

THE SCARLET L: HAVE RECENT DEVELOPMENTS IN LOBBYING REGULATION GONE TOO FAR?

Written by: Brian W. Schoeneman+
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[*505] The American people are tired of a Washington that's only open to those with the most cash and the right connections. They're tired of a political process where the vote you cast isn't as important as the favors you can do. And they're tired of trusting us with their tax dollars when they see them spent on frivolous pet projects and corporate giveaways. n1

President Barack Obama's words aptly define the image the word "lobbying" brings to mind for many Americans. n2 While the word "lobbyist" has become a pejorative in many ways, n3 it is important to remember that lobbying relates directly to some of America's most fundamental rights [*506] enshrined in the First Amendment. n4 Yet despite its historically important role, lobbying has also been a constant target of political posturing. n5 As recently as the 2006 and 2008 federal-election cycles, lobbyist influence over the political process was contentious. n6 Major political change--such as the "Republican Revolution" of 1994, the Democratic recapture of the House and Senate in 2006, and the Republican resurgence in 2010--is often foreshadowed by corruption scandals, sometimes involving lobbyists. n7

As partisan control shifted, both parties enacted reforms designed to stamp out the potential corruption of lobbying. In 1995, the Republican majority enacted the Lobbying Disclosure Act of 1995 (LDA), the first major lobbying reform in almost half a century. n8 Likewise, in 2007, the first piece of legislation introduced by the Senate's Democratic majority was the Honest Leadership and Open Government Act of 2007 (HLOGA). n9 Finally, within weeks of winning the 2008 presidential election, President-elect Barack Obama announced new rules to limit the influence of lobbyists on his administration. n10

Shortly after taking office, the Obama administration announced sweeping new rules that effectively prohibited executive-branch officials from engaging in oral conversations with registered lobbyists on certain issues, n11 including discussions about the American Recovery and Reinvestment Act, commonly [*507] known as the "Stimulus," n12 and the Troubled Asset Relief Program (TARP). n13 With these newest rules, the lobbying community and public interest groups have questioned whether the White House has gone too far in regulating lobbying. n14 The administration has begun to adopt prohibitions and bans on certain communications between officials and lobbyists, moving away from the current law's focus on recordkeeping and disclosure. n15

This Comment argues that the administration's attempt to bar certain lobbyist contact with executive-branch officials violates the First Amendment protections of speech and petition. By branding lobbyists with a "scarlet letter," n16 the White House tramples upon some of the oldest and most important rights of a free society.

This Comment examines the issues surrounding the Obama administration's lobbying ban on the Stimulus. First, this Comment defines lobbying and reviews the history of the right to petition, including the lobbying reforms of 1946, 1995, and 2007 and pertinent case law. Next, this Comment reviews the administration's new approach to lobbying policy. Then, it analyzes the administration's policies to determine their constitutionality. Finally, this Comment discusses the administration's efforts and the future of lobbying reform and concludes that greater transparency, rather than bans on speech, is the best way to ensure a proper balance of constitutional rights and governmental integrity.

[*508] I. THE RIGHT TO PETITION AND THE MODERN PROFESSION OF LOBBYING

In order to better understand the modern profession of lobbying and the evolution of the right to petition, "lobbying" must be defined. The historical evolution of the right to petition--the fundamental right allowing lobbying to flourish--must also be explored. n17 The right to petition permits and protects the existence of lobbying and the lobbying profession. n18 Defining "lobbying" and reviewing the evolution of the right to petition provides the proper context for an analysis of the administration's oral-communications ban.

A. Lobbying Defined: Easier Said Than Done

"Lobbying" may seem relatively easy to define. *Black's Law Dictionary* provides three definitions of "lobbying": "(1) To talk with or curry favor with a legislator . . . in an attempt to influence the legislator's vote . . . (2) To support or oppose (a measure) by working to influence a legislator's vote . . . (3) To try to influence (a decision-maker) . . ." n19 As *Black's* demonstrates, the most fundamental definition of "lobbying" is an attempt to influence "a decision-maker." n20 Yet, despite the common usage of "lobbying," the dictionary definitions are vague. The definitions do not indicate how one "curries favor," nor do they indicate if lobbying is restricted to elected officials.

Unfortunately, the statutory definitions have similar problems. Federal law provides different definitions of lobbyin, n21 reflecting two different philosophies. n22 The first philosophy, reflected in the Internal Revenue Code, defines "lobbying" based on the government *action* the lobbying group wishes to influence. n23 The second philosophy, reflected in the LDA, focuses on which government *actor* is being influenced and defines various government actors. n24

The various definitions encompass a wide array of lobbying behaviors, but each definition covers different behaviors. For example, the Internal Revenue [*509] Code defines "grassroots lobbying," but the LDA does not. n25 Likewise, the Tax Code definitions include state and local lobbying, whereas the LDA definition focuses solely on federal lobbying. n26

The LDA defines "lobbying activities" as "lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others." n27 A "lobbying contact" is

any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to--

- (i) the formulation, modification, or adoption of Federal legislation (including legislative proposals);
- (ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;
- (iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or
- (iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.

n28

Finally, the LDA defines a "lobbyist" as an individual working for a "client for financial or other compensation for services that include more than one lobbying contact," unless the individual devotes less than twenty percent of the individual's time to lobbying activities over a three-month period. n29

The LDA, including its exceptions, provides a good baseline for understanding modern lobbying. This definition of "lobbying" allows for a [*510] detailed look at the historical evolution of the practice in America, beginning with the right to petition.

B. The Right to Petition in Anglo-American Jurisprudence

Although "the right of petition is not synonymous with a right to lobby," lobbying is fundamentally a form of petitioning and is inextricably intertwined with the historical right to petition. n30 Predating the adoption of the U.S. Constitution and Bill of Rights, n31 the right to petition allows citizens to engage the government directly to influence policy and to obtain redress for grievances, among other things. n32 Traditionally, the right to petition focused on writings, n33 but it has since expanded to all forms of communication. n34

The right to petition's roots in North America predate the American Revolution by over a century. n35 The first codification of the right to petition occurred in Massachusetts in 1642. n36 By the time of the American Revolution, [*511] the right to petition had become nearly sacrosanct, as confirmed by a pointed reference in the Declaration of Independence to King George III's failure to respond to colonial petitions. n37 During the federal constitution ratification debates a decade later, four states--Maryland, New York, North Carolina, and Virginia--conditioned their ratification votes on the inclusion of the right to petition in the text. n38

Following the ratification of the U.S. Constitution, James Madison began drafting a variety of amendments, including the First Amendment. n39 The Senate later amended Madison's language and included language protecting the freedom to petition, creating the final form of the First Amendment. n40

C. *The Constitutional Right to Petition*

Over half a century after the adoption of the Bill of Rights, the Supreme Court considered its first case impacting the right to petition, n41 *Crandall v. Nevada*. n42 The Court held that Nevada could not impose a tax on persons passing through the state because doing so infringed on a person's ability to petition the government. n43 A decade later, in *United States v. Cruikshank*, the Court confirmed more emphatically the importance of the right to petition, stating that "[t]he very idea of a government, republican in form, implies a right on the part of its citizens . . . to petition for a redress of grievances." n44 [*512] Later, in *Thomas v. Collins*, the Court determined that the right to petition is "inseparable" from the other rights granted by the First Amendment. n45

However, like the other First Amendment clauses, the Court soon found exceptions limiting the right to petition. n46 The first meaningful restriction arose in 1961 in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, in which the Court recognized in dicta a "sham exception" to the right to petition in antitrust litigation. n47

The Court did not determine whether the right to petition was limited in the same way the Court had determined the freedoms of speech and press were limited until 1985, n48 when it brought the right to petition in line with the rest of its First Amendment jurisprudence. n49 In *McDonald v. Smith*, the Court found that "[t]he right to petition is guaranteed; the right to commit libel with impunity is not." n50 The First Amendment prohibits individuals from using a petition to engage in what would be restricted behavior under the Court's free-speech or free-press jurisprudence. n51 Given this holding, an analysis of future legislation implicating the right to petition would likely include the same analysis reserved for potential violations of other First Amendment rights. n52

As this brief history shows, the right to petition has maintained a prominent position in the English common law and American constitutional traditions. [*513] Respect for the right to petition underlies the current American regime of lobbying regulation. n53

D. *Lobbying Regulation in America*

From the founding of the English colonies in North America, lobbying has been a part of American politics. n54 The adoption of the Constitution itself was influenced heavily by the lobbying efforts of the Federalists. n55 However, colonial lobbying bore little resemblance to the scope or goals of modern lobbying. n56 Unlike modern lobbying, ad hoc committees that came together for a specific purpose and disbanded once that purpose had been achieved or their efforts had failed were the primary colonial lobbyists. n57 Without regulations, many practices currently viewed as corrupt were accepted. n58

[*514] Lobbying first began to resemble its modern equivalent when political opinion regarding federal funding of local projects evolved during the 1820s and 1830s. n59 By the Civil War, Congress supported more internal improvements than it had previously, and lobbyists fought furiously over federal appropriations. n60 These lobbyists were key in passing a variety of railroad-related legislation, including laws allowing railroads to exchange worthless desert land, needed for track right-of-ways, for more profitable federal land elsewhere. n61

[*515] In the latter half of the nineteenth century, a significant expansion in lobbying marked the final evolution into the current lobbying industry. n62 This expansion in lobbying was followed shortly by the first attempt at a federal regulation of lobbying. n63 In 1876, the House of Representatives required lobbyists to register with the House Clerk, n64 but because the requirement had "only a limited life span, and failed to provide an enforcement mechanism," it had little impact on lobbying. n65

The first significant investigation into lobbying in Congress occurred during the Wilson administration. n66 President Woodrow Wilson's unsuccessful efforts to reduce the protective tariff resulted in significant public scrutiny of the tariff lobby's efforts, particularly those of the National Association of Manufacturers. n67 The Senate held a comprehensive series of hearings, which included testimony from sitting senators. n68 The first formal recommendation for a lobbyist-registration law emerged from these hearings. n69 That year, the [*516] House passed a reform bill that ultimately failed in the Senate. n70 Over the next twenty years, multiple bills requiring registration were introduced, but none were enacted. n71

In 1934, Congress successfully passed the first meaningful restriction on lobbying. n72 The law, enacted as an amendment to the Internal Revenue Code, barred tax-exempt charitable organizations from lobbying as a substantial part of their activities. n73 Although this was a major step forward, a decade passed before Congress revisited lobbying regulations. n74

E. Lobbying Regulation and Control from 1946 to 2008

Today, two primary means of regulating lobbying have emerged: prohibitions and disclosures. n75 First, prohibitions focus on certain lobbying-related activities that raise a specter of corruption. n76 Second, disclosures focus on making information available to the public, and they have been the focus of three major reform laws passed in the twentieth century. n77

The first comprehensive lobbying-reform law enacted was the Federal Regulation of Lobbying Act of 1946 (FRLA). n78 The law did little to curb corruption and was viewed widely as ineffectual. n79 Congress did not enact another lobbying reform bill for fifty years--the Lobbying Disclosure Act of 1995 (LDA). n80 The LDA repealed FRLA and created the modern transparency system that remains the backbone of lobbying regulation. n81 Congress amended the LDA by enacting the Honest Leadership and Open Government Act of [*517] 2007 (HLOGA), which requires lobbyists to file more frequent and more detailed lobbying disclosure reports. n82

1. What Might Have Been: The Federal Regulation of Lobbying Act of 1946

Congress passed the FRLA shortly after the end of World War II. n83 Following the major increase in federal power due to the war and the Great Depression, n84 pressure to pass a lobbying-reform law reached its zenith. n85 In 1945, Congress began a comprehensive organizational review. n86 The review included lobby reform, an issue that Congress had studied for over thirty-five years. n87 Despite this fact, the proposal itself was not debated at length before being passed as part of the Legislative Reorganization Act of 1946. n88 Thus, even after its passage, there was little belief that the FRLA would be effective. n89

[*518] On its face, the law appears sweeping. n90 The Act required registration with the Clerk of the House and Secretary of the Senate of "[a]ny person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States." n91 This required disclosing who employed the lobbyist, how long he would be employed for, how much he was being paid, who was paying his salary, what he was to be paid for expenses, and what expenses were included, as well as other minutiae. n92 Violations of the Act were considered a misdemeanor with a maximum fine of \$ 5000 or up to twelve months imprisonment, and a three-year bar on lobbying activities. n93

The Act was problematic in a number of ways. Its ambiguous definition of "lobbying" left open a multitude of lobbying activities, such as lobbying for appointment confirmations and lobbying on issues lacking legislation. n94 The statute also completely ignored the executive branch, a major target for lobbyists given administrative agencies' regulatory functions. n95 Further, the law only required registration for those who received funds that were "principally to aid" or whose "principal purpose" was to influence the passage or defeat of legislation. n96 The law's structure made registration avoidable. n97 [*519] Indeed, by the time Congress resolved these issues, "only 6000 of the reported 60,000 to 80,000 lobbyists in Washington had registered." n98

The courts did little to repair the FRLA's poor statutory structure. The Supreme Court's interpretation of the law in *United States v. Harriss* construed it in such a way as to render it meaningless. n99 In *Harriss*, the government brought charges against an agricultural lobby for violating the FRLA's reporting requirements. n100 *Harriss* argued that the law was unconstitutionally vague, the registration requirements violated the First Amendment rights to free speech and petition, and the penalty of a three-year bar violated the right to petition. n101

The Court construed the FRLA narrowly. n102 Although the Court may have saved the language from being unconstitutionally vague, it also made the statute unworkable. n103 Lobbyists and lawyers could easily maneuver around the Court's narrowed definition to ensure they were outside the registration requirements. n104 Despite this failure, a remedial lobbying-reform law was not enacted until 1995.

2. Modern Reform and Oversight: The Lobbying Disclosure Act of 1995

Congress designed the Lobbying Disclosure Act to ameliorate many of the problems created by the poor drafting of the FRLA and the Court's construction under *Harriss*. n105 It successfully closed many of the largest loopholes, including the weakness of the lobbying definitions and the focus on congressional action. n106

Like the FRLA, the LDA is a registration law. The LDA requires lobbyists to register with the Secretary of the Senate and the House Clerk within forty-five days of their first lobbying contact or when they are first hired by a [*520] client. n107 Reports must be filed semi-annually. n108 In addition to the amount an organization spends on lobbying, registrants must include a list of the issues on which they worked, a list of the contacts made, and the names and titles of the lobbyists employed on those issues. n109 Since the enactment of the LDA, the number of registered lobbyists has increased from 10,798 in 1996 to 30,402 in 2004. n110

Enforcement of the LDA changed significantly from the previous regime under the FRLA. Under the LDA, failure to register was no longer a criminal offense. n111 Instead, violations of the LDA were punishable by a civil fine of up to \$ 50,000. n112 Yet, despite this change in enforcement policy, the same problems that plagued the FRLA plagued the LDA as well. n113 According to the Congressional Research Service, although there are conflicting reports on enforcement data, generally few lobbyists who fail to file or correct an incomplete filing are held accountable. n114

Overall, the LDA was a major improvement over the failed FRLA regulation scheme. Given the number of registered lobbyists in the years following its adoption, it represented a significant increase in compliance from the days of the FRLA. However, despite the changes made, there was still room for improvement.

3. Responding to Abramoff and Cunningham: The Honest Leadership and Open Government Act of 2007

Congress turned its attention back to the issue of lobbying reform following a number of significant scandals in 2005. n115 As part of their political efforts, Democrats, including former Speaker Nancy Pelosi, made ethics and lobbying [*521] reform top priorities. n116 The first bill introduced in the 110th Congress was the Honest Leadership and Open Government Act of 2007. n117 HLOGA passed with bipartisan support and made the first significant changes to the LDA since it was originally passed. n118 HLOGA represented a congressional response to various lobbying-related scandals, including those of Duke Cunningham and Jack Abramoff. n119

Given the pressure on Congress to reign in perceived abuses, HLOGA was a high priority in the early days of the new Congress. n120 It passed with bipartisan support: 83-14 in the Senate n121 and a similarly lopsided 411-8 in the House of Representatives. n122

Unlike the LDA's repeal of FRLA, Congress did not design HLOGA as a replacement for the LDA disclosure regime. Instead, Congress designed it to expand provisions in the LDA and to increase disclosure requirements for lobbyists. n123 Among other things, HLOGA increased the reporting requirements for lobbyists from semiannually to quarterly. n124

[*522] 4. *National Association of Manufacturers v. Taylor: National Association of Manufacturers Fails to Overturn HLOGA on First Amendment Grounds*

Given the greater demand for specificity and increased filings, inevitably, HLOGA was tested in the courts. Soon after its passage, the National Association of Manufacturers (NAM) filed suit against the Secretary of the Senate challenging the constitutionality of the new law in *National Association of Manufacturers v. Taylor*. n125 NAM challenged the constitutionality of a number of provisions. n126 The district court rejected NAM's argument that HLOGA was constitutionally deficient and held that HLOGA's provisions were narrowly tailored to achieve a compelling government purpose. n127 NAM appealed. n128

The District of Columbia Circuit handed down its opinion in the case in September 2009. n129 The court affirmed the findings of the district court n130 and ruled that the HLOGA provisions NAM challenged did not interfere with NAM's constitutional rights to petition, associate, and engage in free speech. n131 The court utilized a strict scrutiny review of HLOGA. n132

[*523] The court began its analysis with the first prong of the strict scrutiny test, the finding of a compelling government interest. n133 This prong has two parts: first, determining the government interest, and second, determining whether the interest is compelling. n134 The court refused to adopt NAM's argument that the government's interest was the disclosure of the names of participants in "stealth coalitions." n135 The court instead relied on the LDA's justification of providing increased "public awareness of the efforts of paid lobbyists to influence the public decisionmaking process," which had not been amended or altered by HLOGA. n136

In determining whether the government's interest in the level of disclosure mandated in HLOGA was compelling, the court looked to the precedent established in *United States v. Harriss*, which held that disclosure was "designed to safeguard a vital national interest." n137 The court also looked to *Buckley v. Valeo*, the celebrated campaign finance

reform case. n138 Both of these cases supported the District of Columbia Circuit's finding that "[t]ransparency in government, no less than transparency in choosing our government, remains a vital national interest in a democracy." n139

The District of Columbia Circuit then probed the question of whether the government took the action to achieve the governmental interest proffered or whether that interest was simply pretextual. n140 The court quickly disposed of this argument. n141

The court then addressed the second-prong of strict scrutiny analysis and rejected NAM's arguments that the steps taken in HLOGA were overbroad or, alternatively, under-inclusive of the desired congressional results. n142 The court [*524] relied on its decision in *Blount v. SEC* in which it found that "neither a perfect nor even the best available fit between means and ends is required" to satisfy strict scrutiny. n143 The court held that the disclosure regime was narrowly tailored and provided the least restrictive alternative means for Congress to achieve its goal of greater public disclosure of lobbying practices. n144

5. The Road Ahead: A New Administration, a New Approach

After almost seventy years of regulation, and despite the changes enacted in HLOGA just one year prior, n145 lobbying again became a major topic in American politics during the 2008 presidential campaign. n146 Even before the election, Senator John McCain and then-Senator Barack Obama exchanged letters to discuss lobbying reform issues. n147 The promises made by Obama during the campaign led to new lobbying prohibitions in his Administration. n148

Given Obama's frequent criticism of lobbying during the campaign, the Obama administration quickly announced new ethical rules for lobbying. n149 The President-elect introduced new restrictions on lobbyists during his transition to the White House. n150 On his first day in office, he quickly adopted new rules for White House staff that were designed to curb the "revolving door" issue. n151 It was readily apparent that the new administration would be [*525] tougher on lobbyists and more skeptical of lobbying than any administration in recent memory. n152

6. The Administration Prohibits Certain Oral Communications by Lobbyists on the Stimulus

On March 20, 2009, following the passage of the American Recovery and Reinvestment Act (Stimulus), President Obama issued an executive memorandum entitled "Ensuring Responsible Spending of Recovery Act Funds." n153 The memorandum included new rules regarding communications between registered lobbyists and executive branch officials regarding Stimulus-funding proposals. n154

Section 3(a) of the memorandum requires registered lobbyists to put any views that they wish to express to an official in writing. n155 Section 3(b) requires executive-branch officials to "inquire whether any of the individuals or parties appearing or communicating concerning such particular project, application, or applicant [under the Recovery Act] is a lobbyist registered under the Lobbying Disclosure Act of 1995." n156 Although the memorandum does not prohibit a lobbyist from asking general Stimulus questions, it does require the executive-branch official to provide a written document that includes the date and time of the discussion, names of both the lobbyist and the official questioned, and a description of the conversation. n157 All written communications--from either the lobbyist or the official--must be posted [*526] publicly on the agency's website within three business days of the communication. n158

II. APPLYING STRICT SCRUTINY TO THE ADMINISTRATION'S ACTIONS

The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . and to petition the Government for a redress of grievances." n159 Although the Supreme Court has trod carefully around the constitutional protections afforded to lobbying, lobbying regulations are firmly grounded in the Court's First Amendment jurisprudence. n160 And though the Court has never expressly stated that there is a "constitutional right to lobby," n161 it has analyzed the various lobbying-disclosure regimes with a careful eye toward their impact on First Amendment protections. n162 Thus, if the Obama lobbying rules were challenged, courts [*527] would probably apply strict scrutiny to determine the constitutionality of the Administration's lobbying rule regarding the Stimulus. n163

National Association of Manufacturers v. Taylor provides a foundation for a strict scrutiny analysis in the First Amendment petition/speech context. n164 Under that analysis, the first inquiry is whether the Administration has a compelling interest in banning oral communications with lobbyists. n165

A. The Government's Interests in Adopting the Lobbying Ban Are Poorly Articulated and Redundant

The President's March 20 Memorandum lists three specific justifications for the additional rules regarding lobbying regulations involving the Stimulus-grant awards. n166 First, the new rules "provide public transparency and accountability of expenditures." n167 Second, the new rules promote good government by ensuring that Stimulus grants are awarded based on merit, rather than "improper influence." n168 Third, the new rules "empower" executive-department officials to exercise their discretion to ensure that Stimulus funds promote "job creation, economic recovery, and other purposes of the [Stimulus Act]." n169 Compared to the congressional findings supporting the lobbying-disclosure statutes, n170 the justifications in the March 20 Memorandum are exceedingly thin.

The first justification of stricter lobbying restrictions discussed in the March 20 Memorandum--transparency in government--is the most likely to satisfy strict scrutiny because the Memorandum extensively details specific disclosure requirements designed to provide public access to portions of the Stimulus grant process. n171

The second justification would likely not satisfy strict scrutiny because the Memorandum fails to explain the difference between "improper influence" and "proper influence." n172 The Memorandum does not ban lobbyist influence [*528] entirely; it simply requires that all lobbyist statements be made in writing. n173 Thus, under the President's justification, only oral communications are capable of being an "improper influence." n174 This rule is not narrowly tailored: a bribe can just as easily be transmitted via e-mail as it can be in person or over the telephone. The President's failure to articulate what constitutes improper influence, rather than simply influence or even proper influence, weakens this justification of the government's interest.

Finally, the interest of "empowering" executive-branch officials is a nullity; under the Stimulus, executive-branch officials have statutory discretion to grant awards. n175 Congress has already delegated to the executive officials power to exercise their discretion to promote the goals of the Stimulus. n176 These additional rules do not provide any greater discretion or empowerment for executive officials than the statutory empowerment already given by Congress. n177 Compared to the congressional findings outlined in *United States v. Harriss* and *National Association of Manufacturers v. Taylor*, n178 President Obama's explanations of the government's interest in enacting the additional rules are poorly articulated and redundant.

In order to survive a strict scrutiny analysis, the government must demonstrate a sufficiently compelling interest to justify encroaching upon First Amendment rights. n179 Although the Supreme Court ruled in *Harriss* and *Buckley* that lobbying-disclosure statutes contain sufficiently compelling interests to justify their impact on the First Amendment, the issue presented by the March 20 Memorandum is not simply one of disclosure. n180 Although the transparency justification may be sufficient to support the increased disclosure requirements, it does not justify the adverse impact a blanket ban on oral communication would have on First Amendment rights. n181 Any contact between lobbyists and executive-branch officials concerning the Stimulus must [*529] be disclosed under HLOGA, regardless of the new rules articulated in the Memorandum. n182 The only difference between HLOGA and these new rules is the disclosure not only of the contact's existence, but also of its substance. n183 Requiring the disclosure of a contact's substance is a novel approach, but it raises the specter of content-based speech regulation. n184 Further, the "chilling effect" that such a substance-based disclosure requirement would have on lawful petitioning of the government is not justified. n185

The Supreme Court's ruling in *Harriss* focused on ensuring that the public knew "who is being hired, who is putting up the money, and how much" they are spending to influence public officials--not on what was being said. n186 Under the March 20 Memorandum, the government focuses not on *who* is lobbying--which would already be captured in LDA- and HLOGA-mandated disclosure forms--but on *what* is being said. n187 By focusing on the contact's substance, the administration skirts the edge of content-based speech regulation.

B. The Ban on Oral Communications Is Not An Effective Means of Advancing the Government's Interest

If one considers the March 20 Memorandum's justifications as compelling government interests, the next step in strict scrutiny analysis is to determine whether the steps taken effectively advance those interests. n188

Although the various disclosure requirements on executive-branch officials would effectively advance transparency, n189 the lobbyist-communication ban [*530] may not do so. HLOGA requires lobbyists to disclose who they are lobbying for, which agencies they are lobbying, and how much they are being paid. n190 The ban on oral communication does little to further transparency; it simply stifles communication. n191

C. The Lobbying Ban Is Not Narrowly Tailored

Finally, in order to survive strict scrutiny, the government must demonstrate that the questioned regulation is narrowly tailored. n192 As the District of Columbia Circuit noted in *Blount v. SEC*, a regulation is narrowly tailored when no less-restrictive alternative would accomplish the government's goals as effectively. n193

There are numerous less-restrictive alternatives that could provide transparency without the need for blanket bans on oral communications. The March 20 Memorandum already requires that agencies post written communications by lobbyists in support of specific projects on their websites n194 and that executive-branch officials document and post summaries of conversations with lobbyists on "general [Stimulus] policy issues." n195 Therefore, it may be less restrictive simply to require the same documentation by the government official in all cases, regardless of the content of the conversation.

In addition, the sole focus on registered lobbyists renders the March 20 Memorandum fatally under-inclusive. It ignores the potential "improper influence" exerted by non-registered lobbyists on executive officials making Stimulus-award decisions. n196 The justifications made by the administration do not explain why conversations with registered lobbyists are a greater threat of "improper influence" than conversations with unregistered, but still interested, third parties.

D. The Administration's Ban on Oral Communications Does Not Survive a Strict Scrutiny Analysis

The President has failed to articulate a compelling the government interest in banning lobbyist conversations regarding Stimulus awards. Further, the lobbying bans do not effectively advance the government interests that were proffered as justification for the bans. Finally, given both the existence of less-restrictive alternatives and the under-inclusiveness of the bans, the communication bans found in the March 20 Memorandum do not satisfy strict [*531] scrutiny and are therefore unconstitutional infringements on the First Amendment.

III. PUTTING LOBBYING AND REFORM IN PERSPECTIVE

A significant number of Americans have lost faith in government. n197 The President has shown that he believes lobbyists have played a role in that loss of faith. n198 However, rebuilding faith in the government should not include the wholesale abrogation of the First Amendment. Absent extortion, blackmail or bribery, a conversation--even a conversation directly advocating on behalf of a project or appropriation--should be protected. If that conversation crosses the line into legitimately illegal territory, it should be prosecuted. But a conversation between a lobbyist and a bureaucrat should not instantly invite suspicion of corruption or undue influence. Executive-branch officials still have the option of simply ignoring these entreaties, just as their legislative-branch colleagues do.

Further, as the Supreme Court recently noted in *Citizens United v. Federal Election Commission*,

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each. n199

It seems equally important that executive branch officials not be deprived of "the right and privilege to determine for [themselves] what speech and speakers are worthy of consideration." n200

There is a fundamentally American aversion to the censorship of debate, and this may be the reason why so many disparate groups have criticized the administration's policies in this area. n201 The Obama administration's transparency efforts are laudable, but the bans on communications are not.

The trend toward censorship of debate and bans on political speech--even in as limited a context as lobbying on the Stimulus--represents a step backward [*532] in the expansion of citizen contact with government. A policy focusing on registered lobbyists represents another chapter in the long-running political argument between the government and those who seek to influence it. n202

The public has a vague notion of what lobbying is, but generally does not recognize the difference between law-abiding lobbyists and the Jack Abramoffs of the lobbying world. n203 In fact, some call for an outright ban on all lobbying as the only way to solve the problem. n204 As such, attacking lobbyists and the "special interests" is an easy way to score political points with broad swaths of the electorate, especially those who do not feel politically empowered. Yet

doing so can cause more damage to government than it prevents. Lobbyists offer public officials more than campaign contributions; the most important thing a lobbyist can provide a public official is reliable information. n205 That information allows officials to make informed decisions about legislation and helps them prioritize their legislative efforts and draft legislation that works in the real world, not just on paper. n206 Lobbying also helps constituents voice their concerns and solve problems caused by the government--the exact scenario the right to petition was designed to remedy.

IV. CONCLUSION

Although the goals of rooting out public corruption and restoring public faith in the government are laudable, the Obama administration's prohibitions on lobbyists and citizens interacting with executive-branch employees regarding the Stimulus violate constitutional protections enshrined in the First Amendment. The administration's efforts to ensure public transparency are noble, but an outright conversation ban goes too far toward censorship. The American people and their government must be ever vigilant to ensure that efforts to stamp out corruption do not undercut some of the most fundamental rights upon which our nation was founded.

Legal Topics:

For related research and practice materials, see the following legal topics:

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Congressional Duties & Powers
War Powers Clause
Constitutional Law
Bill of Rights
Fundamental Freedoms
General Overview
Transportation Law
Carrier Duties & Liabilities
Rates & Tariffs

FOOTNOTES:

n1 Senator Barack Obama, Address at the Lobbying Reform Summit at the National Press Club (Jan. 26, 2006) (transcript available at <http://obamaspeeches.com/047-Lobbying-Reform-Summit-National-Press-Club-Obama-Speech.htm>). Although President Obama gave this speech while he was a senator, he echoed these sentiments in the 2010 State of the Union address:

We face a deficit of trust--deep and corrosive doubts about how Washington works that have been growing for years. To close that credibility gap we have to take action on both ends of Pennsylvania Avenue--to end the outsized influence of lobbyists; to do our work openly; to give our people the government they deserve. . . .

That's what I came to Washington to do. . . . That's why we've excluded lobbyists from policymaking jobs, or seats on federal boards and commissions.

But we can't stop there. It's time to require lobbyists to disclose each contact they make on behalf of a client with my administration or with Congress. It's time to put strict limits on the contributions that lobbyists give to candidates for federal office.

President Barack Obama, Remarks by the President in the State of the Union Address (Jan. 27, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>) [hereinafter State of the Union Address].

n2 See Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 522, 524 (2007).

n3 See *To Lobby (v.): To Be Part of a Basic American Tradition*, POLITICO (Feb. 7, 2007), <http://www.politico.com/news/stories/0207/2677.html>.

n4 U.S. CONST. amend. I; see Alan B. Morrison, *Introduction: Lobbyists--Saints or Sinners?*, 19 STAN. L. & POL'Y REV. 1, 1 (2008).

n5 See 2 ROBERT C. BYRD, *THE SENATE 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE* 491-508 (1991).

n6 See David Mattingly & Joe Johns, *Analysis: Obama, McCain Both Have Lobbyist Ties*, CNN.COM (July 29, 2008), <http://www.cnn.com/2008/POLITICS/07/29/lobbyists/index.html?iref=allsearch>; *The Insider's Guide to the U.S. Mid-Terms*, CNN.COM (Oct. 31, 2006), http://articles.cnn.com/2006-10-31/politics/insider.midterms_1_mid-term-elections-bush-seats?_s=PM:POLITICS.

n7 See Nicholas W. Allard, *Lobbying Is an Honorable Profession: The Right to Petition and the Competition to Be Right*, 19 *STAN. L. & POL'Y REV.* 23, 26 n.8 (2008); DAVID MASON, HERITAGE FOUND., *TIME TO RESOLVE THE HOUSE POST OFFICE SCANDAL* (1994), available at <http://www.heritage.org/Research/Reports/1994/02/EM375nbsps-Time-to-Resolve-the-House> (discussing the House Post Office scandal).

n8 Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 *Stat.* 691 (codified as amended in scattered sections of 2 & 18 U.S.C. (2006 & Supp. II 2009)); William V. Luneberg, *The Evolution of Federal Lobbying Regulation: Where We Are Now and Where We Should Be Going*, 41 *MCGEORGE L. REV.* 85, 86 (2009).

n9 Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 *Stat.* 735 (codified in scattered sections of 2 & 18 U.S.C. (Supp. II 2009)).

n10 Press Release, The Office of the President-Elect, Obama Transition Announces Rules for Lobbyists in Transition (Nov. 11, 2008), available at http://change.gov/newsroom/entry/obama_transition_announces_rules_for_lobbyists_in_transition/.

n11 Ensuring Responsible Spending of Recovery Act Funds, Memorandum of March 20, 2009, 74 *Fed. Reg.* 12,531, 12,533 (Mar. 25, 2009) [hereinafter Presidential Memorandum of March 20].

n12 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 *Stat.* 115.

n13 Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 *Stat.* 3765 (codified as amended in scattered sections of 5, 12, 15 & 31 U.S.C. (2006 & Supp. II 2009)). This Comment focuses on the Stimulus lobbying rules. The TARP rules are similar in some ways, but they contain some specific differences which are beyond the scope of this Comment. For an in-depth analysis of the TARP rules, see Daniel Schuman, *The TARP Lobbying Rules: What They Say and What They Mean for Transparency*, SUNLIGHT FOUND. BLOG (Oct. 15, 2009, 9:37 AM), <http://blog.sunlightfoundation.com/2009/10/15/tarp-lobbying-rules/>.

n14 See, e.g., *Lobbying Restrictions Generate More Criticism*, OMBWATCH.ORG (May 6, 2009), <http://www.ombwatch.org/node/9970>.

n15 See *Presidential Memorandum of March 20*, *supra* note 11; see also *Lobbying Restrictions Generate More Criticism*, *supra* note 14.

n16 The term "scarlet letter" comes from Nathaniel Hawthorne's novel, *The Scarlet Letter*, about Hester Prynne, a woman who is forced to wear the letter "A" embroidered on her dress to signify that she is an adulterer. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 57-58 (Ross C. Murfin ed., 1991) (1850). The embroidered letter "had the effect of a spell, taking her out of the ordinary relations with humanity, and inclosing her in a sphere by herself." *Id.* at 58. Some argue that the Obama administration's tough regulations on lobbyists have branded lobbyists with a type of scarlet letter. See Manuel Roig-Franzia, *The Insider's Insider*, WASH. POST, Aug. 24, 2009, at C1 (noting that Heather Podesta and other lobbyists wore red, gothic L's on their clothing during the Democratic National Convention in 2008 as a way of "razzing" candidate Obama for his attacks on lobbying).

n17 See Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J.L. & PUB. POL'Y 149, 180-81 (1993).

n18 *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967) ("While the term 'lobbyist' has become encrusted with invidious connotations, every person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition.").

n19 BLACK'S LAW DICTIONARY 1022 (9th ed. 2009).

n20 *Id.*

n21 See Lloyd Hitoshi Mayer, *What Is this "Lobbying" that We Are So Worried About?*, 26 YALE L. & POL'Y REV. 485, 508 n.89 (2008). The Internal Revenue Code contains three definitions of "lobbying." See I.R.C. §§ 162(e), 501(c)(3), 4911 (2006). Another definition is located in the LDA/HLOGA. See 2 U.S.C. § 1602 (2006 & Supp. II 2009).

n22 See Mayer, *supra* note 21, at 509.

n23 I.R.C. § 501(c)(3); see Mayer, *supra* note 21, at 509 (discussing this Internal Revenue Code definition).

n24 2 U.S.C. § 1602(3), (4), (8)(a); see Mayer, *supra* note 21, at 511 (discussing the definition of "lobbying" as set forth in the LDA).

n25 Compare I.R.C. § 4911(c), with 2 U.S.C. § 1602(7). The Government Accountability Office (GAO)--formerly the General Accounting Office--defined "grassroots lobbying" as "efforts to influence legislation by influencing the public's view of that legislation," and noted that the Internal Revenue Code definition captured this type of lobbying behavior but the LDA definition did not. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-99-38, FEDERAL LOBBYING: DIFFERENCES IN LOBBYING DEFINITIONS AND THEIR IMPACT 11 & app. 1, at 30. This Comment will not focus on grassroots lobbying.

n26 Compare I.R.C. § 4911, with 2 U.S.C. § 1602. See generally U.S. GEN. ACCOUNTING OFFICE, *supra* note 25.

n27 2 U.S.C. § 1602(7) (2006). This Comment uses the LDA definition of "lobbying activities," "lobbying contacts," and "lobbyists."

n28 *Id.* § 1602(8)(A). Exceptions to "lobbying activities" include congressional testimony, *id.* § 1602(8)(B)(vii), publicly disseminated speeches or broadcasts, *id.* § 1602(8)(B)(viii), or requests for information about a single individual's federal benefits, *id.* § 1602(8)(B)(xvi). The LDA includes nineteen different exceptions for oral or written communications that are not considered lobbying. *Id.* § 1602(8)(B).

n29 *Id.* § 1602(10).

n30 See *Thomas, supra* note 17, at 184.

n31 See Norman B. Smith, "*Shall Make No Law Abridging . . .*": *An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1154 (1986). The right to petition the government for a redress of grievances is an "ancient right." *Id.* at 1153. At least one early petition dates back as far as the reign of Anglo-Saxon King Athelred the Unready. *Id.* at 1154 (noting the first recorded petition to King Athelred from his nobles in 1013, demanding his return after he fled England for France). Two centuries later, as part of a sweeping recognition of rights, the Magna Carta included a specific right to petition in Clause 61:

[S]o that if [the king] . . . offend[s] against anyone in any way, or transgress[es] any of the articles of peace or security, and the offence is indicated to four of the aforesaid twenty-five barons, those four barons shall come to us or our justiciar, if we are out of the kingdom, and shall bring it to our notice and ask that we have it redressed without delay.

J.C. HOLT, MAGNA CARTA app. 6 at 471 (Cambridge Univ. Press, 2d ed. 1992).

n32 See *Smith, supra* note 31, at 1178-80.

n33 See *id.* at 1189.

n34 *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (1968) (stating categorically that an attempting to persuade Congress was acting within the right of petition).

n35 See *Smith, supra* note 31, at 1170.

n36 *Id.* In response to the citizenry's fears of an overly powerful magistracy, Governor John Winthrop of the Massachusetts Bay Colony commissioned a body of men to draw up a system of laws for the colony. *Id.* This system of laws, known as the Massachusetts Body of Liberties, explicitly protected the right to petition. THE BODY OF LIBERTIES OF THE MASSACHUSETTS COLONY IN NEW ENGLAND art. 12 (1641), *re-printed in* DOCUMENTS OF THE CONSTITUTION OF ENGLAND AND AMERICA: FROM MAGNA CHARTA TO THE FEDERAL CONSTITUTION OF 1789 57, 59 (Francis Bowen ed., 1854). Article Twelve stated:

Every man, whether inhabitant or foreigner, free or not free, shall have liberty to come to any public court, council, or town-meeting, and, either by speech or by writing, to move any lawful, seasonable, and material question, or to present any necessary motion, complaint, petition, bill, or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order, and respective manner.

Id. This was the first time that the right to petition had been enacted as part of a system of laws. *Smith, supra* note 31, at 1170. As the colonies matured, the right to petition continued to play an important role in colonial affairs. *Id.* at 1173-74 (noting that the right to petition was included in declarations by a number of colonial conventions, the Stamp Act Congress of 1765, and the First Continental Congress in 1774).

n37 THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776) ("In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.").

n38 *See Smith, supra* note 31, at 1174.

n39 *See id.* at 1175. The first draft of the First Amendment included language ensuring the right of the people "to apply to the government for redress of grievances." THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 143 (Neil H. Coogan ed., 1997).

n40 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

n41 *Smith, supra* note 31, at 1183-84.

n42 *Crandall v. Nevada*, 73 U.S. 35, 44 (1867). In *Crandall*, the Court found that

[a citizen] has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. . . . [A]nd this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.

Id.

n43 *Id.* at 43-44. The Court reasoned that because an individual may need to travel to Washington in order to present a petition, the First Amendment implied a right to interstate travel. *Id.* at 44.

n44 *United States v. Cruikshank*, 92 U.S. 542, 552 (1875).

n45 *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable.").

n46 *See Smith, supra* note 31, at 1183-85.

n47 *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961); *see Smith, supra* note 31, at 1184. In *Noerr*, the Court noted that if Noerr had used the right of petition as a pretext for engaging in otherwise unlawful behavior, the right would not have shielded the company from liability. *Noerr*, 365 U.S. at 144. The Court reaffirmed this exception. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511

(1972) (allowing court petitions against competitors' applications); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) (finding that union lobbying efforts were not a violation of the Sherman Act); see *Smith*, *supra* note 31, at 1192 n.229.

n48 *Smith*, *supra* note 31, at 1184-85.

n49 *McDonald v. Smith*, 472 U.S. 479, 482 (1985). *McDonald* arose after McDonald sent a number of letters, containing potentially libelous claims, to President Reagan opposing the potential nomination of Smith for U.S. Attorney. *Id.* at 480-81. McDonald argued that the letters were protected under the right to petition. *Id.* at 481-82. The Court held that "[t]he right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression." *Id.* at 482.

n50 *Id.* at 485.

n51 *Id.* (explaining that because the rights in the First Amendment are inseparable, the right to petition should be limited in accordance with the right of free speech and freedom of the press).

n52 See *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 9-13 (D.C. Cir. 2009) (analyzing the National Association of Manufacturers's claims that HLOGA violates its First Amendment rights under a strict scrutiny analysis).

n53 See 2 U.S.C. § 1607 (2006) ("Nothing in this [Act] shall be construed to prohibit or interfere with (1) the right to petition the Government for the redress of grievances.").

n54 See Michael Barone, *In Defense of Lobbyists*, REALCLEARPOLITICS (June 14, 2008), http://www.realclearpolitics.com/articles/2008/06/in_defense_of_lobbyists.html. In addition to his many other endeavors, Benjamin Franklin was one of the first American lobbyists, sent to England to represent Pennsylvania in the 1760s. *Id.*

n55 See Burdett Loomis, *From the Framing to the Fifties: Lobbying in Constitutional and Historical Contexts*, EXTENSIONS (Fall 2006), http://www.ou.edu/special/albertctr/extensions/fall_2006/Loomis.pdf. The Federalist Papers, written by Alexander Hamilton, John Jay, and James Madison can easily be viewed as lobbying materials: they were designed to influence the various constitutional ratifying conventions and to create grassroots support from the general public. *Id.* The public, in turn, would pressure its representatives in those conventions to ratify the Constitution. Madison, Jay, and Hamilton's efforts were successful; the Federalist Papers played a significant role in shaping public opinion in favor of the new Constitution. *Id.*

Madison recognized the potential impact that lobbying could have on the nascent American government. THE FEDERALIST NO. 10, at 56, 59 (James Madison) (Jacob E. Cooke ed., 1961). Madison wrote extensively about the threat of "faction" to American democracy. *Id.* at 56-58. Although he recognized the threat, he also understood that there was no way to guard against the threat completely without destroying the Republic he had endeavored to create. *Id.* at 60 ("[T]he causes of faction cannot be removed . . . relief is only to be sought in the means of controlling its effects."). His definition of "faction" is similar to perceptions of lobbying that still persist to this day. See STAFF OF S. SUBCOMM. ON INTERGOVERNMENTAL RELATIONS, 99TH CONG., CONGRESS AND PRESSURE GROUPS: LOBBYING IN A MODERN DEMOCRACY 1 (Comm. Print 1986) [hereinafter PRESSURE GROUPS]. Despite Madison's fear of faction, his own efforts were a part of one of the first successful examples of grassroots lobbying in American history.

n56 See PRESSURE GROUPS, *supra* note 55, at 2, 10. After the adoption of the U.S. Constitution, lobbyists flocked to the early American Congress. *Id.* at 2. One of the earliest recorded lobbyists at the time was William Hull, a Revolutionary War veteran. Peter Grier, *The Lobbyist Through History: Villainy and Virtue*, CHRISTIAN SCIENCE MONITOR (Sept. 28, 2009), <http://features.csmonitor.com/politics/2009/09/28/the-lobbyist-through-history-villainy-and-virtue/>. Hull was sent to Philadelphia by veterans from Virginia to lobby Congress and President George Washington to provide back pay for soldiers who had served in the Revolution. See 133 CONG. REC. S25,410 (daily ed. Sept. 28, 1987) (discussing Hull's role). His efforts, though unsuccessful, were representative of early lobbying under the new Constitution. Grier, *supra*.

n57 See PRESSURE GROUPS, *supra* note 55, at 2.

n58 See, e.g., *id.* For example, the lobbying efforts of Nicholas Biddle, President of the Bank of the United States, included providing loans on favorable terms to legislators and paying retainers to elected officials who were inclined to support the Bank. See JON MEACHAM, *AMERICAN LION* 208-09 (Random House Trade Paperbacks ed. 2009) (recounting a story told by Chief Justice Roger B. Taney during a shared carriage ride with an anti-Bank congressman who later voted for the Bank after receiving a \$ 20,000 loan). Biddle's efforts to secure a recharter of the Bank during the Jackson administration were led by a lobbyist few could rival for influence: Senator Daniel Webster. PRESSURE GROUPS, *supra* note 55, at 2. Biddle paid Senator Webster a retainer to lead the push for the Bank's recharter in Congress. See *id.*; see also 133 CONG. REC. S25,410 (daily ed. Sept. 28, 1987). Senator Webster wrote an extraordinary letter to Biddle that read, "I believe my retainer has not been renewed or refreshed as usual. If it be wished that my relation to the bank should be continued, it may be well to send me the usual retainers." See PRESSURE GROUPS, *supra* note 55, at 2. Similar "sweetheart deals" today by mortgage companies like Countrywide Financial caused serious damage to the reputations of a number of high-ranking senators, including former Senator Chris Dodd (D-CT), and sparked widespread calls for hearings and investigations. *Dodd and Countrywide*, WALL. ST. J., Oct. 10, 2008, at A16. Despite this example of modern blatant corruption, to this day Senator Webster enjoys an unstained reputation as one of the lions of the Senate and heroes of the nation. MEACHAM, *supra*, at 130-31.

n59 See MEACHAM, *supra* note 58, at 56. Beginning in Andrew Jackson's presidency, political opinion shifted on the issue of federal infrastructure spending, with Congress supporting more local projects than had been the case in the past. *Id.* at 137. Providing public funding for internal improvements was not always viewed as a fundamental role of the federal government. *Id.* at 56. The "internal improvement" debates split the Democratic and National Republican/Whig parties during the first half of the nineteenth century. *Id.* at 56, 289. Jackson opposed the use of federal funds on local-level and state-level internal improvements, but his opponents, like John Quincy Adams and Henry Clay, strongly supported the use of federal funds for infrastructure. *Id.* at 56. Despite President Jackson's reticence, the federal government began to spend more and more on internal improvements. *Id.* at 139. By the end of president Jackson's final term in office, he had authorized more federal funds for internal improvements than the prior six presidents combined. *Id.*

n60 PRESSURE GROUPS, *supra* note 55, at 3. During this period, one of the more famous apocryphal anecdotes about lobbying originated. President Ulysses S. Grant would often visit the lobby of the Willard Hotel, next to the White House. Interview by Liane Hansen with Barbara Bahny, Pub. Relations Dir., The Willard Intercontinental Hotel, in D.C. (Jan. 15, 2006) (transcript available at <http://www.npr.org/templates/story/story.php?storyId=5158557>). His visits soon became well known and petitioners would frequent the lobby, leading Grant to dub them "lobbyists." *Id.* This version of the etymology of "lobbyist" is still often referred to today and is referenced by the Willard Intercontinental in its history of the hotel. *Id.*

n61 PRESSURE GROUPS, *supra* note 55, at 3. These laws led directly to the first major lobbying scandal, the Credit Mobilier Scandal of 1872. *Id.* The Union Pacific Railroad designed Credit Mobilier as a shell corporation

to generate additional profits on the construction of the transcontinental railroad by inflating costs. *Id.*; see also EDWARD WINSLOW MARTIN, BEHIND THE SCENES IN WASHINGTON: A COMPLETE AND GRAPHIC ACCOUNT OF THE CREDIT MOBILIER INVESTIGATION 248-63 (1873). When an investigation of Credit Mobilier seemed imminent, Congressman Oakes Ames of Massachusetts, who served as the President of Credit Mobilier, provided gifts of stock to influential members of Congress as part of his lobbying efforts for Credit Mobilier. PRESSURE GROUPS, *supra* note 55, at 3. Recipients of Credit Mobilier stock included Vice President Schuyler Colfax, Speaker of the House James G. Blaine, and future President James A. Garfield. *Id.* In 1872, the New York Sun reported the facts of the scandal, resulting in investigations in both the House of Representatives and the Senate, the censuring of one House member, and the recommended expulsion of another. *Id.* The member recommended for expulsion was not expelled because his term ended. *Id.*

n62 PRESSURE GROUPS, *supra* note 55, at 4. Formerly the province of general lobbyists hired for a specific issue, lobbying shifted to a more permanent, in-house industry. *Id.* Following the shift, lobbyists tended to represent specific companies or industrial interests. *Id.* During this time, mass-reform movements, such as the labor movement and the temperance movement, made their presences felt in the nation's capital and maintained in-house lobbyists. *Id.*

n63 CRAIG HOLMAN, PUB. CITIZEN, ORIGINS, EVOLUTION AND STRUCTURE OF THE LOBBYING DISCLOSURE ACT 2-3 (2006), available at <http://www.citizen.org/documents/Origins%20of%201obbying%20Disclosure%20Act.pdf>.

n64 *Id.* This registration was limited to one session of the 44th Congress. *Id.*

n65 PRESSURE GROUPS, *supra* note 55, at 8.

n66 See *Maintenance of a Lobby to Influence Legislation: Hearing on S. Res. 92 Before the S. Comm. on the Judiciary*, 63d Cong. 3-4 (1918) [hereinafter *1918 Senate Hearing*]. President Woodrow Wilson was an ardent opponent of lobbying. PRESSURE GROUPS, *supra* note 55, at 6. President Wilson's criticism of lobbying began long before his presidency. In 1885, he recognized Congress's structural failures that promoted lobbying, particularly the structure of the committee system. *Id.* The House made sweeping changes to the committee system in 1911 that curbed many of the abuses Wilson had criticized, but he still faced powerful lobbies when he became president in 1913. *Id.* at 6-7. When President Wilson attempted to lower the protective tariff, he was met with stiff resistance by tariff supporters--especially their lobbyists. *Id.* at 7.

n67 PRESSURE GROUPS, *supra* note 55, at 7.

n68 *1918 Senate Hearing*, *supra* note 66. When Senator Henry F. Ashurst of Arizona was asked about his knowledge of any lobbying on the tariff bill, he mentioned the efforts of a particular lobbyist on Indian legislation, whom he characterized as "the smoothest lobbyist I ever met. He could carry a bundle of eels upstairs and never drop one." *Id.* at 12.

n69 PRESSURE GROUPS, *supra* note 55, at 7.

n70 *Id.*

n71 *Id.* at 8-9.

n72 *Id.* at 9.

n73 *I.R.C. § 501(c)(3)* (2006).

n74 PRESSURE GROUPS, *supra* note 55, at 9-10.

n75 See Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 *CORNELL J.L. & PUB. POL'Y* 1, 17 (2006).

n76 See *id.* These include things such as gifts and honoraria for public officials, 2 *U.S.C. § 1613* (2006), and revolving-door employment for elected and appointed officials, *see, e.g., 18 U.S.C. § 207* (2006 & Supp. II 2009).

n77 See Johnson, *supra* note 75; *infra* Part I.E. 1-3.

n78 Federal Regulation of Lobbying Act of 1946, Pub. L. No. 79-601, 60 *Stat. 839*, repealed by Lobbying Disclosure Act of 1995, P.L. 104-65, 109 *Stat. 691* (codified as amended in scattered sections of 2 & 18 U.S.C. (2006 & Supp. II 2009)); *see also* HOLMAN, *supra* note 63, at 4.

n79 See Steven A. Browne, Note, *The Constitutionality of Lobby Reform: Implicating Associational Privacy and the Right to Petition the Government*, 4 *WM. & MARY BILL RTS. J.* 717, 719 (1995) ("[The FRLA] is a poorly considered law based on little prior debate. The legislation's inferior draftsmanship and subsequent interpretation by the Supreme Court resulted in an ineffective law.").

n80 Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 *Stat. 691* (codified as amended in scattered sections of 2 & 18 U.S.C. (2006 & Supp. II 2009)); *see also* HOLMAN, *supra* note 63, at 8.

n81 HOLMAN, *supra* note 63, at 7-8.

n82 Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 *Stat. 735* (codified in scattered sections of 2 & 18 U.S.C. (Supp. II 2009)).

n83 HOLMAN, *supra* note 63, at 4.

n84 Gene Smiley, *Great Depression*, in *THE CONCISE ENCYCLOPEDIA OF ECONOMICS* 230, 230 (David R. Henderson ed., 2008).

n85 See William P. Fuller, *Congressional Lobbying Disclosure Laws: Much Needed Reforms on the Horizon*, 17 *SETON HALL LEGIS. J.* 419, 422-23 (1993) (noting concerns of President Harry S. Truman and House Speaker Sam Rayburn with lobbying in Washington following the end of World War II).

n86 See PRESSURE GROUPS, *supra* note 55, at 41-42.

n87 *Id.* at 42.

n88 Federal Regulation of Lobbying Act of 1946, Pub. L. No. 79-601, 60 Stat. 839, *repealed by* Lobbying Disclosure Act of 1995, P.L. 104-65, 109 Stat. 691 (codified as amended in scattered sections of 2 & 18 U.S.C. (2006 & Supp. II 2009)). In an introductory speech to the legislation, Congressman Everett Dirksen remarked that the legislation was designed "to reach those whose principal purpose, not incidental purpose, . . . is to come here and endeavor to influence the passage of legislation either by bringing about its defeat or its enactment." 92 CONG. REC. 10,088 (daily ed. July 25, 1946). The report on the bill, which was included in the Congressional Record, demonstrates that the drafters recognized the potential conflict with the First Amendment. *Id.* The report sets out a list of things that the FRLA is not intended to do, and the very first item reads, "[the FRLA] does not curtail the right of free speech or freedom of the press or the right of petition." *Id.* The Senate report accompanying the bill included some cynical language about lobbyists, stating there is a

class of lobbyists . . . employed to come to the Capitol under the false impression that they exert some powerful influence over Members of Congress. These individuals spend their time in Washington presumably exerting some mysterious influence with respect to the legislation in which their employers are interested. The title in no wise prohibits or curtails their activities. It merely requires that they shall register and disclose the sources and purposes of their employment and the amount of their compensation.

Id. at 10,089. Regardless of this view of lobbying, the drafters recognized that the new law could violate the right to petition. Dirksen made it clear that "[Congress has] no desire to restrict in the slightest way the right of a citizen to petition his Government for a redress of grievances by urging the passage or defeat of legislation." *Id.* at 10,090.

n89 See, e.g., Comment, *Improving the Legislative Process: Federal Regulation of Lobbying*, 56 YALE L.J. 304, 331 (1947). Commentators believed:

It [wa]s probable that the Lobbying Act will prove largely ineffective. The loopholes provided by the "principal" requirement, the incompleteness of the information required to be filed, the lack of an adequate enforcement agency, and the weakness of the publicity provisions may combine to make the Act as dead a law as similar state statutes.

Id.

n90 Federal Regulation of Lobbying Act of 1946, 60 Stat. at 841. Section 307 of the Act applied to

any person . . . who . . . in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes:

(a) The passage or defeat of any legislation by the Congress of the United States.

(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.

Id.

n91 *Id.*

n92 *Id. at 841-42*. The law also required groups to disclose to the House Clerk and Secretary of the Senate the names and addresses of any individuals who contributed more than \$ 500 to the organization, if that organization was engaged in influencing Congress to pass or defeat legislation. *Id. at 840*.

n93 *Id. at 842*.

n94 *Hearing on Lobbying Reform Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. (1995) (statement of Thomas M. Susman), available at <http://www.carmengroup.com/lobbying-reform>.

n95 See HOLMAN, *supra* note 63, at 5.

n96 Federal Regulation of Lobbying Act of 1946, 60 *Stat. at 841*.

n97 Fuller, *supra* note 85, at 427.

n98 See Gary Lee, *Lobbyists Acknowledge Loopholes*, WASH. POST, July 17, 1991, at A21; see also Fuller, *supra* note 85, at 427.

n99 *United States v. Harriss*, 347 U.S. 612, 623 (1954); see HOLMAN, *supra* note 63, at 6.

n100 *Harriss*, 347 U.S. at 614-15.

n101 *Id. at 617*.

n102 *Id. at 623*. The Court held that

there are three prerequisites to coverage under § 307: (1) the "person" must have solicited, collected, or received contributions; (2) one of the main purposes of such "person," or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress; (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress.

Id.

n103 HOLMAN, *supra* note 63, at 6.

n104 *Id.*

n105 2 U.S.C. § 1601 (2006) ("[E]xisting lobbying disclosure statutes have been ineffective because of unclear statutory language, weak administrative and enforcement provisions, and an absence of clear guidance as to who is required to register and what they are required to disclose.").

n106 *Id.*

n107 2 U.S.C. § 1603 (2006).

n108 *Id.* § 1604(a). HLOGA amended this provision for semi-annual reports to require quarterly filings. Honest Leadership and Open Government Act of 2007, 2 U.S.C. § 1604(a) (Supp. II 2009).

n109 2 U.S.C. § 1604(b) (2006).

n110 See R. ERIC PETERSEN, CONG. RESEARCH SERV., LOBBYING REFORM: BACKGROUND AND LEGISLATIVE PROPOSALS, 109TH CONGRESS 6 tbl.1 (2006), available at <http://moneyline.cq.com/flatfiles/editorialFiles/moneyLine/reference/crs/lobbying/crs109gifts.pdf>.

n111 2 U.S.C. § 1606.

n112 *Id.*

n113 See PETERSEN, *supra* note 110, at 6-7.

n114 *Id.* (noting a claim from Senator Chris Dodd that the Senate's Office of Public Records had referred over 2000 cases to the Department of Justice (DOJ) and heard nothing, and stating a DOJ claim of 200 referrals with thirteen further enforcement actions, resulting in fines of \$ 47,000 being collected).

n115 See 153 CONG. REC. S220 (daily ed. Jan. 8, 2007) (statement of Sen. Reid); see also Tony Perry, *Rep. Cunningham Pleads Guilty to Bribery, Resigns*, L.A. TIMES, Nov. 29, 2005, at A1; Susan Schmidt & James V. Grimaldi, *The Fast Rise and Steep Fall of Jack Abramoff*, WASH. POST, Dec. 29, 2005, at A1.

n116 David Espo, *Pelosi Says She Would Drain GOP "Swamp,"* WASH. POST (Oct. 6, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/06/AR2006100600056.html>.

n117 Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (codified in scattered sections of 2 & 18 U.S.C. (Supp. II 2009)).

n118 See *id.*; see also 153 CONG. REC. S10,723 (daily ed. Aug. 2, 2007) (roll-call vote).

n119 See Dorie Apollonio et. al, *Access and Lobbying: Looking Beyond the Corruption Paradigm*, 36 HASTINGS CONST. L.Q. 13, 15-16 (2008) (discussing the Cunningham bribery case and the Abramoff case in greater detail).

n120 153 CONG. REC. S219-20 (daily ed. Jan. 8, 2007) (statement of Sen. Reid). In his introduction speech to S.1, Senate Majority Leader Henry Reid (D-NV) stated:

Ethics reform is also the first order of business because it is a clear priority of the American people. In election day exit polls on November 7, voters spoke loudly and very clearly about their diminished faith in government. Forty-one percent of voters named corruption as extremely important in determining whom they would vote for. Americans want us to purge the Government of undue influence, and they want us to eliminate the conditions that led to the scandal-making headlines of last year and 2005: headlines about officials being flown to Scotland for rounds of golf; headlines about committee chairmen negotiating lucrative lobbying jobs with the industries they oversee, while working on legislation important to those industries; and, of course, headlines about "pay to play" schemes such as the infamous K Street Project, where jobs and campaign donations were traded for legislation and other official acts.

Id. at S220.

n121 *See* 153 CONG. REC. S10,723-24 (daily ed. Aug. 2, 2007) (roll-call vote).

n122 *See* 153 CONG. REC. H9210 (daily ed. July 31, 2007) (roll-call vote).

n123 *Lobby Reform Bill Passes House Without Grassroots Lobbying Disclosure*, OMBWATCH.ORG (May 30, 2007), <http://www.ombwatch.org/node/3303>. Although HLOGA affects lobbyists, many of the changes made were directly aimed at lawmakers. HLOGA increased the "cooling off" period for senators to two years and added a one-year cooling off period for Senate staff. 18 U.S.C. § 207(e) (Supp. II 2009). It also bars elected officials and staff from accepting gifts and travel from lobbyists, subject to exceptions made by each chamber's rules. 2 U.S.C. § 1613 (Supp. II 2009).

n124 2 U.S.C. § 1604(a). HLOGA also required that lobbyists specifically disclose any political contributions made directly by the lobbyist to a member of Congress in excess of \$ 200. *Id.* § 1604(d). Prior to this adoption, the federal-election rules treated lobbyists no differently than any other individuals. 2 U.S.C. § 431 (2006) (defining who must file reports).

n125 *See* Press Release, Nat'l Ass'n of Mfrs., NAM Challenges Constitutionality of Member Disclosure Law (Feb. 6, 2008), http://www.nam.org/Communications/Articles/2008/02/NAM_Challengesconstitutionalityof-MemberDisclosureLaw.aspx/NAMChallengesConstitutionalityofMemberDisclosureLaw.aspx (last visited Jan. 26, 2011) [hereinafter NAM Press Release].

n126 *Nat'l Ass'n of Mfrs. v. Taylor (Taylor II)*, 582 F.3d 1, 6 (D.C. Cir. 2009). When certain organizations made contributions to a lobbyist or lobbying organization in excess of a certain monetary threshold, the LDA required registrants to disclose their information, even if they were not direct clients. 2 U.S.C. § 1603(b) (2006). This provision generally affected large trade associations, although some, like NAM, avoided the law because their members' contributions rarely exceeded the monetary thresholds triggering disclosure. *Taylor II*, 582 F.3d at 8. HLOGA, however, reduced the requirements and added a provision affecting non-clients who "actively participate in the planning, supervision, or control of such lobbying activities." 2 U.S.C. § 1603(b) (Supp. II 2009). This would effectively require organizations like NAM to disclose their membership lists, which they had previously held private. *Taylor II*, 582 F.3d at 8. NAM filed suit, claiming the statute was "vague, overbroad and burdensome" and violated the First Amendment. NAM Press Release, *supra* note 125, at 1.

n127 *Nat'l Ass'n of Mfrs. v. Taylor (Taylor I)*, 549 F. Supp. 2d 33, 68 (D.D.C. 2008).

n128 *Taylor II*, 582 F.3d at 1.

n129 *Id.*

n130 *Id. at 29.*

n131 *Id. at 9, 22.*

n132 *Id. at 16.* The court began by focusing on the First Amendment, specifically the level of scrutiny with which the law should be reviewed. *Id. at 10.* NAM argued in favor of strict scrutiny, while the government argued in favor of what the court characterized as a "lesser-but-still-heightened form of scrutiny." *Id.* The court did not decide what the correct level should be, stating that if the statute could survive strict scrutiny, determining the appropriate test was unnecessary. *Id. at 11.*

n133 *Id.*

n134 *Id.*

n135 *Id.* NAM cited comments from elected officials, including Congressman Lloyd Doggett (D-TX) and Senator Joe Lieberman (I-CT), during the floor debates of HLOGA regarding certain ad hoc groups which came together specifically to lobby on particular pieces of legislation, but whose actual membership and lobbying goals were obscured by "innocent sounding names." *Id. at 11 n.7.*

n136 *Id. at 16.*

n137 *Id.*; see *United States v. Harriss*, 347 U.S. 612, 626 (1954).

n138 *Taylor II*, 582 F.3d at 16; see *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

n139 *Taylor II*, 582 F.3d at 14.

n140 *Id. at 17.*

n141 *Id.* The court noted that,

[o]n its face, it certainly appears to [advance the compelling government interest]. By requiring registrants to disclose the "name, address, and principal place of business" of any organization that contributes the monetary threshold and actively participates in the planning, supervision, or control of the registrant's lobbying activities, the section provides the very information--"who is being hired, who is putting up the money, and how much"--that Harriss found to be "a vital national interest."

Id. at 16 (quoting *Harriss*, 347 U.S. at 626).

n142 *Id.* at 20. The second prong of the strict scrutiny examination probes whether the action taken is narrowly tailored to achieve the compelling interest cited. *Id.* at 20.

n143 *Id.* at 17 (quoting *Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995)). Blount challenged the constitutionality of Municipal Securities Rulemaking Board Rule G-37. *Blount*, 61 F.3d at 939. Rule G-37 prohibited municipal securities brokers from making campaign contributions to state officials if they were engaged in business together. Mun. Sec. Rulemaking Bd., Rule G-37 (1994), available at http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-37.aspx#_b. The District of Columbia Circuit found that Rule G-37 was narrowly tailored to effectively advance the compelling government interest of ensuring investors in municipal bonds were protected from fraud and unfair market practices. *Blount*, 61 F.3d at 944-47.

n144 *Taylor II*, 582 F.3d at 19-20.

n145 *See supra* Part I.E.3.

n146 *See* Ralph Dannheisser, *McCain, Obama Built Images by Pushing Lobbying Restrictions*, AMERICA.GOV (May 28, 2008), <http://www.america.gov/st/usg-english/2008/May/20080528084503abretnuh5.785769e-02.html> (explaining that Senator McCain and then-Senator Obama discussed plans to restrict lobbying and campaign financing during their presidential campaigns).

n147 *McCain Criticizes Obama on Lobbying Ethics Reform*, USATODAY.COM, http://www.usatoday.com/news/washington/2006-02-06-mccain-obama_x.htm (last visited Jan. 26, 2011).

n148 *See, e.g.*, Senator Barack Obama, Remarks on Taking Our Government Back at Manchester, New Hampshire (June 22, 2007) (transcript available at http://www.barackobama.com/2007/06/22/remarks_of_senator_barack_obam_17.php) (promising stricter regulations on lobbying if elected); *see also* *Press Release, The Office of the President-Elect, supra* note 10 (implementing new lobbying regulations).

n149 *See Press Release, The Office of the President-Elect, supra* note 10.

n150 *Id.*

n151 *See Obama's First Day: Pay Freeze, Lobbying Rules*, MSNBC.COM (Jan. 21, 2009), <http://www.msnbc.msn.com/Id/28767687>; *Obama Team Announces New Rules on Lobbyists*, MSNBC.COM (Jan. 11, 2008), http://www.msnbc.msn.com/id/27665871/ns/politics-white_house/ (discussing the "revolving door" between the government and lobbyists). The President made ending the revolving-door practice a key priority and, shortly after he was elected, the transition team began developing and implementing plans to minimize the impact of lobbyists on the new Administration. *See Press Release, The Office of the President-Elect, supra* note 10. On January 21, 2009, his first full day in office, President Obama announced the first lobbying restrictions on executive-branch political appointees. *See Obama's First Day, supra*.

The President also issued Executive Order 13,490, entitled "Ethics Commitments by Executive Branch Personnel," which required all executive-branch appointees to sign a pledge that, among other things, barred them from accepting gifts from registered lobbyists while in office. Exec. Order No. 13,490, 74 *Fed. Reg.* 4673 (Jan. 21, 2009). It also prevented appointees from working on matters on which they lobbied during the previous two years. *Id.* Finally, it barred appointees from lobbying "any covered executive branch official or non-career Se-

nior Executive Service appointee for the remainder of the administration." *Id.* These new lobbying reforms were designed, in the words of President Obama, "to help restore faith in government, without which we cannot deliver the changes that we were sent here to make." *Obama's First Day, supra.* Not only were these rules designed to target lobbyists, they were also designed to deter executive branch officials from using their ties to become lobbyists after leaving the administration. *Id.* The constitutionality and effectiveness of these bans are beyond the scope of this Comment.

n152 *Obama's First Day, supra* note 151.

n153 *Presidential Memorandum of March 20, supra* note 11, at 12,531.

n154 *Id.* at 12,533.

n155 *Id.*

n156 *Id.*

n157 *Id.*

n158 *Id.* The Office of Management and Budget (OMB) later clarified the President's Memorandum with its own memorandum. Memorandum from the Office of Mgmt. and Budget on Interim Guidance Regarding Communications with Registered Lobbyists About Recovery Act Funds to the Heads of Exec. Dep'ts & Agencies 1 (Apr. 7, 2009), *available at* www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m-09-16.pdf. The memorandum clarifies the President's March 20 Memorandum and notes exceptions to the reporting requirements for widely attended events and oral communications on purely logistical matters. *Id.* at 1, attach. 1-2. This memorandum triggered criticism from a variety of public affairs organizations. *See* JACOB R. STRAUS, CONG. RESEARCH SERV., LOBBYING THE EXECUTIVE BRANCH: CURRENT PRACTICES AND OPTIONS FOR CHANGE 11-12 (2009); Letter from Citizens for Responsibility and Ethics in Washington, Am. Civil Liberties Union, and Am. League of Lobbyists, to Gregory B. Craig, White House Counsel (Mar. 31, 2009), *available at* <http://www.alldc.org/pdfs/033109WhiteHouseLetter.pdf>.

In response to this heavy criticism, OMB issued a memorandum on July 24, further clarifying the President's March 20 Memorandum. Memorandum from the Office of Mgmt. and Budget on Updated Guidance Regarding Commc'n with Registered Lobbyists About Recovery Act Funds to the Heads of Exec. Dep'ts & Agencies 1 (July 24, 2009), *available at* www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-24.pdf. This memorandum expanded the ban on oral communications to all individuals outside the federal government, even those who are not registered lobbyists. *Id.* at 1, attach. 1.

Although both the April 7 and July 24 memoranda purport to explain the President's March 20 Memorandum, both include language that is absent from the text of the March 20 Memorandum. For example, the justification for the ban on any oral communication with individuals outside of the federal government is found nowhere in the text of the March 20 Memorandum. Given the additional constitutional concerns that arise with such a broad ban on petitioning rights for individuals outside of the government, this Comment focuses only on the March 20 Memorandum's express requirements.

n159 U.S. CONST. amend. I.

n160 See Allard, *supra* note 7, at 39.

n161 See Thomas, *supra* note 17, at 150, 172.

n162 See *United States v. Rumely*, 345 U.S. 41, 46 (1954).

n163 See Kathryn L. Plemmons, "Lobbying Activities" and Presidential Pardons: Will Legislators' Efforts to Amend the LDA Lead to Increasingly Hard-Lined Jurisprudence?, 18 *BYU J. PUB. L.* 131, 135-36 (2003).

n164 *Nat'l Ass'n of Mfrs. v. Taylor (Taylor II)*, 582 F.3d 1, 11 (D.C. Cir. 2009) (quoting *Blount v. SEC*, 61 F.3d 938, 944 (D.C. Cir. 1995)).

n165 *Id.*

n166 *Presidential Memorandum of March 20*, *supra* note 11, at 12,531.

n167 *Id.*

n168 *Id.*

n169 *Id.*

n170 See *Taylor II*, 582 F.3d at 19-20 (discussing the goals Congress intended to achieve by passing stronger restrictions on lobbying).

n171 See *Presidential Memorandum of March 20*, *supra* note 11, at 12,532-33. A court would probably find the means narrowly tailored for a compelling government interest. See *Blount v. SEC*, 61 F.3d 938, 944 (D.C. Cir. 1995).

n172 See generally *Presidential Memorandum of March 20*, *supra* note 11.

n173 *Id.* at 12,533.

n174 See *id.* at 12,531, 12,533.

n175 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 *Stat.* 115, 116 ("The President and the heads of Federal departments and agencies shall manage and expend the funds made available in this Act so as to achieve the purposes specified in subsection (a), including commencing expenditures and activities as quickly as possible consistent with prudent management.").

n176 *Id.* Notably, Congress used the mandatory "shall" rather than the permissible "may."

n177 Compare *Presidential Memorandum of March 20*, *supra* note 11, with American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

n178 *United States v. Harriss*, 347 U.S. 612, 625 (1954); *Nat'l Ass'n of Mfrs. v. Taylor (Taylor II)*, 582 F.3d 1, 15-16 (D.C. Cir. 2009).

n179 *Taylor II*, 582 F.3d at 11 (quoting *Blount v. SEC*, 61 F.3d 938, 944 (D.C. Cir. 1995)).

n180 Compare *Harriss*, 347 U.S. at 626 (reasoning that the LDA's disclosure requirements "safeguard a vital national interest"), and *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (per curiam) (finding "limit[ing] the . . . appearance of corruption resulting from large individual financial contributions" a sufficient justification), with *Presidential Memorandum of March 20*, *supra* note 11, at 12,533 (requiring disclosure of a communication's substance for transparency).

n181 Cf. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010).

n182 2 U.S.C. § 1604 (Supp. II 2009).

n183 Compare *id.* (requiring disclosure of a contact), with *Presidential Memorandum of March 20*, *supra* note 11 (requiring disclosure of both the contact and the substance of the communication).

n184 See *Turner Broad. Sys. Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 642 (1994).

n185 See *Walker v. City of Birmingham*, 388 U.S. 307, 345 (1967) (Brennan, J., dissenting).

n186 *United States v. Harriss*, 347 U.S. 612, 625 (1954). The focus on "who" is doing the speaking may represent unlawful suppression of political speech based on the speaker's status. See *Citizens United*, 130 S. Ct. at 898-99. In *Citizens United v. Federal Election Commission*, the Supreme Court struck down blanket prohibitions on the use of corporate funds to further corporate political speech for or against candidates for federal public office. *Id.* at 917. The Court specifically noted:

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. . . . Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. . . . As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Id. at 898-99 (citations omitted).

n187 *Presidential Memorandum of March 20*, *supra* note 11, at 12,533.

n188 *Nat'l Ass'n of Mfrs. v. Taylor (Taylor II)*, 582 F.3d 1, 11 (D.C. Cir. 2009) (quoting *Blount v. SEC*, 61 F.3d 938, 944 (D.C. Cir. 1995)).

n189 *See supra* text accompanying note 171.

n190 2 U.S.C. § 1604(b) (Supp. II. 2009).

n191 *Cf. Citizens United*, 130 S. Ct. at 878.

n192 *Taylor II*, 582 F.3d at 11 (quoting *Blount*, 61 F.3d at 944).

n193 *Blount*, 61 F.3d at 944.

n194 *Presidential Memorandum of March 20*, *supra* note 11, at 12,533.

n195 *Id.*

n196 *See id.*

n197 *Capstrat, Public Policy Polling: Americans Have Little Faith in Government*, *Big Business*, TRIANGLE BUS. J. (May 19, 2009), <http://triangle.bizjournals.com/triangle/stories/2009/05/18/daily17.html>.

n198 State of the Union Address, *supra* note 1.

n199 *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 899 (2010).

n200 *Id.*

n201 *See supra* note 138 and accompanying text.

n202 *See Presidential Memorandum of March 20*, *supra* note 11, at 12,533; *see also* BYRD, *supra* note 5, at 492.

n203 *See* Emily Miller, *Obama, Abramoff, and "Lobbying Reform,"* POLITICS DAILY (May 15, 2009), <http://www.politicsdaily.com/2009/05/15/Abramoff-obama-and-sham-lobbying-reform/>.

n204 *See, e.g.,* Heather Dunham, *Comment to Some Agencies Set to Implement Lobbyist Ban*, THE HILL (Oct. 13, 2009, 3:55 PM), <http://thehill.com/business-a-lobbying/62347-agencies-set-to-implement-lobbyist-ban>.

n205 John M. de Figueiredo, *Lobbying and Information in Politics*, 4 BUS. & POL. 125, 126 (2002).

n206 See BYRD, *supra* note 5, at 508.