

MEMORANDUM TO THE MEMBERS OF THE COMMITTEE

FROM: s/Joel Hefley, Chairman
s/Alan B. Mollohan, Ranking Minority Member

SUBJECT: Recommendations for disposition of the complaint
filed against Representative DeLay

As the members of the Committee are aware, we, in our capacities as Chairman and Ranking Minority Member, have been considering the complaint filed by Representative Bell against Representative DeLay on June 15, 2004.^{1[1]} Committee Rule 16 provides the Chairman and the Ranking Minority Member, acting jointly, with two options regarding the allegations made in a properly filed complaint:

- to establish an investigative subcommittee, and forward the complaint, or any part of it, to that subcommittee for a formal investigation, or
- to “recommend to the Committee that it dispose of the complaint, or any portion thereof, in any manner that does not require action by the House, which may include dismissal of the complaint or resolution of the complaint by a letter to the Member . . . against whom the complaint is made.”

After carefully considering the allegations of the complaints, and engaging in extensive fact-gathering under Committee Rule 16(c), we have determined to make recommendations to the Committee regarding disposition of each of the three counts of

^{1[1]}On June 22, 2004, we determined, under Committee Rule 16(a), that the complaint meets the requirements of the Committee Rules for complaints. The rule provides a 45-day period from the date of that determination for our consideration of a complaint and authorizes the Committee to extend that period for an additional 45 days. The Committee granted such an extension on July 22, 2004, and as a result, the period for our consideration of this complaint was extended through September 20, 2004.

While the Committee Rule 16(d) provides for the automatic creation of an investigative subcommittee if, by the end of that period, the complaint is not disposed of, it also provides that if at any time during that period either one of us places the complaint on the Committee agenda, then an investigative subcommittee may be established only by a vote of the Committee. On September 20, 2004, both of us acted to place the complaint on the Committee agenda.

the complaint. Briefly stated, for the reasons detailed below, our recommendations to the Committee are as follows.

1. Count I of the complaint alleges that Representative DeLay violated both criminal law and House Rules by soliciting and receiving campaign contributions from Westar Energy, Inc. “in return for legislative assistance on the energy bill” in 2002, and that his actions constituted the dispensing of impermissible special favors. In particular, the complaint references a \$25,000 contribution that Westar made in May 2002 to the Texans for a Republican Majority PAC (“TRMPAC”), a PAC with which Representative DeLay was affiliated. **The information we obtained indicates that (1) neither Representative DeLay nor anyone acting on his behalf improperly solicited contributions from Westar, and (2) Representative DeLay took no action with regard to Westar that would constitute an impermissible special favor.**

However, we also obtained information indicating that Representative DeLay’s participation in and facilitation of an energy company fundraiser in June 2002 is objectionable in that his actions, at a minimum, created the appearance that donors were being provided with special access to Representative DeLay regarding the then-pending energy legislation. Accordingly, our recommendation is that this count be disposed of by means of a letter of admonition to Representative DeLay that states that while, on the basis of the information before the Committee, a formal investigation of the violations alleged in Count I is not warranted, his actions with regard to the June 2002 energy company fundraiser raise an appearance of impropriety under House standards of conduct.

2. Count II alleges that Representative DeLay used TRMPAC, the Texans for a Republican Majority PAC, to “funnel” corporate funds to Texas state campaigns in 2002 in violation of provisions of the Texas election code. **Our recommendation is that action on this count be deferred under Committee Rule 15(f) pending further action both in the cases that were initiated by the recent TRMPAC-related indictments in state court in Texas and in the District Attorney’s continuing investigation TRMPAC’s activities in 2002.**

3. Count III alleges that the contacts of Representative DeLay’s staff with the Federal Aviation Administration and the Justice Department in May 2003 regarding absent Texas state legislators constituted an effort to use federal resources in a political issue and hence were improper under Committee guidance on contacts with federal agencies. **Our recommendation is that this count be dismissed insofar as it concerns the contacts with the Justice Department, and that insofar as it concerns the contacts with the FAA, it should be disposed of by means of a letter of admonition to Representative DeLay that sets out the serious concerns that those contacts raise under House standards of conduct that preclude using governmental resources for a political undertaking.**

Our recommendation that Counts I and III be resolved by a letter of admonition is made pursuant to Committee Rule 16(b)(1), which provides that with Committee

approval, a complaint may be resolved “by a letter to the Member, officer, or employee of the House against whom the complaint is made.” That Committee Rule, as well as the House Rule on which it is based (House Rule 11, clause 3(k)(1)(A)), took effect in 1997, and it reflects prior Committee practice.

Resolution of a complaint by means of a letter to the respondent is appropriate where, according to the information before the Committee, the respondent’s conduct either violates or raises concerns under House Rules or standards of conduct, but the circumstances – including the completeness of the information before the Committee, and the nature of the violation – indicate that a formal investigation is not warranted.^{2[2]} While the Committee does not hesitate to launch a formal investigation where there is any unresolved issue of material fact, or the conduct involved indicates that a formal sanction may be in order, the Committee has resolved a number of complaints by such a letter.^{3[3]} In the past such letters have not been formally termed as “letters of admonition,”^{4[4]} but this term accurately describes the substance of these letters.

^{2[2]} Committee Rule 24 provides for a number of formal sanctions that range from a “Letter of Reproval” to censure or expulsion from the House. However, those sanctions may be imposed by the Committee only after a formal investigation and, absent an admission to violations by the respondent, an adjudicatory hearing in which one or more alleged violations are proved by clear and convincing evidence.

^{3[3]} See, e.g., House Comm. on Standards of Official Conduct, *Summary of Activities One Hundred Fourth Congress*, H. Rep. 104-886, 104th Cong., 2d Sess. (1997) at 19 (complaint against Representative Arme), 19-20 (referral from the Federal Election Commission regarding Representative Charles Wilson), 22 (complaint against Representative Torricelli), 23-24 (complaint against Representative Gephardt), 24-25 (complaint against Representative Solomon), and 25 (complaint against Representative McDermott).

^{4[4]} A provision of the rules of the Senate Select Committee on Ethics (Committee Rule 3(g)(2)) specifically provides for the resolution of cases by issuance by that Committee of letters of admonition.

Put another way, neither one of us believes that a formal investigation is warranted now with regard to any count of the complaint, and thus we do not recommend that an investigative subcommittee be established with regard to any of the complaint's allegations. **It is our intention to publicly release this memorandum and its attachments under our authority under Committee Rule 7(g). To the extent that this memorandum does not fully reflect the reasons for the Committee's actions on the complaint, we recommend that the Committee issue a public statement that provides such an explanation.**

Two additional matters are addressed in this memorandum. First, Representative DeLay's submissions raised three major objections to the complaint and Representative Bell's conduct in this matter. For the reasons set out below, our conclusion is that two of those objections – that the complaint was not properly filed under Committee Rule 14(a), and that Representative Bell's acceptance of assistance in drafting of the complaint violated House Rule 24 – are not valid. Representative DeLay's other major objection – which is that the complaint includes innuendo, speculative assertions and 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. In addition, in the last section of this memorandum, we address the requests made by various entities that the Committee employ outside counsel in its consideration of the complaint.

Our fact-gathering activities under Committee Rule 16(c). During our consideration of the complaint, Committee Rule 16(c) authorized us to “jointly gather additional information concerning alleged conduct which is the basis of a complaint.” As noted above, we made extensive use of that authority, and our efforts included the following. We sought and received relevant documents from Westar Energy, Inc. and the Inspectors General of the U.S. Department of Transportation and the U.S. Department of Justice. In addition to Representative DeLay, individuals who provided documents and/or written responses to our requests for information included the following:

- Mr. Doug Lawrence, who had been Vice President for Public Affairs of Westar and was the author of two documents on which Count I of the complaint relies; Mr. Lawrence is currently a lobbyist and consultant at the state level in Kansas;
- Messrs. Richard Bornemann, Timothy Smith and William Kenworthy, who are Washington-area lobbyists who represented Westar in the relevant period;
- Mr. Drew Maloney, who is a lobbyist and a former DeLay staff member; prior to his departure from the DeLay staff at the end of March 2002, among the issues he handled were those relating to energy;
- Representatives Billy Tauzin and Joe Barton, who in 2001-2002 were, respectively, Chairman of the Energy and Commerce Committee, and Chairman of that Committee's Energy and Air Quality Subcommittee;

- Mr. Jack Victory of Representative DeLay's leadership office staff; Mr. Victory is a policy advisor to Representative DeLay and in 2002 handled energy issues after the departure of Mr. Maloney from the staff;
- Ms. Juliane Sullivan of Representative DeLay's leadership office staff; Ms. Sullivan is Representative DeLay's Policy Director; and
- Mr. Andy Black of Representative Barton's Energy and Commerce Committee staff.

This fact-gathering activity does not and is not intended to substitute for a formal investigation.^{5[5]} Rather, this informal fact-gathering has the more limited purpose of "ensur[ing] that the chairman and ranking minority member have sufficient information to make a recommendation" to the full Committee.^{6[6]} Put another way, its purpose is to inform us and the Committee on whether a formal investigation of any allegation made in a complaint is warranted.

If in the future credible information that is materially at odds with the information we have obtained to date regarding Counts I or III of the complaint were to come to the Committee's attention, the Committee retains the authority to act on that information as appropriate.

The TRMPAC-related indictments of September 21, 2004. On September 21, 2004, a grand jury of the District Court for Travis County, Texas issued a total of 32 indictments of individuals affiliated with TRMPAC and certain of TRMPAC's corporate donors. The indictments included the following: fourteen against Mr. John D. Colyandro, who was Executive Director of TRMPAC, nine against Mr. Warren M. RoBold, who was a fundraiser for the PAC, and eight against corporate donors. Copies of certain of the key indictments are Attachment A to this memorandum.

As shown in Attachment A, one of the corporations indicted was Westar, and the charge is that Westar's May 2002 contribution to TRMPAC of \$25,000 "was not authorized by Subchapter D of Chapter 253 of the Election Code."^{7[7]} In this regard, Subchapter D of the Texas Election Code sets out certain limited contributions or expenditures that a corporation may make. One provision of Subchapter D (§ 253.094) states that a corporation "may not make a political contribution or political expenditure that is not authorized by this subchapter," and that a person who violates that provision commits a third degree felony. One of the indictments of Mr. Colyandro was that he knowingly accepted the Westar contribution, which

the defendant knew to have been made in violation of Chapter 253 of the Election Code, and that, having been made by a corporation and not having been

^{5[5]} While responses to our requests for information are not provided under oath, those responses are subject to the "false statements" criminal statute, 18 U.S.C. § 1001, as amended in 1996. That statute, among other things, prohibits knowingly and willfully making any materially false statement or concealing a material fact in "any investigation or review, conducted pursuant to the authority of any committee . . . of the Congress, consistent with applicable rules of the House or Senate."

^{6[6]} House Comm. on Rules, *Report of the Ethics Reform Task Force on H. Res. 168*, 105th Cong., 1st Sess. (Comm. Print 1997) 16.

^{7[7]} The indictments of the seven other corporations are phrased in a virtually identical manner.

authorized by Subchapter D of Chapter 254 of the Election Code, was made in violation of Subchapter D of Chapter 253 of the Election Code.^{8[8]}

Of course, for many months we have been monitoring the grand jury investigation through media reports. These indictments are directly pertinent to one of the key issues raised by Count II of the complaint, which is whether TRMPAC's use of corporate funds in 2002 Texas state elections was lawful under the Texas Election Code. In this regard, two of the indictments – one of Mr. Colyandro, and one of another individual affiliated with TRMPAC, Mr. James W. Ellis – concern a specific TRMPAC transaction with the Republican National Committee that is the subject of ¶¶ 32-34 of Representative Bell's complaint. The issuance of these indictments is a major step by Texas authorities to resolve issues that are also raised in Count II, and thus their issuance supports our recommendation that action on Count II be deferred.

Westar's contribution of \$25,000 to TRMPAC is a major focus of Count I of the complaint, and as we've noted, two of the Texas indictments relate to that contribution. However, the issue raised by those indictments – *i.e.*, whether the contribution was lawful under the Texas Election Code – is entirely different from the issues raised by Count I – *i.e.*, whether Representative DeLay improperly solicited the contribution, and whether he granted Westar impermissible special favors. We see nothing in the indictments that affects our analysis of Count I of the complaint.^{9[9]} Of course, if further proceedings on the Westar-related indictments were to produce information that is materially at odds with the information we obtained relating to Count I, the Committee retains the authority to act on that information as appropriate.

* * *

The specifics of our recommendations, and the reasons for them, are detailed below.

Count I of the Complaint, relating to contributions from Westar Energy and congressional action on the legislation it was seeking in 2002.

Facts and violations alleged in Count I. Count I alleges that Representative DeLay's conduct relating to Westar Energy, Inc. in 2002 violated applicable laws, rules or standards of conduct in two respects. First, the complaint alleges that Representative DeLay solicited and received campaign contributions from Westar "in return for legislative assistance on the energy bill" and thereby violated the following –

- the provisions of federal criminal law on bribery and illegal gratuities, 18 U.S.C. § 201, and

^{8[8]} Except for the indictment of Mr. Colyandro with regard to the TRMPAC transaction with the Republican National Committee, the other indictments of him are phrased in a virtually identical manner.

^{9[9]} In this regard, we note that each of the fourteen indictments of Mr. RoBold relates to his activity in connection with one of the corporate contributions. Those indictments allege in part that Mr. RoBold "did, with intent to promote and assist the commission of said offense [under the Texas Election Code], solicit, encourage, direct and aid the said corporation to commit the said offense." We had not obtained information indicating Mr. RoBold's involvement in any solicitation of Westar, and we note that he was not indicted with regard to the Westar contribution.

- a provision of the House Code of Official Conduct, House Rule 23, clause 3, that provides that a Member, officer or employee “may not receive compensation and may not permit compensation to accrue to his beneficial interest . . . the receipt of which would occur by virtue of influence improperly exerted from his position in Congress.”

Second, the complaint also alleges Representative DeLay’s actions with regard to Westar constituted the dispensing of special favors in violation of ¶ 5 of the Code of Ethics for Government Service. That provision of the Code states in part that a federal official should “[n]ever discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not.”

In support of these allegations, the complaint refers to three matters:

- two internal Westar documents from May 2002 that tie campaign contributions by the company and its executives with the company’s efforts to have a particular provision that would benefit Westar only included in the then-pending energy legislation,
- the contributions actually made by Westar and its executives in 2002 to House Members, PACs affiliated with House Members, and one non-incumbent candidate for the House, and
- the action of Representative Barton in inserting a provision pertaining to Westar in the House-Senate conference on energy legislation on September 18, 2002, and a vote taken by the House conferees the next day, September 19th, in which an attempt to strike that provision was defeated.

The two internal Westar documents referenced in the complaint are attached to this memorandum as Attachments B and C. Both of those documents had been authored by Mr. Doug Lawrence, who, as noted above, was at the time Westar’s Vice President for Public Affairs. They were among a group of documents that was publicly released by Westar last year in connection with a report of a special committee to the company’s board of directors on matters that were or might become the subject of a federal investigation of the company that was then underway.^{10[10]}

Attachment B is a memorandum of May 17, 2002 that sets out proposed campaign contributions by 13 Westar executives to five House Members, including Representative DeLay, and one non-incumbent candidate for the House. The memorandum characterizes the proposed contributions as “the total budget for our Washington efforts regarding the Federal Energy Bill and its impact on our financial restructuring plan.” The proposed contribution to Representative DeLay’s campaign is \$2,500. The memorandum also refers to corporate “soft money” in the amount of \$25,000, without identifying a proposed recipient. It also notes that the budget allocations were “as recommended by our Washington Lobbyist.”

Attachment C is the text of a follow-up e-mail of May 20, 2002 to one of the Westar executives that, among other things, refers to the company’s efforts to insert “our grandfather

^{10[10]} The text of the report of the special committee, as well as the text of the documents released by the special committee, are available on Westar’s Web site, www.westarenergy.com, through the “Corporate Governance” link.

provision on PUHCA [Public Utility Holding Company Act] repeal into the Senate version of the energy bill,” and characterizes the proposed contributions as “a plan to get a seat at the table” of the Conference Committee. The e-mail also refers to the proposed recipients as “a group of candidates associated with Tom Delay [sic], Billy Tauzin, Joe Barton and Senator Richard Shelby.” As to the relationship between the proposed recipients and the energy legislation, the e-mail states the following:

Delay [sic] is the House Majority Leader [sic: at the time, he was Majority Whip]. His agreement is necessary before the House Conferees can push the language we have in place in the House bill. [Representative] Shimkus is a close associate of [Representative] Billy Tauzin and Joe Barton, who are key House Conferees on our legislation. They made this request in lieu of contributions made to their own campaign. Tom Young is Senator Shelby’s Chief of staff who is running for the House in Alabama. Shelby . . . is our anchor on the Senate side. He’s made a substantial request of us for supporting Young’s campaign.

The second matter that the complaint references, as noted above, is the campaign contributions actually made by Westar and its executives in 2002 after the above two documents were sent. Those contributions included \$25,000 from Westar to the Texans for a Republican Majority PAC (TRMPAC), a political action committee with which Representative DeLay was affiliated, in May 2002, and a total of \$33,200 in “hard money” donations by Westar executives. The recipients of the contributions from the executives included the six House campaigns noted in the May 17, 2002 memorandum (Attachment B). Later in the year, the recipients included the campaign and leadership PAC of Representative Barton, the leadership PAC of Representative Tauzin, and the campaigns or PACs of several other House Members. Representative DeLay’s campaign received a total of \$2,400 from Westar executives in June 2002.

Finally, as noted above, the third point referenced in Count I of the complaint is action that was taken on the Westar provision in the House-Senate conference on the energy legislation. The pertinent paragraph of the complaint (¶ 12) alleges the following:

On September 18, 2002, in the conference on the energy bill, Mr. Barton inserted the Westar provision. The next day, Mr. Barton, who held Mr. Tauzin’s proxy, defeated Congressman Edward Markey’s motion to strike the Westar provision on a party line vote of 8 to 6. During the discussion of Mr. Markey’s motion, Mr. Barton stated, “[t]his particular provision benefits one company. That company is . . . Western Resources [former name of Westar] in Topeka, Kansas.” [citation omitted.]

Referring to the above three matters together, the complaint asserts (in ¶ 19),

[T]he Westar ‘get a seat at 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.” (footnote omitted).

The applicable laws, rules and standards of conduct. Under House standards of conduct as set out in Committee publications, a Member may not make a solicitation for campaign or political contributions that is linked with any specific official action taken or to be taken by that Member. In addition, a Member may not accept any contribution that is linked with any specific official action taken or to be taken by that Member.^{11[11]} These standards are grounded on the fundamental requirement of the House Code of Official Conduct that a Member, officer or employee “shall conduct himself at all times in a manner that shall reflect creditably on the House.”^{12[12]}

Quite clearly, if a Member were to agree to take official action in exchange for a campaign contribution, that Member would be subject not only to disciplinary action by this Committee for violation of the House Code of Official Conduct, but also to criminal prosecution by the Justice Department under the bribery statute. However, the scope of the House standards of conduct in this area is broader than that of the criminal bribery statute. In this regard, the bribery statute is violated only where it is shown that there was a “quid pro quo,” *i.e.*, a specific intent to give or receive something of value in exchange for an official act.^{13[13]}

In contrast, the House standards of conduct generally preclude any link between the solicitation or receipt of a contribution and a specific official action.^{14[14]} Thus, for example, the Committee has stated that where a constituent simply encloses a campaign contribution in a letter requesting casework assistance, the Member should return the contribution.^{15[15]} In addition, the Committee has stated that a Member should not make any solicitation that creates even the appearance that campaign contributors will receive or be entitled to either special treatment or special access to the Member in his or her official capacity.^{16[16]} Put another way, there are

^{11[11]} See, e.g., House Comm. on Standards of Official Conduct, *Laws, Rules and Standards of Conduct on Campaign Activity*, 107th Cong., 1st Sess. (2001) (hereafter, *Campaign Activity* booklet) 32-34, 36-37; *House Ethics Manual*, 102d Cong., 2d Sess. (1992) 257-58.

^{12[12]} House Rule 23, cl. 1. As noted above, the complaint alleges a violation of the federal criminal bribery and gratuity statutes. Enforcement of the federal criminal statutes is province of the Justice Department, rather than this Committee, and thus typically the Committee does not either charge or attempt to prove that a Member has violated such a statute. Instead, Committee disciplinary proceedings generally are based on House Rules and standards of conduct.

It should also be noted that while the complaint alleges a violation of both the bribery and gratuity statutes, the gratuity statute applies only where an official accepts “anything of value *personally*” (emphasis added). For that reason, the statute does not apply to the receipt or acceptance of a bona fide campaign contribution, as such a contribution is not a benefit that is received “personally.” See U.S. Dep’t of Justice, *Criminal Resources Manual* § 2045; *United States v. Brewster*, 506 F.2d 62, 77 (D.C. Cir. 1974).

^{13[13]} See *United States v. Sun-Diamond Growers*, 526 U.S. 404-405 (1999).

^{14[14]} Sound guidance on this point appears in one of the earliest works on congressional ethics, the 1952 book by Senator Paul H. Douglas, *Ethics in Government* (at 89):

It is probably not wrong for the campaign managers of a legislator before an election to request contributions from those for whom the legislator has done appreciable favors, but this should never be presented as a payment for services rendered. Moreover, the possibility of such a contribution should never be suggested by the legislator or his staff at the time the favor is done. Furthermore, a decent interval of time should be allowed to lapse so that neither party will feel that there is a close connection between the two acts.

^{15[15]} *Campaign Activity* booklet at 37.

^{16[16]} *Id.* at 34.

fundraising activities that do not violate any criminal statute but may well violate House standards of conduct.

In addition – and entirely apart from the authorities that govern the solicitation and receipt of political contributions – the Committee has long advised that a Member may not take or withhold any official action on the basis of whether the person involved is a campaign contributor.^{17[17]} This guidance is substantially based on ¶ 5 of the Code of Ethics for Government Service, which provides that a federal official should “[n]ever discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not.”^{18[18]} The Committee has made it clear that this provision does not prohibit a Member from taking action on behalf of a person who is a contributor, but instead it prohibits a Member from taking an official action solely or substantially on the basis that a person has made a contribution.^{19[19]}

As noted above, the complaint also alleges a violation of clause 3 of House Rule 23, which prohibits receipt of compensation that “would occur by virtue of influence improperly exerted from [one’s] position in Congress.” The legislative history of that provision indicates that it was intended to prohibit the use of one’s official position “to make pecuniary gains” (*see House Ethics Manual* at 88), and historically the Committee has not applied the provision with regard to receipt of campaign contributions.

Summary and analysis of the information before the Committee regarding Count I.

Based on the analysis set out above, we sought information relating to two issues under Count I:

- did Representative DeLay make a solicitation of campaign funds from Westar that was improperly linked with action on legislation sought by the company, and
- did Representative DeLay take any actions with regard to the Westar legislation, and if so, did his actions constitute the granting of an impermissible “special favor” to a campaign donor?

As detailed below, the information that we obtained relating to these two issues indicates that (1) neither Representative DeLay nor anyone acting on his behalf improperly solicited contributions from Westar, and (2) Representative DeLay took no action with regard to Westar that would constitute an impermissible special favor. However, we also obtained information indicating that Representative DeLay’s participation in and facilitation of an energy company fundraiser in June 2002 – the fundraiser in which Westar made a \$25,000 contribution to TRMPAC – is objectionable in that, at a minimum, his conduct created at least the appearance that donors were being provided with special access to Representative DeLay regarding the then-pending energy legislation.

^{17[17]} *See Campaign Activity* booklet at 37-39; Standards Committee Advisory Memorandum of May 11, 1999 on “Prohibition Against Linking Official Actions to Partisan or Political Considerations, or Personal Gain”; *House Ethics Manual* at 250-51.

^{18[18]} Committee precedent is that violation of a provision of the Code of Ethics for Government Service may be the basis of a Committee disciplinary action. *House Ethics Manual* at 18-19.

^{19[19]} *See House Ethics Manual* at 250-51.

Below in this memorandum we set out the facts we obtained on, first, the circumstances of Westar's contribution to TRMPAC, then the matter of the June 2002 energy company fundraiser, and, finally, Representative DeLay's actions with regard to the legislative provision sought by Westar. Preliminarily, however, we set out the basic facts regarding Westar and the legislative provision it was seeking in 2001-2002, as well as a chronology of the actions taken relating to that legislation. This basic information helps to place the allegations of Count I in proper context.

Westar, and the legislative provision sought by the company in 2001-2002. Westar, which is headquartered in Topeka, Kansas, provides electric service for customers in the eastern part of Kansas. The company's name had been Western Resources, but in mid-2002, its name was changed to Westar Energy. In the mid-1990's, the company began to acquire businesses outside the regulated utility field, and primarily in the field of home security monitoring. However, in 2000 the company decided to undertake an effort to split its regulated utility business and its non-regulated businesses into two separate companies. It appears that the basic purpose of the legislative provision that Westar sought in this period was to enable the company to proceed with this restructuring plan.

As is indicated in some of the materials quoted above, the legislative provision sought by Westar concerned the then-pending proposals to repeal the Public Utility Holding Company Act of 1935 (PUHCA),^{20[20]} and the interplay between that Act and the Investment Company Act of 1940 (ICA),^{21[21]} which is the major statute that regulates mutual funds. Under a provision of the ICA,^{22[22]} companies that are subject to regulation under PUHCA are exempt from regulation under the ICA.

Attachment D to this memorandum is a set of lobbying materials that Westar distributed in support of its proposal. These materials were provided to us by Mr. Jack Victory, who handled energy issues for Representative DeLay, and who said he received them in meetings with a Westar lobbyist. Those materials indicate that if the then-pending proposal for the repeal of PUHCA were enacted, one result would be that because of the company's particular circumstances, Westar – and Westar alone – would become subject to regulation under the ICA. Accordingly, Westar proposed a provision, the effect of which would have been to exempt the company (or, more accurately, one of the companies that would result from Westar's proposed restructuring plan) from regulation under the ICA.^{23[23]} The provision was in the nature of a "grandfather", as it would have exempted Westar from the ICA on the basis of certain corporate attributes that it had as of December 31, 2001.

Chronology of action on the Westar "grandfather" provision. The following chronology of actions on the Westar provision is based on information we obtained in our fact-gathering. Among the points indicated in this chronology are that (1) the Member who was most active on

^{20[20]} 15 U.S.C. §§ 79 *et seq.*

^{21[21]} *Id.* §§ 80a-1 *et seq.*

^{22[22]} *Id.* § 80a-3(c)(8).

^{23[23]} That the legislative provision was related to Westar's proposed restructuring is also indicated in the Westar memorandum that is attached hereto as Attachment N.

the Westar legislation was Representative Barton, who was at the time Chairman of the House Energy and Air Quality Subcommittee, and (2) significant action on that legislation was initiated by Representative Barton more than seven months before the Westar communications on contributions on which the complaint relies were sent.

- On June 27, 2001, Representative Barton and his committee staff member met with Westar's lobbyist, Richard Bornemann, on the company's circumstances.^{24[24]}
- On September 21, 2001, Representative Barton circulated a discussion draft of electricity legislation to the members of the Energy and Air Quality Subcommittee, and that draft included the Westar provision as § 125 of the bill. The title page and § 125 are Attachment E to this memorandum.
- On October 9, 2001, Representative Barton circulated another discussion draft of electricity legislation to the subcommittee members, and the Westar provision was § 125 of that draft as well. The title page and § 125 of the October 9th draft are also in Attachment E to this memorandum.
- On December 5, 2001, Representative Barton introduced H.R. 3406, the Electric Supply and Transmission Act, in which the Westar provision appeared as § 125 – see Attachment F.
- On April 26, 2002, the Senate passed an amended version of H.R. 4, the energy legislation that the House had passed on August 2, 2001.^{25[25]} While the House version did not include repeal of PUHCA, the Senate version did include repeal, and thus the matter of PUHCA repeal was expected to come before the House-Senate conference on H.R. 4.
- On July 24, 2002, Representative Barton and his committee staff member met with two Westar lobbyists, Mr. Bornemann and Ms. Marianne Smythe, to discuss a revised version of the Westar provision. After H.R. 3406 was introduced, concerns had been raised that the Westar provision as it appeared in that bill might allow companies in addition to Westar to avoid regulation under the ICA. To address those concerns, Westar proposed a narrower version. That narrower version is discussed in the Westar lobbying materials that are Attachment D to this memorandum.
- On both September 13 and September 18, 2002, Chairman Tauzin and Representative Barton circulated to the House conferees on H.R. 4 drafts of an offer to the Senate on electricity

^{24[24]} For the sake of completeness, it should be noted that according to Federal Election Commission records, Mr. Bornemann made contributions to Representative Barton's campaign committee and/or his leadership PAC, the Texas Freedom Fund, in each year 1999 through 2001, including contributions of \$1000 to his campaign committee on both May 29, 2001 and October 17, 2001. As to solicitations of Mr. Bornemann by or on behalf of Representative Barton, Representative Barton stated to us that they consisted of only blast-faxes from the fundraising consulting firm used by his committees and routine telephone calls or faxes from an individual who assisted his committees with their fundraising.

^{25[25]} The bill as passed by the House included provisions that opened the Arctic National Wildlife Refuge to oil and gas exploration, established vehicle fuel economy standards, and provided incentives for offshore oil and gas drilling, energy production and conservation, and other energy-related activities. See *2001 CQ Almanac*, pp. 9-3 – 9-9.

issues. Both of those drafts included the narrower version of the Westar provision that is set out in Attachment D. The Westar provisions in these two drafts are Attachment F to this memorandum (in the draft circulated on September 18th, the Westar provision was § 136).^{26[26]}

- On September 19, 2002, the House conferees voted on an amendment offered by Representative Markey to strike § 136, the Westar provision, from the House offer. The transcript of the debate on his amendment is Attachment H. Representative Barton spoke in “mild opposition” to the amendment, indicating that the purpose of the provision was to prompt the Securities and Exchange Commission to use its existing authority to exempt Westar from the ICA. The amendment was defeated on a party line vote of 8 to 6, and Representative Barton cast his vote as well as those he held by proxy – including the vote of Representative DeLay – against the amendment.
- On September 27, 2002 Westar filed an SEC Form 8-K disclosing that the company and some of its employees had been served with federal grand jury subpoenas by the U.S. Attorney’s office in Topeka, Kansas on various matters relating to the company and its CEO, including on the use of the company’s aircraft. A copy of that Form 8-K is in Attachment I to this memorandum.
- On September 30, 2002, Westar’s SEC Form 8-K was circulated among the conferees on H.R. 4, along with a letter from the Chairman of the Kansas Corporation Commission (KCC) expressing opposition to the Westar provision. A copy of the KCC Chairman’s letter is also in Attachment I.^{27[27]}
- On September 30, 2002, according to Representative Barton, he instructed the staff to drop the Westar provision from subsequent offers to the Senate on electricity issues, after learning that Westar was under federal investigation and considering criticisms of the provision.

The conference committee did not report any bill before the end of the 107th Congress, and thus no energy legislation was enacted at that time. Among the documents that Westar provided us is a copy of an e-mail from Westar executive Doug Lawrence to company CEO David Wittig of September 30, 2002, which is Attachment J. According to that message, the Westar provision was killed by both of the two above-noted factors: Westar’s disclosure that the company was under federal investigation, and the letter of the KCC Chairman expressing opposition to the provision.

^{26[26]} The September 13, 2002 draft that appears in Attachment G, which was provided to us by Representative Barton, bears a date at the bottom of July 19, 2004. Representative Barton advised us that neither he nor his staff were able to locate a copy of that draft in his office files, and thus the text of that draft that he provided to us is one that was printed from the database of the House Office of Legislative Counsel.

^{27[27]} As that letter indicates, the KCC had been at odds with Westar since the spring of 2001 regarding the company’s plans to separate its regulated public utility business from its unregulated businesses. The Commission’s view was that the plan would leave the company’s utility business saddled with debt that was incurred in the acquisitions of the company’s unregulated businesses.

The issue of whether Representative DeLay made a solicitation of campaign funds from Westar that was improperly linked with official action.

Review of the materials presented in the 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. The major violation alleged could hardly be more serious: that Representative DeLay solicited a bribe from Westar in the form of campaign contributions. However, the information presented in the complaint on Westar's reasons for making the contributions at issue here – specifically, the Westar documents that are attached hereto as Attachments B and C – includes no reference whatsoever to any solicitation by Representative DeLay or anyone acting on his behalf.

In the absence of any information in the complaint regarding a solicitation of Westar by or on behalf of Representative DeLay, we sought such information under our authority under Committee Rule 16(c). As detailed below, we obtained information regarding the discussions between Westar's lobbyist and the organizer of a June 2002 fundraiser for Representative DeLay's leadership PACs, as well as information on Westar's participation in that event. The information that we obtained does not indicate that there was any improper solicitation of Westar by either Representative DeLay or anyone acting on his behalf.

Turning, first, to Westar's program for the making of campaign contributions in 2002 as described in Attachments B and C, one of the documents that Westar provided to us significantly illuminates that program. That document, which is Attachment K, is a memorandum to Doug Lawrence, who was then Westar's Vice President for Public Affairs and was the author of Attachments B and C. The memorandum, which is dated April 23, 2002 and thus pre-dates Attachments B and C,^{28[28]} sets out recommendations for a program of political contributions by Westar and its executives. While that memorandum is unsigned, Mr. Lawrence has advised us that he received it from Westar's lobbyist, Mr. Bornemann.

As detailed below, the relationship between the two Westar documents of May 2002, on the one hand, and the April 23rd memorandum, on the other, is evident from a review of their texts. The documents of May 2002, which were authored by Mr. Lawrence and propose that Westar executives make a number of specific political contributions, merely characterizes the contents of the April 23rd memorandum from Westar's lobbyist. As is also detailed below, the May 2002 communications mischaracterize the April 23rd memorandum in certain key respects, and it is those mischaracterizations that have generated much of the controversy in this matter.

The April 23, 2002 memorandum recommending a program of Westar political contributions. The April 23rd memorandum by Mr. Bornemann is important here for several reasons. To begin with, the memorandum presents the program for campaign contributions as

^{28[28]} Westar also provided us with one other document that pre-dates Attachments B and C, and that is a brief memorandum from CEO David Wittig to twelve Westar executives that states in its entirety, "We are going to enter the donation season (particularly political), which will require us to write some checks. The attached Donation Schedule is a guideline of how we might share the responsibility." The attached schedule sets out only a proposal of the amount per thousand dollars of donations that each of the recipients would donate.

part of a long-term program for the company to establish a presence in Washington.^{29[29]} In contrast to Attachments B and C, it does not tie that program to the provision that Westar was seeking in the then-pending energy legislation. The program's purpose is stated in the April 23rd memorandum as follows:

Below are our recommendations for beginning to develop a significant and positive profile for the Company's federal presence. A couple of observations.

First, this is not a random wish list that simply matches titles with solicitations. We have thought this through, and we're happy to explain it in more detail.

Secondly, this will strike you as very big But that's largely because of the rapidity and reach of the Company's move to enlarge its traditional single-state delegation-based approach to Washington. The Company now seeks a committee and leadership-based approach to Capitol Hill – and we do well to recognize that there are high 'up-front' costs for a long-term presence.

Issues come and go, and we know you agree that the 'switch' cannot be turned on and off according to the issue *de jure* [sic]. There's significant value in securing your 'place at the table' for a much longer period ahead. [emphasis added]

In short, it appears that the "seat at the table" language in Attachment C, on which the complaint focuses attention (see ¶¶ 9, 19), was simply taken from this earlier memorandum by Mr. Bornemann, and that it was not indicative of a solicitation made by or on behalf of any House Member that linked campaign contributions with action on the energy legislation.^{30[30]} Moreover, Mr. Lawrence, who was the author of Attachment C, has confirmed to us that this was the case. A letter to us on behalf of Mr. Lawrence from his counsel states the following on this point:

Mr. Lawrence had no communication with a Member of Congress or an individual affiliated with a Member of Congress, regarding any campaign contribution being linked to legislation. The reference to 'getting a seat at the table' [in Mr. Lawrence's e-mail of May 20, 2002] was from Westar's Lobbyist, Richard Borneman [sic], who had used the phrase in an earlier communication. Mr. Lawrence did not believe, nor was it communicated to him, that Westar's campaign contributions were linked to any legislation. [emphasis added]

^{29[29]} By way of background, and as the April 23rd memorandum indicates, it appears that prior to 2002, the efforts of Westar executives to generate political contributions were limited to efforts on behalf of federal, state or local candidates in Kansas. In this regard, see Exhibits 238 and 239 to the Westar Energy, Inc. Report of the Special Committee to the Board of Directors of April 29, 2003. As noted above, the report with exhibits is available on Westar's Web site.

^{30[30]} The concept that the program of political contributions proposed by Westar's lobbyist was a long-term program, rather than one that was tied specifically to the then-pending energy legislation, is supported by the fact that a number of the contributions that Westar executives made to House Members in 2002 were made in October and November 2002 – *i.e.*, after the demise of the Westar grandfather provision. Contributions made by Westar executives during all of 2002 are set out in Exhibit C to Representative Bell's complaint.

In addition, the above-quoted materials from Mr. Bornemann's memorandum indicate that that campaign contributions discussed in that memorandum did not reflect solicitations received from any Member or anyone acting on behalf of a Member, but instead were simply proposals of the lobbying firm. Thus the memorandum refers to "our recommendations," and states that, "We have thought this through"

In this regard, the proposed contribution to Representative Shimkus is particularly noteworthy. In referring to that contribution, the e-mail of May 20, 2002 (Attachment C) states that Representatives Tauzin and Barton "made this request in lieu of contributions to their own campaign." In contrast, the April 23rd memorandum indicates merely that the Shimkus campaign was to be the first beneficiary of a series eight "Tex-Cajun Cookout" fundraisers that Representatives Tauzin and Barton were proposing to hold in the period of April to July 2002. Mr. Bornemann's memorandum "strongly recommend[ed]" participation in all eight."^{31[31]} In sum, while Attachment C suggests that Representatives Tauzin and/or Barton personally requested that Westar executives contribute to Representative Shimkus' campaign, the information we have obtained indicates that there was nothing more involved than the receipt of routine printed invitations from a campaign committee.^{32[32]}

Contacts between Westar's lobbyist and the organizer of an energy company fundraiser for Representative DeLay. Finally, and most importantly, insofar as contributions to Representative DeLay are concerned, the April 23rd memorandum arguably suggests that Westar sought out Representative DeLay, rather than vice versa. On this subject, Mr. Bornemann's memorandum has a section on "Soft Money", the text of which is as follows:

We believe that the most beneficial way to spend corporate dollars – as opposed to cutting personal or PAC checks – is with the House Leadership. That means joining the fold, so to speak, of House Majority Leader Tom Delay (R-TX) [sic: at the time, he was Majority Whip].

We have been looking for an effective, but relatively inexpensive way to do this because the conventional route is near-prohibitive in cost.

For example, Mr. Delay has two leadership PACs – the reportable 'Americans for a Republican Majority (ARM)', and the non-reportable 'Texans for a Republican Majority (TRM)'. But, as near we can tell, checks in the range of \$50-\$100K seem to be the norm here.

^{31[31]} Representative Tauzin stated to us that in April or May 2002, the Director of his Bayou Leader PAC received a call from Mr. Bornemann asking about the fundraising events that the PAC was planning. According to Representative Tauzin, the Director advised Mr. Bornemann of the series of cookouts that the PAC was sponsoring along with Representative Barton's Texas Freedom Fund, and Mr. Bornemann asked that copies of the invitations be sent to him. Copies of invitations to those cookout-fundraisers are in Attachment L.

^{32[32]} As noted above, Attachment C also includes the statement that Senator Richard Shelby has "made a substantial request of us for supporting [Tom] Young's campaign [for the House]." In this regard, it is noteworthy that according to news media reports, complaints were filed against Senator Shelby on the basis of the May 2002 Westar documents with both the Senate Select Ethics Committee and the Alabama State Bar, and both bodies dismissed those complaints. See Chappie, "Ala. Bar Dismisses Shelby Complaint," *Roll Call*, July 23, 2003; Kavanagh, "Senate Ethics Committee Declines to Investigate Shelby," *Federal Ethics Report*, Jan. 2004 at 18.

....

How does one play for a more reasonable dollar amount?

We may have an opportunity later this summer, for an energy industry ‘roundtable’ golf match at the Homestead for a ‘mere’ \$25,000. We have spoken to the former DeLay staffer who’s putting this together, and his preference – for the time being – is to admit generation-only type companies. These are more entrepreneurial, more naturally Republican, in some views of the world.

Nonetheless, we think we can get by with that if we beg. We’re not suggesting you do it now since the ability to use a corporate check would allow quick turn-around – should you decide to do it.

As the complaint notes, and as suggested in Mr. Bornemann’s memorandum, Westar did make a \$25,000 contribution to the Texans for a Republican Majority PAC (TRMPAC), and Westar officials attended the event at The Homestead that is noted in the memorandum. The contribution was made by means of a company check dated May 14, 2002 that was paid on May 29th.^{33[33]}

Moreover, consistent with the suggestion made in the memorandum, both Mr. Bornemann and the former DeLay staff member who is referred to in that document have stated to us that it was Mr. Bornemann who initiated contact on Westar’s participation in this fundraiser. The former DeLay staff member who organized the event was Mr. Drew Maloney, who had departed the staff at the end of March 2002 to become a lobbyist.^{34[34]} A letter to us on behalf of Mr. Bornemann from his counsel states the following:

Mr. Bornemann recalls initiating a discussion with Mr. Maloney, at a time after Mr. Maloney had left the Hill to join the private sector, about Westar’s contributing to one of Congressman DeLay’s political entities. Because ‘Texans For A Republican Majority’ (‘TRIMPAC’) [sic] – an entity about which Mr. Bornemann was completely unfamiliar – was legally able to accept so-called soft money, Mr. Bornemann opted to recommend to Westar that it contribute directly to TRIMPAC.^{35[35]}

^{33[33]} As we have noted, this contribution is the subject of an indictment of Westar that charges that the contribution was unlawful under the Texas Election Code.

^{34[34]} As noted above, among the issues that Mr. Maloney handled in the DeLay office were those related to energy.

^{35[35]} Mr. Bornemann also stated to us that he had a separate conversation with Mr. Maloney in this same time period in which he described Westar’s circumstances and the legislation it was seeking, and asked Mr. Maloney to introduce him to his successor in the DeLay office, Mr. Jack Victory. Mr. Bornemann stated to us that there was no discussion of political contributions in that conversation, and that he had had numerous social interactions with Mr. Maloney prior to this time.

Mr. Maloney’s stated to us was that he had a conversation with Mr. Bornemann regarding the Westar legislation in this time period, but his recollection is that this conversation occurred shortly before he left the DeLay office.

On this matter, Mr. Maloney stated to us,

My recollection is that Mr. Bournemann [sic] approached me about participating in an event for Congressman DeLay. I believe I explained that I was organizing an energy event for Congressman DeLay at the Homestead on June 2-3, 2002. I was seeking \$25-50K per participant. I told him the preference would be to have members from the company (Westar) attend, not a contract lobbyist. I also checked with the other participants to see if Westar participation was compatible, and then confirmed to Mr. Bournemann that Westar could join the group to attend the event. At some point following the initial discussion, Mr. Bournemann advised me that Westar would participate at the \$25,000 level and send two representatives from the company to the event.

Communications among Mr. Lawrence, Mr. Bornemann and Mr. Maloney related to Westar's attendance at the event are attached hereto in Attachment M. Also included in Attachment M are communications between Mr. Maloney and Chris Perkins, who worked for ARMPAC, and Dani DeLay Ferro (Mr. DeLay's daughter, who was also involved in the arrangements for the event) that include reference to Westar's participation in the event.

Mr. Bornemann has also stated to us, through a letter from his counsel, that in his later contacts with the DeLay office on the Westar legislation, as well as in the one other contact he had with Mr. Maloney regarding Westar, there was no discussion of political contributions. In addition, a letter to us on behalf of Mr. Lawrence from his counsel states the following with regard to solicitations of contributions:

Mr. Lawrence had no conversation with any member of the House of Representatives, or those affiliated with a House Member, regarding campaign contributions nor is he aware of any other officer of Westar discussing with any House Member, or those affiliated with any House Member, regarding campaign contributions as named in the enclosed documents [*i.e.*, the documents that are Attachments B and C to this memorandum].

In sum, the information we have obtained does not indicate that Representative DeLay or anyone acting on his behalf solicited campaign contributions from Westar in an improper manner.

Representative DeLay's participation in and facilitation of the June 2002 energy company fundraiser.

In the course of seeking information relating to the two issues raised by Count I of the complaint, we obtained information on the June 2002 energy company fundraiser with Representative DeLay in which Westar participated. That information indicates that the fundraiser was not consistent with House standards of conduct providing that fundraising activities should not involve even an appearance that donors are being provided with special access to a Member in his or her official capacity.

The standards relating to this point are discussed on p. 34 of the Committee's *Campaign Activity* booklet. The booklet there references circumstances that arose in 1987 when a Senate Committee Chairman invited lobbyists and PAC directors to join a "Chairman's Council" that involved having breakfast with him once a month. As the booklet reflects, the Standards Committee has endorsed the ruling made by the Senate Select Committee on Ethics on such activities:

While solicitations offering access to policy discussion groups may violate no law or Senate rule, they nonetheless affect public confidence in the Senate. Therefore, Senators should not make solicitations which may create the appearance that, because of a campaign contribution, a contributor will receive or is entitled to either special treatment or special access to the Senator.^{36[36]}

In a similar vein, a Member should not participate in a fundraising event that gives even the appearance that special treatment or special access to the Member in his or her official capacity is being provided to donors.

As shown by the documents in Attachment M, the fundraiser here included both a briefing and a golf outing, and attendance at the event was limited to executives of five energy companies: Reliant Energy, Williams Energy, Mirant Energy, El Paso and Westar. According to Mr. Maloney, the idea for the event originated in a discussion he had with an official of Reliant Energy after he had left the Hill, and they had decided that they would ask for \$25,000 to \$50,000 from each participant. The event was a fundraiser for another of Representative DeLay's leadership PACs, the Americans for a Republican Majority PAC (ARMPAC), but companies were given the option to donate to TRMPAC.

As a general matter, fundraisers directed to a particular industry or to others sharing a particular federal interest are permissible, and at such events Members are free to talk about their record and positions on issues of interest to the attendees. In addition, of course, a Member has no control over what the donors at a fundraising event spontaneously say to or ask of the Member with regard to their legislative interests. Nevertheless, there are a number of considerations regarding this particular fundraiser that raise serious concerns under the standards of conduct discussed above.

In particular, there was the timing of the fundraiser, *i.e.*, it took place just as the House-Senate conference on major energy legislation, H.R. 4, was about to get underway. Indeed, one of the communications between organizers of the fundraiser – an e-mail of May 30, 2002 from Mr. Maloney to Mr. Perkins that notes the legislative interests of each of the attendees – includes a specific reference to the conference. (That e-mail is included in Attachment M.) In addition, there was the fact that Representative DeLay was in a position to significantly influence the conference, both as a member of the House leadership and, by action taken about a week and a half after the fundraiser, his appointment as one of the conferees.

^{36[36]} Senate Select Comm. on Ethics, Interpretative Ruling No. 427 (Sep. 25, 1987), *reprinted in Senate Ethics Manual*, 108th Cong., 1st Sess. (2003) at 291-92..

In view of these considerations, other aspects of the fundraiser that would have been unobjectionable otherwise had the effect, in these specific circumstances, of furthering the appearance that the contributors were receiving impermissible special treatment or access. One of these aspects was the presence at the fundraiser of two key staff members from Representative DeLay's leadership office: Jack Victory, who handled energy issues, and the office counsel, Carl Thorsen.^{37[37]} In addition, there were the limited number of attendees, and the fact that the fundraiser included several events at a resort over a two-day period, both of which facilitated direct contact with Representative DeLay and his congressional staff members.

Furthermore, there is the description of the event that was provided to the Committee by counsel for the Westar attendees, Messrs. Doug Lawrence and Doug Sterbenz. That description includes the following:

On Sunday, June 2, 2002 Douglas Sterbenz and Doug Lawrence attended a reception and dinner with fifteen to twenty others at the Homestead. Representative Tom DeLay was present for the reception and dinner. Mr. DeLay asked the group to advise him of any interest we had in Federal Energy Legislation. Mr. Lawrence advised Mr. DeLay that Westar supported repeal of the P.U.C.H.A. [sic] provision in the Energy Bill, provided that Westar's restructuring wouldn't be harmed by the [r]epeal. Lawrence advised that Westar needed a grandfather clause to continue as a safe harbor if P.U.C.H.A. was to be repealed. The following day, Mr. Lawrence provided a staff aide to Rep. DeLay a bound briefing book that Westar had put together on this issue.

On June 3rd, 2002, Mr. Lawrence attended a golf outing at the Homestead where he played golf with the attendees. Mr. Lawrence shared a cart with an aide to Congressman Delay and advised the aide he would give him the materials in the briefing book and later did. At lunch that day, Mr. Sterbenz, Mr. Lawrence and others participating in the golf outing had lunch. During the lunch Mr. Lawrence restated to Rep. DeLay Westar's position regarding the need for a grandfather clause if P.U.H.C.A. was to be repealed. [emphasis added]

We brought the above-quoted statement to Representative DeLay's attention and requested his response to it. He stated that he gave a general briefing on energy issues at that event, but that he has no recollection of his specific remarks. He also stated that,

[I]t would not be typical for me at such events to have 'asked the group to advise' me of 'any interest' the attendees had in 'Federal Energy Legislation.' That is not at all consistent with the manner in which I normally would interact with attendees at such an event.

^{37[37]} Representative DeLay has stated that both were present at the event on their own time, rather than official time. The concern we are raising here is not that they were doing campaign work on official time, but rather that their presence may have furthered at least the appearance that the donors were obtaining special access to Representative DeLay in his official capacity.

He also stated that none of his staff members who were in attendance recalled having any conversation with Mr. Lawrence or receiving any materials from him.

Two additional documents that we obtained in the course of our fact-gathering relate to the energy company fundraiser. One is a document that we obtained from Westar, and it is a memorandum of June 25, 2002 from Mr. Lawrence to other Westar officers that sets out a second round of proposed campaign contributions. That memorandum, a copy of which is Attachment N, includes the following statement:

Right now, we have made significant progress with House Majority Whip Tom DeLay, and Energy Subcommittee chairman Joe Barton. The contributions made in the first round were successful in opening the appropriate dialogue. [emphasis added]

In response to a question that we posed to Mr. Lawrence on this statement, he stated that his reference here was to the opportunities he had at the Homestead event to meet with Representative DeLay, make a presentation on Westar's position on PUHCA repeal, and present a briefing book to a DeLay staff member.

The other document is a memorandum from Westar's lobbyist, Mr. Bornemann, to a DeLay staff member requesting an appointment for the company's CEO with Representative DeLay. That memorandum, which is Attachment O to this memorandum, specifically references Westar's participation in the energy company fundraiser, stating,

[T]wo of our officers recently had the opportunity to attend a get-together and meeting that Mr. DeLay held at the Homestead in West Virginia [sic: it is in Virginia]. Our people thought [he] was terrific, and enjoyed their time with the Majority Whip.

We further address Representative DeLay's activities in connection with this fundraiser in the section below in which we set out our conclusions and recommendations regarding Count I.

The issue of whether Representative DeLay took any actions with regard to the Westar legislation, and if so, whether those actions constituted the granting of an impermissible "special favor" to a campaign donor.

While the complaint states (in ¶ 17) that the Committee "should find that Rep. DeLay was 'dispensing special favors' in violation of House Rules," the complaint does not allege any particular "favors" that Representative DeLay dispensed to Westar. One paragraph of the complaint (¶ 12) alleges actions taken by certain House Members in support of the Westar provision, but that paragraph includes no reference to Representative DeLay:

On September 18, 2002, in the conference on the energy bill, Mr. Barton inserted the Westar provision. The next day, Mr. Barton, who held Mr. Tauzin's

proxy, defeated Congressman Edward Markey's motion to strike the Westar provision on a party line vote of 8 to 6. During the discussion of Mr. Markey's motion, Mr. Barton stated, "[t]his particular provision benefits one company. That company is . . . Western Resources [former name of Westar] in Topeka, Kansas." [citation omitted]

Indeed, as detailed above in this memorandum (on pp. 11-13), the information that we obtained indicates that Representative Barton was the Member who was most active on the legislative provision sought by Westar.

We sought information specifically relating to any actions taken by Representative DeLay or his staff on the Westar provision. The information we obtained indicates that neither he nor any member of his staff took any action with regard to that provision other than engaging in meetings and other communications with representatives of Westar.^{38[38]} In addition to the Homestead event, those communications were as follows:

- Jack Victory, who handled energy issues for Representative DeLay, met with one or more Westar lobbyists on two occasions – June 26 and July 24, 2002 – and also had telephone conversations with one of the lobbyists, Mr. Bornemann, and
- Representative DeLay and Mr. Victory met with Westar CEO David Wittig, Doug Lawrence and Mr. Bornemann on September 25, 2002.^{39[39]}

It is possible that in certain circumstances, the granting to a person of access to a Member or staff person in his or her official capacity may in itself constitute an impermissible special favor. Here, however, the information we have obtained does not indicate that the meetings and other conversations that Representative DeLay and his staff held with Westar representatives constituted an impermissible special favor or were otherwise improper.

According to Mr. Victory, he met with Westar's lobbyist, Mr. Bornemann, on June 26, 2002 because Mr. Bornemann had called and requested a meeting. Of course, having attended the fundraiser on June 2-3, Mr. Victory was aware that Westar was a donor to a campaign committee affiliated with Representative DeLay. However, Mr. Victory stated to us that it is his policy to try to meet with everyone that requests a meeting on a matter within the scope of his assigned duties. He also stated that at the meeting, his advice to Mr. Bornemann was that he should talk to members or staff of the conference regarding Westar's position.^{40[40]}

^{38[38]} Representative DeLay was a conferee on the energy bill in 2002, but he was not present at the conference meeting at which Representative Markey's amendment to strike the Westar provision was voted on. As noted above, Representative Barton cast Representative DeLay's vote against the amendment by proxy.

^{39[39]} As was noted above, Mr. Bornemann also had one discussion with Mr. Victory's predecessor in the DeLay office, Mr. Maloney, on Westar's circumstances and proposed legislation. Mr. Maloney stated to us that this discussion occurred not long before he left the congressional office. However, Mr. Bornemann's recollection is that it occurred soon after he left the office, and that in it Mr. Bornemann requested that Mr. Maloney introduce him to Mr. Victory.

^{40[40]} Mr. Bornemann stated to us that he has no recollection of this meeting.

According to Mr. Victory, at the meeting of July 24, 2002, Mr. Bornemann was accompanied by two former employees of the Securities and Exchange Commission, and they explained the legislative language that would resolve Westar's concern.^{41[41]} Mr. Bornemann's recollection of this meeting is similar. He stated that the meeting consisted largely of a presentation by Marianne Smythe, who was Westar's counsel on securities law matters.^{42[42]}

The meeting with Representative DeLay on September 25, 2002 lasted 10 to 15 minutes and was attended by David Wittig, who was then CEO of Westar, Mr. Lawrence, and Mr. Bornemann, as well as by Mr. Victory. A memorandum from Mr. Bornemann to Representative DeLay's staff requesting the meeting (and which also references the Homestead event) is Attachment O to this memorandum.

According to Mr. Lawrence, the September 25th session was a "meet and greet," at which the Westar representatives presented another copy of their briefing book on the Westar grandfather provision. Mr. Lawrence also stated that at that meeting, "Mr. DeLay advised that there would be an Energy Bill with P.U.C.H.A. [sic] repeal but there was no certainty that Westar's provision on grandfathering would be in that legislation." Mr. Bornemann recalled Representative DeLay's remarks somewhat differently, stating to us that,

Congressman DeLay referred to Westar's proposed amendment to the Investment Company Act of 1940, in the context of the PUHCA repeal provisions of the energy bill, and said that there was little chance of this happening legislatively; Congressman DeLay also indicated that he thought that the SEC could resolve the problem administratively.

Mr. Bornemann also recalled that the initial part of the meeting included "social chit chat" and discussion of the upcoming elections and tax legislation. He also stated that there was no discussion of political contributions in this meeting.

Mr. Victory also stated to us that he also has a vague recollection that after learning that Westar was under federal investigation – a development which appeared in the news media on September 30, 2002^{43[43]} – he spoke to Mr. Bornemann telling him that he thought the provision was dead. A document that we obtained from Westar refers to a contact with the DeLay staff that occurred in that time period. That document, which is Attachment J to this memorandum, is an e-mail from Doug Lawrence to Westar CEO David Wittig of September 30, 2002, and it states in part,

Things are grim in DC. The Delay staff has asked us to release people from their commitment to support our provision. The Wine letter has killed us, it has been

^{41[41]} As was noted above in the chronology of the Westar legislation, the Westar lobbyists had a similar meeting with Representative Barton and his staff member on the same date.

^{42[42]} Because Attachment D includes a letter from Ms. Smythe of the firm of Wilmer, Cutler and Pickering, it appears likely that those documents were provided to Mr. Victory in the meeting of July 24th.

^{43[43]} Further information regarding the federal investigation of Westar that was publicized on September 30, 2002 is set out in Attachment I, which includes a copy of the SEC Form 8-K that Westar filed on this matter on September 27, 2002.

circulated along with last week's 8K [Westar's SEC filing announcing the federal investigation of the company]."

The "Wine letter" that is noted in the e-mail, which was a letter from the Chairman of the Kansas Corporation Commission expressing opposition to the Westar provision, is included in Attachment I and was discussed above. With regard to the reference to commitments of support in this e-mail, Mr. Lawrence has told us that he has no personal knowledge of any such commitments, and that in this e-mail, he was simply repeating a statement that had been made to him by Mr. Bornemann. However, in his counsel's letter to us, Mr. Bornemann denied making such a statement to Mr. Lawrence. According to that letter,

[T]he e-mail does not reflect information that Mr. Lawrence received from Mr. Bornemann. Mr. Bornemann states that he had no other activities or communications with any DeLay staff member on this matter [other than the ones identified above], and he denies hearing or receiving recommendations from Mr. DeLay, or from any other member of Congress or staff person, any recommendation as to how to handle congressional advocacy of any issue pertaining to Westar

In response to a question we posed to Representative DeLay on this e-mail, he said, "I was not aware of the existence of any commitments made to Westar by any Members, staff, or any other individuals regarding the provision and thus had no involvement whatsoever." In addition, with regard to this e-mail, Mr. Victory told us, "I remember no instance when Representative DeLay, I or any other member of his staff talked to anyone about any such commitment or about releasing people from their commitment to Westar. I do not know why the email says what it does."

More broadly, Representative DeLay has stated to us that neither he nor anyone in his office took any actions to advance the Westar provision:

To my knowledge, neither I nor anyone in my office took any affirmative action to assist Westar in having this legislation included in the conference report. I took no action regarding the legislation of interest to Westar. I made no request, took no action, nor did I suggest or express any interest in including the legislation in the energy conference report.

Moreover, even if the reference to the DeLay staff in the September 30th e-mail were to be fully credited – *i.e.*, even if a DeLay staff member were involved in monitoring or even seeking commitments for the Westar provision – that circumstance, taken with the other information we have obtained, would not indicate that Representative DeLay conferred an impermissible special favor on Westar. As detailed in this memorandum, the other information we have obtained includes that the major actions taken in furtherance of the Westar provision were taken by Representative Barton, and that his actions on that legislation long pre-date the contributions that are the subject of Count I of the complaint.

The actions taken by Representative Barton are detailed above, on pp. 11-13, and with regard to those actions, Representative Barton stated to us,

I had many conversations with Majority Leader DeLay about the energy conference during this time period. I do not recall, however, any discussion specifically concerning PUHCA or the Investment Company Act provisions.

Similarly, Mr. Andy Black, Representative Barton's committee staff member, stated to us,

I do not recall Congressman DeLay or his staff taking any action on this issue. Mr. Barton and Mr. Tauzin were leading the electricity discussions with Senate negotiators.

We also asked Mr. Victory and Mr. Black about any communications they had about the Westar provision. Mr. Black said he did not recall any specific discussions, and Mr. Victory stated the following:

My recollection is on 2 occasions I talked with Andy Black, of Chairman Barton's staff, about the Westar language. I believe the first conversation was on what Chairman Barton thought about the policy and the second was to find out if it would be included in Chairman Barton's package. I do not believe Andy offered any response during the first conversation, and I believe the second conversation, which happened around the date of the conference meeting, Andy informed me that Chairman Barton decided to include the language.

In sum, the information we have obtained indicates that Representative DeLay took no action with regard to the Westar provision that constituted an impermissible special favor or was otherwise improper.

* * *

We also note that the complaint carries the suggestion that any action on any legislative provision that would benefit only one company or entity is by definition an impermissible special favor. That is not the case. Where, for example, a company or other entity, because of its particular circumstances, is uniquely and unfairly harmed by a provision of federal law, a measure to remedy that situation may be entirely permissible.

Here, for example, Westar argued that if PUHCA were repealed without exempting the company from regulation under the ICA, Westar would be placed "in the untenable position of being required to register under a statute that will make it impossible for it to continue its current business operations."^{44[44]} In this regard, on its Web site the SEC notes that the ICA "regulates the organization of companies, including mutual funds, that engage primarily in investing, reinvesting, and trading in securities" In a memorandum of February 13, 2002 prepared in connection with the proposed Westar provision, the SEC noted that, "An operating company typically finds the requirements of the Investment Company Act incompatible with its business

^{44[44]} See Attachment D, letter of March 28, 2002 from Marianne K. Smythe, at 3.

needs,” in part because it imposes limitations on a company’s “ability to use leverage, engage in affiliated transactions, and provide incentive compensation to employees.”

Of course, we do not here attempt to make any judgment on the merits of the arguments that were made in 2001-2002 in support of or in opposition to the Westar grandfather provision. However, while sponsoring or taking actions in behalf of legislation that benefits only one or a small number of entities does not necessarily constitute an impermissible special favor, this episode makes clear that Members need to be very cautious in taking such actions. This is particularly the case where the entity that would benefit from the legislation is a political contributor or supporter.^{45[45]} It is also clear from this episode that one of the most effective ways to ensure that a substantial claim of special favors will not be raised with regard to legislation of this kind is to have the legislation considered in an entirely open process, in which all interested parties are provided with an opportunity to state their views.

Conclusions and recommendations with regard to Count I. We first set out our conclusions and recommendations regarding the two violations alleged in Count I of the complaint, and then set out our conclusions and recommendations with regard to the related matter of Representative DeLay’s activities in connection with the June 2002 energy company fundraiser.

The violations alleged in Count I. Based on the results of our fact-gathering activities, as detailed above, we do not recommend that either of the violations alleged in Count I – *i.e.*, that Representative DeLay made a solicitation of campaign funds from Westar that was improperly linked with official action, and that he took actions that constituted an impermissible “special favor” to Westar – be referred to a subcommittee for a formal investigation.

We recognize that a number of individuals and organizations have called for a formal investigation of the allegations made in the complaint, and particularly the allegations made in Count I. The point on which we most strongly disagree with those persons is most apparent in the following paragraph, ¶ 19, of the complaint:

[T]he Westar ‘get a seat at the table’ e-mail, together with the temporal proximity of the contributions and legislative action taken regarding the ‘Westar amendment’ establishes a *prima facie* case that Rep. DeLay violated both federal statutes and House rules.

In fact, that set of allegations does not establish a *prima facie* case that Representative DeLay violated any laws or rules, because as we have established, those allegations do not include any reference whatsoever to any solicitation of Westar by Representative DeLay, or any action he took on the Westar legislation.

Notwithstanding this failing in the nature of Count I, we accepted the complaint, and we sought information from those having personal knowledge of the circumstances of Westar’s contributions and the actions taken on the Westar legislation. As detailed above, the information we obtained indicates that neither Representative DeLay nor anyone acting on his behalf

^{45[45]} See, in this regard, the guidance set out on pp. 250-51 of the *House Ethics Manual*.

improperly solicited contributions from Westar, and Representative DeLay took no action with regard to Westar that would constitute an impermissible special favor.

When all of the rhetoric and irrelevant considerations are stripped away from the violations alleged in Count I, the question presented to the Committee with regard to those allegations is a simple one: whether the Committee should launch a formal investigation of a Member solely on the basis of entirely unsubstantiated allegations – here, allegations of a solicitation of a bribe and related offenses – made by a person or persons who have no personal knowledge whatsoever of the relevant facts. Our answer to this question here is the same as it would be in any other case that presents similar circumstances: no.

Representative DeLay's actions in connection with the June 2002 energy company fundraiser. As explained above, Representative DeLay's participation in and facilitation of the June 2002 energy company fundraiser is a matter separate from, albeit related to, the matters alleged in Count I of the complaint. The information we obtained related to that matter, as detailed in this memorandum, indicates that Representative DeLay's conduct with respect to this fundraiser did not conform to House standards providing that fundraising activities should not involve even an appearance that donors are being provided with special access to a Member in his or her official capacity.

The broad House standards of conduct in this area, as described in this memorandum, are extremely important ones. The history of Committee enforcement actions, as well as our own personal experience, indicate that with rare exception, Members do not violate the basic prohibitions that apply in this area, *i.e.*, Members do not enter into agreements, either explicit or implicit, to trade their votes or other official actions for campaign contributions, and Members do not take a particular official action merely because a campaign donor has requested them to do so.

Yet it is also true that so long as the current campaign finance system is in place, individuals and organizations seeking legislation or some other official action from House Members will make campaign contributions to those Members, and some of the time those Members will take the action sought by those persons. And whenever this occurs, there will be some who will claim that those actions were the result of corruption, and that governmental actions are being bought and sold for campaign contributions.

With the current campaign finance system, it is not possible to preclude such claims from being made. However, if Members comply with the applicable standards on soliciting and accepting contributions, it is possible at least to mitigate any valid concerns that may be raised by those activities. These standards extend to the appearances created by fundraising activities. In short, under those standards, there are certain proffered campaign contributions that must be declined, and certain fundraising opportunities that must be forgone, solely because they create an appearance of improper conduct.

In view of the circumstances of the June 2002 energy company fundraiser, as detailed in this memorandum, Representative DeLay's facilitation of and participation in that event were contrary to those standards. Those circumstances included not only the nature of the event, but

also its timing, in that it took place just as the House-Senate conference on the energy legislation – legislation of vital importance to the contributors at the fundraiser – was about to commence. Moreover, Representative DeLay was in a strong position to influence the conference, both because of his leadership position and the fact that about a week and a half after the fundraiser, he was named a conferee. At a minimum, his actions created the appearance that donors were being provided with special access to him with regard to the pending energy legislation.

In addition, while the views of any one donor are not dispositive on whether a fundraising activity creates an appearance of impropriety, the documents we obtained indicate that the individuals who were active on Westar's behalf were of the view that the company's participation in the fundraiser provided special access to Representative DeLay. As noted above, later in June 2002, when Mr. Lawrence was proposing that Westar executives make additional contributions, he stated that Westar had made "significant progress" with Representatives DeLay and Barton, and that, "The contributions made in the first round were successful in opening the appropriate dialogue." (see Attachment N). When we asked Mr. Lawrence about that statement, he said he was referring to the presentations he was able to make at the fundraiser earlier that month. In addition, the following month, when Mr. Bornemann, Westar's lobbyist, sent a memorandum to the DeLay staff seeking an appointment with Representative DeLay for the company's CEO, he noted Westar's participation in the Homestead event (Attachment O).

The information that the Committee has before it regarding Representative DeLay's actions in connection with the June 2002 fundraiser, as set forth in this memorandum, is sufficient for the Committee to make a determination on them, and a formal investigation of the fundraiser is not warranted. While a formal investigation would likely elicit additional testimony on whether, at the event, Representative DeLay did or did not make the remarks that Mr. Lawrence attributed to him, that question is not a critical one here. The other circumstances of the event are more than sufficient to support a determination that his activities with regard to it were not proper.

It is also pertinent to note here a statement that the Committee issued in 1997 at the time it dismissed a complaint against Representative DeLay that charged, among other things, that he gave preferential treatment in legislative matters to those who had made contributions to Republican candidates. That statement said in part,

Rep. DeLay was advised that it is particularly important that a Member not make statements that create the impression that the Member would consider an individual's requests for access or for official action based on . . . campaign contributions.

The focus in the present matter is not so much on statements made by Representative DeLay, but more on actions he took – *i.e.*, his actions in facilitating and participating in the energy company fundraiser – that raise the very same concern expressed in that earlier Committee statement.

In sum, our recommendation is that Count I of the complaint be disposed of by means of a letter of admonition to Representative DeLay that states that while, on the basis of the information before the Committee regarding the violations alleged in Count I, a formal

investigation of those allegations is not warranted, his actions with regard to the June 2002 energy company fundraiser raise an appearance of impropriety under House standards of conduct.

Count II of the Complaint, relating to TRMPAC's use of corporate funds in 2002.

Facts and violations alleged in Count II. Count II alleges that in 2002 Representative DeLay used a Texas-based political action committee, the Texans for a Republican Majority PAC (TRMPAC), to funnel corporate money to state legislature campaigns in violation of Texas election law. Regarding TRMPAC's use of corporate funds in 2002, the complaint cites to and attaches copies of the following items:

- several news articles that appeared in 2003-2004 regarding a grand jury investigation of use of corporate funds in the 2002 elections, including by TRMPAC, that was initiated by the District Attorney of Travis County, Texas,
- a letter of March 31, 2003 that an organization named Texans for Public Justice sent to the Travis County District Attorney requesting an investigation of possible illegal corporate political expenditures by TRMPAC in 2002, and
- certain of the Form 8872 filings that TRMPAC made with the Internal Revenue Service regarding its contributions and expenditures in 2002.

As a related matter, the complaint alleges that in September 2002 TRMPAC sent a check for \$190,000 to the Republican National Committee, and within the next three weeks the RNC wrote checks totaling \$190,000 to seven candidates for the Texas House. The complaint alleges that, "The implication of this transaction is that TRMPAC and the RNC engaged in money laundering and a conspiracy to launder money." These allegations are based on three items: a newspaper article that appeared on this matter in February 2004, and copies of two TRMPAC e-mails that the newspaper had obtained.

As to Texas law on the use of corporate funds by a political committee, the complaint refers to and attaches a copy of an advisory opinion that the Texas Ethics Commission issued in 1993. That opinion interprets the provision of the Texas Election Code that generally limits the political expenditures of corporations to those that "finance the establishment or administration of a general purpose [political] committee."

Finally, with regard to Representative DeLay's involvement in TRMPAC, the complaint alleges that he formed the committee and appointed "one of his top aides" as its director, and that he was head of TRMPAC's advisory board and was "integrally involved in its administration." In support of these allegations the complaint cites a newspaper article that appeared in March 2004 regarding, among other things, testimony provided by TRMPAC's executive director in a deposition in a civil lawsuit. The complaint alleges that Representative DeLay's conduct is a felony under the Texas statutory law.

The applicable laws, rules and standards of conduct. Paragraph 2 of the Code of Ethics for Government Service requires that federal officials “[u]phold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.” A violation of that standard of conduct may implicate the requirement of the House Code of Official Conduct that a Member, officer or employee “shall conduct himself at all times in a manner that shall reflect creditably on the House.”^{46[46]} In the same vein, the Committee has stated that a Member or staff person must take reasonable steps to ensure that any outside organization over which he or she exercises control, including any political committee, operates in compliance with applicable law.^{47[47]}

In view of the indictments and the ongoing investigation by Texas authorities of the violations alleged in Count II, the Committee should defer action on that count. The indictments that were issued last month by a grand jury of the District Court for Travis County, Texas were discussed at the outset of this memorandum. Representative DeLay was not indicted, and according to comments of his that were quoted in the news media, he has not been subpoenaed or asked to testify in that matter. However, according to news media reports, officials of the Travis County District Attorney’s office have stated that the investigation is continuing, and no one has been ruled out of the investigation. Of course, the indictments are directly pertinent to the threshold question presented by Count II of the complaint, which is whether TRMPAC’s use of corporate funds in the 2002 Texas state elections was lawful under the Texas Election Code.

The Committee Rules include provisions that address the handling of a complaint that alleges a violation of a law or rule that is enforced by law enforcement or regulatory authorities. Committee Rule 15(f) provides that the Committee “may defer action on a complaint against a Member” where either of two circumstances is present –

- “when the complaint alleges conduct that the Committee has reason to believe is being reviewed by appropriate law enforcement or regulatory authorities,” or
- “when the Committee determines that it is appropriate for the conduct alleged in a complaint to be reviewed initially by law enforcement or regulatory authorities.”

A 1975 Committee report explained the Committee’s approach in the circumstance of an ongoing investigation by law enforcement authorities as follows:

[W]here an allegation involves a possible violation of statutory law, and the committee is assured that the charges are known to and are being expeditiously acted upon by the appropriate authorities, the policy has been to defer action until the judicial proceedings have run their course. This is not to say the committee

^{46[46]} House Rule 23, cl. 1. While the complaint alleges a violation of state election law, enforcement of that law is the province of state authorities, rather than this Committee. As noted above with regard to federal criminal statutes, typically the Committee does not either charge or attempt to prove that a Member has violated such a law. Instead, Committee disciplinary proceedings generally are based on House Rules and standards of conduct.

^{47[47]} *Campaign Activity* booklet at 7; see also House Select Comm. on Ethics, *In the Matter of Rep. Newt Gingrich*, H. Rep. 105-1, 105th Cong., 1st Sess. 7-8 (1997).

abandons concern in statutory matters – rather, it feels it normally should not undertake duplicative investigations pending judicial resolution of such cases.^{48[48]}

Under the rule, deferral by the Committee where there is an ongoing law enforcement proceeding is not mandatory, but rather is discretionary. Historically, the Committee has been more reluctant to defer where the Member conduct that is at issue is related to the discharge of his or her official duties as a Member of the House. Here, whatever Representative DeLay's role was in the TRMPAC activities challenged in Count II, his participation in those activities, if any, was not related to the discharge of his or her official duties as a Member of the House.

In addition, it appears that the second circumstance in which, under Committee Rule 15(f), deferral may be indicated – *i.e.*, “it is appropriate for the conduct alleged in a complaint to be reviewed initially by law enforcement or regulatory authorities” – is present here as well. In this regard, resolution of the allegations of Count II requires interpretation of provisions of the Texas Election Code and determinations on how they apply to the specific facts presented here. The disposition of the recently initiated criminal cases should provide information that bears directly on these points.

Based on the above considerations, our recommendation is that the Committee defer action on Count II pending further action in both the cases that were initiated by the recent indictments and in the District Attorney's investigation. If the Committee concurs that action on Count II should be deferred, Committee staff will monitor the Travis County proceedings. When circumstances arise indicating that the deferral should end, the Chairman and Ranking Minority Member will make appropriate recommendations for action on Count II to the Committee.

Count III of the Complaint, relating to DeLay office contacts in May 2003 with the FAA and the Justice Department regarding the absent Texas legislators.

Facts and violations alleged in Count III. Count III concerns contacts made by DeLay staff members with the Federal Aviation Administration and the U.S. Department of Justice in May 2003 regarding members of the Texas House of Representatives who had absented themselves from the session on congressional redistricting in order to deny the House a quorum. The complaint's allegations on this matter purport to be based on reports that were issued by, respectively, the Inspectors General of the U.S. Department of Transportation (DOT IG) and the U.S. Department of Justice (DOJ IG), and the complaint cites to and attaches a copy of the DOJ IG report. In lieu of the DOT IG report, the complaint cites to and attaches a copy of a report of the House Committee on Transportation and Infrastructure on the matter (with separate views). That report was in turn substantially based on a prepared statement and the oral testimony of the DOT IG before that Committee on July 15, 2003.

The complaint's allegations regarding the DeLay staff contact with the FAA are as follows. The subject of the contact, which occurred on May 12, 2003, was an airplane owned by State Representative Pete Laney that was believed to be flying some legislators out of the state.

^{48[48]} House Comm. on Standards of Official Conduct, *Policy of the House of Representatives with Respect to Actions by Members Convicted of Certain Crimes*, H. Rep. 94-76, 94th Cong., 1st Sess. 2 (1975).

The FAA also received requests for assistance regarding this aircraft from the Texas Department of Public Safety (Texas DPS), as well as from the Federal Air and Marine Interdiction Center as a result of inquiries made to the Center by the Texas DPS. The DeLay staff member gave the FAA the tail number of that airplane and without giving any explanation for the request, asked the FAA its location. The FAA responded that the aircraft was about to land in Ardmore, Oklahoma. According to the complaint, the request for information required the efforts of “at least 13 FAA officials at several different facilities,” and the FAA instituted a safety “alert” on the airplane.

The allegations regarding the DeLay staff contact with the Justice Department, which occurred on May 13, 2003, are as follows. According to the complaint, “Armed with the location of the absent legislators,” counsel for Representative DeLay telephoned the Office of Legislative Affairs of the Justice Department “requesting the Department’s assistance in enforcing the ‘arrest’ warrant issued by the Texas House Sergeant-at-Arms.” The complaint also alleges that Representative DeLay’s counsel contacted the U.S. Attorney for the Western District of Texas, Johnny Sutton, and that Mr. Sutton reported back that the U.S. Attorney would not get involved in the matter.

The complaint further alleges that the above-described activities constitute “an acknowledged improper use of federal resources in a political issue,” as well as a violation of guidance issued by the Standards Committee that contact with government agencies may “not be for ‘political . . . considerations,’” citing the Committee’s Advisory Opinion No. 1.

The applicable laws, rules and standards of conduct. The use of executive branch resources for a partisan political purpose may implicate several provisions of law. Such activity may violate 31 U.S.C. § 1301(a), which provides that official funds are to be used only for the purposes for which appropriated. As the Justice Department has stated, “If . . . there is no reasonable connection between the expense incurred and the official purposes to be served by an appropriation – as, generally speaking, there would not be when an expense is incurred purely for partisan political purposes – official funds may not be used to pay the expense.”^{49[49]} In addition, an executive branch employee who participates in political activity while on duty or in a government building violates a provision of the Hatch Act.^{50[50]} “Political activity” is defined broadly for purposes of the Hatch Act as “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.”^{51[51]}

As noted above, ¶ 2 of the Code of Ethics for Government Service requires that a House Member, like any other person in Government service, “[u]phold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.” Quite clearly, this provision may be implicated if a House Member were to act in a manner contrary to any of those authorities. It may also be implicated if a Member were to request that an executive branch employee engage in an activity having an impermissible political purpose under the above statutes. Such conduct by a Member may also implicate the fundamental requirement of the House Code of Official Conduct that a Member, officer or

^{49[49]} 6 U.S. Op. Off. Legal Counsel 214, 216 (1982).

^{50[50]} 5 U.S.C. § 7321.

^{51[51]} 5 C.F.R. § 734.101.

employee “shall conduct himself at all times in a manner that shall reflect creditably on the House.” (House Rule 23, cl. 1).

In addition, where the primary purpose of an action taken by a Member in his or her official capacity is politically related, and the action is taken on behalf of a political ally or supporter, that action practically by definition constitutes an impermissible special favor under ¶ 5 of the Code of Ethics for Government Service. As the Committee has explained, under that standard of conduct, the actions one takes in his or her official capacity are to be taken without regard to the political affiliation of the individuals involved,^{52[52]} but in an action of the nature described here, the political affiliation of the involved individuals would be the overriding consideration.

Summary and analysis of the information before the Committee regarding Count III. By way of background, on May 11 and 12, 2003, Democratic Members of the Texas House of Representatives absented themselves from a legislative session on congressional redistricting for the purpose of denying the House a quorum.^{53[53]} In documents dated May 12, 2003, the Speaker of the Texas House of Representatives issued directives to the Texas House Sergeant-at-Arms “to send for and arrest” each of the absent legislators, and “to return that person to the Hall of the Texas House of Representatives and there secure and retain that person.” A copy of one of those directives is in Attachment P to this memorandum.

By letter of May 12, 2003, the Sergeant-at-Arms requested the assistance of the Director of the Texas Department of Public Safety (Texas DPS) in securing the attendance of the absent legislators, and in doing so, he cited a rule of the Texas House (House Rule 5, § 8) that provides that in certain circumstances, absentees may be –

sent for and arrested, wherever they may be found, by the sergeant-at-arms or an officer appointed by the sergeant-at-arms for that purpose, and their attendance shall be secured and retained. [emphasis added]

In a letter to the Director of the Texas DPS of May 12, 2003, the Texas Attorney General stated that the Texas House Speaker had asked him to review the law underlying the request that the Sergeant-at-Arms had made of him. That letter cites the above-quoted rule of the Texas House and indicates that an officer appointed by the sergeant-at-arms under the rule “would include the Texas Department of Public Safety.” Copies of those two letters are also in Attachment P.

The DeLay staff contacts with the FAA. Representative DeLay stated to us that the Texas House Speaker called him and told him that there was an airplane shuttling the absent legislators, and he asked Representative DeLay if there was anything he could do to help locate the plane. Representative DeLay believes that in that conversation, the Speaker also gave him the tail number of the particular plane, N711RD. Representative DeLay then provided the tail number to

^{52[52]} See Standards Committee Advisory Memorandum of May 11, 1999 on “Prohibition Against Linking Official Actions to Partisan or Political Considerations, or Personal Gain”.

^{53[53]} Representative DeLay’s strong support for and involvement in the congressional redistricting proposal that was then pending before the Texas House has been widely reported in the news media. See, e.g., *2003 Congressional Quarterly Almanac*, pp. 14-6 – 14-7.

Juliane Sullivan, who was Policy Director in the Majority Leader's office, and asked her to contact the FAA to see if it were possible to determine the location of the airplane.

Late in the afternoon of May 12th, Ms. Sullivan called David Balloff, who is the FAA's Assistant Administrator for Government and Industry Affairs, on the matter. She told him that she was trying to locate a particular aircraft, the tail number of which was N711RD. She did not give Mr. Balloff any explanation for her inquiry, and he did not ask her about it, although Mr. Balloff later told the DOT IG that his first thought was that there was a safety issue. He told her that he would check and call back. Mr. Balloff then called the FAA's Washington Operations Center with the question. A Center official checked an FAA database and told him that the airplane would be landing in 7 minutes in Ardmore, Oklahoma.

Mr. Balloff relayed this information to Ms. Sullivan (at 4:21 p.m., according to DOT records), and she informed Representative DeLay. He then asked her if it was possible to obtain information on where else the airplane had been over the past couple of days. Ms. Sullivan called Mr. Balloff with that question, and he told her that he would see what he could do. He called the Washington Operations Center and was told that this information could be obtained only by calling other FAA offices, and that the Center would make those contacts. An official of the Center called three other FAA offices and was told that the requested information was not immediately available. However, subsequently one of those offices called the Center official back and advised him that the airplane had flown from Austin to Plainview on May 11th. Information on the airplane's flights on that date was relayed to Mr. Balloff when he visited the Center later in the evening, and he then relayed information to Ms. Sullivan (at 6:23 p.m., according to DOT records).

Ms. Sullivan relayed the information she received from the FAA to Representative DeLay, who in turn relayed it to the Texas House Speaker. The next day, May 13th, Ms. Sullivan e-mailed Mr. Balloff an article from the *Houston Chronicle* of May 12, 2003 about the absent Texas legislators with the note, "I thought you would find this article of interest." The article stated, among other things, that the Texas House Speaker had announced that most of the absent Texas House Members were in Ardmore, Oklahoma, and that Texas DPS officers were arriving in Ardmore "to offer to escort them back to Austin."

According to the report of the DOT IG, on May 12, 2003 FAA offices had also been contacted regarding this airplane by the Texas DPS and an office of the U.S. Department of Homeland Security.

The DeLay staff contacts with the Justice Department. On May 12, 2003, Carl Thorsen, who was counsel in the Majority Leader's office, had a discussion with staff in the office of the Texas Attorney General on the matter of the absent Texas legislators. In the course of that discussion Mr. Thorsen was informed that the Texas Attorney General's office planned to make an inquiry to the Justice Department. According to Representative DeLay, neither that office nor any other state official suggested or requested that Mr. Thorsen take any action. On May 13th, however, Representative DeLay asked Mr. Thorsen to make an inquiry with the DOJ, and Mr. Thorsen contacted DOJ solely on the basis of his request.

Mr. Thorsen called William Moschella, who was the Assistant Attorney General in the Office of Legislative Affairs. The report of the DOJ IG states (on p. 4) that according to Mr. Moschella, Mr. Thorsen “said that he was calling to find out if the Department of Justice had any legal authority to intervene in the Texas legislators matter, although [Mr. Thorsen] said he thought he knew what the response would be.” Mr. Thorsen “did not ask him to take any action, and phrased his request as a legal question.” Mr. Moschella responded that he would consult with other Department officials and provide a quick answer.

Mr. Moschella then e-mailed the question to Edward Whelan, the Acting Assistant Attorney General in the Department’s Office of Legal Counsel (OLC), with copies to two other DOJ officials. There were several more e-mails and telephone conversations between DOJ officials on the matter, and about one or two hours after Mr. Moschella’s initial inquiry to Mr. Whelan, they had a telephone conversation on it. Mr. Whelan advised Mr. Moschella that there was nothing criminal involved, and so DOJ had no jurisdiction and would not become involved. Mr. Moschella then called back Mr. Thorsen stating that there was nothing that DOJ could do.

The DOJ IG report states in two places (on pp. 4, 22) that on May 13th, Mr. Thorsen also spoke with Johnny Sutton, the U.S. Attorney for the Western District of Texas. According to both of these individuals, Mr. Sutton placed the calls to Mr. Thorsen. Mr. Thorsen received a call from him that morning that apparently was prompted by officials of the Texas Attorney General’s office. According to Mr. Thorsen, the conversation was brief and concluded with both agreeing that any discussion of the matter of the absent legislators should be routed through the DOJ Office of Legislative Affairs. After that conversation, Mr. Thorsen called Mr. Moschella. In addition, Mr. Sutton stated to the DOJ IG that he called Mr. Thorsen later in the day to say that he would not get involved in this matter, but Mr. Thorsen states that he does not have a specific recollection of this conversation.

The report of the DOJ IG also describes the contacts that various DOJ offices received on this matter from the office of the Texas Attorney General, the Texas Rangers, the Texas DPS, and a Texas House Member.

Conclusions and recommendations with regard to Count III. The contacts of Representative DeLay’s office with the Justice Department were of a different nature from those with the Federal Aviation Administration, and we reach different conclusions with regard to those two sets of contacts.

With regard to the contacts with the Justice Department, the information we have obtained indicates that they were not improper. According to that information, those contacts did not involve either an explicit or implicit request or demand that DOJ take action with regard to the absent legislators. Instead, they consisted of a straightforward inquiry on whether there was any legal basis for DOJ to intervene.

In contrast, our conclusion regarding the contacts with the FAA seeking flight information is that, at a minimum, they raise serious concerns under the House standards of conduct summarized above. Briefly stated, according to the information we have obtained, those contacts were made solely at the request the Texas House Speaker; the request was made in

connection with a partisan conflict in which he was engaged at the time with Democratic members of the Texas House; and the information that Representative DeLay's office obtained from the FAA was relayed solely to the Texas House Speaker.

Representative DeLay's submissions argue that the contacts that his office made with the FAA were entirely proper, and the major assertions made in support of that position are as follows.

First, Representative DeLay's submissions assert that the DOT IG found no wrongdoing in this matter. It is correct that the statement that the DOT IG submitted to the House Transportation and Infrastructure Committee states (on p. 17), "We did not find that Balloff's actions in this matter to have violated any rules or regulations." However, this assertion disregards a number of important considerations. To begin with, the DOT IG's statement (on p. 17) raises specific concern about Mr. Balloff's failure to inquire of Ms. Sullivan as to why she was requesting information on the particular airplane, "[W]e do not understand why he did not ask the staffer about the purpose of her request – particularly since he told us he thought it might involve a safety issue." In addition, there are the statements made by Mr. Balloff to the DOT IG regarding his views of Ms. Sullivan's requests and his handling of them after he learned about the absent Texas legislators on May 13th:

I figured out why they were calling. . . I just felt like I had been used. . . I don't do anything for political purposes. . . and I just did not like. . . somebody calling me for political reasons. . . I would never use my office to help somebody politically, for any political reasons, period.^{54[54]}

He also stated that in hindsight, "he would have handled the staffer's request differently, by coordinating with the FAA Chief Counsel's Office and senior agency officials, along with asking the requestor for background about the request."^{55[55]} In short, without being apprised of the reason for the request, the FAA was denied the opportunity to make a prior, reasoned determination on whether collecting and providing the requested information would be both permissible and appropriate under the laws, rules and policies governing the FAA at the time.

Yet another pertinent point here is that on July 15, 2003, upon the recommendation of the DOT IG, the FAA issued an order setting out a specific policy regarding disclosure of aircraft and flight data from FAA information systems.^{56[56]} That policy includes the following basic provision:

No request for Flight Track Data shall be granted unless it is first determined that the request is being made in the interest of aviation safety or efficiency, or for an official purpose by a United States Government agency or law enforcement organization with respect to an ongoing investigation.

^{54[54]} DOT IG, *Federal Aviation Administration Efforts to Locate Aircraft N711RD*, Statement before the House Committee on Transportation and Infrastructure, July 15, 2003, at 17.

^{55[55]} DOT IG, *Detailed Investigative Findings & Chronology*, enclosure to letter of July 11, 2003 to Senator Joseph Lieberman, at 4.

^{56[56]} FAA Order 7210.3T, Facility Operation and Administration, Paragraph 2-1-5, effective Feb. 19, 2004.

In sum, the statements made by Mr. Balloff regarding his views of his actions after he had learned the purpose of the requests, and the FAA's later establishment of a restrictive policy on responding to such requests, indicate a larger concern about the propriety of the FAA's response to the requests of Representative DeLay's office, regardless of whether, in the specific circumstances, Mr. Balloff's actions did not violate the FAA rules or regulations that were in effect at the time.

Second, it is asserted that the House Committee on Transportation and Infrastructure found no wrongdoing in this matter. In this regard, the report that the Transportation Committee issued on this matter states with regard to the DOT IG's report, "[T]here were no findings that federal resources were misused or that agency personnel violated any departmental rules or regulations."^{57[57]} Because the Transportation Committee report merely characterizes the findings of the DOT IG, the materials set out above regarding the DOT IG's report respond to this assertion as well. It should also be noted that it is the Committee on Standards of Official Conduct, and not the Transportation Committee, that has the jurisdiction to make determinations regarding the official conduct of House Members and staff.

Third, Representative DeLay's submissions assert that the information he sought and was provided is publicly available over the Internet. Indeed, according to the statement of the DOT IG (on p. 14), "[C]omparable information – including near real-time aircraft locator data – is currently available to the general public through commercial databases accessible via the internet." However, the issues discussed here have arisen because Representative DeLay did not obtain the information on the location of the particular aircraft from one of the commercial databases, but instead he obtained it from FAA databases using the services of FAA personnel.

Finally, Representative DeLay's submissions assert that these contacts were proper because they were made in the context of a "legitimate law enforcement issue." While acknowledging that this matter arose out of a political dispute, one of his submissions states that it "was a proper matter for the law enforcement authorities of Texas," citing the letters of the Sergeant-at-Arms and the Texas Attorney General that are noted above. However, review of those documents establishes that to the extent that there was any "enforcement" issue here, it was solely a matter of enforcement of rules of the Texas House of Representatives that govern its Members.^{58[58]}

Indeed, this consideration highlights a separate basis on which the contacts with the FAA were objectionable, and that is that such use of federal executive branch resources to resolve an issue before a state legislative body raises serious concerns under the fundamental concepts of separation of powers and federalism. The enforcement of the rules of the Texas House – like

^{57[57]} House Comm. on Transportation and Infrastructure, *Request for Department of Transportation Records on Use of Agency Resources Relating to Members of the Texas Legislature*, H. Rep. 108-220, 108th Cong., 1st Sess. (2003) at 4.

^{58[58]} While the documents issued by Texas authorities that are described above also refer to a provision of the Texas Constitution, that provision (Art. 3, § 10) provides in its entirety, "Two-thirds of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each House may provide."

enforcement of the rules of the U.S. House of Representatives or any other legislative body – is the responsibility of the Members, officers and employees of that body.

Insofar as enforcing the rules of the Texas House on Member attendance is concerned, as noted above, the rules of that body provide that this is the responsibility of “the sergeant-at-arms or an officer appointed by the sergeant-at-arms.” Whether it is permissible and appropriate for the Texas House Sergeant-at-Arms to appoint every official of the Texas Department of Public Safety as such an officer is a matter to be resolved by Texas authorities under Texas law.^{59[59]} However that matter is resolved, the Committee action here should take account of the serious concerns raised by use of federal executive branch resources to resolve a partisan dispute before a state legislative body.

In view of the thorough investigations of the contacts with the Justice Department and the Federal Aviation Administration that were conducted by the departmental Inspectors General, as well as the additional information we obtained in our fact-gathering, there is no need for a formal investigation of the allegations of Count III. We recommend that insofar as Count III concerns the contacts with the Justice Department, it should be dismissed. Insofar as it concerns the contacts with the FAA, it should be resolved by a letter of admonition to Representative DeLay that sets out the above-stated concerns that those contacts raise under House standards of conduct that preclude using governmental resources for a political undertaking.

The objections raised in Representative DeLay’s submissions to the complaint and Representative Bell’s conduct, and the requests that the Committee employ outside counsel in its consideration of the complaint

The objections raised to the complaint and Representative Bell’s conduct.

Representative DeLay’s submissions in this matter raise a number of objections both to the complaint and to Representative Bell’s conduct in this matter. The major objections raised by those submissions are as follows:

- The complaint contains innuendo, speculative assertions and conclusory statements in violation of Committee Rule 15(a)(4);
- 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), regarding complaints transmitted directly to the Committee by a Member; 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.

^{59[59]} This matter has been the subject of litigation in Texas courts. See *Davis v. Burnam*, 137 S.W.3d 325 (Texas App. Ct. 2004) (vacating, on procedural grounds, a trial court ruling that the Texas DPS does not have statutory authority to arrest absent Texas House Members on request of the Speaker).

The first of these objections, regarding innuendo, speculative assertions or conclusory statements in the complaint, should be taken up separately by the Committee, and we intend to bring it before the Committee in the near future. As to the other two objections, our conclusions, for the reasons set out below, is that they are not valid.

The claim that the complaint was not properly filed under Committee Rule 14(a). This objection that Representative DeLay has raised to the complaint, like his other major objection that is addressed below, is based on published reports that Representative Bell accepted assistance from a private organization in the drafting of his complaint. In this regard, a private organization has posted on its Web site a press release dated June 15, 2004 stating that it had “assisted Congressman Bell in drafting the complaint”^{60[60]} This assistance was also referenced in news articles, including one that stated that an official of that organization “drafted the complaint for Bell,” and that “the lawmaker had first approached her.”^{61[61]}

In making this objection, Representative DeLay’s submissions refer to Committee Rule 14(a), which provides for two forms of complaints:

- under Committee Rule 14(a)(1), a complaint by a House Member that is “transmitted directly to the Committee,” and
- under Committee Rule 14(a)(2), a complaint by an individual who is not a House Member, as to which a House Member “certifies in writing that he or she believes the information is submitted in good faith and warrants the review and consideration of the Committee.”^{62[62]}

The argument on this point that is made in his submissions is as follows. Because of the assistance that an outside organization provided in the drafting of the complaint here, the complaint is in fact not one offered by a House Member under Committee Rule 14(a)(1). Instead, it is a complaint by an individual who is not a House Member under Committee Rule 14(a)(2). However, according to this argument, the complaint was not properly filed under that provision, in that Representative Bell did not provide the written certification required by that provision. On this basis, Representative DeLay asserts that the complaint submitted by Mr. Bell is a “hybrid” that the rules do not contemplate, and Committee acceptance of the filing would mean that the Committee interprets the first two paragraphs of Committee Rule 14(a) to set out “a distinction without a difference.”

This objection to the complaint is not valid. Quite clearly, House and Committee rules make it possible for an outside individual to be a complainant against a House Member, officer or employee, provided that a House Member provides the certification set out in Committee Rule 14(a)(2) regarding that individual’s complaint, and the other applicable rules are complied with. If, however, instead of merely certifying the complaint of an outside individual, a Member wishes to make that complaint his or her own, as a general matter, the Member is free to do that, provided, again, that there is compliance with the other applicable rules. It appears that the

^{60[60]} www.citizensforethics.org/activities/20040615.

^{61[61]} Bolton, “Bell Takes Parting Shot,” *The Hill*, June 15, 2004; see also Bresnahan, “Bell’s Complaint Imperils Ethics Truce,” *Roll Call*, June 15, 2004.

^{62[62]} These provisions of the Committee Rules reflect the provisions of House Rule 11, clause 3(b)(2).

alternative of the Member acting as the complainant will be particularly viable where, as here, the bases of the complaint are publicly available information.

The difference between these two alternatives is that in the instance in which a private individual is the complainant, the Member's responsibility insofar as the Committee is concerned is limited to his or her certification. In contrast, where the Member elects to become the complainant, he or she assumes responsibility for the contents of the complaint in its entirety. In short, the manner in which we interpret paragraphs (a)(1) and (a)(2) of Committee Rule 14 does not result in those provisions setting out a distinction without a difference.

The claim that Representative Bell's acceptance of assistance in drafting the complaint violated House Rule 24. House Rule 24, which prohibits Members from maintaining an "unofficial office account," has long been interpreted generally to prohibit Members from accepting, from private sources, in-kind donations of goods and services in support of official House business.^{63[63]} The Committee has issued guidance on how the prohibition applies in a number of circumstances, including the acceptance of the services of individuals under volunteer or intern programs for the educational benefit of the participants;^{64[64]} the participation of outside individuals and private organizations in meetings, conferences and other events sponsored by a House office;^{65[65]} and acceptance of travel from private sources for official or officially connected purposes.^{66[66]}

The Committee has clearly stated that under the "unofficial office accounts" rule, it is impermissible for a Member to accept, on a regular or continuing basis, the uncompensated services of an individual to perform duties that are normally performed by congressional staff.^{67[67]} However, the Committee has never stated that the rule is so broad that a Member violates it by, for example, occasionally accepting a draft of legislation or related material that was prepared by an outside individual or organization that is advocating that legislation. It appears that there is no reason to treat the acceptance of outside assistance in the drafting of a complaint, or even acceptance of a draft of a complaint, any differently under House Rule 24. Accordingly, this objection to Representative Bell's conduct is not valid.

The requests that the Committee employ outside counsel in its consideration of the complaint. As the Committee members are aware, after this complaint was filed, a number of outside organizations and members of the media urged that outside counsel be employed for its consideration. With regard to our consideration of the complaint under Committee Rule 16 in our capacities as Chairman and Ranking Minority Member, we elected to utilize the assistance of the regular Committee staff, and we do not recommend that outside counsel be retained with regard to the Committee's consideration of the matter.

^{63[63]} See *House Ethics Manual*, 102d Cong., 2d Sess. (1992) 217-21, 232-35.

^{64[64]} *Id.* 195-200, 206-10.

^{65[65]} House Comm. on Standards of Official Conduct, Advisory Memorandum of Sept. 28, 2001 on "Prohibition Against Private Subsidy of Conferences, Meetings and Other Events Sponsored by a House Office".

^{66[66]} House Comm. on Standards of Official Conduct, *Rules of the U.S. House of Representatives on Gifts and Travel*, 106th Cong., 2d Sess. (2000) 91-95.

^{67[67]} See, e.g., House Comm. on Standards of Official Conduct, *In the Matter of Rep. E.G. "Bud" Shuster*, H. Rep. 106-979, 106th Cong., 2d Sess. at pp. 3F-3G,44-51 (2000); House Comm. on Standards of Official Conduct, *Summary of Activities, One Hundred Fourth Congress*, H. Rep. 104-886, 104th Cong., 2d Sess. 13, 16 (1997).

At least some of the requests for the use of outside counsel cite to the fact that certain of the Committee members have received campaign contributions from Representative DeLay. It appears that those requests do not reflect an objection to the use of regular Committee staff members in the consideration of this matter, but instead reflect an objection to the participation of the members of the Committee. To the extent that those requests reflect a view that the determinations on this complaint should be made by an outside counsel, rather than by the members of this Committee, that is a view that the House has consistently rejected, most recently in 1997. Under Article I, Section 5 of the Constitution, it is the responsibility of the House of Representatives itself to determine the rules of the House and discipline its Members. The 1997 report of the Task Force on Ethics Reform states that the Task Force Members

expressed the view that House Members better understand the rules, customs, and practices of the House, and . . . expressed the strong preference that House Members accused of misconduct be judged by their peers.^{68[68]}

To the extent that those requesting the use of outside counsel have the view that Committee members who accepted campaign contributions from Representative DeLay should be disqualified from acting on this complaint, they should refer to Committee Rule 9(e) on disqualification, which provides in pertinent part as follows:

A member of the Committee may disqualify himself from participating in any investigation of the conduct of a Member . . . upon the submission in writing and under oath of an affidavit of disqualification stating that the member cannot render an impartial and unbiased decision.

Under the rule, a member who submits such an affidavit will be disqualified only if the Committee “approves and accepts such affidavit.” Accordingly, the matter of disqualification is left to each individual Committee member, but a member may disqualify himself or herself only upon swearing that the member “cannot render an impartial and unbiased decision.”

Moreover, on September 23, 2004, both of us, in our capacities as Chairman and Ranking Minority Member of the Committee, joined in issuing a public statement addressed to this matter. We stated emphatically our belief in the integrity and ability of every member of the Committee, and that both of us are confident in the ability of our fellow members, without exception, to execute their responsibilities faithfully and fairly, regardless of any political affiliations or personal relationships. We went on to note that if either of us believed that any committee member were unable to discharge his or her duties properly, we would seek to have that member removed from the committee.^{69[69]}

^{68[68]} House Comm. on Rules, *Report of the Ethics Reform Task Force on H. Res. 168*, 105th Cong., 1st Sess. (Comm. Print 1997) 6.

^{69[69]} In addition, on September 27, 2004, in response to an article that had appeared in the news media, we issued a statement that addressed the agreement we have had under which, as the need arises, either of us may provide to a member of the leadership information on the status of or the procedures relating to a Committee matter. That statement noted, among other things, that in no event does any such contact involve our disclosing information required to be kept confidential under Committee Rule 7, and in no event would either of us tolerate any attempt to “lobby” us on a case pending before the Committee

Finally, to the extent that the requests for use of outside counsel reflect an objection to the use of regular Committee staff members in the consideration of this complaint, those making the requests may be overlooking the changes in House and Committee Rules regarding staff that were made in 1997. With regard to Committee staff, clause 3(g) of House Rule 11 includes the following provisions:

- “the staff [shall] be assembled and retained as a professional, nonpartisan staff,”
- “each member of the staff shall be professional and demonstrably qualified for the position for which he is hired,”
- “the staff as a whole and each member of the staff shall perform all official duties in a nonpartisan manner”, and
- “All staff members shall be appointed by an affirmative vote of a majority of the members of the committee. Such vote shall occur at the first meeting of the membership of the committee during each Congress and as necessary during the Congress.”

These rules relating to Committee staff have been fully implemented.
