

**Common Cause * Public Campaign * Public Citizen
U.S. Public Interest Research Group**

May 27, 2004

The Hon. Doc Hastings, Chairman
The Hon. Alan Mollohan, Ranking Member
Committee on Standards of Official Conduct
HT-2 Capitol
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Hastings and Ranking Member Mollohan:

The House Ethics Committee is expected to soon begin an investigation into allegations that House Majority Leader Tom DeLay has violated House rules and standards of conduct. We believe it is essential that an independent outside counsel be appointed to assist the Committee in this matter. We strongly urge you to take this necessary step to protect the integrity of this important investigation – and of Congress itself. We ask that you respond to this request within two weeks.

We believe an outside counsel is generally useful in guaranteeing the independence, integrity and public acceptance of congressional ethics inquiries. The case for outside counsel is particularly compelling, however, when the Member being investigated serves in a leadership position. For that reason, the Committee has properly retained outside counsel in several such probes, including those involving former House Speakers Jim Wright (D-TX) and Newt Gingrich (R-GA).

As you know, Rule 6 of the House Ethics Committee rules expressly authorizes the retention of outside counsel. Under that rule,

Subject to the approval of the Committee on House Administration, the Committee may retain counsel not employed by the House of Representatives whenever the committee determines, by an affirmative vote of a majority of the members of the Committee, that the retention of outside counsel is necessary and appropriate.

Archibald Cox - the former Watergate Special Prosecutor, U.S. Solicitor General and Common Cause Chairman - set forth the rationale for appointment of independent counsel in a 1989 letter to Sen. Howell Heflin (R-AL), chair of the Senate Ethics Committee during the Senate's investigation of the Keating Five matter:

First, the use of outside counsel is the best way to ensure that the investigation and the advice given to the Committee are both entirely free from the complications created by past or present relationships . . .

Second, the use of outside counsel increases the public credibility attaching to the ultimate conclusions of the Senate Ethics committee. Here appearance is highly important as well as reality. It is always important to the individuals as well as to the Senate.

Third, the use of outside counsel is the best way to bring to an investigation ample time and a high level of expertise. I know that I was greatly assisted in heading the Watergate investigation by the experienced lawyers who had often engaged in the conduct of investigations.

Similarly, Richard Phelan, who served as outside counsel in the investigation into Speaker Wright, wrote of the need for outside counsel in investigations involving powerful Members:

The Wright case served a vital principal: that no matter how powerful a Congressman is, the House of Representatives is duty bound to investigate him once credible charges about his ethics are filed. The very integrity of this branch of government, the Congress, depends on its ability to police itself. And in most cases, the Congress has determined that justice can only be done when an outside counsel – a lawyer with independence and stature who can investigate allegations of wrongdoings and stand up to powerful congressman – is assigned to the case... Since 1980, every significant Standards Committee investigation has begun with the appointment of independent counsel from which these probes got legitimacy.

We also note the comments of then-Majority Whip Dick Cheney (R-WY) on the Wright investigation during a June 1988 appearance on ABC's "This Week With David Brinkley:"

They ought to hire an outside counsel . . . It does require outside counsel . . . This is not a unique situation in the sense of a Member being investigated and outside counsel being hired. I was on the Ethics Committee when we investigated the ABSCAM scandal some years ago. We hired outside counsel for that purpose. It is appropriate.

For the same reasons outside counsel was appropriate in those cases – and is useful as a matter of course, in our view – the pending investigation of Rep. DeLay requires such an appointment.

In particular:

- Rep. DeLay's position as majority leader vests him with considerable power and influence over the way Congress operates, and the resulting capacity to exact retribution against other Members. The Majority Leader is directly involved in making committee assignments, raising campaign funds for colleagues and, critically, controlling the flow of legislation to the floor of the House. Any sitting Member asked to pass judgment on the Majority Leader's actions is being placed in an inherently untenable position.

- The integrity of the House ethics process has come under a cloud. House ethics rules have been changed twice – and then changed back – specifically in response to earlier investigations of Rep. DeLay; nonpartisan committee staff who recommended past admonishments of Rep. DeLay have been fired; and members of the Ethics Committee who voted to admonish the Majority Leader have since been removed from the Committee, including Rep. Joel Hefley (R-CO), the former chairman.
- The independence of the House Ethics Committee has been cast into doubt. Two of the Committee's sitting members have contributed to Rep. DeLay's legal defense fund. And although the latter two members have promised to recuse themselves from any investigation of the Majority Leader, it is unclear whether they will ultimately be involved in deciding whether or how he should be sanctioned if he is found to have violated House rules or standards. The very fact that some committee members have already stipulated they cannot sit in fair and impartial judgment begs for an outside counsel.

Given these recent blows to the public credibility of both the Ethics Committee and Congress as an institution, it is essential that any investigation of Rep. DeLay be fair and impartial in both appearance and reality. Only the appointment of independent outside counsel can achieve this result.

We await your response.

Respectfully Submitted,

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