the facts alleged (and known) failed to support a violation of the illegal gratuity statute. The contributions from Westar were not received by Majority Leader DeLay personally, did not inure to his benefit personally, and were not received by any sort of sham organization that would funnel the money to him personally. Accordingly, Representative Bell and CREW's accusation that Majority Leader DeLay violated the illegal gratuity statute was made with actual malice, *i.e.* they had explicit knowledge of the falsity of the accusation; or, they made the allegations with reckless disregard for truth or falsity.

Under these circumstances, libeling a Member of Congress in a complaint filed before the Committee disrupts the legislative process, is an obstacle to the Committee's duties, and brings undue harm to the reputation of the Member, the House, and the integrity of the system.

C. The False and Libelous Statements Alleging that Majority Leader DeLay Misused Federal Resources Constitute Contempt of Congress by Representative Bell and CREW.

In the complaint, Representative Bell and CREW mischaracterize and misattribute actions regarding contact with the Federal Aviation Administration ("FAA") and the Department of Justice ("DOJ") to Majority Leader DeLay and his staff.

Specifically, Representative Bell and CREW: (1) falsely attribute all contacts with the FAA and all subsequent FAA action to Majority Leader DeLay or his staff; (2) falsely allege that Majority Leader DeLay's staff requested the DOJ's assistance in enforcing the Texas arrest warrant; (3) falsely attribute all requests for information from the DOJ to Majority Leader DeLay or his staff; and (4) falsely claim Majority Leader DeLay or his staff contacted the Federal Bureau of Investigation ("FBI").¹¹⁵ Representative Bell and CREW knowingly included these allegations despite their falsity. Each of the false allegations was clearly contradicted by the three government investigations that already investigated the matter.¹¹⁶

Accordingly, the false and defamatory statements contained in the complaint are libelous and made with actual malice. For the reasons stated above, these libelous statements also obstruct the legislative process and the Committee's duties.

V. REPRESENTATIVE BELL AND CREW COULD BE HELD IN CONTEMPT OF CONGRESS.

Representative Bell and CREW have demonstrated contemptuous behavior toward the House and the Committee by improperly obstructing and interfering with the legislative process before the Committee through violations of House and Committee rules and by libeling a Member in the process. As set forth above, Representative Bell and CREW have obstructed the legitimate performance of the duties of the Committee, abused legislative resources, and impugned the integrity of the system.

To preserve the letter and spirit of the House rules and Committee rules, Representative Bell and CREW could be found in contempt of Congress for violations of House and Committee rules and for libeling a Member. The propriety of such a finding is supported by four broad areas of conduct that reveal their malicious and intentional purposes.

First, Representative Bell and CREW's conduct illustrates contempt for the law. CREW disagrees with the current system of campaign finance and asserts that campaign contributions improperly influence and corrupt officials. Rather than seeking to alter the system of campaign finance in a straightforward manner, CREW has hijacked the official, internal ethics processes of the House for its baseless accusations, which serve CREW's own self-proclaimed agenda of "counterbalance[ing] the conservative legal watchdog groups." Advocating for campaign finance reform is well within CREW's rights, but abusing the House investigative authority and libeling Majority Leader DeLay before the Committee is contemptuous of the rule of law.

Second, Representative Bell and CREW's conduct illustrates contempt for the House, its rules, and its dignity and honor. The procedural and jurisdictional deficiencies of the complaint demonstrate a blatant disregard for the well-reasoned rules of the House. Having to even consider the false accusations of Representative Bell and CREW deprives this House and its Members of the time necessary to carry out their other duties.

Third, Representative Bell and CREW's conduct illustrates contempt for the Committee, its rules and processes, and its Members. Representative Bell and CREW's failure to follow House and Committee rules, along with CREW's public statements and fundraising efforts alluding to this complaint, demonstrate their disrespect for both the letter and spirit of the established rules of the Committee.

As discussed, CREW "shopped around" for a Member to bring these unfounded allegations, and—in the end—convinced a Member to do so under his own name, in violation of the Committee rules. CREW has publicly flouted its disregard for the Committee rules. As a co-signer of a letter published, CREW openly questions the integrity of the Committee and the honor of its Members by implying that the Committee abdicates its duties of investigating "even the most egregious charges until intense media and public interest in particular cases forced the Committee's hand."¹¹⁷ In furthering their own political vendettas and agendas, Representative Bell and CREW create a media frenzy and political hype injuring the reputation of the Committee and its Members.

On the eve of election, the media is all too willing to publish the allegations, without regard for their truth, against a sitting Member of Congress. In fact, CREW's carefully

orchestrated strategy of issuing public statements, filing the complaint and then making wild allegations impugning the integrity of the Committee¹¹⁸ simply perpetuates its fundraising prowess.

Both Representative Bell and CREW have violated House rules and presented libelous statements against a Member to the Committee, and then questioned the integrity of the Committee, publicly pressuring the Committee to relinquish its peer-review role. Committee Members and their staff were forced to spend substantial time and resources investigating the unfounded claims and inadvertently furthering others' partisan motives and aspirations. At the same time, remarkably, the Majority Leader was forced into a position of trying to prove a negative. The false allegations and malicious conduct of Representative Bell and CREW, which are indisputable, discredit the House far more than the inescapable appearances of impropriety created by the current political financing system. Virtually every Member of the House who raises political money is vulnerable to a contention that his or her conduct is or has been improperly influenced by political contributions, even as the law and rules of the Committee expressly permit Members to raise funds from those who may have legislative interests before the House or the Member's committee.

Finally, Representative Bell and CREW's conduct demonstrates contempt for Majority Leader DeLay personally. In an effort to further their partisan and vindictive agendas, Representative Bell and CREW included two counts of libelous material in their complaint. This libel undermines the credibility of not only the Majority Leader, but also the credibility of the House, the Committee, and the legislative process.

VI. CONCLUSION

To preserve the integrity and honor of the House of Representatives, both CREW and Representative Bell (who aided and collaborated with CREW) could be found in contempt for their violations of House and Committee rules and for libeling Majority Leader DeLay. At a minimum, there could be a resolution of disapproval or the rules of the House could be reformed to prevent similar abuses of the process in the future.

Like you, I know the House does not want to do anything that might discourage Members from filing complaints that are fully justified. However, an appropriate rebuke, based on the egregious conduct in this case, will not deter Members from filing justifiable complaints when such complaints merit the Committee's review. On the contrary, it will assure all Members and the public that the Committee process and its rules can be trusted to operate on the principle of good faith. It will also signal to all Members that the processes and rules of the House will be followed in both letter and spirit. If appropriate action is taken by the House, then it will lessen the inclination that other Members might have to engage in such contemptuous collaborations. Neither Representative Bell, by being a Member, nor CREW, by its attempt to avoid the jurisdiction of the Committee, is impervious to a citation for contempt of Congress.

To ignore this abuse of the peer process would demean the process, undermine the rights of your colleagues, further divert legislative resources, and damage the reputations of the House and its Members.

Finally, I would encourage you and the House Rules Committee to carefully evaluate the method employed by the Committee in this matter. It is quite different than anything the Committee has ever done. This was an inquiry into events that occurred as much as two years ago. The Committee, under its authority to “gather information,” collected documents and written statements from a number of witnesses including Mr. DeLay. At no time in the process did the Committee share the information it was collecting with Mr. DeLay even though most of it was exculpatory and a request to see such information was submitted to the Committee. Cloistered, the Committee reached its decision on a matter of great importance to the House and to Mr. DeLay without ever affording him the opportunity to see the exculpatory information or cross-examine what the witnesses were telling the Committee.

The Committee never told Mr. DeLay of the findings it made public last night until two hours before it released its 44 page Memorandum and a ream of attachments to the public. Consequently, Mr. DeLay never had an opportunity to appear and argue his position, and there was no offer to allow Mr. DeLay the courtesy of submitting a comment that could be published along with the Committee’s report. Meanwhile, for all the public knows, this was a fair proceeding, and Mr. DeLay was afforded all the rights and privileges that Americans take for granted. Nothing could be further from the truth. This is another reason why I am writing to you today. Mr. DeLay is entitled to be heard even if comes too late to change the Committee’s *unilateral* decision. This is a story that must be told, and this is an issue that the House must address *before* the Committee is presented with another set of scurrilous allegations that will leave an accused Member in such a defenseless and unfair position.

ERB

Enclosures

¹ Committee on Standards of Official Conduct, 108th Cong., 2d Sess., *Statement of the Committee regarding disposition of the complaint filed against Representative Tom DeLay*: Memorandum of the Chairman and Ranking Minority Member, October 6, 2004, 2, 24-30 [hereinafter *Committee Memorandum*].

² *Id.* at 29.

³ *Id.* at 1, 5-22.

⁴ *Id.* at 1, 20-21.

⁵ *Id.* at 10.

⁶ At our request—in keeping with Committee rules and practice—the Committee has deferred any consideration of Count II of the “complaint” inasmuch as those allegations concerned a well-publicized, highly partisan investigation that was initiated by the District Attorney in Austin, Texas. *Id.* at 2, 23-24.

⁷ *Id.* at 3.

⁸ *Id.* at 31.

⁹ *Id.* at 31-32.

¹⁰ Attached hereto is a true and correct copy of alleged "complaint" filed with the Committee by Representative Bell on June 15, 2004 and was dismissed by the Committee on October 6, 2004.

¹¹ See, e.g., *An Open Letter to the House Regarding the Ethics Oversight Process*, published in ROLL CALL (June 17, 2004) [hereinafter *CREW Letter*]. The letter was published a mere three days following the filing of the allegations with the Committee. Notably, the letter was signed by eight "watchdog" organizations. The letter was clearly prepared well in advance of the filing of the allegations: getting eight organizations to sign off on text and securing publication in a daily newspaper both take more than two days. This indicates that the filing was merely a launch of a concerted effort to create a media frenzy and backdrop against which to fundraise. The text of the letter states,

"An Open Letter to the House Regarding the Ethics Oversight Process

Esteemed Members of the U.S. House of Representatives:

This Tuesday, Congressman Chris Bell filed an ethics complaint against Majority Leader Tom DeLay with the House Committee on Standards of Official Conduct.

As an ideologically diverse coalition of the nation's leading watchdog organizations, we have been calling on the House of Representatives to overhaul its ethics oversight procedures, which have been effectively dead for the last seven years. In 1997, the House changed its ethics rules, forbidding outside groups like ours from filing complaints with the Ethics Committee, and establishing that only a member of Congress may trigger an investigation of a fellow member. At the same time, however, the members entered into an unwritten 'truce,' agreeing not to launch ethics complaints against each other. Additionally, the Ethics Committee has been reluctant to use its own authority to investigate even the most egregious charges until intense media and public interest in particular cases forced the Committee's hand.

We believe that Congressman Bell, by filing an ethics complaint that effectively breaks the seven year truce, has highlighted a real problem in the House ethics oversight system: the threat of retaliation against members who bring ethics complaints is so daunting that it has brought the oversight process to a virtual standstill. It takes a Member who is leaving Congress to file a complaint and trigger an investigation. Clearly, broader, systemic change is needed in the House, and we will continue to work toward that goal.

On March 11, 2004, Ethics Committee Chairman Hefley and Ranking Member Mollohan issued a letter in which they stated that they were 'fully committed to pursuing any credible claim that a Member or staff person has violated any provision of the House rules.' We expect the Committee to - as Mr. Hefley and Mr. Mollohan promised in their letter - 'apply the rules in a fair, non-partisan and even handed manner, to the end of protecting the integrity and the reputation of the House of Representatives.'

We sincerely hope that the Committee on Standards of Official Conduct will not abdicate its responsibility to thoroughly investigate the allegations against Majority Leader DeLay in a timely manner. The integrity of the House of Representatives is at stake.

Sincerely,

Citizens for Responsibility and Ethics in Washington
Judicial Watch
Campaign Legal Center
Center for Responsive Politics
Common Cause

Democracy 21
Public Campaign
Public Citizen

For more information go to www.citizensforethics.org”

See also Letter from Common Cause to Common Cause Supporters, *Help Us “Hammer” a Point Home* (August 3, 2004).

¹² *Dear Colleague from the Chairman and Ranking Minority Member*, March 11, 2004 Letter found at <http://www.house.gov/ethics/m_Committee_work_DC_letter_3-04.htm> [hereinafter *March 11 Letter*].

¹³ Committee on Standards of Official Conduct, 108th Cong., *Rules of the Committee on Standards of Official Conduct*, Rule 14 (March 19, 2003) [hereinafter *Committee Rules*].

¹⁴ *Id.* at Rule 14(a).

¹⁵ It is appreciated that there are other parts to Rule 14, but they are irrelevant in this context.

¹⁶ *Committee Rules*, *supra* note 13, at Rule 15.

¹⁷ HOUSE ETHICS REFORM TASK FORCE, 105TH CONG., 1ST SESS., *REPORT OF THE ETHICS REFORM TASK FORCE ON H. RES. 168 RECOMMENDING REVISIONS TO THE RULES OF THE HOUSE AND THE RULES OF THE COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT* 12 (Comm. Print 1997) (stating “the Task Force recommends strengthening the current transmittal method by proposing a new ‘sponsorship’ system, whereby the Member certifies to the standards Committee his belief that the complainant is acting in ‘good faith’ and that the allegations the non-Member is transmitting warrant the review and consideration of the Committee.”) [hereinafter *Task Force Report*].

¹⁸ *Id.*

¹⁹ 143 CONG. REC. H7555-7559 (daily ed. Sept. 19, 1997) (debating and voting on Murtha amendment, H.Res. 168).

²⁰ *Id.* at H7557.

²¹ See *Committee Rules*, *supra* note 13, at Rule 15 (requiring that a complaint submitted to the Committee by a non-member must reveal the name and address of the party filing the complaint; must be properly verified under oath; and written certification in writing from a member that he or she believes the information is submitted in good faith and warrants the review and consideration of the Committee.)

²² House Rule 24 is the former House Rule 45, both of which state, “A Member, Delegate, or Resident Commissioner may not maintain or have maintained for his use, an unofficial office account. Funds may not be paid into an unofficial office account.” United States House of Representatives, *Rules of the 108th Congress*, Rule 24 (visited July 15, 2004) <<http://www.house.gov/rules/RXXIV.htm>> [hereinafter *House Rules*]. See also Committee on Standards of Official Conduct, 102d Cong., 2d Sess., *Ethics Manual for Members, Officers, and Employees of the U.S. House of Representatives*, Chap. 6 (visited July 12, 2004) <http://www.house.gov/ethics/ethicschap6.html> [hereinafter *Ethics Manual*].

²³ *Id.*

²⁴ *In the Matter of Representative E.G. “Bud” Shuster*, U.S. House of Representatives, Committee on Standards of Official Conduct, 106th Cong. (Sept. 27, 2000).

²⁵ *Id.*

²⁶ Under the amended gift rules of the *Ethics Manual*, the provision of pro bono legal assistance is an acceptable gift under certain circumstances, which include: only where filing an amicus curiae brief, challenging a federal law or regulatory action, or participating in a civil action challenging the lawfulness of an action or a federal official or agency. However, the circumstances listed are not applicable in the case of filing ethics complaints. Applying the pro bono gift rule in for filing ethics complaints would lead to the absurd outcome of undoing the efforts of the Task Force to create separate vehicles for submission of complaints by Members and non-Members. The House intended and expects candor from submitters not deliberate obfuscation of parties involved. Moreover, the amended gift rule was drafted against the backdrop of the Committee Rule 14. Had the drafters wished to create an exception for pro bono legal assistance to Committee Rule 14, then they would have done so explicitly, defining “civil action” more

broadly to encompass legal representation before an investigative subcommittee. The language of House Rule 24 applies to civil and criminal actions in a judicial setting, not to congressional inquiries. For these reasons, the pro bono gift rule does not apply to filing of ethics complaints.

²⁷ Alexander Bolton, *Bell takes parting shot*, THE HILL, June 15, 2004, at 1 [hereinafter *Bolton*]. CREW's Sloan was then quoted in the *Houston Chronicle* as saying:

I think this filing will really push the ethics committee to take a hard look at this
When no one has been willing to do this for seven years, it is not an easy thing to suddenly go and file a complaint against DeLay, who is known to be one of the most vindictive people in government.

Julie Mason, *Ethics probe of DeLay sought*, HOUSTON CHRONICLE, June 14, 2004, at 1.

²⁸ *Bolton*, *supra* note 27, at 1.

²⁹ Representative Chris Bell, *Press Conference Transcript*, 4 (June 15, 2004) [hereinafter *Bell Transcript*].

³⁰ *Id.* at 8.

³¹ John Bresnahan, *Bell's Complaint Imperils Ethics Truce*, ROLL CALL, June 15, 2004.

³² Citizens for Responsibility and Ethics in Washington, Press Release, *CREW Assists Chris Bell (D-TX) in Drafting Ethics Complaint Against Majority Leader Tom DeLay (R-TX)* (June 15, 2004).

³³ *Id.*

³⁴ *Bolton*, *supra* note 27, at 1 (emphasis added).

³⁵ Citizens for Responsibility and Ethics in Washington, *About Us* (visited Oct. 5, 2004) <<http://www.citizensforethics.org>> [hereinafter CREW Website].

³⁶ *Id.*

³⁷ See, e.g., Citizens for Responsibility and Ethics in Washington, Press Release, *CREW FOIAS Report on Westar Campaign Contributions From FEC* (July 12, 2004); Citizens for Responsibility and Ethics in Washington, Press Release, *CREW, Common Cause, Call for Outside Counsel to Investigate Allegations Against House Majority Leader DeLay* (June 15, 2004); Citizens for Responsibility and Ethics in Washington, Press Release, *CREW Files FEC Complaint Against Bacardi PAC For Secret Contributions* (May 18, 2004); Citizens for Responsibility and Ethics in Washington, Press Release, *CREW Demands DeLay Bribery Investigation* (March 31, 2004); Citizens for Responsibility and Ethics in Washington, Press Release, *Bipartisan Watchdog Groups Call on Hastert, Pelosi to Fix House Ethics Oversight Procedures, Statement of Melanie Sloan, Executive Director* (March 2, 2004); and Citizens for Responsibility and Ethics in Washington, Press Release, *DeLay's Former PACs Have Failed to File Full Financial Reports with the IRS and the State of Texas* (November 10, 2003).

³⁸ Melanie Sloan, Citizens for Responsibility and Ethics in Washington, *Bipartisan Watchdog Groups Call on Hastert, Pelosi to Fix House Ethics Oversight Procedures, Statement of Melanie Sloan, Executive Director* (March 2, 2004).

³⁹ Citizens for Responsibility and Ethics in Washington, IRS Form 990, at 13, Filed for Tax Years 2001-2002.

⁴⁰ Political Moneyline (visited July 19, 2004)

<<http://www.tray.com/cgi-win/indexhtml.exe?MBF=NAME>>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Citizens for Responsibility and Ethics in Washington, *Index.php* (visited July 12, 2004) <<http://www.citizensforethics.org>>.

⁴⁶ Nor can it be perfected retroactively. A complaint cannot be amended without leave of the Committee. See *Committee Rules*, *supra* note 13, at Rule 15(g). Since such an action would require the substitution of the real party in interest, an outside group, it would in effect constitute a new filing and necessitate a restart of the automatic transmittal features of Committee Rule 16(d).

⁴⁷ *Ethics Manual*, *supra* note 22, at 15 (citing former House Rule 43, cl. 2).

⁴⁸ Rule 24 (formerly Rule 45) was in existence at the time of the 1997 Ethics Reform. It must be assumed that it would have been altered if the House had meant to allow a Member to use outside resources to organize or draft a document that would be filed as the official work of a Member of Congress. Since it was not changed, it plainly means that the House meant for Members to do official work without the help of outside private resources. If they wanted to assist an outside group they should do so only in accordance with Rule 14(a)(2), serving three important functions: 1) the Member would not violate Rule 24; 2) the proffered complaint would be tendered with a certification that it was being filed in good faith; 3) the identity of the outside group would be known so that the public and the House could examine its agenda; and 4) the ethics Committee would not be put in the untenable position of being a passive participant in such nefarious activities.

⁴⁹ See *Committee Rules*, *supra* note 13, at Rule 16(c). The “gathering information” authority is limited to the Chair and Ranking Member and allows only unsworn witness interviews and requests for the voluntary production of documents in connection with determining how to initially dispose of the complaint. See *Task Force Report*, *supra* note 17, at 16.

⁵⁰ *House Rules*, *supra* note 22, at Rule 14(a)(3).

⁵¹ *Id.* at Rule 15.

⁵² U.S. CONST. art. I, sec. 6, cl. 1. See, e.g., *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975); *Tenney v. Brandhove*, 341 U.S. 367, 376-377 (1972); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967); and *Powell v. McCormack*, 395 U.S. 486, 505 (1969).

⁵³ The Task Force, in creating the sponsorship system requiring a good faith certification, specifically said it was doing so to “increase Member accountability.” *Task Force Report*, *supra* note 17, at 13.

⁵⁴ *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26, 40 (1st Cir. 1998) (citing *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996)).

⁵⁵ 747 F. Supp. 60 (D.D.C. 1990).

⁵⁶ *Id.* at 64 (quoting *Martin v. Malhoyt*, 830 F.2d 237, 257 (D.C. Cir. 1987)).

⁵⁷ *Id.* (quoting *Martin*, 830 F.2d at 257).

⁵⁸ If this is a *prima facie* case, then every member of Congress is vulnerable if a contributor says anything that suggests the contribution was given to “build a relationship,” “ensure access” or words to that effect. Members cannot and should not be held accountable for what motivates a contributor to make a contribution. Such words spoken by a contributor do not make a *prima facie* case.

⁵⁹ March 11, 2004 Letter, *supra* note 12.

⁶⁰ *CREW Letter*, *supra* note 11. CREW signed this letter, which acknowledged the change in House rules that prevented outside organizations from filing complaints. Nonetheless, CREW openly and proudly disregarded this rule in colluding with Representative Bell on the filing.

⁶¹ *Bolton*, *supra* note 27, at 1.

⁶² See, e.g., Citizens for Responsibility and Ethics in Washington, Press Release, *Media Advisory Groups Call for Outside Counsel in Tom DeLay Ethics Probe* (July 14, 2004).

⁶³ John Breshnahan, *Watchdog Groups Seek Outside DeLay Counsel*, ROLL CALL, July 15, 2004.

⁶⁴ Star-Telegram Washington Bureau, *Petition demands DeLay ethics investigation*, FORT WORTH STAR-TELEGRAM, July 13, 2004.

⁶⁵ See Glen Justice, *George Soros Gives, And Republicans React With Fury*, THE NEW YORK TIMES, November 16, 2003 [hereinafter *Justice*]; DriveDemocracy.org, *Nail the Hammer* (visited July 19, 2004) <<http://www.drivedemocracy.org>>.

⁶⁶ *Id.*

⁶⁷ See Department of Justice, *Status of Statewide Redistricting Plans*, found at <http://www.usdoj.gov/crt/voting/sec_5/statewides.htm>; Press Release, Texas Secretary of State Geoff Connor, *Statement from Secretary of State Geoff Connor regarding the Department of Justice's pre-clearance of Plan 1374C, the congressional redistricting map approved by the Texas Legislature*. <<http://www.sos.state.tx.us/about/newsreleases/2003/12192003.shtml>>. On January 6, 2004, a three-judge federal panel upheld the new congressional redistricting lines, ruling that the new map adheres to the U.S. Constitution and the federal Voting Rights Act, and affirming the Legislature's right to redraw the state's political map more than once a decade. *Session v. Perry*, 298 F.Supp.2d 451 (E.D. Tex. 2004). The judges

were unanimous on most of the points cited in upholding the new plan. *Id.* On January 16, 2004, the Supreme Court denied a motion to stay the 2004 elections under the newly approved map.

⁶⁸ *Justice, supra* note 65.

⁶⁹ See “Who We Are” (visited July 19, 2004) <<http://www.drivedemocracy.org>>; see also Alexander Bolton, *Dean to barnstorm through Deep South*, THE HILL, May 5, 2004, at 1 (stating “I don’t know that Dean coming to the district is as important for us as calling on his network of supporters nationwide” for help, *said Nathan Wilcox, a spokesman for Morrison’s campaign*. “His fundraising power is ultimately where he’s really helpful.” (emphasis added)).

⁷⁰ Letter from Fred Wertheimer, Democracy 21 President, to Joel Hefley, Chairman of House Committee on Standards of Official Conduct (July 19, 2004).

⁷¹ Thomas B. Edsall, *Soros Buys Off Watchdogs, GOP Says*, THE WASHINGTON POST, November 18, 2003.

⁷² John Bresnahan and Damon Chappie, *DeLay Probe Faces Deadlock*, ROLL CALL, September 15, 2004 at 1.

⁷³ Statement of Chairman Joel Hefley and Ranking Minority Member Alan B. Mollohan, September 15, 2004 (last visited Oct. 5, 2004) <http://www.house.gov/ethics/Press_Statement_Delay3.htm>.

⁷⁴ *Id.*

⁷⁵ Chairman Hefley is quoted as saying, “We [the Ranking Member and I] have no disagreement. We are just working through the process. ... I don’t know what’s going to come up here. I can’t predict that.” Gebe Martinez, *Ethics panel to weigh charges against DeLay; It will decide whether to pursue power-abuse case*, HOUSTON CHRONICLE, September 16, 2004, at A10. Chairman Hefley was also quoted as saying, “I would be amazed if there was a 5-5 deadlock.” Larry Margasak, *Ethics Panel to Discuss DeLay Complaint*, AP, September 15, 2004.

⁷⁶ On September 16, 2004, the so-called Congressional Ethics Coalition released the following press release:

“On Tuesday, House Ethics Committee Chairman Joel Hefley (R-CO) and/or Ranking Member Alan Mollohan (D-WVA) short-circuited the ethics process by placing the ethics complaint against Majority Leader Tom DeLay (R-TX) on the Committee’s agenda, thereby stopping the clock that would have required an investigation into the DeLay complaint to be initiated automatically on September 20, 2004.

It therefore appears that this matter is being set up to be dropped entirely by the full Ethics Committee, quite possibly by a 5 to 5 deadlock vote. The membership of the Committee is evenly divided between Republicans and Democrats.

The 1997 task force that rewrote the ethics rules never envisioned this sort of manipulation of the rules. The task force expected that placing a complaint on the agenda would be an “option of last resort.” Yet it has been clear from the beginning that there are more than sufficient grounds in this case for, at a minimum, an investigation of the matter to occur.

In the past, the House Ethics Committee has found ways to take a serious look at potential ethics violations by House leaders of both parties. This does not appear to be happening in the DeLay case.

In our view, this latest action underscores the House’s animosity in recent years toward the idea of monitoring the ethics of its members, despite its constitutional duty to do so. For nearly seven years, the House maintained a truce under which no one from either party filed an ethics complaint. Now that a complaint has been filed, it appears that the complaint is being set up for outright dismissal without any real inquiry being conducted into the merits of the charges.

There is no way that any responsible member of the House can justify burying the DeLay ethics complaint without any real inquiry into the serious ethics issues that have been repeatedly raised.

We strongly urge the House Ethics Committee to open an inquiry and conduct an investigation into the allegations in the Delay complaint. Anything less would be irresponsible conduct on the part of the Ethics Committee - and would call for the full House to take action to override the Committee.

Citizens for Responsibility and Ethics in Washington
Judicial Watch
Common Cause
Campaign Legal Center
Center for Responsive Politics
Democracy 21
Public Campaign
Public Citizen”

Joint Statement of Congressional Ethics Coalition on DeLay Ethics Complaint, US NEWSWIRE, September 16, 2004. The contact listed on the press release is CREW’s Melanie Sloan.

⁷⁷ *Ethics Manual*, *supra* note 22, at Chap. 1.

⁷⁸ Representative Bell’s ethics charges show a continued and persistent attempt by political organizations and House Democrat Leadership to malign Majority Leader DeLay for political gain. On September 3, 2003, *Roll Call* reported that a coordinated campaign effort among House Democrats and the Democratic Congressional Campaign Committee (“DCCC”) was underway:

House Democrats are once again mounting a major offensive against Majority Leader Tom DeLay (R), hoping to energize their base and hurt moderate Republicans by painting the Texan as the radical right-wing face of the GOP.

The strategy to focus their opposition against DeLay began to take shape earlier this year, but has gained steam in recent weeks as Democratic leaders decided vilifying the Majority Leader could help them raise money, motivate core Democratic voters and potentially hurt incumbent Republicans representing swing districts.

The strategy, which Democrats claim is helping to further fuel DeLay's negative name identification throughout the country, has manifested itself through press releases, fundraising letters and voter outreach.

Erin Billings, *Democrats Again Make DeLay the Issue*, ROLL CALL, September 3, 2003.

The article noted that Democrats were specifically planning to vilify the Majority Leader's role in Texas redistricting for political purposes:

Several key House Democratic aides said the party intends to continue and even heighten the effort, especially in light of the messy Texas redistricting battle in which Democrats believe they helped paint DeLay as arrogant and power hungry.

Id.

The article went on to report that the DCCC had already vilified the Majority Leader's role in Texas redistricting:

The Democratic Congressional Campaign Committee recently sent out a direct-mail fundraising letter to its donors focusing on DeLay as leading an arrogant power grab in

the House. That letter, which has just started arriving in people's mailboxes, has brought in approximately \$200,000 so far, according to the DCCC.

Id.

On March 10, 2004, *The Hill* reported:

House Democratic leaders are honing an election strategy to taint the entire Republican caucus by demonizing Majority Leader Tom DeLay (R-Texas).

Hans Nichols, *Newtaring DeLay is Dem's Aim*, THE HILL, March 10, 2004.

The article further discussed Minority Leader Nancy Pelosi's involvement in the effort:

The strategy, which is based on the belief that DeLay is regarded as an extremist in many GOP-leaning districts, was previewed to lawmakers last week at a leadership luncheon by Minority Leader Nancy Pelosi (D-Calif.).

Id.

A quote by DCCC spokesman Greg Speed in the article confirms the effort:

"DeLay is not Newt yet. Everyone knows that," said a Democratic leadership aide. Greg Speed, spokesman for the DCCC, said: "Once you raise his profile and how the right-wing agenda that dominates the Congress hurts families, it can become a winning issue in these Republican-held seats.

Id.

Candidate Richard Morrison, who is running against the Majority Leader in the 22nd District, has used Representative Bell's ethics charges in his campaign. On June 14, Morrison issued a press release touting the allegations. On his campaign website, Morrison has posted official documents relating to the ethics allegations from Representative Bell's official House website. The links on Morrison's campaign website mirror the links on Representative Bell's official website. Under the headline "Tom DeLay Target of U.S. House Ethics Probe," Morrison has posted the following items that were produced with official resources on his campaign website:

- Representative Bell's official investigation request to the Committee on Official Standards and Conduct;
- The C-SPAN video clip from Representative Bell's press conference in the U.S. Capitol;
- Representative Bell's official statement regarding the ethics charges; and
- The Summary of the Complaint filed before the Committee.

See Richard Morrison U.S. Congress (visited Oct. 5, 2004)

<<http://www.richardmorrisonfordistrict22.com/>>.

⁷⁹ Damon Chappie, *Panel Kept Bell from Using Mail*, ROLL CALL, June 21, 2004.

⁸⁰ *Id.*

⁸¹ Congressional Member's Handbook, *Inside Mail*.

⁸² EDWARD M. DANGEL, CONTEMPT § 1, at 2 (Boston: National Lawyers' Manual Co. 1939).

⁸³ See A. Hinds, 2 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 1616-1619 (1907). (regarding contempt case of Samuel Houston for assaulting a member) [hereinafter *Hinds' Precedents*]; *id.*

at § 1625 (regarding contempt case of A.P. Field for intimidating and bullying language to a Member and later assaulting the Member).

⁸⁴ See *Hinds' Precedents*, *supra* note 83, at §§ 1599-1603 (regarding the contempt cases of Robert Randall and Charles Whitney for attempting to bribe Members); *id.* at §§ 1606-1607 (regarding contempt case of Col. John Anderson for attempting to bribe a Member). After Anderson brought a civil action against the House's Sergeant at Arms alleging assault, trespass and false imprisonment, the Supreme Court found the House possessed the implied power to find non-Members contempt, because:

What is the alternative? The argument obviously leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it. . . .

Anderson v. Dunn, 19 U.S. 204, 228 (1821).

⁸⁵ See *Hinds' Precedents*, *supra* note 83, at § 1604 (regarding contempt case of William Duane for libeling the Senate).

⁸⁶ This sort of contempt of Congress arising from the willful refusal of a witness summoned by the authority of either House of Congress to give testimony or produce papers upon matters under inquiry before the either House or its subcommittee has been criminalized by federal statute. See 2 U.S.C. § 192 (setting offense as a misdemeanor and specifying penalty amount).

⁸⁷ See, e.g., *Jurney v. MacCracken*, 294 U.S. 125 (1935).

⁸⁸ *Marshall v. Gordon*, 243 U.S. 521, 541 (1917).

⁸⁹ *Id.* at 546. In *Marshall*, the Supreme Court granted a *habeas corpus* petition of a U.S. Attorney, who had been held in contempt of Congress for writing a public letter that charged a House subcommittee with frustrating the action of a grand jury. The Court held that the contempt power of Congress extends to prevent acts which in and of themselves, inherently, prevent or obstruct the discharge of legislative duty and to compel the doing of those things which are essential to the performance of the legislative functions. *Id.* Specifically, the Court found that the letter did not present "any obstruction to the performance of legislative duty" and did not endanger "the power of the House to carryout its legislative authority." *Id.*

⁹⁰ See *Hinds' Precedents*, *supra* note 83, at §§ 1604, 1616-1619, 1625.

⁹¹ House Rules illustrate the institution's intolerance for inflammatory or accusatory language against its Members. *House Rules*, *supra* note 22, Rule XIV cl. 8(b) (allowing deletion of unparliamentary remarks from Congressional Record). In addition, the House does not fail to use or threaten to use its contempt power as an act of self-preservation when necessary. See, e.g., H.R. Res. 657, 106th Cong. (2000) (seeking to hold a "watchdog group," Project on Government Oversight, in contempt of the House Committee on Resources); 135 CONG. REC. H2238 (daily ed. May 31, 1989) (statement of Rep. Wright) (discussing letter warning a non-Member by the Committee on Standards of Official Conduct that any further public discussion of previous executive session testimony could result in contempt); 132 CONGR. REC. H698 (daily ed. Feb. 27, 1986) (discussing contempt citations against lawyers Joseph and Ralph Bernstein); H.R. Res. 200, 98th Cong. (1983). (certifying House report concerning contempt of Congress by Rita Lavelle); Louis Fisher, CONGRESSIONAL INVESTIGATIONS: SUBPOENAS AND CONTEMPT POWER, CRS Report RL31836 (2003), found at <<http://www.senate.gov/reference/resources/pdf/RL31836.pdf>>.

⁹² See, e.g., *Jurney*, *supra* note 87, at 150.

⁹³ *Groppi v. Leslie*, 404 U.S. 496, 504 (1972).

⁹⁴ As commonly defined, the contempt power of Congress is the power to "punish someone who shows contempt for the process, orders, or proceedings of the Congress." BLACK'S LAW DICTIONARY 337 (8th ed. 2004).

⁹⁵ See CREW Website, *supra* note 35 (visited Oct. 5, 2004) <<http://www.citizensforethics.org/activities/20040615/>>.

⁹⁶ Here, Representative Bell and CREW's conduct is ongoing, and similar to a continuing tort. See 54 C.J.S. *Limitations of Actions* § 177 (1987) (defining a "continuing tort" as one that is inflicted repeatedly

over a period of time). As demonstrated in cases involving reticent witnesses, Congress' contempt power extends to those whose contemptuous conduct is ongoing as well as those whose contemptuous conduct occurred purely in the past. *See, e.g., Journey, supra* note 87, at 149-152.

⁹⁷ Perhaps Representative Bell and CREW's conduct would not be so egregious if the Committee rule that previously allowed non-Members to bring a complaint had not been expressly amended to stop the practice.

⁹⁸ While the *Ethics Task Force* does not give explicit guidance as to the definition of good faith, the common legal meanings of "good faith" include the "absence of intent to defraud or to seek unconscionable advantage" and "faithfulness to one's duty or obligation." BLACK'S LAW DICTIONARY 713 (8th ed. 2004).

⁹⁹ *See* CREW Website, *supra* note 35.

¹⁰⁰ *See Task Force Report, supra* note 17, at 13.

¹⁰¹ *Id.* at 1. This sort of conduct is nothing new. *See, e.g.,* Damon Chappie & Juliet Eilperin, *Ethics Tit-for-Tat Ensnarers Gephardt & Gingrich: Sources Say Republicans Drafted Measure Calling for Outside Counsel in Gephardt Case*, ROLL CALL, July 1, 1996.

¹⁰² Representative Bell and CREW cannot invoke the Speech and Debate clause immunity or otherwise avoid questioning or sanctioning by the House for their conduct. Const., Art. I § 6, cl. 1 (stating that no Member will be questioned in any other place); 18 U.S.C. § 1001(c) (criminalizing false statements made during a Congressional investigation).

¹⁰³ *See* AM. JUR. 2D, Libel and Slander § 130 (1995); *see also Greenbelt Co-op Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁰⁴ *Id.*

¹⁰⁵ Due to the separation of power principle, when "a textually demonstrable constitutional commitment of the issue" is given to another political branch, judicial review is generally not available. *Nixon v. United States*, 506 U.S. 224 (1993) (refusing to review Senate's procedure regarding constitutional power to try district court judge for impeachment). However, the constitutional limitations standard for libel set forth in *Times v. Sullivan* is arguably applicable, and therefore discussed.

¹⁰⁶ These elements are useful for the analysis of (and conclusion that) Representative Bell and CREW published the defamatory statements against Majority Leader DeLay with actual malice. This analysis is especially helpful here, because CREW re-published the complaint and its exhibits on its website. CREW Website, *supra* note 35.

¹⁰⁷ *See* 71 AM. JUR. POF3D 321 § 21; *Herbert v. Lando*, 441 U.S. 153 (1979); *Connaughton v. Harte Hanks Comm'n, Inc.*, 842 F.2d 825 (6th Cir. 1988), *aff'd* 491 U.S. 657 (1989).

¹⁰⁸ Complaint at 4-5, ¶ 13.

¹⁰⁹ 18 U.S.C. § 201(c) (emphasis added). The correct citation is 18 U.S.C. § 201(c)(1)(B). The (A) subpart of the statute applies to those to give or offer the gratuity; subpart (B) applies to the recipient of illegal gratuities.

¹¹⁰ Complaint at 4-5, ¶ 13; 18 U.S.C. § 201(c)(1)(B).

¹¹¹ Complaint at 6, ¶ 18, Exhibits G and H.

¹¹² *United States v. Brewster*, 506 F.2d 62, 76 (1974) (stating that the "anything of value for himself" element would only be satisfied "if a legislator knew that a contribution was being given for an official act, received the contribution and knowingly applied it to his own uses."); *see also United States v. McDade*, 827 F.Supp. 1153, 1175 (E.D.Pa.1993), *aff'd*, 28 F.3d 283 (3d Cir.), *cert. denied*, 514 U.S. 1003 (1995) (finding that the indictment did not charge the Member of Congress with accepting campaign contributions but rather charged that the Member of Congress accepted "sham campaign contributions," which the Member planned to use for his own benefit, rather than for the benefit of his campaign); Department of Justice, *Criminal Resources Manual*, § 2045 (stating "However, for such gifts to be "gratuity" crimes under § 201, the Court held that there must be proof that the corpus of the gift inured to the *personal benefit* of the public officer donee."). At the time the *Brewster* court was considering the issue, the provision was 18 U.S.C. § 201(g) and prohibited receiving "anything of value for himself." This phrase was amended to read as prohibiting the receipt of "anything of value *personally*." 18 U.S.C. § 201(c)(1)(B) (emphasis added). Regarding campaign contributions, *Brewster* additionally found that a conviction under § 201(g) would only lie upon a finding that a campaign re-election committee was the alter ego of a candidate or merely a conduit for the candidate. *Brewster*, 506 F.2d at 81. Neither applies in this instance.

¹¹³ Complaint at 4, ¶11.

¹¹⁴ In fact, the complaint's Exhibit C shows a compilation of the FEC filings and other governmental filings that demonstrate all Westar-related contributions went to legal campaign funds or political action committees.

¹¹⁵ Complaint at 14-17, ¶¶ 44-54.

¹¹⁶ See H. Rept. 108-220, *Request for Department of Transportation Records on Use of Agency Resources Relating to Members of Texas Legislature*; Kenneth Mead, Inspector General, Office of the Secretary of Transportation, Department of Transportation, Report No. CC-2003-123 (July 11, 2003) at 8 and n.3; and Office of the Inspector General, Department of Justice, *An Investigation of the Department of Justice's Actions in Connection with the Search for Absent Texas Legislators*, at 4, n.5 (August 12, 2003).

¹¹⁷ *An Open Letter to the House Regarding the Ethics Oversight Process*, ROLL CALL, June 17, 2004, at 6.

¹¹⁸ *Indie Rocks*, NATIONAL JOURNAL'S HOUSE RACE HOTLINE, July 29, 2004. In the article, Sloan publicly pressed for the Committee to "turn it over to an outside, independent prosecutor."