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Joan Claybrook, President

Obama Should Not Nominate Corporate Lobbyist Mark Gitenstein to Justice Department's Office of Legal Policy

Mark Gitenstein, a former Senate staffer turned corporate lobbyist, is reportedly President Obama's top choice to head the Justice Department's Office of Legal Policy (OLP).¹ If this is true, Obama should reconsider.

Gitenstein has a long record of championing laws to shield corporations from accountability at the expense of ordinary Americans. Further, Gitenstein's lobbying work appears to violate the executive order governing conflicts of interest that Obama signed on his first day in office.

Long Record of Advocacy Against Corporate Accountability

As recently as August, Gitenstein was officially registered by his law firm, Mayer Brown, as a lobbyist on behalf of the U.S. Chamber of Commerce, AT&T, Merrill Lynch and several other corporate clients.² Among the causes he has fought for are making it more difficult to hold accounting firms liable for signing off on false earnings projections, weakening a law that helps detect and penalize fraud committed by government contractors, and limiting consumers' ability to pursue class action lawsuits.

Gitenstein's long record of advocacy for powerful corporate interests rather than ordinary Americans clashes with the judicial philosophy that Obama has espoused. In his opposition to Supreme Court nominee Samuel Alito, Obama complained that Alito "consistently sides on behalf of the powerful against the powerless."³ Likewise, in opposing John Roberts' nomination to the court, Obama said in comments "that he has far more often used his formidable skills on behalf of the strong in opposition to the weak."⁴ The same could be said of Gitenstein, whose longest-standing client, the U.S. Chamber of Commerce, vigorously supported President Bush's nominations of Alito and Roberts.

The Chamber supported Alito in part because of his "understanding of business and economic concerns" and Roberts for his "substantial experience advocating for the nation's leading businesses."⁵ These values stand in stark contrast to Obama's stated concern that judges understand the effects of their decisions on ordinary Americans: "We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old."⁶

These are among the high-profile issues upon which Gitenstein has lobbied to reduce corporate accountability:

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- In the mid-1990s, Gitenstein lobbied on behalf of a 430-company coalition for the Public Securities Litigation Reform Act (PSLRA), which made it more difficult to hold businesses and their accounting firms liable for false earnings predictions they put in corporate reports.⁷ Then-Sen. Joe Biden said of the bill, “This is going to give corporations license to lie to investors ... In this bill, Grandma loses. This is absolutely outrageous.”⁸ The bill was approved over President Clinton’s veto in 1995.⁹

In 2002, critics charged that the PSLRA was complicit in the collapse of Enron. Enron’s demise also engulfed accounting firm Arthur Andersen, a former Gitenstein client that had served as Enron’s auditor.¹⁰ Mayer Brown had reported billing the Big Five accounting firms \$780,000 between 1999 and 2001 for lobbying work by Gitenstein and his colleagues.¹¹

- From 1999 to 2001, Gitenstein lobbied on behalf of Boeing, Lockheed Martin, General Dynamics and several other defense contractors on the False Claims Act, a law initiated by President Abraham Lincoln that provides rewards to public employees for information exposing fraud by government contractors.¹² A coalition of defense contractors was seeking legislation that would have increased the burden of proof needed to assess fines under the law and reduced penalties of those found guilty.¹³ In November 2007, the Justice Department said it had recovered more than \$20 billion for fraud since the False Claims Act was strengthened in 1986.¹⁴ Gitenstein lobbied to weaken it.
- Since 2000, Gitenstein has lobbied for the U.S. Chamber of Commerce.¹⁵ He also has served as outside counsel for its Institute for Legal Reform.¹⁶ Gitenstein was among the leading strategists pushing for legislation that sought to limit class action lawsuits by forcing nearly all of them into the federal court system.¹⁷ The class action legislation became law in 2005.

Judicial Nominations and the “Legal Reform” Agenda

The Office of Legal Policy also works “with the Attorney General in advising the President on [judicial] nominations,” according to the OLP’s Web site.¹⁸

Judges have tremendous power regarding the issues on which Gitenstein has lobbied. Gitenstein lobbied for the Chamber on “legal reform issues,”¹⁹ which broadly covers the Chamber’s goal of reducing consumers’ access to the courtroom (including through the imposition of arbitration mandates), capping damages awards, and shielding corporations from actions by state courts and attorneys general. One key “legal reform” issue before Congress is binding mandatory arbitration. Corporations can force consumers into one-sided arbitrations only because of a series of Supreme Court decisions on an obscure law called the Federal Arbitration Act – and that is why legislation is needed to fix the problem.

The Chamber’s view that influencing judgeships fits into its legal reform agenda is reflected in the fact that it has spent tens of millions of dollars this decade in attempts to affect the outcomes of state judicial races.²⁰ This isn’t possible for federal judges, who are appointed rather

than elected. But the Chamber has been active in influencing the makeup of the federal judiciary as well.²¹ The Chamber has operated a formal process to evaluate Supreme Court nominees and influence who is nominated and approved ever since the failed nomination of Robert Bork in 1987.²²

The importance of judicial selection for what the Chamber terms “legal reform” issues is also clear from numerous Supreme Court decisions that have reduced the power of consumers and regulators to hold corporations accountable. For example, in 2008 the Supreme Court slashed the punitive damages award against Exxon for its 1989 Exxon Valdez oil spill from \$2.5 billion to \$500 million.²³ The Court viewed \$2.5 billion – already reduced from a jury’s assessment of \$5 billion – as far too much punishment, even though the oil spill harmed the livelihoods of 33,000 people and Exxon’s profits in 2007 alone were \$39.5 billion. In 2007, the Supreme Court held that FDA approval of medical devices – which ensures only minimum standards of safety – grants manufacturers immunity from all liability for injuries or deaths caused by their defective and mislabeled devices, meaning that patients and their families are denied all state-law compensation, even where the manufacturer has hidden critical information from the FDA or the defects came to light *after* FDA approval.²⁴ Also in 2007, the court overturned a lower-court decision, ruling 5-4 that the short clock on the statute of limitations for filing discriminatory pay actions begins ticking the moment that a business makes an allegedly discriminatory decision, even if the employee does not learn about it until much later.²⁵ Thus, the deadline for action may have long since expired before employees learn they were victims of discrimination. Congress recently passed legislation overturning the Supreme Court ruling. Obama signed it on Jan. 29, 2009.²⁶

These are only a few in a long list of pro-business, anti-consumer decisions by the Supreme Court that show the critical role judges play in determining the outcomes of issues affecting individuals’ ability to seek redress in court. These illustrate the danger of leaving a person who has consistently advocated against consumer interests in charge of choosing the judges who will make those decisions.

Clash with Obama Ethics Policy

Not only does Gitenstein’s work conflict with Obama’s stated values; it also appears to violate Obama’s ethics policy. That policy, announced by executive order on January 21, requires lobbyists to pledge that they will not “for a period of 2 years after the date of my appointment . . . participate in any particular matter on which I lobbied within the 2 years before the date of my appointment” or “participate in the specific issue area in which that particular matter falls.”

The Office of Legal Policies’ work is not merely “substantially and directly related” to Gitenstein’s former clients; it is one of the most important and influential offices in the executive branch regarding the very issues upon which Gitenstein lobbied for his clients. As head of the OLP, Gitenstein would be responsible for “developing and implementing the [Justice] Department’s significant policy initiatives,” according to a description on the OLP Web page, as well as serving as the chief policy advisor to the attorney general and deputy attorney general.²⁷ Last summer, according to a lobbying disclosure form filed with the Senate, Gitenstein likely lobbied on behalf of AT&T to stop Congress from limiting the use of binding mandatory

arbitration clauses,^a which are contract provisions through which corporations force consumers and employees to submit disputes to hand-picked company tribunals instead of being able to file claims in our public courts.²⁸

The Bush Justice Department was weighing in on arbitration legislation around the same time. It wrote a letter to the Senate Judiciary Committee opposing a bill to eliminate forced arbitration by nursing home corporations against elderly residents and their families.²⁹

It would violate both the letter and the spirit of Obama's ethics policy to put Gitenstein in a position where he can substantially influence, and possibly even direct, the Justice Department's policies on the very issues he recently lobbied on.

^a The lobbying disclosure page upon which Gitenstein's name is listed named five Mayer Brown employees who lobbied on behalf of AT&T on five issues: arbitration legislation, broadband regulation, wireless regulation, universal services issues and the Calling Card Protection Act, without specifying which lobbyists worked on which issues. However, given Gitenstein's history of working on legal issues, it is likely that he was among those who worked on arbitration legislation.

Lobbying Clients of Mark Gitenstein

Lobbying Client	Years Gitenstein Lobbied on Behalf of Client	Selected Issues Lobbied	Sum Gitenstein's Firm Received from Client In Reporting Periods in Which He Lobbied for Client
U.S. Chamber of Commerce	2000-2008	Pre-emption, legal reform, class action and campaign finance reform	\$6,410,000
Sealed Air Corporation	2003, 2005-2008	Asbestos litigation (S 852, S 1125), tax legislation	1,690,000
AT&T	2001, 2007-2008	Arbitration legislation (S 1782, HR 3010), broadband and wireless regulation, E.U. net neutrality, universal service, telecommunications	1,170,000
Ace Limited	2000-2006	Tax issues, asbestos legislation	1,226,000
Uniform Standards Coalition	1999	Uniform standards for securities litigation (HR 1689, S 1260 – passed)	780,000
Technology Network	1999-2001	Y2K issues, accounting issues in R&D, stock options, business mergers, SEC bulletin on revenue recognition	752,000
TransCanada Pipelines Limited	2001-2003	Natural gas transmissions and resources operations (HR 4)	640,000
Lockheed Martin Corporation	1999-2001	False Claims Act	32,238
Coalition For Patent Fairness	2006	Amend current patent law (HR 2795)	360,000
Ernst & Young	1999-2001, 2006-2008	Y2K issues, accounting regulation, FTC and internet privacy, Sarbanes-Oxley implementation	340,000
Merrill Lynch	2007-2008	Securities litigation	290,000
Arthur Andersen	1999-2001	Y2K issues, accounting regulation and issues from Enron's collapse, FTC and internet privacy	260,000
Pricewaterhousecoopers	1999-2000, 2006-2008	Y2K issues, accounting regulation, FTC and internet privacy, Sarbanes-Oxley	220,000

Lobbying Client	Years Gitenstein Lobbied on Behalf of Client	Selected Issues Lobbied	Sum Gitenstein's Firm Received from Client In Reporting Periods in Which He Lobbied for Client
		implementation	
Deloitte & Touche	1999-2000, 2006-2008	Y2K issues, accounting regulation, FTC and internet privacy, Sarbanes-Oxley implementation	220,000
KPMG	1999-2000, 2006-2008	Y2K issues, accounting regulation, FTC and internet privacy, Sarbanes-Oxley implementation	220,000
Chicago Stock Exchange	1999-2001	Securities law legislation, Sect. 31 fees, SROs legislation and SEC legislation	120,000
Intel	1999	Y2K issues	120,000
Oracle	1999-2002	Competition policy	80,000
Bayer	2007	U.S.-German tax treaty	40,000
International Employee Stock Option Coalition	2001-2002	Accounting treatment of stock options	80,000
Sithe Energies	2001	Andean Trade Preference Act	60,000
Semiconductor Industry Association	1999	Y2K issues	60,000
Cures Now	2002	Human Cloning Prohibition Act (S 2439)	50,000
General Electric	1999-2001	False Claims Act	40,000
United Technologies	1999-2001	False Claims Act	30,000
Boeing	1999-2001	False Claims Act	32,238
United Defense	1999-2001	False Claims Act	32,238
General Dynamics	1999-2001	False Claims Act	32,238
Litton Industries	1999-2001	False Claims Act	32,238
Semiconductor Equipment & Materials International	1999	Y2K issues	25,000
Total			\$15,444,190

Source: Public Citizen analysis of lobbying disclosure records filed with the secretary of the Senate

ENDNOTES

¹ Al Kamen, "Sen. Schumer Proves Worthy of 'The Amazing Race,'" *Washington Post*, Jan. 13, 2009 (available at http://www.washingtonpost.com/wp-dyn/content/article/2009/01/12/AR2009011203009_2.html); Joe Palazzolo, *The Blog of Legal Times*, Jan. 14, 2009 (available at <http://legaltimes.typepad.com/blt/2009/01/more-names-emerge-for-key-doj-slots.html>).

² Public Citizen analysis of lobbying disclosure records filed with the secretary of the Senate (available at <http://soprweb.senate.gov/index.cfm?event=selectfields>).

³ Sen. Barack Obama, Senate floor speech on the nomination of Samuel A. Alito Jr. to be an associate justice of the Supreme Court of the United States, Jan. 26, 2006, p. S190.

⁴ Sen. Barack Obama, Senate floor speech on the nomination of John Roberts to the Supreme Court of the United States, Sept. 22, 2005, p. S10366 (available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S10365&dbname=2005_record).

⁵ Press release of U.S. Chamber of Commerce, "Chamber Endorses Samuel Alito as Supreme Court Associate Justice; NCLC Plays Crucial Role in the Chamber's Endorsement Process," Jan. 6, 2006 (available at <http://www.uschamber.com/nclc/news/alerts/ba060106.htm>) and Press release of U.S. Chamber of Commerce, "U.S. Chamber Endorses John Roberts for Supreme Court," Aug. 24, 2005 (available at <http://www.uschamber.com/press/releases/2005/august/05-141.htm>).

⁶ "Obama On Judges, Supreme Court," MSNBC, July 17, 2007 (available at <http://firstread.msnbc.msn.com/archive/2007/07/17/274143.aspx>).

⁷ Nicholas Confessore, "How K Street Democrats Undermine Liberal Politics," *The American Prospect*, Oct. 9, 2000.

⁸ *Id.*

⁹ Pamela Barnett, "Hill Eyes Reform Of 1995 'Reform' Law," *Congress Daily*, Feb. 27, 2002.

¹⁰ *Id.*

¹¹ Public Citizen analysis of lobbying disclosure records filed with the secretary of the Senate (available at <http://soprweb.senate.gov/index.cfm?event=selectfields>).

¹² *Id.*

¹³ "Don't weaken the whistleblower law," *Roanoke Times*, July 22, 2000 and Charles Tiefer, "Giving Away the Store: How Much More Can The New Administration Surrender To Contractors?" *Legal Times*, March 5, 2001.

¹⁴ U.S. Department of Justice press release, "Justice Department Recovers \$2 Billion for Fraud Against the Government in FY 2007; More Than \$20 Billion Since 1986," Nov. 1, 2007 (available at http://www.usdoj.gov/opa/pr/2007/November/07_civ_873.html).

¹⁵ Public Citizen analysis of lobbying disclosure records filed with the secretary of the Senate (available at <http://soprweb.senate.gov/index.cfm?event=selectfields>).

¹⁶ Molly M. Peterson, "Breux floating idea of alternative to class action bill," *Congress Daily*, Sept. 17, 2003.

¹⁷ Pamela Barnett, "White House 'Not Opposed' To Class Action Compromise," *Congress Daily*, April 7, 2003, and Public Citizen analysis of lobbying disclosure records filed with the secretary of the Senate (available at <http://soprweb.senate.gov/index.cfm?event=selectfields>).

¹⁸ U.S. Department of Justice, Office of Legal Policy, Judicial Nominations, 111th Congress (available at <http://www.usdoj.gov/olp/judicialnominations111.htm>).

¹⁹ Public Citizen analysis of lobbying disclosure records filed with the secretary of the Senate (available at <http://soprweb.senate.gov/index.cfm?event=selectfields>).

²⁰ Public Citizen complaint to Internal Revenue Service, Request for Investigation Re: The U.S. Chamber of Commerce, EIN 53-0045720 and the Chamber's Institute for Legal Reform, EIN 52-2109035, Oct. 31, 2006 (available in PDF at <http://www.citizen.org/documents/ACF1F3E.pdf>).

²¹ See, e.g., Jeffrey Rosen, "Supreme Court, Inc.," *New York Times*, March 16 2008, (available at <http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html>) ("Whatever happens in November, Robin Conrad says the Chamber of Commerce is prepared to lobby as hard as ever for the appointment of pro-business justices Regardless of how many justices retire in the next presidential term, Conrad is confident that, having helped to transform the Supreme Court in less than 30 years, she and her colleagues can assure American business of a sympathetic hearing for decades to come.").

²² See, e.g., Press release of the U.S. Chamber of Commerce, "U.S. Chamber Endorses John Roberts for Supreme Court," Aug. 24, 2005 (available at <http://www.uschamber.com/press/releases/2005/august/05-141.htm>).

²³ *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008).

²⁴ *Riegel v. Medtronic Inc.*, 128 S. Ct. 999 (2008).

²⁵ *Ledbetter v. Goodyear*, 127 U.S. 2162 (2007).

²⁶ Sheryl Gay Stolberg, "Obama signs equal-pay legislation," *The New York Times*, Jan. 29, 2009.

²⁷ U.S. Department of Justice, Office of Legal Policy Web site (available at <http://www.usdoj.gov/olp/>).

²⁸ Public Citizen analysis of lobbying disclosure records filed with the secretary of the Senate (available at <http://soprweb.senate.gov/index.cfm?event=selectfields>).

²⁹ Principal Deputy Assistant Attorney General Keith B. Nelson letter to Sen. Patrick Leahy, chairman, Senate Judiciary Committee, July 30, 2008 (available in at <http://www.citizen.org/documents/DOJ%20-%202007-30-08%20Ltr.pdf>).