

Revised

TESTIMONY OF ROBERT F. BAUER\*  
BEFORE THE  
U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON RULES  
ON  
LOBBYING REFORM: REFORMING THE GIFT AND TRAVEL RULES

March 9, 2006

Thank you for your invitation to speak on the gift and travel rules, and the questions presented by their proposed reforms.

I am offering views developed as a lawyer who has advised clients on the rules, studied them, and occasionally written about them. My aim here is to sketch my understanding of how the rules have developed, their current strengths and weaknesses, and why some believe them to be inadequate. I will suggest some modest approaches, most already under discussion in this Congress, to addressing these concerns.

One question raised is whether lobbying has changed, which I take to be a question of how the rules might or might not have caught up with changes in lobbying. Lobbying, over the years I have observed it, has changed: it has become highly professional, sophisticated in both strategy and implementation. Of course, there are doubtless still lobbyists who try to market special relationships, giving rise to the impression that deals are made over bourbon with a friend. It is not my impression that this is found at the top of the profession or draws top dollar from major clients with active government relations programs.

This is important, because the best lobbyists would not imagine for a moment that their case is made, even significantly advanced, with a meal or a drink or an invitation to a "widely attended event" featuring a seated dinner and light entertainment. Their work is done—the best work is done—with information, analysis, careful tactical judgment and persuasive argument. Lobbying understood this way, as a craft, has been seriously slighted in the current debate, and it shapes assumptions about the stakes in the current discussion of the rules and proposed reforms. It is unfortunate that lobbying has come to be the familiar name for the profession: it prejudices the discussion before it has even begun, and it is no fairer than referring to a journalist as a "hack."

Now, against this background, how well do the current rules work?

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Critics worry about the appearance of impropriety, and this is also a bedrock concern of the rules. House rules command Members to observe their spirit as well as their letter: the House can discipline Members and staff for acting in violation of this spirit, and without regard to appearances, in a manner reflecting discredit on the institution. Members may not benefit from by improperly exerting the influence of their position, and they may not accept any favor or benefit under circumstances suggesting to reasonable persons that their official actions or decisions would be thereby affected. These rules clarify, supplement and reinforce the more specific rules setting limits on gifts and providing for exceptions.

More appreciation of the expansive scope of the rules would put them in sharper relief, clearer. One of their distinctive features, setting them apart from "black letter," is the requirement that Members and staff avoid a legalistic, rule-bound interpretation of their ethical responsibility. Under the rules, the Members must make choices, declining even otherwise lawful gifts if in the circumstances it would be imprudent, that is, offensive to appearances, to do so.

In that sense, the rules are understandable: they are, however, demanding, because they call for the exercise of judgment on a case-by-case basis. Disagreement is predictable when judgment is brought to bear in particular circumstances. To repeat: this is not because there are no rules, or because they are inadequate, but because—ambitious in scope and aim—the rules subject Members and staff to individual assessments on particular facts. A Member may accept from one source an offer to travel at private expense, to participate in a conference, but would have to decline, from another source, even a modest local meal. It all depends on the circumstances, as it should.

The rules insist on this judgment, but where that judgment is appropriately exercised, they also allow for various types of gifts within dollar limits and exceptions. It is a compromise, an entirely reasonable one. Whether this or the other rule might be reformed—improved in clarity or tightened against evasion or dispensed with altogether—is a different question, and the answer is one that Congress is currently debating and will provide. Yesterday, the Senate voted to prohibit all gifts from lobbyists, including the meals that its Rules Committee had made allowance for in the bill sent to the floor.

Nonetheless, the overall structure of current rules is sound, and insofar as they authorize a Member to accept a meal in a constituent's home, or an award from a local association that is presented over lunch, or the expenses of attendance at a conference or of a visit to a business facility, a useful purpose is served.

There have been proposals to limit these types of benefits to those provided by an educational institution or “think tank”: the Aspen Institute is frequently cited as an example. In my view, Congress should take some care to avoid any suggestion to the public at large that lunch in the company of experts, in resort settings, is acceptable, while lunch with company employees at a plant site is not.

As Congress confronts adverse public impression of its record on compliance and enforcement, it might consider a few improvements that might go some way toward meeting these concerns.

1. *Solicitations.* As set out at some length in the Ethics Manual, the House rules (consistent with Federal law) now contain prohibitions the solicitation of gifts: but this discussion is complicated, or so some would say, and there is some confusion about this. The House could make it clear, by a specific rule devoted to just this question, that the solicitation of gifts, even if the gift would be otherwise allowable under an exception, is prohibited. Clarification now, in the turbulent climate of the hour, would have the attention of all concerned and leave no doubt about what the rules require.

2. *Approval for Travel.* All travel could be subject to Committee approval, as pending Senate proposals would provide. Having a process for approval would assist the Members in asking the right questions about invitations to travel at private expense. That there was a process would be reassuring to the public.

3. *Training.* It has been proposed that training be revamped and made mandatory, and it is hard to see the objection to that.

4. *Disclosure.* Disclosure where disclosure is required can benefit from use of the World Wide Web. It will be quicker and more widely accessible.

5. *Simplification.* Some of the rules are complicated or, in materials respects, vague. The simplest rule is always best: more likely to be understood and followed, and less likely to become fodder for complaint and public controversy. I have not been able to sort through all the rules and consider, for each, how this might be done.

I can offer this example, an exception of some significance, namely the “personal friendship” exception. Under the current rule, the Member must consider a number of factors, including the “history of his or her relationship” to the donor and whether the donor personally paid or sought a tax deduction or a business reimbursement. In the first case, the standard is vague: all friendships are different, with different histories, and this is a town where, perhaps because there are so few, many friendships are claimed. The second factor is more concrete: the gift was either a personal gift, paid personally, or it was not. It might make sense to simply strip the

rule down to its essentials, with a safeguard: provide that the gift must be personally paid, without deduction or reimbursement, and then place all gifts from personal friends under an annual ceiling, say, \$250, which cannot be further exceeded without approval from the Committee. There is already in place an approval requirement for any one gift, exceeding \$250 in value, from a personal friend, and this would be both consistent with it and helpful to the clarification and enforcement of the rule as a whole.

These steps should help to clarify the rules and encourage wide compliance. In the end, it is up to the Member: to set the tone, set standards for staff, exercise careful judgment in determining what the rules require in specific cases. And this is how it should be. Elected officials should have to make these decisions: they are the ones elected to assume responsibility for their offices. Once they are supplied with information and support, which should be provided also to staff, they should be held accountable for the choices. Senator Paul Douglas of Illinois, who wrote the famous lectures on Ethics in Government and whose comments grace the opening pages of the House manual on Gifts and Travel, properly defined the governing principle: "[T]he ultimate answer must be my own life." Paul H. Douglas, *In the Fullness of Time* (1971) at 193.

Thank you.