



## **AN OUTSIDE COUNSEL IS NEEDED FOR THE DELAY INVESTIGATION**

Common Cause strongly urges the House Ethics Committee to appoint an outside counsel to investigate allegations of ethics violations by House Majority Leader Tom DeLay (R-TX). We believe an outside counsel is necessary if there is to be a publicly credible investigation and subsequent resolution of these allegations, which include accepting travel from lobbyists and foreign agents – a possible violation of House travel rules – and DeLay’s involvement with a lobbyist who is now under investigation by the Justice Department, the Interior Department and the Senate Committee on Indian Affairs. An outside counsel is needed for these reasons:

- There is strong precedent for appointing an outside counsel in cases involving members of the leadership, including the investigations of former Speakers Jim Wright (D-TX) and Newt Gingrich (R-TX);
- DeLay’s role as a powerful member of the House leadership with a web of connections to his colleagues through campaign money and political favors makes a fair and credible investigation difficult to achieve;
- The bitter partisan fight sparked by the weakening of the ethics rules and the ouster of the ethics committee chair has undermined the credibility of any investigation carried out by the committee;
- The ouster of three members of the committee, the firing of senior staff and a continuing controversy over staffing has left the committee without the capacity for such a critical and difficult investigation.

When an outside counsel is appointed, the committee should not place limits on the scope of the investigation.

**Derek Bok**  
Chairman

**Chellie Pingree**  
President and CEO

**Archibald Cox**  
Chairman Emeritus

**John Gardner**  
Founding Chairman

Common Cause has worked for 35 years as an advocate for a more ethical and accountable Congress. During that time, Common Cause has urged the ethics committee to investigate allegations against members of both parties. Common Cause called for the investigation of Democratic Speaker Jim Wright (D-TX) in 1988 and Republican Speaker Newt Gingrich (R-GA) in 1994. In both of these cases, Common Cause urged the Ethics Committee to appoint an outside counsel in order to meet the high standards of public accountability and integrity that the investigation of a Congressional leader requires. In both cases, the committee did appoint an outside counsel.

The U.S. Constitution states that Members of Congress will judge the official conduct of their colleagues. Article 1, Section 5, of the Constitution reads: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly behavior, and, with the Concurrence of two thirds, expel a Member." But this constitutional requirement does not preclude an investigation by an outside counsel or prevent that counsel from making recommendations on sanctions to the committee. Since 1979, there have been 11 instances where the Committee on Standards of Official Conduct has appointed a special counsel to investigate possible ethics violations by one or more members of the House of Representatives. In each of these instances, the committee decided that the rules normally applied to investigations were insufficient because of the extraordinary circumstances of the case. A similar situation exists today with the impending investigation of DeLay.

In a 1989 letter to Senator Howell Heflin (D-AL), the then-chair of the Senate Ethics Committee, Archibald Cox, who served as the Watergate Special Prosecutor and chair of Common Cause, wrote:

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.

Richard Phelan, who served as the special counsel in the Wright investigation, wrote the following in a letter about the need for special counsel in cases involving powerful members of Congress:

The Wright case served a vital principle: 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 a powerful Congressman – is assigned to the case... Since 1980, every significant Standards Committee investigation has begun with the appointment of an independent counsel from which these probes got legitimacy.

## **Political Leaders Supporting Outside Counsel**

Over the years, leaders of both parties have called for outside counsels in House ethics cases. As allegations about the activities of Speaker Wright arose in 1988, President Ronald Reagan, Vice President George H. W. Bush, and Minority Whip Dick Cheney (R-WY) all supported the appointment of a special counsel. Several years later, when Speaker Gingrich was the target of allegations, Democratic leaders called for an outside counsel.

President Ronald Reagan (*AP*, June 15, 1988):

President Reagan suggested Wednesday that “everyone would feel that it was more proper” if House Speaker Jim Wright were investigated by an independent counsel instead of the House ethics committee...And I think everyone would feel that it was more proper if it was done by an outside investigator, an appointed investigator.”

Reagan’s press secretary Marlin Fitzwater (*UPI* report, June 16, 1988):

Presidential spokesman Marlin Fitzwater explained Reagan’s position when asked if the president was calling for a special prosecutor in the Wright probe in place of an investigation by the House ethics committee, which has announced a preliminary inquiry. ... “The president was simply pointing out that a third party investigating tends to remove any appearance of partiality,” he said.

Vice President George H. W. Bush (*The Washington Post*, May 26, 1988):

Vice President Bush, questioned anew about ethical lapses in the Reagan administration, fired back today by calling for an independent counsel to investigate charges of wrongdoing by House Speaker Jim Wright (D-Tex.), the highest-ranking Democrat in the capital. ... [Asked about allegations about the Reagan Administration] “Talk about ethics. You talk about Ed Meese -- how about talking about what Common Cause raised about the speaker the other day? Are they going to look into it? Are they going to go for an independent counsel so the nation will have this full investigation? Why don’t people call out for that? I will right now. I think they ought to.”

House Minority Whip Dick Cheney (R-WY) (appearing on “This Week With David Brinkley” in June 1988):

“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 allegation some years ago. We hired outside counsel for that purpose. It is appropriate.”

When allegations arose about Gingrich in 1995, Democratic congressional leaders called for an outside counsel:

- Then-House Democratic Whip David Bonior (D-MI) said of the Gingrich case, “We need an independent, professional nonpartisan outside counsel to investigate the ethical cloud which has settled over the head of Newt Gingrich.”

- Representative John Lewis (D-GA) said, “Stop the slowdown, stop the gridlock, stop the cover-up. Get on with it and appoint an outside counsel now.”
- Representative Julian Dixon (D-CA), who was chair of the Ethics Committee during the Jim Wright investigation, said of the Gingrich allegations, “This issue has festered, and it’s not going to go away. I would think that the best way to resolve it is to bring in someone who is independent of the institution to evaluate the situation, and then follow his recommendations.”

### **Cases Involving Party Leadership**

Members of the House will sit in judgment of DeLay and other Representatives. This means that members of the House, and particularly those who sit on the Ethics Committee, are required to pass judgment on the behavior of their peers. In a body where Members have working and personal relationships with many of their colleagues, casting judgment on a colleague can be difficult. This is complicated further when the member being investigated is in a position of power within the party and can directly influence the political future of the members passing judgment.

Representative DeLay’s ascension to his position as majority leader in the House has involved countless political favors, both large and small, up to and including direct campaign contributions to dozens of members of his party. A recent *New York Times* article titled, “Tom DeLay’s Empire of Favors,” explained one reason DeLay has so far survived four admonishments by the Ethics Committee and subsequent allegations of ethics rules violations:

The reason, it seems, is that over the years, brick by brick, Mr. DeLay has built a wall of political support. His small acts of kindness have become lore. Pizza during late night votes. Travel arrangements for low-level lawmakers. Birthday wishes, get-well cards, condolences for House members in emotional need.

On a larger scale, friends – and enemies – describe him as a favor-trader extraordinaire, piling up a mountain of goodwill. Almost every Republican in the House owes Mr. DeLay for something – a job, a piece of legislation or a large campaign contribution.

In return, Republican members in the House have supported DeLay when he has needed it. In March 2005, *The New York Times* reported:

A legal defense fund established by Tom DeLay, the House majority leader, has dramatically expanded its fund-raising effort in recent months, taking in more than \$250,000 since the indictment last fall of two his closest political operatives in Texas, according to Mr. DeLay’s latest financial disclosure statements.

The list of recent donors includes dozens of Mr. DeLay’s House Republican colleagues, including two lawmakers who were placed on the House ethics committee this year, and several of the nation’s largest corporations and their executives.

When allegations arose against similarly powerful members of the leadership – such as Speakers Wright and Gingrich – the committee chose in both cases to appoint an outside counsel. Members of party leadership, and certainly Rep. DeLay, are elected to those positions by the members of their party because of the goodwill and trust they accrue through years of service. It is, therefore, understandably difficult for a rank and file member of either party to pass judgment and possibly punish members of their party's leadership. More importantly, there is a public perception that cases involving popular and powerful leaders in Congress may lead Ethics Committee members to be partial when conducting a difficult and lengthy investigation.

### **DeLay's Power and Money Web**

Rep. DeLay's case is a perfect example of the conflicts and complications that can arise when the Ethics Committee must sit in judgment of a member of the party leadership. DeLay has numerous ties to the Republican members of the Ethics Committee because of his position as majority leader.

The current Ethics Committee is replete with examples of these kinds of conflicts of interest:

- The two newest members of the current Ethics Committee, Lamar Smith (R-TX) and Thomas Cole (R-OK), have already recused themselves, at least partially, from the impending investigation of DeLay because of their close ties to the majority leader.
- The other three Republican members of the committee, Rep. Doc Hastings (WA), the committee chairman, and Reps. Judy Biggert (IL) and Melissa Hart (PA) have all received contributions from DeLay's political action committee, Americans for a Republican Majority.
- Cole and Smith have contributed \$5,000 and \$10,000, respectively, to DeLay's legal defense fund, which is to help pay for a legal case involving a Texas political action committee affiliated with DeLay. Elements of that case were also the focus of an ethics complaint before the committee last year. The committee could still take up part of that complaint, pending the outcome of an ongoing investigation in Texas.

The favors and contributions DeLay has made in his role as majority leader in the House complicate the job of members sitting in judgment of his actions. Members who have received contributions or favors from DeLay may be less inclined to vote in support of any negative findings or to support sanctions. More importantly, an investigation conducted by members who owe DeLay political favors will not be publicly credible. Given the circumstances, appointing an outside counsel is the only way to credibly and fairly prove if the allegations against DeLay are true.

## **Partisan Fighting Undermines Ethics Committee**

The task of investigating DeLay is made more difficult by the intense, highly charged partisan combat surrounding the matter. The Republican leadership's forced passage of weakened ethics rules at the beginning of the 109<sup>th</sup> Congress sparked outrage by Democrats in the House and appears to have ended the seven-year bipartisan moratorium on ethics complaints. Both parties are now threatening to use ethics complaints as a form of political retaliation.

Partisan warfare on ethics puts even more pressure on members of the committee as they consider allegations of ethical wrongdoing, especially against DeLay, and makes more critical the need for an outside counsel to investigate those allegations. If the investigation of DeLay is to rise above partisan politics and meet the high standards of public accountability that are required, it is essential that the committee appoint an outside counsel who will be impartial and immune to allegations of partisanship.

The bitter fight has drawn outside groups into the fray, some supporting DeLay, others pushing to undermine a powerful member of the Republican Party and to weaken him in his own district. For Democrats on the Ethics Committee, pressure from allied groups will make it difficult to maintain a fair and unbiased view of an investigation of DeLay.

But for Republicans on the committee, the pressure is far more intense. This spring, a group of prominent conservative organizations held a 900-person dinner in tribute to DeLay as a show of support. The timing and tone of the tribute dinner put more pressure on the Republican members who must sit in judgment of DeLay. The event created the impression that another decision against DeLay would be harmful not only to the Republican Party, but to the entire conservative movement.

Grover Norquist of the group Americans for Tax Reform said, "The conservative movement is doing this because he has been a hero to us and the left is going after him." David A. Keene, chairman of the American Conservative Union, said, "We felt that ... we can't just really stand by and let our ideological opponents single out one of our leaders and trash him without responding."

Morton C. Blackwell of the Leadership Institute, a host of the event, implied that there would be future consequences for members who are not actively working to exonerate DeLay. When interviewed, he said:

Conservatives who are supportive of Tom DeLay need to make it clear that any politician who hopes to have conservative support in the future had better be in the forefront as we go after and respond to those who attack Tom DeLay.

## **Ethics Committee Ousters**

The Ethics Committee faces the impending DeLay investigation in a disrupted and weakened state. The committee chairman, two Republican members and the senior staff all were removed from the committee earlier this year. As a result, the committee's credibility with the public is badly damaged.

Particularly disturbing was the decision to remove Rep. Joel Hefley (R-CO) as Ethics Committee chairman, after the committee admonished DeLay three times in 2004. In a January 7, 2005 interview in *The Washington Post*, Hefley said he would likely lose his Ethics Committee chair after those admonishments of DeLay:

“I think I’m going to get booted,” Hefley says. He bases this on the disparaging quotes from GOP leadership staffers that have shown up in media reports in recent days. He also says he has been threatened. “They said I was hurting my career here,” Hefley says of Republican colleagues he will not name. “The implication is that some form of retribution would be taken.”

Two other members, Reps. Kenny Hulshof (R-MO) and Steven LaTourette (R-OH), were also removed from the committee. “I believe the decision was a direct result of our work in the last session,” said Hulshof. It is unreasonable to expect the current members of the Ethics Committee to ignore these same political pressures and pursue another potentially damaging investigation of DeLay.

Finally, the committee’s two most experienced staffers, who had been involved in the DeLay admonishments and the Gingrich case, were fired by the new committee chair, Rep. Doc Hastings. *The New York Times*, on Feb. 17, 2005, reported on the removal of Ethics Committee senior staff after admonishing DeLay:

Two senior staff members of the House ethics committee are being removed from their jobs by the new chairman, drawing criticism from Democrats and others who said the changes reflected continued retaliation for actions taken last year against the majority leader, Tom DeLay.

Although the House has rolled back the rules changes it adopted at the beginning of the 109<sup>th</sup> Congress, the Ethics Committee remains stalled while trying to resolve a dispute over the hiring of Hastings’ chief of staff to head the Ethics Committee staff. The committee has generally hired its staff on a bipartisan basis.

### **Outside Counsel Must Be Able To Fully Investigate Allegations**

Any outside counsel charged with the investigation should not be unnecessarily limited in scope, authority or independence by the committee. The special counsel should have full authority to investigate and present evidence and arguments to the Ethics Committee. If the committee is seen as preventing the special counsel from conducting a thorough investigation, then the public will doubt the integrity of the investigation.

As the ethics committee considered allegations against Speaker Jim Wright in 1988, then-Common Cause chair Archibald Cox wrote:

In order to carry out the responsibilities of an outside counsel effectively, it is necessary for the counsel’s authority and independence to be clearly and public established. The

House Ethics Committee has run into serious problems in the past when this was omitted. For example, in 1977 during the Committee's Koreagate investigation, outside counsel Philip Lacovara, Esq., resigned in protest. Similarly, in 1981 during the House Ethics Committee's Abscam investigation, outside counsel E. Barrett Prettyman, Esq., resigned in protest. In both cases apparently an effort was made to prevent the outside counsel from carrying out their investigations in the manner they felt was required.

In the cases involving House Speakers Wright and Gingrich, there were also reports of internal struggles over the scope of the outside counsel's investigations.

It is critical that the Ethics Committee appoint a special counsel whose investigation is not unnecessarily limited in scope, authority or independence. Overly restricting the work of the special counsel will hurt the public credibility of the investigation and its outcome. In 1988, during the Jim Wright investigation, Representative Newt Gingrich expressed strong support for a special counsel with full independence to conduct a thorough investigation. According to a press advisory released from Gingrich's office in 1988:

Congressman Newt Gingrich (R-GA) today insisted that the House Ethics Committee give the special counsel appointed to investigate House Speaker Jim Wright the independence necessary to do a thorough and complete job. Discouraged by several news reports that special counsel Richard Phelan would be restricted in the scope of his investigation, Gingrich took a series of actions including writing to House Ethics Committee Chairman Julian Dixon (D-CA), forwarding the letter to his colleagues in the House, and speaking on the House floor on the need for a truly independent counsel with *full leeway in pursuing the investigation*.

Richard Phelan, who served as special counsel in the Jim Wright investigation, and Michael I. Rothstein, an assistant in that investigation, wrote the following in *Roll Call* in December 1995, in reference to the ongoing investigation of Representative Gingrich:

In our view, the credibility of an independent counsel's investigation necessarily depends upon his or her ability to follow the material leads developed during the course of the investigation. Thus, if the independent counsel requests documents directly related to the specific matter under investigation, and those documents contain credible evidence that another violation has occurred, counsel must bring this to the attention of the committee's chairman and ranking member. Indeed, forcing the independent counsel to don blinders in such a circumstance would make a mockery of the process, and his or her own ethics.

The Ethics Committee should appoint an outside counsel with "full leeway in pursuing the investigation" of allegations against DeLay. While any effective investigation should be focused on allegations that have been raised about DeLay, the counsel should not be prohibited from pursuing relevant information developed during the investigation. Specifically, the Ethics Committee must commit itself to the following measures – these recommendations are similar to those made by Common Cause in the past and are based on the charter given to Watergate Special Prosecutors Archibald Cox and Leon Jaworski:

1. The special counsel shall have full authority to investigate and present evidence and arguments before the Ethics Committee concerning the questions arising out of the activities of House Majority Leader Tom DeLay;
2. The special counsel shall have full authority to organize, select, and hire staff on a full- or part-time basis in such numbers as the counsel reasonably requires and will be provided with such funds and facilities as the counsel reasonably requires;
3. The special counsel shall have full authority to review all documentary evidence available from any source and full cooperation of the Committee in obtaining such evidence;
4. The Committee shall give the special counsel full cooperation in the issuance of subpoenas;
5. The special counsel shall be free, after discussion with the Committee, to make such public statements and reports as the counsel deems appropriate;
6. The special counsel shall have full authority to recommend that formal charges be brought before the Ethics Committee, shall be responsible for initiating and conducting proceedings if formal charges have been brought and shall handle any aspects of the proceedings believed to be necessary for a full inquiry;
7. The Committee shall not countermand or interfere with the special counsel's ability to take steps necessary to conduct a full and fair investigation; and
8. The special counsel will not be removed except for good cause.