THE AMERICAN LAW INSTITUTE

Principles of Government Ethics

Reporter's Memorandum No. 2

(May 2, 2011)

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Principles of Government Ethics

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The Council approved the initiation of the project in October 2009.

An earlier draft of the material contained in this Memorandum can be found in the Reporter's Memorandum (2011).

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PRINCIPLES OF GOVERNMENT ETHICS
REPORTER'S MEMORANDUM NO. 2
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I. Introduction

The regulation of lobbying may be an appropriate place to begin the analysis of the principles of government ethics. Lobbying is the setting for the direct interaction of the public representatives of the people as a whole – elected officials, their staffs, and administrative appointees – with the private representatives of the people acting as individuals, groups, organizations, firms or other combinations interested in influencing government decisions. As a result, lobbying implicates a host of constitutional, political, and ethical questions relating to the activities of both government officials and the lobbyists themselves.

Lobbying is controversial. At the national level, in the last decade, some lobbyists featured prominently in scandals involving members of Congress. Candidates and elected officials compete to denounce lobbyists and to decry lobbyists' influence in government. Yet, lobbying is a constitutionally protected activity, and both the number of lobbyists and the amount of money spent on lobbying has grown steadily at both the national and state levels. The news media now regularly report on lobbying expenditures as part of their analysis of the political process.

Lobbying is also a heavily regulated activity, with both the extent and pace of regulation increasing. Congress, all fifty states, and many local governments have enacted laws regulating lobbying. Many of these measures have recently been revised and updated, and new proposals for lobbying regulation, as part of ethics reform packages, are frequently advanced in Congress and many state and local legislatures. Lobbying is also directly affected by such other measures as the Internal Revenue Code, the Foreign Agents Registration Act (FARA), procurement laws, executive orders and internal legislative rules.

Lobbying regulation in some respects resembles campaign finance regulation. Both lobbying and campaign finance implicate constitutional rights and are essential to modern democracy, yet both trigger deep-seated concerns about the impact of private wealth and special interest influence on government. To some extent, the perceived failures of campaign finance reform have led to greater attention by reformers, lawmakers, and academics to lobbying. And, as shall be described shortly, the interconnection of lobbying and campaign finance has become one of the most important developments in lobbying regulation.

Given the number of measures addressing lobbying at the federal, state and local levels, this

Draft will not attempt to restate the law governing lobbying. Instead, it will briefly summarize the goals of lobbying regulation and the principal regulatory techniques employed to achieve those goals; address the constitutional ground rules that inform and constrain the regulation of lobbying; and then turn to what appear to be the front-line questions for the oversight and control of lobbying, that is, those proposals that have either drawn the most attention or raise the most constitutional and policy uncertainty.

This Draft does not follow the standard ALI format for Drafts. This is partly due to the Reporter's lack of experience with ALI practice. But it is primarily due to the Reporter's desire to focus analysis and discussion on the principal disputed questions in the field, before turning to the more settled principles.

The remainder of this Introduction will briefly address the goals of lobbying regulation and the regulatory techniques used to achieve those goals. Thereafter, Part II of this Draft will review the constitutional law of lobbying. Parts III through VII will then address the principal regulatory proposals attracting the attention of legislators, contested in litigation, or on various reform agendas – grassroots lobbying (Part III); lobbying and campaign finance (Part IV); contingent fee lobbying (Part V); lobbying by former government officials (the "revolving door" problem) (Part VI); and the contents and scope of lobbyist disclosure(Part VII). Part VIII will conclude with a brief discussion of issues not discussed in this Draft that may be appropriate for inclusion in later drafts or the final Report.

A. Goals of Lobbying Regulation

Over the past half-century the regulation of lobbying at the federal, state and local level appears to have been aimed at the achievement of four principal goals:

(1) protection of the opportunity for individuals, groups, and organizations to lobby, that is, to present facts, arguments, and views concerning potential government actions to legislative and executive branch officials;

(2) prevention of improper influences over government action;

(3) promotion of a level playing field by restriction of unfair or unequal opportunities to influence government action; and

(4) provision for the transparency of lobbyist-government official interactions.

The first goal is aimed at protecting lobbying and preventing regulations that would interfere with the ability of people to communicate with their government in order to inform and influence government action. Lobbying is an aspect of the freedoms of speech, press, association, and petition protected by the constitution. Lobbying can advise government officials about conditions in particular industries, geographic areas, or socio-economic groups; the costs and benefits of proposed laws and regulations; the consequences of the government actions under consideration; and the views of those affected by potential government decisions. It is means of political expression, a form of popular participation in government, and a tool for educating government decision-making.

But if the first goal of lobbying regulation is to assure that the core right to communicate with government is not abridged, the second regulatory goal reflects the concern that lobbying can be, and has been, accompanied by inappropriate techniques inconsistent with public-regarding decision-making. Lobbying should inform, and thereby improve, government action, not distort it. The principal concern here is not with the communicative aspect of lobbying per se, but with activities ancillary to communication that may improperly influence government action. To be sure there is no widely agreed-upon definition of the *proper* influences on government action – on whether and to what extent an elected official should consider the needs or preferences of her local constituency versus the state or nation as a whole; the implications of a vote or decision for her reelection; or the views of the leaders of her political party or supporters in the last election. But it is generally recognized that it is improper for a public official to take an official action in exchange for, in response to, or in order to obtain a private or personal material benefit. The belief that the provision of private or personal material benefits to public officials is an improper influence on government action underlies the widespread criminal prohibitions on bribery and illegal gratuities. These prohibitions apply to the offer or provision of benefits that are tied to specific official acts. They also apply generally, and are not limited to bribes or gratuities offered or provided only by lobbyists. But the focus of lobbying on influencing government action and the regular interactions of lobbyists with government officials have led many jurisdictions to adopt restrictions on the ability of lobbyists in particular to provide officials with benefits that are not linked to specific official acts but are instead intended only to facilitate access, provide opportunities for quasi-social interaction, smooth relations, or promote good will towards the lobbyists and the interests they represent. The concern here is that

such benefits, even though not tied to specific official actions, distract government decision-makers from the focus on the public interest. As a result, they constitute a form of improper influence that ought to be curbed, if not prohibited outright.

A third goal of lobbying regulation is the prevention of some lobbyists from obtaining unfair or unequal influence relative to others. To some extent, the concerns about improper and unfair influence overlap. If one lobbyist provides an official with a material benefit and others do not, this may constitute both improper and unfair influence. But the concern about unfair influence focuses in particular on lobbyists who – based on past or present relationships with government officials– may have opportunities for special access to officials that are not available to other people attempting to communicate with these officials. An area where this concern has had considerable impact has been in driving rules intended to limit the ability of former government officials to lobby with respect to matters with which they were once involved or to lobby agencies or branches of government where they recently worked, that is, so-called "cooling off" or "revolving door" restrictions. The concern about unequal influence can also be seen as underlying the laws governing the tax treatment of lobbying. Under the Internal Revenue Code, businesses may not treat lobbying expenditures as a deductible ordinary and necessary business expenses, while a charity entitled to receive tax-deductible contributions under section 501(c)(3) will forfeit that tax treatment if it engages in lobbying as a substantial part of its activities. Both of these tax provisions reflect the view that deductibility is a form of government subsidy inconsistent with a level playing field for lobbying. Similarly, the Byrd Amendment, which bars the use of funds appropriated by Congress to lobby for federal contracts, grants, loans, and cooperative agreements, reflects the concern that Congress not subsidize some lobbying activity.

To be sure, the scope of the goal of preventing unequal influence is quite limited. Lobbying involves the expenditure of private funds and different individuals, firms, groups, and organizations have widely different resources available for lobbying. They are, thus, capable of spending widely different amounts on lobbying. In theory, equalization could be advanced either by capping the spending of those with great resources or subsidizing the lobbying of those without resources. As will be discussed more fully in Part II, limits on lobbying expenditures, like limits on campaign expenditures, would run straight into the First Amendment's protection of lobbying. There would

be no constitutional objection to offering subsidies for lobbying, but with thousands upon thousands of bills, amendments, appropriations, regulations and other measures subject to lobbying each year, it is difficult to imagine exactly how subsidies would be provided, how their amounts would be calculated, or who would receive them. Thus, instead of addressing lobbying inequality generally, the level playing field goal tends to focus on inequalities that may be said to flow from government action, such as the provision of government funds and tax benefits to some but not other lobbyists, or the benefits some lobbyists may obtain from prior government service.

(4) The fourth goal – transparency – looms largest in contemporary lobbying regulation. Indeed, with the proliferation of open meetings laws, freedom of information laws, public access to records laws, public official financial disclosure laws and other "government in the sunshine" measures, transparency has become a central focus of the regulation of government operations. Transparency is seen as promoting public understanding of how government works, which in turn enables the people to better assess government performance, to seek change where appropriate, and to hold government more accountable for its actions. Although measures promoting transparency do not of their own force actually prohibit any lobbying or activities ancillary to lobbying, transparency may also have the effect of discouraging practices that either are or are likely to be perceived as improper or unfair. As Justice Brandeis famously observed nearly a century ago, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

It is sometimes asserted that transparency promotes public confidence in government. It is not clear if this is really the case. Indeed, there is some evidence that greater public attention to the nitty-gritty of government operations, to the battling of party and group interests, the pulling and hauling and the wheeling and dealing inherent in legislative decision-making can be demoralizing rather than confidence-building. The dictum often – perhaps mistakenly – attributed to Bismarck that "laws, like sausages, cease to inspire respect in proportion as we know how they are made" may be more accurate. Nevertheless, the public is surely likely to be anxious about veiled interactions between lawmakers and lobbyists so that transparency may be valuable in ameliorating public suspicions about lobbyist-government misconduct even if it does not exactly produce confidence in the results of disclosed interactions. Certainly, transparency facilitates public oversight and pressure

for the adoption of reforms to address forms of improper or unfair influence that transparency may reveal.

B. Techniques of Lobbying Regulation

Lobbying regulatory techniques follow directly from the regulatory goals. The goal of protecting the communicative and political expressive element of lobbying means that lobbying per se – that is, the fact and substantive content of lobbying – cannot be prohibited or limited in amount. So one technique is, in a sense, no-regulation. Unlike, say, in campaign finance, where federal and many state laws restrict campaign contributions, there is no restriction on the use of private funds to pay for lobbying expenditure. Indeed, even regulatory fees that may be imposed on lobbyists as part of registration and reporting requirements have been subject to close constitutional oversight and, when found to be greater than necessary to cover the costs of enforcing those requirements, may be struck down as an unconstitutional tax on lobbying.[1]

On the other hand, the goal of transparency is widely advanced by federal, state and local laws providing for the **disclosure** of lobbying. Congress, every state, and many localities have enacted laws requiring those engaged in lobbying to register with a designated regulator and then file periodic reports which vary in their required content but generally include at least some statement of the funds paid to the lobbyist, the expenditures incurred by the lobbyist, and the nature of the matter subject to the lobbying during the period covered by the report. These laws may provide separate attention to the individuals who actually do the lobbying -- that is, personally contact public officials -- and to the clients or principals whom they represent. So, too, they may distinguish among lobbyists who work in-house as full-time employees within the organization they represent; "contract" lobbyists who are hired by clients to represent them; and lobbying firms that employ multiple lobbyists to represent a range of different clients. These laws also generally provide the regulatory definitions of lobbying and/or lobbyist, including exclusions from coverage of certain contacts with government officials not deemed to be lobbying, such as public testimony, the submission of written comments as part of an administrative proceeding, or responding to a government request for information. Many disclosure laws have sought to make disclosed information more easily accessible to the public by requiring electronic filing and the development of data bases that make lobbyist reports more easily searchable and downloadable.

The central focus of registration and reporting requirements tends to be the money trail – the funds paid by clients or principals to lobbyists and the funds spent by lobbyists in the course of their representational activities. Recent regulatory measures and proposed reforms have sought to widen the scope of lobbyist reports. Among the measures that have been proposed or adopted in various jurisdictions are requiring the disclosure of "indirect" spending intended to advance the lobbying agenda by persuading members of the public to contact government decision-makers (so-called "grassroots spending," *see* Part III, *infra*); greater disclosure of the groups that fund the organization that is a lobbyist's nominal client (Part VII, *infra*); and more information concerning the particular officials contacted by lobbyists and the matters discussed with them (Part VII, *infra*).

The goals of preventing improper or unfair influence may be addressed by either disclosure requirements or by limitations or prohibitions. Until recently, the central focus of the concern over improper influence was **gifts** to government officials, and comparable material benefits such as the payment of honoraria or the provision of travel, meals or entertainment. Depending on the jurisdiction, the provision of gifts and other private benefits by lobbyists to government officials may be barred outright, subject to dollar limitations, restricted under some circumstances, or required to be reported. With many jurisdictions having adopted tighter gift restrictions, the focus of regulatory change has increasingly shifted to the role of lobbyists in financing the campaigns of elected officials, although, as will be discussed in Part IV, *infra,* there is no consensus on what **campaign finance** practices ought to be addressed, or whether or to what extent regulation should proceed by limitation, proscription, or disclosure. The regulation of the campaign finance activities of lobbyists also raises constitutional concerns. The evolving case law does not clearly mark out the permissible scope of special restrictions on lobbyists' involvement in financing campaigns.

In addition, in order to reduce any temptation lobbyists may feel to employ improper lobbying techniques, most jurisdictions regulate **contingent fees**, primarily through prohibition but in some jurisdictions through disclosure requirements (*see* Part V*, infra*). Contingent fee regulations also raises constitutional concerns.

As already indicated, the principal regulatory technique for addressing unfair or unequal influence is the cooling-off period or **revolving door** law, although these restrictions vary considerably with respect to the determination of who ought to be subject to a revolving door rule

and the length and scope of the cooling off requirement (*see* Part VI*, infra*). A lobbyist's former government employment may also be subject to disclosure. At the national level, the Obama Administration has adopted a number of regulatory measures, apparently influenced by the level playing field goal, that might be labeled "reverse revolving door" and bar lobbyists from serving in certain government positions (*id.*). Revolving door restrictions may also raise constitutional issues.

II. Lobbying and the Constitution

The Supreme Court's case law affecting the regulation of lobbying may be said to fall into four groups: (1) a set of cases running from the mid-nineteenth through the early twentieth century dealing with contingency fees that demonstrated the Court's low regard for lobbying in general; (2) a pair of cases from the 1950s that treated lobbying as constitutionally protected activity but also upheld disclosure requirements; (3) a group of cases sustaining the special tax treatment of lobbying that also both recognized the constitutionally protected status of lobbying but upheld its regulation; and (4) a number of other cases not dealing directly with lobbying but indicating that laws regulating the raising and spending of money to be used on political communications raise constitutional questions.

A. The Contingency Fee Cases

In the American political system, lobbying, that is, the use of paid agents, hired to represent a private interest before a legislature is nothing new. Lobbying has existed, and been controversial, since at least the early nineteenth century. In November 1847 Alexander Marshall, an experienced "lobby member" before the Virginia legislature, wrote to the officials of the Baltimore & Ohio Railroad proposing that they retain him to help them persuade the legislature to grant the railroad a certain right of way it wanted. Marshall's proposal stressed the need for "an active, interested, well-organized influence" in the legislature. Marshall urged that the railroad

> "inspire your agents with an earnest, nay, an anxious wish for success. You must give them nothing if they fail – endow them richly if they succeed. . . . My plan would aim to place the 'right-of-way' members on an equality with their adversaries [a competing railroad], by sending down a corps of agents, stimulated by an active partisanship by the strong lure of profit. . . . Under this plan you pay nothing unless a law be passed which your company will accept. . . . I have surveyed the difficulties of this undertaking, and think they may be surmounted. The cash outlay for my own expenses, and those of the subagents, would be

> heavy. I know the effective service of such agents as I would employ cannot be had except on a heavy contingent. I should not like to undertake the business on such terms, unless provided with a contingent fund of at least $50,000 [or nearly $1.2 million in 2009 dollars], secured to my order on the passage of a law, and its acceptance by your company."[2]

Marshall's proposal stressed that he "contemplate[d] the use of no improper means or appliances in the attainment of your purpose. My scheme is to surround the legislature with respectable and influential agents, whose persuasive arguments may influence the members to do you a naked act of justice." Marshall did, however, stress the need to keep the arrangement secret "from motives of policy alone, because an open agency would furnish ground of suspicion and unmerited invective, and might weaken the impression we seek to make."[3] Subsequently, Marshall, claiming both that the arrangement had been agreed to by the railroad and that he had won for the railroad what it wanted from the Virginia legislature, sued the railroad over its failure to pay him his fee.

When the dispute came before the United States Supreme Court, the Court dismissed Marshall's claim, finding the contract void for public policy. Although the Court determined that "[a]ll persons whose interests may in any way be affected by any public or private act of the legislature, have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees," it was troubled by Marshall's concealment of his role as the railroad's agent: "A hired advocate or agent, assuming to act in a different character, is practicing deceit on the legislature." And the Court expressed concern that the contingency arrangement would inevitably lead to improper influence and outright corruption:

> "Bribes in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are 'proper means;' and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or 'careless' members in favor of his bill. The use of such means and agents will have the effect to subject the State governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector."[4]

The Court ultimately concluded that "contracts for a contingent compensation for obtaining legislation, or to use any personal or any secret influence or any secret or sinister influence on legislators, is void by policy of the law."[5]

Marshall foreshadowed the principal concerns of lobbying regulation more than one hundred and fifty years later – recognition of the right to present "claims and arguments" to the legislature and to hire representatives to assist in doing so; a hostility to secrecy and a preference for the transparency of lobbying arrangements; and an anxiety that lobby agents will employ improper means or exercise undue influence in pursuit of their goals.

Although *Marshall* focused on the potential for improper influence the Court saw inherent in secrecy and the use of contingency fees subsequent contingent fee cases appeared to treat lobbying as troublesome per se. A decade after *Marshall*, the Supreme Court decided *Provident Tool Company v. Norris*, which involved a contingent fee agreement pursuant to which a lobbyist had enabled Provident Tool to obtain a contract for the provision of muskets to the Union Army at the outset of the Civil War. Justice Field declared that "all agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution." In the Court's view, contingent fee lobbying agreements, and, implicitly, compensated lobbying more generally, "tend to introduce personal solicitation and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds." Concern about what Professor Richard L. Hasen has recently referred to as the "rent-seeking"consequences of lobbying dominated the Court's analysis. Lobbying was found to be troublesome not only when "improper influences were contemplated or used, but upon the corrupting tendency of the agreements."[6]

In *Trist v. Child*, an 1874 decision growing out of the suit brought by Child against Trist for compensation for Child's services in presenting Trist's claim to Congress for payment for services Trist had provided the United States in negotiating a treaty with Mexico thirty years earlier, the Court found that while "an agreement express or implied for purely professional services" would surely be valid, a contingent fee for "lobby service" to secure passage of a bill was not. According to Justice Swayne permissible professional services would include "drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority." But "such services are separated by

a broad line of demarcation from personal solicitation." The Court provided as an example of the objectionable personal service a letter from the lobbyist to Trist urging him:

> "Please write to your friends to write to any member of Congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know to work. Even if he knows a page, for a page often gets a vote."

The Court strongly condemned such paid personal-solicitation lobbying:

> "The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy."

To be sure, the contingent compensation aggravated the abuse – "[w]here the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased" – but the reliance on "personal solicitation" to influence legislative action was itself seen as a problem.[7] In other cases from this era in which the Court declined to enforce contingent fee lobbying agreements, the Court also tended to blur the distinction between lobbying *per se* -- that is, "services in procuring legislation upon a matter of public interest" – and "contracts for a contingent compensation for obtaining legislation."[8]

The first sign of a change in the Court's attitude toward lobbying came in 1927 in *Steele v. Drummond*, which involved, as part of a complex transaction, the successful efforts by one of the parties to secure the enactment of ordinances approving the construction of a proposed railroad line in a particular location. When the arrangement broke down, Drummond sued Steele for the costs he had incurred in reliance on their agreement, and Steele defended by claiming that the deal was void for public policy, relying on the contingent fee cases. The Court, however, rejected the argument, finding there was no evidence that the railroad project was "not a legitimate enterprise undertaken for the public good, or that anything improper was contemplated as a means to secure the passage of the ordinances. . . . There is nothing that tends to indicate that in the promotion or passage of [the ordinances] there was any departure from the best standards of duty to the public." Although the Court referred to the public interest in the project – and to the fact that the plaintiff's private benefit

was not inconsistent with the public interest – the key point appears to have been that seeking legislative action is not inherently problematic. The Court would refuse to enforce agreements contingent on legislative action only if improper means were actually used, not because lobbying raised the possibility that improper means might be used.[9] *Steele*, in effect serves as a transition from the anti-lobbying opinions of the mid-nineteenth through early twentieth centuries to the First Amendment-centered affirmatively lobbying-protective analysis adopted by the Court in the 1950s.

B. Lobbying and the First Amendment

In the 1950s, the Supreme Court decided two cases that reframed judicial analysis of lobbying from a focus on the potential for improper influence latent in lobbyists' efforts at personal persuasion of legislators to the First Amendment's protection of the communication about political matters which lies at the core of lobbying. The emerging case law, however, recognized that even though protected by the First Amendment, lobbying may be regulated in order to protect the integrity of the legislative process.

In *United States v. Rumely*, the Supreme Court considered the scope of the investigative authority of the House of Representatives' Select Committee on Lobbying Activities, which had been created by the House in 1949 to examine how well the Federal Regulation of Lobbying Act of 1946 ("FRLA") was working. The Committee was authorized *inter alia* to "conduct a study and investigation of . . . all lobbying activities intended to influence, encourage, promote or retard legislation." As part of its investigation it sought to obtain from Rumely, the secretary of an organization known as the Committee for Constitutional Government, records concerning the organization's sale "of books of a particular political tendentiousness," particularly the names of those who had made bulk purchases of those books for political distribution. When Rumely refused to provide the information, the House sought to hold him in contempt.

Writing for the Court, Justice Frankfurter expressed the concern that permitting the Committee "to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment." But he stopped short of holding the investigative effort unconstitutional. Instead, he noted that Congress had not defined "lobbying activities" in the resolution authorizing the

investigation. He concluded that in order to "avoid[] a serious constitutional doubt" about whether Congress could investigate the sale of political books to the public the phrase "lobbying activities" would be read to mean "lobbying in its commonly accepted sense, that is representations made directly to Congress, its members, or its committees." Using this narrower definition of lobbying, Justice Frankfurter determined that Congress had not granted the Committee the authority to investigate Rumely's organization's activities.[10]

The Court returned to the meaning of "lobbying activities," the scope of Congressional authority of Congress to regulate lobbying, and the significance of the First Amendment in this context the following year in *United States v. Harriss,* which involved a prosecution brought against the National Farm Committee and several individuals for violations of the reporting requirements of the FRLA. Specifically, the Committee was charged with failing to report the solicitation and receipt of contributions to influence the passage of legislation; the individuals were charged with failing to report expenditures for the same purpose. The expenditures included "payment of compensation to others to communicate face-to-face with members of Congress, at public functions and committee hearings concerning legislation" and payments "related to the costs of a campaign to induce various interested groups and individuals to communicate by letter with members of Congress on such legislation." The defendants contended that the statute violated the First Amendment and that its "vague and indefinite" language violated the Due Process Clause. The Court rejected both arguments.

Relying on *Rumely*, the Court interpreted the FRLA to apply only to "'lobbying in its commonly accepted sense' – to direct communication with members of Congress on pending or proposed federal legislation. The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign." As such it satisfied the due process requirement of definiteness without violating "the freedoms guaranteed by the First Amendment – freedom to speak, publish, and petition the Government." Chief Justice Warren explained that the measure was justified by Congress's legitimate interest in knowing who was behind efforts to influence legislative action:

"Present-day legislative complexities are such that individual members of Congress cannot

> be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. . . .
>
> "Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. . . .
>
> "Under these circumstances, we believe that Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection. And here Congress has used that power in a manner restricted to its appropriate end."

Harriss is significant in three respects. First, without literally saying so, the Court clearly indicates that lobbying is protected by the First Amendment. Although the Court acknowledges that lobbying involves placing pressures on members of Congress – which greatly troubled the Court in the older contingency fee cases – *Harriss* emphasized in upholding the FRLA that "Congress has not sought to prohibit these pressures." The limited scope of Congress's regulation was critical to its constitutionality.

Second, the Court upheld disclosure because of Congress's interest in understanding who is behind efforts to influence it – subtly echoing the Court's view in *Marshall* more than a century earlier that a lobbyist's failure to disclose the principal on whose behalf he acts is a form of deceit. Strikingly, given our current sense that the purpose of disclosure is to educate the public, inform the voters, and, thus, ultimately, advance the goal of government accountability to the people, *Harriss*, like *Marshall* a century earlier, stressed the importance of disclosure to members of Congress in enabling them to better understand the forces behind the lobbyists seeking to influence them. The Court also analogized lobbyist disclosure to the Federal Corrupt Practices Act, an early federal campaign finance law, which had imposed contribution and expenditure reporting requirements on elected officials. In adopting the FRLA, Congress "acted in the same spirit and for a similar purpose" as it did in passing the Corrupt Practices Act – "to maintain the integrity of the governmental process."

Third, the Court sent mixed signals about the constitutionality of applying disclosure requirements to money spent on efforts to persuade members of the public to communicate with legislators as part of efforts to pass or block legislation – what has come to be referred to as "grassroots lobbying." On the one hand, one of the charges against the defendants in the case involved their failure to report grassroots expenditures. In its reference to the legislative history of FRLA, the Court included grassroots activity with direct communications to members of the Congress when it explained that "at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings *or through an artificially stimulated letter writing campaign."* And in a footnote the Court quoted at length from the Senate and House reports accompanying the title of the bill that became FRLA which laid out "the three distinct classes of so-called lobbyists" who would be subject to disclosure requirements. The first group mentioned was

> "[t]hose who do not visit the Capitol but initiate propaganda from all over the country, in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts. This class of persons and organizations will be required under the title, not to cease or curtail their activities in any respect, but merely to disclose the sources of their collections and the methods in which they are disbursed."

On the other hand, the Court construed the Act to refer only to "'lobbying in its commonly accepted sense' – to direct communications with members of Congress on pending or proposed federal legislation." In so reading the Act, the Court quoted from and invoked *Rumely*, with its suggestion that such a narrower reading was necessary to avoid a constitutional question. The issue of grassroots lobbying will be addressed in Part III, but the arguments both for and against the constitutionality of regulating grassroots lobbying grow out of *Harriss.*

The Court has not directly addressed the constitutionality of the regulation of lobbying per se since *Harriss*. However, other cases have carried forward *Harriss*'s main themes – that lobbying is activity that falls within the First Amendment's protection of speech, press, and petition, but that some regulation of lobbying is constitutional and, indeed, appropriate in light of the interest in maintaining the integrity of the governmental process. Moreover, lower courts have repeatedly relied on *Harriss* in striking down state laws that impose excessive registration fees on lobbyists and, thus, are tantamount to a tax on political communication, but have also cited *Harriss* in upholding federal

and state laws requiring lobbyists to register and file periodic reports concerning their finances and activities.

C. Lobbying and the Internal Revenue Code

Five years after *Harriss*, in *Cammarano v. United States*, the Court considered and rejected the claim that a Treasury regulation denying a deduction for "ordinary and necessary" business expenses for money spent for lobbying purposes violated the First Amendment. Finding that the regulation was consistent with Congress's intent, the Court denied that the regulation discriminated against or burdened speech: "Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in such activities is required to do." Moreover, the regulation was justified by the legitimate Congressional goal of promoting a level playing field for lobbying activity: "[I]t appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned."

Twenty-five years after *Cammarano*, in *Regan v. Taxation with Representation of Washington*, the Court also upheld against a First Amendment challenge the provision of the Internal Revenue Code conditioning the availability of a tax deduction for contributions to § 501(c)(3) charities on the requirement that "no substantial part of the activities" of the charity "is carrying on propaganda or otherwise attempting to influence legislation." As in *Cammarano*, the Court concluded this restriction did "not infringe[] any First Amendment rights or regulate any First Amendment activity." Rather, it simply reflected Congress's decision not to "pay for the lobbying out of public monies."

In an important concurring opinion, Justice Blackmun, joined by Justices Brennan and Marshall, wrote that although the First Amendment does not require a tax subsidy for lobbying, conditioning the tax subsidy on a complete prohibition of lobbying by the benefitted organization would be unconstitutional as it would "den[y] a significant benefit to organizations choosing to exercise their constitutional rights." However, because the tax code permits a § 501(c)(3) charity to establish a § 501(c)(4) affiliate – a (c)(4) is exempt from tax on its income, but contributions to the

(c)(4) are not tax-deductible to the donors – which could engage in lobbying, the limitation on lobbying by the 501(c)(3) is constitutional. In the view of the concurring justices, the tax code could prevent an organization from using tax-deductible contributions from lobbying but could limit the use for lobbying of *only* the tax-deductible contributions, not other funds. For them, the First Amendment barred conditioning the tax benefit on a prohibition of all lobbying, including lobbying financed from unsubsidized donations.

The tax cases, thus, confirm both that laws affecting lobbying will be viewed through a First Amendment framework, and that such laws may be upheld notwithstanding the First Amendment implications.

D. Other Supreme Court Cases

No other Supreme Court cases consider laws directly addressing the regulation of lobbying. Nonetheless, a number of other decisions help shape the field.

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. most resembles *Rumely* in finding that constitutional concerns about restricting lobbying can affect an issue of statutory interpretation. In *Noerr* the Court held that the contention that a group of businesses conspired to seek passage of legislation beneficial to them and harmful to their competitors did not state a claim of an antitrust violation – "such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."

In *Meyer v. Grant*, the Court struck down a Colorado law that prohibited the use of paid circulators who carried petitions and solicited the signatures necessary to get an initiative proposition placed on the state ballot. The Court treated initiative petition signature solicitation as an activity intended "to achieve political change." Limiting that activity limited political expression and, thus, was subject to exacting political scrutiny. The Court has similarly subjected to exacting scrutiny laws regulating the solicitation of charitable contributions. As discussed in Part V, infra, these cases are relevant to the constitutionality of laws prohibiting the use of contingency fee arrangements in the hiring of lobbyists.

The Court's campaign finance cases, from *Buckley v Valeo* on, have also been invoked by lower courts dealing with lobbying regulation for the propositions that limits on political expression,

including paid political expression, trigger First Amendment concerns, but that some regulations, particularly disclosure requirements pass constitutional muster. In its most recent campaign finance decision – *Citizens United v. Federal Election Commission* – the Court cited and quoted from *Harriss* in rejecting Citizens United's challenge to federal campaign finance disclosure requirements:

> "And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. *United States v, Harriss*, 347 U.S. 612, 625, 74 S.Ct. 808, 98 L.Ed 989 (1954) (Congress 'has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose')."

The Court's campaign finance jurisprudence may also have implications for forms of lobbying regulation in addition to disclosure, or even laws regulating the campaign finance practices of lobbyists. The Court has held that campaign contribution restrictions may be justified by the constitutionally significant interest in preventing corruption and the appearance of corruption. The Court's sense of the meaning of "corruption" has varied over time. *McConnell v. FEC,* decided in 2003, broadened the notion of corruption to include the use of campaign contributions to obtain unfair or preferential access to lawmakers, and lower courts relied on *McConnell* in affirming certain lobbying restrictions, particularly those dealing with the campaign finance practices of lobbyists. *Citizens United* adopted a somewhat narrower definition of corruption, finding that "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt." As will be seen in subsequent Parts, *Citizens United* has already begun to affect the jurisprudence of lobbying regulation, including both limits on lobbyists' campaign contributions and revolving door rules.

III. Grass Roots Lobbying

A. Background

The single most significant unresolved issue with respect to the reporting and disclosure of lobbying activities is whether disclosure requirements can and should be applied to "indirect" lobbying or so-called "grass roots activities," that is, communications aimed not directly at members of the legislative and executive branches and their staffs, but at the public – whether by mass membership organizations to their members or by individuals, groups or organizations to the public

at large – in order to get members of the public to contact lawmakers with respect to pending or proposed government actions. Federal law does not require the disclosure of expenditures for grass roots lobbying. As noted in Part II, the Supreme Court in *Harriss* interpreted the FRLA to apply only to direct lobbying. When Congress replaced the FRLA with the Lobbying Disclosure Act of 1995 ("LDA") it considered expanding the definition of lobbying to include grassroots lobbying but for a mix of political and legal considerations declined to do so. When the LDA was amended and strengthened by the Honest Leadership and Open Government Act of 2007 ("HLOGA"), coverage of grassroots lobbying was again considered but rejected.

Many knowledgeable observers today treat grassroots or indirect lobbying as an important part of lobbying activity. As Nicholas Allard has explained, the "advocacy process" often has an "external" component which "focuses on efforts to inform and leverage public opinion on an issue in order to shape political outcomes. Indirect advocacy involves research institutions, education and public relations campaigns, mobilization and strategic communication efforts, and coalition building, all of which take place outside of the legislative chamber, but with obvious indirect effects."[11] Thomas Susman has pointed out that "[g]rassroots organizing and public relations campaigns also accompany rulemaking proceedings" in addition to legislative lobbying, and that with the rise of "Internet organizing, websites, blogs, banners, and more," grassroots lobbying has become more technologically sophisticated and widespread.[12] William Luneburg observes that grassroots lobbying – which he defines as "exhortations to the public at large or various sectors thereof to contact Congress or the federal bureaucracy on an issue or particular legislation or regulation" – "is omnipresent today, particularly given the ease of Internet access to persons who may react favorably to the exhortations and, with a few 'mouse' clicks and not much more effort, send the requested message or an edited version through cyberspace to the requested target." In his view, lobbying disclosure that omits grassroots activity is "seriously incomplete assuming, as most commentators do, that it can contribute significantly to the success of lobbying campaigns."[13] The recently-released Report of the Task Force on Federal Lobbying Laws of the Section on Administrative Law and Regulatory Practice of the American Bar Association called for requiring registered lobbyists to report "expenditures for advice on or production of public communications (paid media, phone banks, mass emails, websites, advertising, etc) related to bills or issues disclosed by the registrant

on one or more lobbying reports."[14]

On the other hand, some activists and scholars have opposed regulation of grassroots lobbying. Jay Alan Sekulow and Erik Zimmerman of the American Center for Law and Justice have emphasized that "[g]rassroots issue advocacy increases citizen participation in the democratic process by encouraging Americans to exercise their right to inform their elected representatives about their positions on important issues." In their view, any regulation of grassroots lobbying, by imposing administrative requirements, with the attendant costs of compliance and penalties for noncompliance, would significantly hamper ordinary citizens' political activity.[15] As a result, they have concluded that regulation of grassroots lobbying would violate the First Amendment. Lloyd Hitoshi Mayer has emphasized the benefits of grassroots lobbying in terms of both keeping the public informed about pending legislative and regulatory matters and informing the government about not just the substance of public views but also the intensity of the public's concern. Focusing on policy arguments rather than constitutional ones, he has also expressed doubt that grassroots lobbying presents any of the dangers raised by direct lobbying.[16]

Although the federal LDA and HLOGA do not apply to grassroots lobbying, most state lobbying disclosure laws do cover some grassroots lobbying activity. One recent study concluded that all but thirteen states require reporting concerning some indirect lobbying expenditures.[17] Unsurprisingly, a number of these requirements have been challenged in court. In most, albeit not all, of the cases courts have upheld these requirements.

In *Young Americans for Freedom, Inc. v. Gorton*, the Washington Supreme Court in 1974 rejected a challenge to the Washington State law enacted two years earlier that required disclosure of grassroots lobbying campaigns that involved the expenditure of more than $500 within three months or $200 in one month "in presenting a program addressed to the public, a substantial portion of which is designed or calculated primarily to influence legislation." The court found that the requirement advanced the informational function generally justifying lobbying disclosure. Indeed, it concluded that striking down the law "would leave a loophole for indirect lobbying without allowing or providing the public with information and knowledge re the sponsorship of the lobbying and its financial magnitude."[18] Two years later, the Michigan Supreme Court in an advisory opinion that addressed a host of challenges to a proposed campaign finance, government ethics, and lobbying

measure found that it would be permissible to treat as lobbying subject to disclosure "soliciting others to communicate with an official in the legislative branch or an official in the executive branch for the purpose of influencing legislative or administrative action" above the statutory dollar threshold, provided that the definition was "interpreted to mean express and direct requests to so communicate."[19]

More recently, the federal courts of appeals for the Eighth and Eleventh Circuits, addressing challenges to the lobbying disclosure laws of Minnesota and Florida, respectively, have rejected claims that it is unconstitutional to regulate grassroots lobbying. The Minnesota law defined lobbying to include "attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials." The National Rifle Association asserted that it would be unconstitutional to require it to report concerning letters and mailgrams the organization sent to its Minnesota members urging them to contact their state legislators with respect to certain legislative items. The Eighth Circuit, however, rejected their claim, finding that "when persons engage in an extensive letterwriting campaign for the purpose of influencing specific legislation, the State's interest is the same whether or not those persons are members of an association."[20]

The Eleventh Circuit has now twice upheld Florida's grassroots lobbying disclosure requirements. In *Florida League of Professional Lobbyists, Inc. v. Meggs*, in 1996, the court observed that the governmental interest in disclosure of indirect lobbying efforts, including media campaigns "may in some ways be stronger" than the case for disclosure of direct lobbying because "when the pressures are indirect . . . they are harder to identify without the aid of disclosure requirements."[21] In 2008, the court again considered a challenge to Florida's requirement that lobbyists report indirect communications, which the court noted might include opinion articles, issue advertisements and letter writing campaigns from lobbyists on behalf of their clients to the press and public at large for the purpose of influencing legislation or policy. The court concluded that the requirement was justified by the "compelling" interest in voters being able to appraise "the integrity and performance of officeholders and candidates."[22]

One court decision has gone the other way. In *Montana Automobile Ass'n v. Greely*, the Montana Supreme Court struck down the provision of Montana's law that defined as a "principal" not only someone who spends more than $1000 a year to engage a lobbyist but also a person "other

than an individual" who spends above that threshold amount "to solicit, directly or indirectly or by an advertising campaign, the lobbying efforts of another person." The court found that this could include the efforts of various organizations to ask their members to contact public officials with respect to legislators, as well as publications or broadcasts using mass media. It concluded there was no compelling state interest that would justify the burden on First Amendment rights such a provision would impose.[23]

It is also worth noting that although the LDA and HLOGA do not treat grassroots or indirect activities as lobbying for purposes of registration and reporting requirements, the Internal Revenue Code does treat grassroots activity as lobbying when it denies a business expense deduction or the availability of tax-deductible contributions to 501(c)(3) charities.

B. The First Amendment Issue

The First Amendment issue with respect to requiring the reporting and disclosure of grassroots lobbying activity has two parts – can any disclosure requirement pass First Amendment muster, and, even if so, what limits does the First Amendment place on grassroots disclosure?

(1) Does the First Amendment permit the application of reporting and disclosure requirements to grassroots lobbying at all? The answer is most likely "yes." The principal obstacle to applying disclosure requirements to grassroots lobbying are the sentence in *Harriss* construing the FRLA "to refer only to 'lobbying in its commonly accepted sense' – to direct communication with members of Congress on pending or proposed federal legislation" and the comparable reading of the FRLA by *Rumely* on which *Harriss* relied. But *Harriss* and Rumely are actually consistent with mandatory disclosure of at least some grassroots lobbying campaigns.

First, *Harriss* does not say that requiring the disclosure of grassroots activity would be unconstitutional, only that it could raise a more substantial constitutional question than disclosure with respect to direct contacts with legislators and legislative staff. Invocation of the constitutional avoidance canon reserves the constitutional question; it does not resolve it.

Second, and more importantly, *Harriss* actually treats at least some grass roots lobbying as part of "lobbying in its commonly accepted sense." The very next sentence after the sentence just quoted states: "The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyist themselves or through their hirelings *or*

through an artificially stimulated letter campaign." (emphasis supplied). At that point, the opinion's footnote 10 cites to and quotes from the legislative history of the Act which indicates that the first of the "three distinct classes of so-called lobbyists" to which the FRLA was intended to apply consisted of "[t]hose who do not visit the Capitol but initiate propaganda from all over the country, in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts" – in other words, grassroots lobbying. *Harriss* on its own terms, thus, appears to permit the application of disclosure requirements to at least some grassroots lobbying.

Third, the informational interest served by the regulation of direct lobbying is equally applicable to indirect lobbying. As *Harriss* found, there is an important government interest in enabling members of Congress to find out from those attempting to influence them "who is being hired, who is putting up the money, and how much." With grassroots lobbying often a component of efforts to influence legislative and regulatory processes, disclosure of the source and scope of grassroots lobbying activities can provide valuable information both to government officials and to the general public. Indeed, as the Eleventh Circuit observed, disclosure may be more valuable here than for direct lobbying because the sponsors and extent of grassroots lobbying efforts may be much less apparent than the interests behind face-to-face lobbying.

Finally, in the half-century since *Harriss* the Supreme Court has repeatedly upheld federal campaign finance laws which require the reporting and disclosure of political expenditures aimed at the general public. Indeed, the Court has invoked the government interest in informing voters about the interests behind electoral communications to uphold disclosure requirements even as it has struck down associated substantive limits on electoral expenditures. In *Buckley v. Valeo*, the Court invalidated the provision of the Federal Election Campaign Act ("FECA") that would have limited how much individuals or committees could spend independently (e.g., not in contributions to candidates, parties, or political actions) to support or oppose candidates for office, but it upheld the requirement that those expenditures above a threshold amount be reported. More recently, in *Citizens United v. Federal Election Commission*, the Court upheld the application of the requirement of the Bipartisan Campaign Reform Act ("BCRA") for the reporting of independent electioneering communications above a dollar threshold to corporations even as it struck down all limits on corporate campaign spending. The Court reaffirmed its prior position that disclosure of the identity

of the person, group, or organization paying for an electioneering communication advances the important public interest in voter information. Although campaign finance is not on all-fours with lobbying, the two forms of political engagement are similar and have been treated by the Court as triggering similar constitutional concerns. As a result, the Court's determination that disclosure of the financing of electoral communications aimed at the public does not violate the First Amendment would support a determination that at least some disclosure of grassroots lobbying would be constitutional as well.

(2) How do First Amendment considerations affect the application of reporting and disclosure requirements to grassroots lobbying? Even if applying disclosure requirements to grassroots lobbying is constitutional, First Amendment concerns still affect how disclosure requirements are applied to grassroots activity.

First, there is the question of whether the reporting of grassroots activities would apply only to those whose direct lobbying activities have already triggered the duty to register as a lobbyist and file periodic reports, or whether grassroots activity alone, without any direct contacts with legislative or executive branch officials could be the basis of registration and reporting requirements. The former approach imposes less of a burden on constitutional rights. If someone is already required to register as a lobbyist because of his or her contacts with government officials and/or the expenditure of a certain amount of money on attempting to influence government action, then mandating the inclusion of grassroots expenditures in a quarterly or semi-annual report amounts to no more than a more detailed version of a pre-existing reporting requirement rather than the addition of an entirely new regulatory obligation. But for an individual or organization not engaged in lobbying in the traditional sense, imposition of a registration and reporting requirement for the dissemination of communications aimed at the general public or the organization's members could come as a surprise and impinge on the ability to engage in political activity, although conditioning and registration and reporting requirement on expenditures above a fairly high dollar threshold might mitigate the burden by limiting any obligation to individuals or organizations engaged in a significant level of activity. On the other hand, from the perspective of providing government decision-makers or the public with information about the sources and scope of grassroots lobbying campaigns, it may not make a difference if an organization that has undertaken grassroots activity is also engaged in more

traditional face-to-face lobbying or if grassroots lobbying above a dollar threshold is the only form its efforts to influence government action has taken.

Second, there is the question of what public communications can be treated as lobbying – that is, efforts to influence government action – as opposed to more general political discussion. In the campaign finance context, the Supreme Court has struggled to draw a line distinguishing between campaign-related expenditures, which may be subject to reporting and disclosure requirements consistent with the First Amendment, and the more general discussion of political issues – typically referred to as "issue advocacy" – which may not be so regulated. In *Buckley v. Valeo*, the Court interpreted FECA's requirement for the disclosure of independent expenditures to apply only to express advocacy, that is, "expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate." In *McConnell v. FEC*, the Court indicated that Congress could go somewhat beyond express advocacy when it upheld the provision of BCRA requiring the disclosure of "electioneering communications," that is, broadcast messages concerning candidates that are aired within a defined pre-election period, even if the messages do expressly advocate the election or defeat of that candidate. Although in *FEC v. Wisconsin Right to Life, Inc*., the Court held that the First Amendment required that the meaning of "electioneering communication" be narrowed to messages that are the "functional equivalent of express advocacy" with respect to the portion of BCRA extending the ban on corporate and union independent expenditures to electioneering communications, in *Citizens United v. FEC*, the Court indicated that the broader statutory definition of electioneering communication could be constitutionally applied to BCRA's disclosure requirement even as it invalidated the substantive prohibition on corporate and union campaign expenditures. Still, the campaign finance cases indicate that if lobbying disclosure requirements are extended to grassroots lobbying, the First Amendment will require a definition of lobbying that excludes coverage of more general issue advocacy.

Two possible ways of distinguishing between grassroots lobbying and issue advocacy would be either (i) to limit disclosure requirements to communications that refer to a specific bill or pending or proposed executive or legislative action, or (ii) to limit disclosure to messages that express call on listeners, viewers, or readers to contact a government official. The first approach has the benefit of limiting regulation to messages focused on relatively determinate government actions.

Much as an election is a particularly focused form of political activity, limiting the definition of lobbying to communications that refer to a particular bill or other proposed official action would also limit regulation to communications that focus on a particular political activity rather than discuss public policy generally. Thus, when the Washington Supreme Court upheld that state's grassroots disclosure requirement, the court noted that under state law "reporting would not be required when the subject campaign does not have as its object the support or rejection of specific legislation."[24] The difficulty here would be defining a particular legislative proposal and distinguishing it from a broader legislative subject, especially as particular proposals change during the legislative process. Would messages dealing with "health insurance reform" be sufficiently focused, or would a message have to refer to "preexisting conditions," or "public option," or a specific bill number?

The second approach of distinguishing between messages that expressly call on the recipient to contact government officials to urge them to take a particular action provides a clearer standard. Moreover, it is more consistent with the traditional definition of lobbying as involving contacts with government officials and with the Court's express advocacy standard in campaign finance disclosure, which focuses on communications that call on the recipient to take the action of voting for or against the candidate mentioned in the message. Thus, the Michigan Supreme Court interpreted that state's proposal for the disclosure of indirect lobbying to apply only to "express and direct requests to [others to] communicate" with officials for the purpose of influencing legislative or administrative action.[25]

A definition of grassroots lobbying that limits the reporting requirement to communications that call upon recipients to contact government officials would also be consistent with the Supreme Court's decision in *Rumely.* As the Court explained, the activity of Rumely's organization that attracted the attention of the House Select Committee on Lobbying Activities was "the sale of books of a particular tendentiousness." There was no claim that the books called on readers to contact government officials. Rather, Committee Chairman Buchanan's concern was with "attempts 'to saturate the thinking of the community.'" The *Rumely* Court was clearly troubled by a Congressional investigation into efforts to influence public thinking generally rather than the legislative process more specifically. Such more general efforts to affect public opinion would be exempt from regulation under a definition of grassroots lobbying that limits coverage to messages to the public

which use language calling on message recipients to contact government officials.

To be sure, even a grassroots lobbying disclosure requirement that could survive a facial constitutional challenge could be subject to an as-applied challenge. In upholding FECA's campaign finance disclosure requirement, the Supreme Court in *Buckley* observed that there could be cases where an organization could show that disclosure of its activities would be reasonably likely to result in harassment or threats of reprisal to contributors or members. If so, the organization could obtain an exemption from even a valid disclosure law. Similar reasoning would presumably apply in the grassroots lobbying disclosure context, although given that such disclosure would likely be focused on organizational expenditures rather contributors, members, or the identities of the recipients of the organization's messages, it seems that the need for an as-applied exception would rarely arise.

C. Options

In sum, there are a number of alternatives for the regulation of – that is, the application of reporting and disclosure requirements to – grassroots lobbying.

(1) Grassroots lobbying – that is communications intended to influence government action that are aimed at the public rather than directly at government officials – could be exempt from regulation.

This is the approach taken by federal law and by thirteen states. Some commentators have argued that this position is required by the First Amendment. Some have expressed doubt that grassroots lobbying creates the risks of direct lobbying that justify disclosure, while indicating concern that regulation, even if limited to disclosure, will burden desirable public participation in political activity.

(2) Some grassroots lobbying activity could be subject to disclosure.

This is the law in thirty-seven states. Given the integration of grassroots campaigns into many contemporary lobbying efforts, it has been argued that exclusion of grassroots lobbying creates an unjustified loophole in disclosure. Some disclosure is consistent with the First Amendment, as several state and federal appeals courts have held.

If grassroots lobbying is subject to disclosure, then several further decisions have to be made:

> (A) Should disclosure apply only to the grassroots lobbying activities of lobbyists (or their principals) who are already subject to regulation because of their direct lobbying activity; or

(B) Should disclosure be applied to individuals or organizations that engage in grassroots lobbying above a threshold level even if they do not engage in direct lobbying?

The recent ABA Task Force report endorsed a version of the more limited approach to grassroots lobbying disclosure by proposing to require that only the client of a firm that is required to register under the LDA should be required to disclose grassroots lobbying expenditures.

(C) How is grassroots lobbying subject to disclosure requirements to be distinguished from unregulated issue advocacy or efforts to shape public opinion more generally? Should regulation be limited to communications that expressly call on message recipients to contact legislative and executive branch officials?

Finally, two other issues may be worthy of consideration if grassroots lobbying is subject to regulation.

(D) Should the definition of regulated grassroots lobbying be limited to communications that use certain media, such as broadcast, cable and satellite communications, or should it be defined more broadly to include the Internet, print, phone banks, etc?

Most of the calls for the disclosure of grassroots lobbying have not discriminated among various communications media but have instead looked to the wide range of media, including the Internet, that can be and have been used as part of lobbying campaigns. However, BCRA's expansion of the scope of regulated electoral advocacy to include electioneering communications focused only on communications disseminated by broadcast, cable and satellite. Moreover, efforts to extend campaign finance regulation to the Internet have drawn sharp opposition. It is not clear that the First Amendment requires any differentiation among the different types of media in this context. Other provisions of campaign finance law, including the disclosure of express advocacy, also apply to non-broadcast media. Excluding Internet communications from coverage would open up a major gap in coverage even as the grassroots gap is closed. Yet, intense political opposition to any regulation of political content on the Internet, coupled with the difficulty of determining the cost of Internet communications for purposes of a mandate that requires disclosure of expenditures, may make it difficult to cover Internet communications.

(E) Should there be an exemption for communications by an organization to its own members?

Requiring an organization to disclose its activities in communicating with own its members arguably places more of a burden on speech, press, petition, and especially political association rights than requiring an organization to report concerning its activities attempting to persuade the general public to contact elected officials. Although opposition to the reporting of grassroots lobbying is not limited to such "internal communications," opponents tend to give special attention to the impact of regulation on such intra-organizational activities. Indeed, most of the examples of the unduly broad reach of Montana's indirect lobbying requirement given by the Montana Supreme Court when it struck down that state's grassroots lobbying disclosure law involved internal communications. It is not clear that mandatory disclosure of grassroots lobbying aimed at organizational members raises a special First Amendment concern. When campaign finance law prohibitions on corporate and union independent expenditures were considered to be constitutional, the Supreme Court in the 1950s construed the federal prohibition not to apply to "internal" electoral communications by a union to its members in order to avoid a constitutional question; so, too, FECA exempts from its definition of campaign expenditure "any communication by any membership organization or corporation to its members, stockholders or executive or administrative personnel." But that provision was aimed at exempting such communications from spending limits or prohibitions. Indeed, the FECA definition of "expenditure" excludes the requirements for the disclosure of independent expenditure from the exemption. The Eighth Circuit rejected the argument that communications by an organization to its members urging that they contact their government officials concerning a legislative matter violated the First Amendment. If an exemption were to be created for such internal communications, it would have to be based on a policy judgment that such communications either pose less of a concern than other forms of grassroots lobbying or that there is an organizational autonomy reason for an exemption, rather than on a determination that an exemption for such communications is constitutionally mandated.

IV. Lobbying and Campaign Participation

A. Background

Until recently the central focus of the principle of restricting improper influence was on gifts to government officials, and comparable material benefits such as the payment of generous honoraria

for speeches, or the provision of travel, meals, or entertainment. Indeed, gifts and free entertainment and travel continue to be an area of considerable regulatory activity. But where restrictions on gifts and other direct material benefits are in place, regulatory concern has shifted to other means by which lobbyists can do something for elected officials, such as donating to the official's favorite charity (particularly an academic center named in honor of or the official or a foundation run by a member of the official's family)[26] or, especially, taking an active role in supporting the official's election campaign. Indeed, probably the principal "growth area" in lobbying law recently has been in the regulation of the campaign finance.

As William Luneburg recently observed, "lobbyist assistance in political fundraising is a matter of intense interest today."[27] Thomas Susman has pointed out that lobbyists are actively involved in electoral campaigns "through contributing, bundling, organizing, hosting, advising, serving in an official capacity and the like" and that such activity "carries the potential (some would say danger) of triggering reciprocal favors by the officeholder." Although Nicholas Allard has suggested that the role of campaign contributions in lobbying has been overstated, he also agrees that it would be "unrealistic to dismiss the role of campaign contributions on the lobbying process." Moreover, he notes that as laws and regulations restrict or prohibit lobbyists from giving gifts to legislators or paying for their meals or entertainment, the salience of campaign contributions and other campaign participation by lobbyists has grown:

> "By prohibiting and restricting a wide array of activities and contacts involving lobbyists that are, in most cases, still permitted if related to fundraising activities, the new rules enhance the already too important impact of fundraising on the political process, thus increasing the risk of the perception, if not the reality, of impropriety. For example, under the [new federal] rules, a lobbyist may not buy a Congressman a meal at a restaurant – unless he and perhaps other guests also hand over checks as campaign contributions."[28]

The media and public interest organizations have given extensive attention to the campaign finance practices of lobbyists – as donors, bundlers, and fundraisers. The recent ABA Task Force Report made several recommendations for what it referred to as the "separation of lobbying and campaign participation."

This is an area where there has been new and increasing legislative action. A signal feature of HLOGA – the 2007 federal lobbying law – is the requirement that federal candidate campaign

committees, political party committees, and leadership PACs disclose the bundled contributions that they receive from federally registered lobbyists that are in excess of $15,000 in a six-month period. A bundled contribution is one that has been collected by an individual and forwarded, along with similar contributions, to a candidate or political committee in such a way that the person collecting and forwarding the contributions and presenting them to the candidate or committee is credited by the committee or candidate involved for raising the money.

Turning to the states, more than a dozen states impose a variety of campaign finance restrictions aimed specifically at lobbyists. These, and federal lobbying law, can be organized in two ways: by mode of regulation – that is, disclosure, restriction, or prohibition -- and by activity regulated – such as the lobbyist's own campaign contributions; the lobbyist soliciting or bundling contributions; or the lobbyist taking on a formal position in a candidate's campaign. Thus, state measures addressing the campaign finance activities of lobbyists include: prohibiting lobbyists from making – and legislators, state elected officials, and candidates for state executive or legislative office from accepting – campaign contributions while the legislature is in session (Arizona, Colorado, Utah, Wisconsin); banning contributions by lobbyists to legislators and other elected officials (Kentucky, North Carolina, Tennessee) or, more narrowly, to the elected officials they are registered to lobby (Alaska, California, South Carolina); imposing a lower donation limit on lobbyists' contributions to candidates or political committees than would apply to donations by other donors (Massachusetts); banning bundling by lobbyists (Maryland, North Carolina); prohibiting lobbyists from organizing fundraisers or serving as campaign treasurers for candidates (Maryland).

B. The Evolving Case Law

The most common state provision aimed at lobbyists' campaign finance participation, and the one most frequently subject to constitutional challenge under the First Amendment, is the ban on lobbyist contributions while the legislature is in session. These have been struck down by state or federal district courts in Alaska, Arkansas, Florida, and Missouri. In addition, a federal district court in Tennessee invalidated the application of that state's ban on lobbyist contributions during the legislative session to non-incumbent candidates for office, without addressing whether the ban could constitutionally be applied to incumbents. These courts concluded that the session contribution bans were flawed in several ways. The prohibitions were found to be overinclusive in barring even small

contributions that were deemed to present no danger of undue influence, to restricting contributions to elected statewide officials who were not part of the legislative process, and in applying to contributions to nonincumbents. By the same token, the bans were seen as underinclusive because they target contributions only during the legislative session or shortly thereafter, thus failing "to recognize that corruption can occur anytime, even outside the banned time period." By taking a potentially large chunk of the year out of the fundraising process, the bans were said to help incumbents, as challengers would have less time to overcome the built-in advantages incumbents enjoy. Moreover, given the possibility of "unusually long" or extra legislative sessions, they placed a burden on all fundraising activity.[29]

Two state courts have upheld bans on lobbyists' contributions during the legislative session – the Vermont Supreme Court and the United States Court of Appeals for the Fourth Circuit.[30] The Fourth Circuit decision, in *North Carolina Right to Life, Inc. v. Bartlett*, provided the more substantial treatment of the constitutional question. Writing for the court, Chief Justice Wilkinson applied strict judicial scrutiny to the contribution restriction and held that it was justified by the compelling state interest in preventing corruption and the appearance of corruption.

> "With respect to actual corruption, lobbyists are paid to effectuate particular political outcomes. The pressure on them mounts as legislation winds its way through the system. If lobbyists are free to contribute to legislators while pet projects sit before them, the temptation to exchange 'dollars for political favors' can be powerful. . . While lobbyists do much to inform the legislative process, and their participation is in the main both constructive and honest, there remain powerful hydraulic pressures at play which can cause both legislators and lobbyists to cross the line. State governments need not await the onset of scandal before taking action."

> "The appearance of corruption resulting from . . . lobbyist contributions during the legislative session can also be corrosive. Even if lobbyists have no intention of directly 'purchasing' favorable treatment, appearances may be otherwise. The First Amendment does not prevent states such as North Carolina from recognizing these dangers and taking reasonable steps to ensure that the appearance of corruption does not undermine public confidence in the integrity of representative democracy."

Chief Justice Wilkinson also found that the restriction was narrowly tailored. The ban applied only to lobbyists and the political committees that employ them " – the two most ubiquitous and powerful players in the political arena." Moreover, the restriction was temporally limited to the legislative

session which, typically although not invariably, covered just a few months in an election year, and was also the period "during which the risk of an actual quid pro quo or the appearance of one runs highest."

Broader bans on lobbyists' campaign contributions have also drawn constitutional challenges, with mixed results.[31] In 1979, the California Supreme Court struck down a complete prohibition on lobbyists' campaign contributions, adopted by voter initiative in 1974. The court found the ban to be fatally overbroad because it applied to donations "to any and all candidates even though the lobbyist may never have occasion to lobby the candidate." The court also noted that by applying to small as well as large contributions the ban was not "narrowly directed to the aspects of political association where potential corruption might be identified." Two decades later a federal district court upheld a more tightly focused ban, adopted by California voters in 2001, which prohibits lobbyists from making contributions only to those candidates running for offices the lobbyist has registered to lobby. In 1999, the Alaska Supreme Court sustained a somewhat broader ban – albeit less than a complete prohibition – on contributions by lobbyists to candidates in legislative districts outside the district in which the lobbyist is eligible to vote.

Both the Alaska and more recent California court decisions emphasized the dangers posed by lobbyists' contributions while minimizing the burden the restrictions placed on lobbyists' constitutional rights. The Alaska court found that lobbyists' contributions "create special risks of actual or apparent corruption" because "of the lobbyist's special role in the legislative system." The lobbyist's incentive to make contributions to large numbers of legislators who are "in position to introduce or thwart legislation and to vote in committees or on the floor on matters of professional interest to the lobbyist . . . creates a very real perception of interest-buying." The California court noted that lobbyists' contributions present a special danger of corruption because lobbyists' "continued employment depends on their success in influencing legislative action." The courts found that the restrictions were narrowly tailored to focus on the danger of undue influence without burdening lobbyists's rights because they did not limit the ability of lobbyists to undertake independent expenditures, contribute to political parties, or volunteer on behalf of legislative campaigns.

In 2010, two federal courts divided over the constitutionality of state laws banning campaign contributions by lobbyists. The federal district court in North Carolina rejected challenges to recently-enacted restrictions that bar a lobbyist from making a campaign contribution to a legislator or public servant and also prohibit lobbyists from bundling campaign contributions for candidates or public servants. As the court noted, the law was fairly far-reaching, not limited in time (as the prior North Carolina law had been) or to contributions made to officials who had been the target of the lobbyist's activities, and it made no exception for de minimus contributions. The Court applied the "closely drawn" standard of review and found the ban served the "sufficiently important interest" of limiting corruption and the appearance of corruption. The Court emphasized that the law left open other means for lobbyists to participate in financing electoral politics, including contributing to political action committees ("PACs") that contribute to candidates; advising a PAC with respect to which candidates the PAC should contribute; encouraging others to make campaign contributions; and volunteering in campaigns.

On the other hand, the Second Circuit invalidated a Connecticut law prohibiting lobbyists and their family members from contributing to any statewide or state legislative candidate, a legislative caucus or leadership committee, or a party committee, and from soliciting contributions for such candidates or committees. Applying the same "closely drawn" standard as the North Carolina federal district court, the Second Circuit found that a complete ban was not closely drawn to the government's interest in combating corruption and the appearance of corruption. The Court emphasized that a complete ban was more burdensome than a contribution limit, and rejected the idea that lobbyists per se raise a special danger of corruption. The court acknowledged the contention that lobbyists receive "special attention" from elected officials, but, citing *Citizens United*, denied there was anything improper about that:

> "Influence and access, moreover, are not sinister in nature. Some influence, such as wise counsel from a trusted advisor – even a lobbyist – can enhance the effectiveness of our representative government."

Earlier in the same opinion, the Second Circuit had upheld Connecticut's flat prohibition on campaign contributions by government contractors, finding the contractor ban justified because recent Connecticut scandals involving corrupt dealings between contractors and government officials

created an appearance of corruption with respect to all exchanges of money between state contractors and candidates for state office. But "the recent corruption scandals had nothing to do with lobbyists" so a blanket ban on contributions by lobbyists could not be justified. The court also found that the solicitation ban was not narrowly tailored to preventing the kind of improper influence that might result from the bundling of contributions. The law was not limited to bundling or aimed at large-scale efforts to collect contributions. The court noted that "a less restrictive alternative to address the problem of bundling would be to ban only large-scale efforts to solicit contributions" – although it did not indicate whether such a "hypothetical" law would be constitutional.

Finally, courts have addressed a handful of other restrictions on the campaign finance practices of lobbyists.[32] A federal district court in Wisconsin held that the portion of the state law prohibiting lobbyists from furnishing to any agency official or legislative employee of the state or any candidate for state elective office "any . . . thing of pecuniary value" was unconstitutional to the extent that, as interpreted by the state ethics board, the regulation prohibited lobbyists from volunteering personal services to political campaigns. The court recognized that "Wisconsin's lobby law reflects the legislature's judgment that, as a class, lobbyists have greater potential to corrupt the political process than do ordinary citizens" but the court found that the ethics board had failed to show any basis "for finding that volunteering by lobbyists threatens the integrity of the political process any more than volunteering by other citizens, such as environmental activists, insurance executives, or lawyers, whose volunteering is altogether unregulated." On the other hand, a federal district court in Maryland upheld the provisions of that state's law prohibiting a lobbyist from serving as a campaign treasurer for a candidate or elected official, serving on a candidate's fundraising committee, or organizing or establishing a political committee for the purpose of soliciting or transmitting contributions. The court sustained these provisions with little discussion, noting simply that these relationships posed a danger of corruption and that the Maryland legislature had acted after "an actual influence peddling scandal" involving a lobbyist.

The courts that have considered constitutional challenges to state restrictions on the campaign participation of lobbyists have grounded their analyses largely in the Supreme Court's campaign finance case law, rather than any distinctive lobbying jurisprudence. Although much of the academic and professional commentary on lobbying focuses on the resemblance of campaign contributions to

gifts, meals, or entertainment – as private benefits to officials that build social relationships, cement good will, and create a predisposition on the part of the government beneficiaries to reciprocate by taking official actions helpful to the providers of private largesse – which are not political speech or do not finance political speech and thus can be restricted without serious constitutional challenge, legal analysis treats campaign contributions and other forms of campaign participation as constitutionally protected because they are political speech or necessary for the financing of political speech. While lobbyists' campaign contributions can be restricted, those restrictions are subject to the constitutional review applicable to the cognate regulation of campaign finance practices.

In these cases, the courts have divided over three questions: (i) the standard of review; (ii) whether contributions from lobbyists as a category of campaign donors pose special risks to the integrity of the political process that justify closer restrictions on lobbyists' contributions than donations from other sources; and (iii) whether specific evidence of lobbyist-related corruption in the state that has adopted the restriction is needed to justify the restriction.

On the first question, the Supreme Court has held that although contributions are constitutionally protected political speech, they are a lower order of speech than expenditures and, thus, can be limited. Some courts and commentators have found the Court's standard of review of contribution restrictions to be somewhat uncertain and have debated whether the Court imposes "strict" scrutiny or the less strict "exacting" scrutiny. The better reading of the Court's cases is that the standard is "exacting" scrutiny, but it is not clear that the standard makes a great difference since even under exacting scrutiny a restriction would have to promote an important governmental interest, be narrowly tailored to that end, and not unduly burden political speech. The governmental interests that the Court has held contribution restrictions serve are the prevention of corruption and the appearance of corruption.

With respect to the second question, the courts have also divided over whether lobbyists are a distinctive source of the "corruption" or appearance of corruption that the Supreme Court has required as a justification for limiting campaign contributions. Some courts have been willing to defer to legislative judgments that contributions from lobbyists pose a special risk of improperly influencing government because of their regular and extended engagement with the legislative process, their ongoing close contacts with government officials, their inside knowledge, and the

financial rewards they obtain from their relationships with officials and other government decision-making. Other courts, however, have indicated that they do not see lobbyists as posing any greater dangers than anyone else making campaign contributions. This issue is inevitably affected by what may be considered to be improper or undue influence. In *McConnell v FEC*, the Supreme Court upheld restrictions on soft money contributions to the political parties because Congress had demonstrated that such contributions were given in order to win their donors preferential access, which it treated as a species of corruption within the meaning of *Buckley:*

> "Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.' . . . Many of the 'deeply disturbing examples' of such corruption cited by this Court in *Buckley* . . . to justify FECA's contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials. . . . Even if that access did not secure actual influence, it certainly gave the 'appearance of such influence.'"

On the other hand, the *McConnell* court also found that "mere political favoritism or opportunity for influence alone is insufficient to justify regulation" and, in language relied on by the Second Circuit in invalidating Connecticut's broad ban on lobbyists' contributions, *Citizens United* sought to sharpen the constitutional difference between "ingratiation and access" on the one hand and "corruption" on the other. To be sure, *Citizens United* was a spending case not a contribution case, but the decision does add some uncertainty as to just what must be shown about the impact of lobbyist contributions or fundraising to justify their restriction.

The third issue relates to the second. Even if lobbyists are not necessarily a group more likely to convert campaign support into undue influence, recent evidence of government corruption involving lobbyists in a specific jurisdiction can provide support for tighter restrictions on lobbyists in that jurisdiction. On the other hand, as the Connecticut example suggests, the absence of recent local scandals involving lobbyists may be given as a reason for finding that more stringent laws impose an unjustified burden on First Amendment rights.

C. Options

The options with respect to the regulation of the campaign finance practices of lobbyists may be grouped into three categories: (1) do nothing; (2) disclosure; (3) restrictions and prohibitions.

(1) Do nothing.

This can be described as the traditional approach. Let campaign finance law regulate campaign finance practices by requiring candidates, political committees, and other campaign actors to report their finances (including their contributions and expenditures) and imposing dollar limitations on contributions to candidates, PACs, and parties and aggregate contributions in a year or election cycle, but do not impose special reporting requirements on lobbyists or special limits on lobbyists' campaign participation.

The Connecticut *Green Party* decision highlights a central questions in lobbying regulation, which is whether lobbyists per se, pose special dangers of improper influence, or corruption. On one lobbyists are essentially agents, rather than principals, so that the corruption danger, if any, comes from the effort to use campaign support to advance the legislative or regulatory goals of the interests that have retained the lobbyists. While the lobbyists may have special knowledge of the state of legislative developments and special incentives to get contributions to strategically significant legislators at specific times in order to advance a particular measure, it is a client's interest they are advancing. From this perspective, it is not clear why lobbyists' contributions present a special risk of corruption compared with the risk of improper influence generated by the contribution of any individual, organization, or group that has retained a lobbyist to advance its interests with a government body. On the other hand, many experts with first-hand experience of the role of campaign contributions are convinced that there is something particularly toxic about the interaction of lobbying and campaign finance. If successful interest-group representation turns on building relationships with officials in order to get access, and lobbyists are in the business of building those relationships, then they may be particularly likely to use campaign contributions to advance legislative ends. "At the very least, fundraisers are also an opportunity to check in, to get 'face time,' and to build relationships."[33] Moreover, recent political science work indicates that for "contract" lobbyists – that is generalists hired by a variety of clients, rather than in-house lobbyists who work for a specific employer – campaign contributions are a significant means of sustaining relationships with legislators and a marker of professional success.[34] Indeed, a relatively small fraction of lobbyists account for most of lobbyists' contributions. A survey by Public Citizen found that from 1998 through 2005 only one-quarter of federally registered lobbyists actually made campaign contributions

in excess of $200 to a single congressional candidate or PAC, but that 6 % of all lobbyists accounted for 83% of all lobbyists' campaign contributions, and that these superdonors were also major bundlers.[35]

Fueled by the growing recognition that campaign contributions can have the same consequences for lobbyists' influence on legislative and regulatory processes as gifts or free meals, entertainment or travel provided to lawmakers and other public officials, the trend has been away from the traditional approach and toward incorporating some attention to campaign practices in the regulation of lobbying. Both lobbying and campaign finance regulation are rooted in the goals of promoting transparency and curbing the improper or unfair influence of private money on government decision making. Campaign contributions and other forms of campaign support interact with lobbying and are an important mechanism of lobbyists' participation in the law-making process. It is, thus, reasonable to address the campaign finance practices of lobbyists as part of lobbying regulation.

(2) Disclosure.

The least intrusive form of lobbying regulation, and the one most likely to pass constitutional muster, is disclosure. Lobbyists already subject to registration and reporting requirements could be required to detail their campaign finance activities – contributions over a dollar threshold, bundling over a dollar threshold, fundraising, formal service in a position such as treasurer or chief fundraiser in a campaign – in their periodic reports. Although some of this might overlap with reports filed by candidates concerning contributions or staff, it would still be useful for public transparency and voter information to combine lobbying and campaign contribution information in a single place – particularly a form which is filed electronically, downloadable, and searchable.

Even a disclosure-only form of regulation will lead to certain difficult issues with respect to the scope of disclosure. For example, should lobbyist disclosure of contributions and other activities apply only to contributions to candidate campaign committees and leadership PACs (political committees controlled by officeholders), or should the disclosure requirement also be applied to PACs that make donations to candidates, to PACs that make independent expenditures, or to political party committees? Even with respect to donations to, or bundling for, candidate

committees, would disclosure be required only with respect to donations to or bundling for officeholders with whom the lobbyist has had lobbying contacts within the reporting period? That would result in the nonreporting of campaign finance activity for challengers (other than challengers who are also currently officeholders) as well as exclude reporting concerning donations to or for officeholders who become targets of lobbying attention after the campaign contributions were made. Alternatives might be to require disclosure of donations to, bundling for, and campaign positions with candidates for all offices for a legislative chamber or branch of government that the lobbyist has lobbied during the past reporting period, or, indeed, for all candidates for office in a jurisdiction in which the lobbyist is registered to lobby.

(3) Limitations and Prohibitions

Disclosure alone might be deemed inadequate to constrain the potential for improper influence resulting from campaign finance participation, as well as the arguably unfair influence accruing to lobbyists active in an officeholder's campaign relative to lobbyists who have not provided campaign support. Limitations or prohibitions on these practices might be considered necessary or appropriate to advance these goals. Some substantive restrictions might even be supported by lobbyists in order to reduce the demands for campaign support made on them. The campaign finance literature indicates that some of the role of contributions-as-access may originate from the demands of elected officials as well as from the actions of donors. Indeed, there was considerable support from industry for BCRA's limits on soft money donations as a means of reducing the demand for contributions. Less affluent lobbyists, or lobbyists for less affluent clients, might benefit by a reduction in the role played by campaign finance support in the lobbying process.

Substantive restrictions on lobbyists' campaign finance participation could vary across a very wide range. It might be useful to place these into three groups: (a) restrictions on lobbyists' own contributions; (b) restrictions on lobbyists' fundraising or their bundling of the contributions of others; (c) restrictions on lobbyists taking formal positions in campaigns. There are, of course, further permutations within each category.

For example, possible restrictions on lobbyists' own contributions include capping lobbyists' individual contributions at a lower level than that allowed for other donors; capping lobbyists' aggregate contributions to all campaigns in a jurisdiction at a lower level than that allowed

for other donors (the ABA Task Force recommends capping federal lobbyists' aggregate contributions at half the level allowed for other donors in federal elections); or barring lobbyists' donations completely. A cross-cutting set of questions would be whether the special donation restrictions apply to contributions to all candidates and political committees; only to contributions to candidate and leadership PACs; or only to contributions to the campaign and leadership PAC committees of candidates whom the lobbyist has lobbied. Conceivably, as in some states, the restrictions could be limited temporally, so that restrictions on contributions to legislators would apply only when the legislature is in session. Tighter restrictions could trigger more stringent constitutional review.

A similar set of issues might arise for limits on bundling – whether to adopt an absolute ban, or a dollar limit, and if the latter what level should the limit be. So, too, should the restriction apply only to candidates for whom the lobbyist has lobbied (with, as proposed by the ABA Task Force, a post-election restriction on lobbying where the lobbyist has provided campaign support to an official not previously lobbied) or more broadly to bundling for political committees or political parties?

The case law to date is sufficiently mixed as to make predictions concerning the outcome of any challenges to these measure hazardous, although it may be fair to say that the more extensive the restriction the more serious the constitutional challenge is likely to be. Another way to look at the possibilities is in terms of the intensity of the relationship they establish between the lobbyist and the recipient and the resulting likelihood that the campaign support will be reciprocated through influence on official action. It is uncertain whether merely making a campaign contribution – which in most jurisdictions is subject to a dollar limit – has a major effect. People active in the legislative process regularly make contributions not because they particularly support the candidates to whom they are donating but because it has become a precondition for practice. Indeed, making a campaign contribution is often considered to be a cost of doing legislative business, and it is not uncommon for a donor to give to both parties and competing candidates in the same election. So although a campaign contribution may have a positive impact on a relationship with an elected official, the impact may not be great. On the other hand, direct involvement in a candidate's campaign suggests real personal support which may be more likely to be recognized and honored

as such by an officeholder. Campaign activities which involve a distinct personal role for the lobbyist may tend to forge a link between the lobbyist and the candidate which subsequently gives the lobbyist extra influence. As a result, restrictions on such a campaign role may be justified. Bundling falls between these extremes. Although bundling or other forms of fundraising may be less of a commitment than service as a campaign treasurer or other officer, bundling or fundraising over a threshold level can represent a significant level of support for a candidate with a greater likelihood of some reciprocation by the candidate-as-officeholder than a mere contribution. There might, thus, be a good case to prohibiting lobbyists from bundling for candidates running for a position in a body the lobbyist lobbies a sum that is more than a certain multiple of the jurisdiction's maximum permitted campaign contribution.

V. Contingent Fee Arrangements[36]

A. Background

According to one recent law review article, contingent fee lobbying is "surprisingly common, particularly in situations where corporations seek government contract work or appropriations for a particular program that would put money in their pockets. Savvy clients are increasingly deciding that they do not want to pay full price when they do not get a desired result, and contingency fees force lobbyists to risk failure or success along with them." Contingency fee arrangements have been praised for making it possible for some groups to be able to hire lobbyists where they would otherwise be unable to afford to do so, and have been condemned for "inflaming avarice" and creating an incentive for lobbyists to use "corrupt means and improper influences to achieve their goals." Opponents also argue that contingency fees operate as an incentive for lobbying to secure unnecessary and costly government programs because not only the programs but the lobbying costs are ultimately borne by the taxpayers.

Contingent fee arrangements are not addressed by general federal lobbying regulation. More specifically, they were not targeted by the former FRLA and are not addressed by either the LDA or HLOGA. There are several specific federal statutory prohibitions applicable to contingent fee lobbying in particular settings. The Foreign Agents Registration Act ("FARA") prohibits registered foreign agents from entering into contracts for fees that are contingent on the success of

political lobbying. The general federal procurement statute requires a "suitable warranty" that, with some exceptions, contingent fees or commissions have not been used to secure any contract other than one awarded based on sealed-bid procedures, and the Federal Acquisition Regulation requires the contracting officer to insert a standard Covenant Against Contingent Fees in solicitations and contracts. The Byrd amendment has also been interpreted as providing a constraint against contingency fees in lobbying. By prohibiting the use of appropriated funds to lobby for any award of a federal contract, the Amendment prevents payment of lobbying costs from any amounts paid under the contract. However, the Byrd Amendment does not prevent payment to a lobbyist, including a contingent fee, from funds available to the contractor other than those paid by the federal government.

The practice at the state level has been quite different. According to a June 2010 survey by the National Conference of State Legislatures ("NCSL"), forty-two states prohibit compensating lobbyists with contingency fees, and three more states restrict such fees (Delaware provides that no more than half a lobbyist's fee may consist of contingent compensation; Iowa and Montana require reporting of contingent fee arrangements.) Only Louisiana, Missouri, New Hampshire, West Virginia, and Wyoming do not regulate contingent fees.

State laws restricting contingent fees have been challenged in court. Relying on the nineteenth century case law reviewed in Part II.A, *supra*, these laws have generally survived, although more modern First Amendment cases may have undermined their force. On the other hand, further regulation of the contingency fees paid to federally registered lobbyists has been proposed.

B. The Legal Framework

As noted in Part II, the Supreme Court's earliest cases dealing with lobbying involved contingent fees. Although these did not involve statutory prohibitions of such fees but, instead, judicial refusals to enforce such fee arrangements on public policy grounds, these cases provide strong support for the argument that contingent fee arrangements may be prohibited. In a number of these cases, the Court held that contingent fees create such an incentive to improper influence and corrupt practices that the contingent fee contracts would not be enforced even in the absence of any showing of specific misconduct in the lobbying activity for which contingent compensation was sought. Although in the last case in this line, *Steele v. Drummond*, the Court shifted its focus to

whether or not misconduct actually occurred, it did not disapprove the earlier decisions, which certainly continue to provide support for laws barring contingent fee arrangements.

Most modern court decisions continue to support restrictions on contingent fees. In recent cases, the Eleventh Circuit and the Supreme Court of Kentucky rejected facial challenges to state laws banning the payment of contingent fees to lobbyists, a Florida state court found a lobbyist contingent fee arrangement to be void for public policy, and Maryland's highest court permitted an enforcement action by the state ethics board to go forward against a lobbyist who inserted a contingent fee provision in his contract, although the court split over a procedural question in the case.[37] Some of these courts continue to adhere to the view that "[t]here is a legitimate public policy concern that such contingent fee arrangements promote the temptation to use improper means to gain success." Others, such as the Eleventh Circuit, may be less persuaded of the merits of such a ban but find that the issue has been resolved by the older Supreme Court decisions, which were found to constitute "binding case law which is so closely on point, and has been only weakened rather than directly overruled."

Only one court – the Montana Supreme Court – has come out the other way. Acknowledging that "[t]here is, of course, no constitutional protection afforded improper lobbying activities, and the State may attempt to regulate and punish any improprieties," the Montana court found that a "blanket prohibition against contingent compensation of lobbyists" is unconstitutionally overbroad and "infringes the rights of those who, while contemplating neither illegal nor unethical conduct, need or desire to employ a lobbyist on a contingent fee basis in order to advance their interests before a public official."[38]

Modern First Amendment doctrine certainly poses a difficulty for a complete ban on contingent fee lobbying. The Supreme Court in *Meyer v. Grant* invalidated a Colorado law that made it a felony to pay people who circulated the petitions used to gather signatures to place an initiative question on the ballot. The Court found that the law imposed a limitation on political expression and was, thus, subject to exacting scrutiny. By barring the use of paid circulators, the law reduced the number of people willing to carry petitions and the number of people they could reach with their message, and also made it more difficult to place initiatives on the state ballot. Although the state contended that there were methods to disseminate political proposals in addition to the use of paid

circulators, the Court emphasized that "the First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing. The Court rejected the arguments that the restriction could be justified by the state's interest in assuring that an initiative has sufficient grass roots support to be placed on the ballot or – more pertinent to the contingent fee for lobbying question – the interest in protecting the integrity of the initiative process. The former interest was held to be adequately protected by the signature requirement itself, while the latter was held to be adequately addressed by laws criminalizing the forging of petition signatures, making false or misleading statements to obtain a signature, or paying someone to sign a petition.

Moreover, in a series of cases involving charitable solicitations, the Supreme Court repeatedly struck down state laws limiting the percentage of charitable donations collected that could be used to defray solicitation costs or pay professional fundraisers.[39] Limiting the expenditure of funds used to solicit funding was treated as a limitation on the speech involved in solicitation and was, thus, subject to "exacting First Amendment scrutiny." The principal justification offered by the states in these cases was the prevention of fraud, but the Court emphasized that the anti-fraud goal could be attained by laws targeting fraud itself or requiring charities to file financial disclosure reports, so that the limits on compensation were not narrowly tailored to the State's interest in preventing fraud. The Court also rejected what it called "the paternalistic premise" that a state may limit the fees charged by professional fundraisers because that was in the best interest of the charities themselves.

Although a ban on contingent fees is not as severe as the outright ban on compensated petition circulators invalidated in *Meyer*, it is comparable to compensation limits struck down in the charitable solicitation cases. Lobbying is constitutionally protected speech, and that right extends to the ability to hire a paid lobbyist as representative. To the extent that a prohibition on contingent fee compensation makes it more difficult for some individuals or groups to hire a lobbyist or reduces communications made by lobbyists to government officials on their behalf, a prohibition on contingent fees infringes on First Amendment rights. The principal justification traditionally given for the restriction is that contingent fees, by tying compensation to success, create an incentive for a lobbyist to use improper or corrupt means. However, the comparable anti-fraud argument has not

fared well in the petition circulation and charitable solicitation contexts, where the Court's response has been that limits on compensation are overbroad and anti-fraud laws can do the job. To be sure, the Court in the campaign finance cases has held that Congress and the states can use campaign contribution restrictions to address concerns about "corruption and the appearance of corruption" that fall short of outright bribery or the payment of illegal gratuities, but contribution restrictions (and gift restrictions) apply directly to interactions with elected officials, whereas contingent fee prohibitions apply only to private contracts (although they reflect a concern about the ultimate impact of such fee arrangements on public actions). The contingent fees are, thus, not literally corrupting. The claim, rather, is the more attenuated one that they create an incentive to lobbyists to take actions that improperly influence the officials they lobby.

The constitutional status of a contingent fee restriction today is uncertain. Much might turn on the evidence that a ban on contingent fees suppresses the availability of lobbyists or that contingent fee arrangements do in fact have a greater likelihood of resulting in lobbyist misconduct. But *Meyer* and the charitable solicitation cases support the argument that a contingent fee ban is not narrowly tailored to preventing improper lobbying and that, instead, the improper behavior, and only improper behavior, ought to be limited or prohibited.

C. Options

As with other the lobbying regulation issues, the principal options with respect to contingent fee arrangements are (1) do nothing; (2) require disclosure; (3) prohibit contingent fee contracts, either generally or in certain situations deemed to present the greatest risk of misconduct.

The case for doing nothing here is strong. Both the constitutional concerns and the rationale underlying the constitutional concern that the best way to address misconduct is to address that misconduct directly are plausible. Contingent fees are regularly used in the hiring of counsel and have proven to be a means of enabling the less affluent to obtain representation for their interests. As the ABA Task Force on Lobbying has noted "[t]he opportunity to resort to a contingency fee contract may enable some private persons to obtain representation that they could not otherwise afford. . . . In this regard, contingency fee arrangements may promote norms of equal access to justice." The Task Force also notes that contingency fee arrangements may be particularly beneficial for small local governments.

On the other hand, there is both a long tradition of treating contingent fees for lobbying as suspect, and the vast majority of states regulate them, with most of those states prohibiting them outright. It is not clear if much empirical work has been done concerning whether contingent fees are either useful in obtaining lobbying representation or in fueling misconduct, but given the widespread apprehension about their use, it might be desirable to do something more.

Disclosure – which has been required in a handful of states – would surely pass constitutional muster. Given the focus of most disclosure laws on tracing the flow of funds from clients to lobbyists and their use by lobbyists, adding the disclosure of contingent fee arrangements where they are in use would be entirely consistent with the thrust of disclosure laws, would place little new burden on those required to register and report, and would be unlikely to curtail the availability of representation. Disclosure would also provide useful information concerning how widespread contingent fee arrangements are; how large the payments are; what types of clients use them; whether this arrangement actually makes representation more available to less affluent interests and organizations; and whether there is any correlation between contingent fees and misconduct. The ABA Task Force recommends that a federal lobbyist who enters into a contingent fee arrangement be required to disclose it, although as discussed below, the ABA Task Force recommends the prohibition of contingent fees in certain cases. Disclosure is not prohibition and those who find contingent fees troubling would find disclosure to be an inadequate solution.

The third general approach would be outright prohibition, which is the law in most states and also affects lobbying for certain representations at the federal level. Prohibition may be subject to constitutional challenge – and current First Amendment doctrine would appear to make blanket prohibitions vulnerable – but so far these laws have survived.

A variation on prohibition would be a partial prohibition with respect to lobbying where contingent fees appear particularly problematic, such as the federal government contracts covered by the Federal Acquisition Regulation. The ABA Task Force on Federal Lobbying Laws has proposed a ban on contingent fees "where the object of the lobbying is to obtain an earmark, tax relief, or similar authorization of a targeted loan, grant, contract, or guarantee." The ABA report urges that "[w]here the lobbyist is seeking a narrow financial benefit for the client, the temptations for unethical behavior are probably at their greatest. The appearance of unseemliness, driven by

public apprehensions about a possible corrupt exchange, is likely to be particularly strong in that setting also, as taxpayer dollars are directly involved."

It is not quite clear why the incentive for misconduct *by the lobbyist* would be greater when the benefit is narrowly targeted to certain individuals or interests. One would think that the incentive for misconduct would be greater when the fee is greater, which might occur when the legal, regulatory, or tax change benefits an entire industry or economic sector rather than an individual firm. On the other hand, many commentators find earmarks particularly troubling; the ABA Task Force notes "tjhere are reasons to think that this type of legislative action should not be occurring in the first place." Discouraging earmarks might very well be a good justification for barring the use of contingent fees to obtain earmarks, although the target would be not so much improper influence by lobbying as improper action by Congress.

VI. Lobbying by Former Government Officials: Slowing the Revolving Door[40]

A. Background

As one scholar has put it, "[p]erhaps no problem in government ethics is easier to understand or more difficult to address effectively, than that posed by 'revolving-door employment,'"[41] that is the hiring as lobbyists of former government officials upon their departure from public office. "The risk is obvious that a client represented by a public-servant-turned-lobbyist will have, or will appear to have, an unfair advantage in petitioning the government."[42] This unfair advantage can take many forms. The former public official may take advantage of his or her relationships to former colleagues and get better access to current decision-makers. As former Solicitor General and Watergate Special Prosecutor Archibald Cox put it, "the ex-official lobbyist comes as a friend, an insider."[43] Sometimes, the ex-official may literally have better physical access, if, for example, a legislature continues to give former members special access to legislative facilities. In a world in which access is crucial, this may give the former official a great advantage. So, too, as Cox explained, "the ex-official will often be able to trade upon habits of deferring to his advice and wishes engendered during the days when he was senior to, or at least a more influential official than those with whom he now deals in a different capacity." Some times the ex-official will have

special knowledge or inside information about the matter subject to potential government action which will give her an edge over other lobbyists. Beyond the possibility of unfairness to other interests seeking government action, the potential for post-public-service employment as a lobbyist may affect the decisions of government officials while in office who may be "tempted to curry favor with prospective employers or clients."[44]

As a result, Congress, many state legislatures, and a number of cities have adopted "revolving door" rules or "cooling off" periods limiting the ability of former government officials to lobby the government offices where they were once employed. The Senate's revolving door rule played a role in the scandal that led the recent resignation of Senator John Ensign (R-Nev). Ensign was having an affair with the wife of his administrative assistant Doug Hampton. When Hampton found out, Ensign helped Hampton establish himself as a lobbyist by finding him clients. Hampton then contacted Ensign's office on behalf of those clients in violation of the anti-revolving door rule, and was eventually indicted for violating the revolving door prohibition.[45]

The content of these restrictions vary significantly with respect to who is restricted; which offices, agencies, or branches of government they are restricted from lobbying; and how long and with respect to what matters they are restricted. These criteria can also interact with each other, with elected or more senior officials restricted for a longer period of time and with respect to more government agencies. More generally, the considerations going into the framing of revolving door rules may differ for former members of the executive branch versus the legislative branch, and for elected officials versus appointees and staff. The most consistently accepted principles are (i) that former members of government should not be allowed to lobby with respect to matters with which they were personally and substantially involved as government employees, and (ii) that former government officers should not be able to lobby the particular offices or agencies where they were employed for a specific, limited period of time, typically one or two years. Beyond that, the laws vary considerably.

At the federal level, revolving door restrictions were initially aimed at members of the executive branch under the 1978 Ethics in Government Act, and the rules governing former executive branch officials vary considerably according to the level of the former official's employment, the subject matter of his or her public service, and the nature of the representation in

question. Congress first began to regulate the lobbying of former members of Congress and their staffs with the Ethics Reform Act of 1989, which also strengthened the limits on former members of the executive branch. HLOGA adopted or extended a number of revolving door restrictions so that former Senators are now barred from lobbying Congress for two years after leaving office and former members of the House of Representatives are barred from lobbying Congress for one year after leaving office. Higher-paid congressional staffers, including both staff to members of Congress and staff to committees, leadership, and legislative offices are subject to a one-year restriction on lobbying the offices or committees where they had been employed.

Although revolving door restrictions have become increasingly widespread, they have been questioned from opposite directions. On the one hand, they constrain the employment opportunities of former government officials as well as limit the ability of private individuals and groups to retain as lobbyists individuals who may be uniquely well-informed about their issues and well-qualified to represent them. This could discourage some capable people from government service, particularly legislative staff members who do not enjoy civil service protections and whose jobs are subject to unpredictable political changes. The exclusion of former legislators and staffers knowledgeable about both the policy content of and legislative process for important issues is also a cost. Moreover, it has been argued that special access per se is not a problem as long as improper influences, such as the provision of material incentives to current officeholders, are barred. On the other hand, many critics have suggested that existing revolving door restrictions are too weak. The typical one-year rule may not be long enough to curb unfair influence. Moreover, Former members of Congress have demonstrated they can escape revolving door restrictions by avoiding the direct contacts with the legislature necessary to fall within the statutory definition of lobbying and instead providing "strategic consulting" services to clients, as former Senator Christopher Dodd demonstrated when he became chairman and chief executive for the Motion Picture Association of America – in other words "Hollywood's top lobbyist" – less than three months after leaving office, despite the Senate's two-year revolving door rule. As Senator Dodd explained, he saw his job "as an architect of legislative strategy. 'There are other people here who do that,' he said of direct lobbying efforts."[46]

The principal recent developments in this area include regulations, or proposed regulations, concerning negotiations by public officials while in office with respect to employment opportunities after they leave public office; restrictions adopted by the Obama Administration on the appointment of lobbyists to senior administration positions as well the appointment of lobbyists to federal agency advisory boards and commissions – what has come to be called the "reverse revolving door" rule; and the extension of the concern about certain lobbyists having an unfair advantage, which underlies revolving door restrictions, to other situations where a lobbyist's relationship to government officials may give the lobbyist an advantage, such as lobbyists who are related to, or share a household with, government officials.

B. Case Law

There is relatively little case law dealing with revolving door restrictions, perhaps because they have generally been considered constitutionally unproblematic. An early Seventh Circuit decision rejected a due process challenge to the federal criminal law provision barring a former government official from representing a client before the government with respect to a matter in which the former official had been substantially involved while in government, finding that the "statute proscribes as precisely as possible an unethical practice that can manifest itself in infinite forms."[47] Similarly, an Ohio court upheld its one-year revolving door rule, at that time aimed only at executive branch personnel, finding the "state has a substantial and compelling interest to restrict unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government."[48]

A very recent federal district court decision in Ohio could pose a threat to revolving door laws. In *Brinkman v. Budish*,[49] the court enjoined the enforcement of Ohio's revolving door law – which now bars former members of the state legislature and former legislative employees from representing any person on any matter before the legislature or legislative committees for a period of one year after the conclusion of the member or employee's legislative service – in a case in which a former legislator who is also a member of an anti-tax advocacy organization sought to represent that organization, on an uncompensated basis, before the legislature within the statutory one-year period. Finding that the revolving door rule burdened the organization's right to retain a

representative of its choosing, the court subjected the law to strict judicial scrutiny. The court agreed that the goals for the law advanced by the state of preventing "unethical practices of public employees and public officials," and promoting, maintaining, and bolstering "the public's confidence in the integrity of state government" are compelling government interests, but held they were not compelling interests with respect to *uncompensated* lobbying. The court then concluded that the third interest advanced by the government – "to prevent unequal access to the General Assembly by outside organizations by virtue of any significant relationships with current and former public officials who may be in a position to influence government policy" – was not a compelling interest at all. In so finding, the court relied on language in *Citizens United*'s rejection of a ban on corporate campaign spending that it concluded indicated the Court was "against attempts to favor or disfavor certain speaker or viewpoints." The court also relied on *Citizens United*'s rejection of the imposition of restrictions on spending because it may win the spender special influence or access to conclude that "the Supreme Court's reasoning refutes the premise that [the revolving door law] is necessary to prevent General Assembly members from having special access to the legislative process."

That much of the opinion was sufficient to obtain the plaintiff an as-applied exception to represent his organization on an uncompensated basis, but the court then went further and concluded that the law was unconstitutional on its face because it was not narrowly tailored in several respects. First, the court found that the state had failed to show that the one-year cooling off period addressed the corruption danger it said justified the rule: "Defendants have not established that the danger of *quid pro* corruption or the appearance of corruption is significantly lessened if the former legislator is permitted to lobby the General Assembly one year and one day after leaving the legislature." Second, unlike the prior version of the statute which restricted former government employees from undertaking representations only with respect to matters in which they had personally participated, the current Ohio law imposed a one-year ban as to all matters. Finally, the law was both overinclusive in its application to uncompensated lobbying and underinclusive "because it does not restrict other behaviors or activities of former members of the General Assembly that might give rise to actual or perceived corruption, such as the acceptance of gifts or offers of employment unrelated to lobbying."

Much of the *Brinkman* opinion is quite unpersuasive. The court's contention that the one-year rule is not narrowly tailored because there was no showing that the danger of improper influence ends precisely one year after an official leaves office is in conflict with Supreme Court decisions giving Congress and state legislatures considerable deference in setting dollar limits on contributions or dollar thresholds for reporting requirements. As the Court said in *Buckley* with respect to the federal reporting threshold, as long as some regulation is appropriate "[t]he line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion."[50] The claim that the law is underinclusive because other practices can also give rise to improper influence flies in the face of repeated Supreme Court statements that a legislature need not address all problems in a field at once but may proceed step by step. The assertion that the law is overinclusive because it includes uncompensated lobbyists fails to acknowledge that even uncompensated lobbying by former government officials still raises the concern that the lobbyist may enjoy special advantages relative to other representatives due to the inside knowledge that comes from former legislative service as well as the special attention, respect and access a former colleague may receive. In any event, that objection could be cured without much harm to the general purpose of revolving door laws by creating an exception for uncompensated lobbying, or, as in the *Brinkman* case, uncompensated lobbying for a nonprofit organization to which the representative belongs.

More troubling is the premise, central to the court's determination, that the government may not act to level the playing field by limiting the use of lobbyists whose former government service enables them to enjoy special access, and that *Citizens United* compels this result. This seems an overreading of *Citizens United,* which dealt with a law completely banning corporate and union campaign spending. Revolving door laws are much more tightly limited. With respect to the former-official lobbyist, they bar only representation of clients before certain government bodies for a limited period of time or a limited set of matters. The former official is otherwise free to speak with respect to government matters during the revolving door period and entirely free thereafter. With respect to those who would hire them, the burden is relatively slight, excluding a very small number of potential representatives for a very short period of time. The burden on political expression is even more modest than that resulting from term limits for elected

officials, which have been sustained. The burden is also less than that posed by contingent fee restrictions, which may make counsel entirely unavailable to less affluent clients.

If the contention that leveling the playing field is not a proper basis for regulating lobbying were to become more widely accepted, revolving door rules might be more subject to challenge. They might still be sustained by the claim that they remove the employment temptation that could affect a public official's decisions while in office. The narrower revolving door rules focused on prohibiting representations with respect to specific matters in which the official was involved might also be sustained by traditional conflict of interest principles. Of course, it is not clear that the opposition to leveling the playing field will be or should be more widely accepted. Much turns on how the playing field is leveled and how much the leveling regulation infringes on the freedom of the communication of views and the representation of interests to government which is the First Amendment core of lobbying. Revolving door rules are in widespread use, and much of the recent focus of reform has proceeded on the assumption that they are inadequate and ought to be bolstered by extending the revolving door period or widening the scope of exclusion from particular matters to dealings with offices, agencies, or branches of government. *Brinkman* is a reminder that there may be a First Amendment outer limit here too, even if *Brinkman* placed that limit too close to the kinds of relationships that could justify revolving door-type restrictions.

C. Options

The *Brinkman* decision to the contrary notwithstanding there appears to be broad support for revolving door restrictions. The principle issues relate to the duration of a restriction and its scope, with both of those questions arguably affected by the government employment status of the former public official. The many variations in possible revolving door rules preclude the formulation of a handful of specific alternatives. However, there are factors going into revolving door rules and the question of unfair access based on relationships with government officials that are worth considering.

First, it might be appropriate to recommend that the restrictions on former elected officials be longer and more extensive than the restrictions on appointees and staff. Former elected legislators, for example, might be barred from lobbying the legislature in which they once sat for an entire legislative term after they leave office, whereas staff might be subject to a restriction that is

both shorter in time and limited to the offices or committees in which they once served. This would be consistent with both the greater power and prestige attributable to elected officials, the greater opportunities they are likely to have in addition to lobbying, and the greater public awareness of and concern about their lobbying.

Second, outright restrictions on lobbying by former government officials might be supplemented by a disclosure requirement that could extend much further than the restricted period. HLOGA, for example, requires registered lobbyists to disclose their past executive branch and congressional employment going back twenty years; the LDA had previously required reporting of federal government employment only within the previous two years. Again, disclosure does not limit the activity disclosed, but can provide information about the magnitude of the activity which can be useful in deciding if further regulation is needed.

Third, there could be regulation of the efforts by current public officials to obtain post-public-service employment. Such a regulation would directly address one of the concerns underlying the revolving door rule – that public officials may be tempted to make decisions while in office with an eye to future employment. One provision of HLOGA requires members and senior staff of the House of Representatives to disclose to the House Committee on Standards of Official Conduct any negotiations or agreements with respect to future employment or compensation, and to recuse themselves "from any matter in which there is a conflict of interest or the appearance of a conflict. The House rule is not limited to negotiations involving post-government-service employment as a lobbyist, but such a rule would appear to be particularly appropriate in the lobbying context.

Fourth, some attention should be given to the so-called reverse revolving door, that is, the appointment of lobbyists to government positions. Two initiatives of the Obama Administration – one dealing with the appointment of members of the administration and the other with appointments to federal advisory boards and commissions – have highlighted the possibilities of some reverse revolving door rule. The two Obama Administration measures raise very different concerns. It is difficult to see the case for a blanket ban on the reverse revolving door appointment of lobbyists to full-time appointments. Presumably, the appointee's prior service as a lobbyist would be known to both those making the appointment and to the Senate if the position requires

Senate confirmation. If the knowledge, experience, and perspective the person brings to the position is attractive, it is hard to see why prior service as a lobbyist should be disqualifying per se, although closeness to a particular organization, industry, or special interest group might be a factor taken into account. If the concern is that the appointee would subsequently exploit the position when he or she leaves the government, that could be addressed by the regular revolving door rule. Restrictions on the appointment of lobbyists to part-time positions might make more sense, since there could be a legitimate concern that a lobbyist who simultaneously holds high government office might have an unfair advantage in seeking to influence government action. However, it is uncertain whether this problem is more acute for lobbyists than for other individuals whose private sector positions give them a stake in government actions and who, indeed, are often appointed because they represent industries, organizations, or interest groups affected by the recommendations or decisions of the committees or boards on which they are asked to serve.

Finally, the concern about unfair access which is at least partly accountable for the adoption of revolving door rules might also justify restrictions on lobbying by other individuals with specially close relationships to government officials, such as spouses, close relatives, or other members of a government official's household. One provision of HLOGA is a "sense of the Congress" statement that "the use of a family relationship by a lobbyist who is an immediate family member of a Member of Congress to gain special advantages over other lobbyists is inappropriate."[51] HLOGA amended the rules of the House of Representatives to provide that a member of the House shall prohibit all staff employed by the member "from making any lobbying contact . . . with that individual's spouse if that spouse is a lobbyist . . . or is employed or retained by such a lobbyist for the purpose of influencing legislation." HLOGA's amendment of the Senate's rules is aimed more specifically at lobbying by the spouse or immediate family member of a Senator. The rule generally bars Senators and Senate staff from having any lobbying contact with the spouse of a Senator who is a registered lobbyist or employed or retained by a registered lobbyist, while barring the other immediate family members of a Senator from having lobbying contacts with the staff of that Senator. Although the Senate and House measures are quite different they both support the principle of some restrictions on lobbying by spouses and other persons closely related to members of Congress and, perhaps, other senior government officials.

VII. Disclosure Issues

Disclosure is the principal form of lobbying regulation and the main lines of disclosure are widespread and well-established. Although there is considerable variation across jurisdictions, most disclosure laws tend to focus on requiring lobbyists to identify their clients, the compensation they receive, the funds they spend on lobbying, and the subjects with respect to which they lobby. Many recent disclosure law changes have focused on such issues as the frequency of reporting, the threshold for reporting requirements, the use of modern information technology to make reports more accessible, and penalties and enforcement. As already indicated, a number of the substantive concerns with respect to lobbying – such as grassroots spending, campaign finance activities, contingent fees, and revolving door employment – may also be addressed through disclosure (or, in the case of grassroots activity, only through disclosure). Three other proposals with respect to the content of disclosure are also worthy of consideration.

First, disclosure could be expanded to require lobbyists to identify the government officials lobbied. It is a striking feature of lobbying disclosure laws that for all their attention to the money spent on lobbying few, if any, require the reporting of the specific contacts a lobbyist makes with a legislator, staff member, or executive branch officer in the course of lobbying. Most lobbying disclosure laws, such as the federal LDA, focus largely on mandating the reporting of how much was spent on lobbying during the reporting period and on identifying the clients but require little or nothing about the nature of the lobbying contacts themselves. Thus, a registered federal lobbyist must report on "the general issue area in which the registrant engaged in lobbying activities," "specific issues upon which a lobbyist employed by the registrant engaged in lobbying activities, including, to the maximum extent practicable, a list of bill numbers and references to specific executive branches;" and "a statement of the Houses of Congress and the Federal agencies contacted by lobbyists employed by the registrant on behalf of the client." But there is no requirement that the lobbyist indicate the specific actions requested of the officials lobbied, or, more importantly, that the lobbyist filing a report actually identify the officials lobbied – or even, the specific congressional committee or subcommittee, or the specific agency bureau, unit, or division, contacted.

"Contact disclosure" would require lobbyists to disclose the specific officials, or at least the congressional offices, congressional committees, and specific federal agency offices,

contacted and to provide more information about the content of that contact than the number of the bill and a "reference" to executive branch actions. If the purpose of lobbying transparency is to serve the public interest in understanding "the efforts of paid lobbyists to influence the public decisionmaking process,"[52] such contact disclosure would be at least as valuable as disclosure of the amount of money spent on lobbying. Indeed, only contact disclosure can actually demonstrate the links between particular lobbyists and particular elected officials or senior agency appointees. When combined with campaign finance disclosure of donations to the same elected officials, contact disclosure could give a fuller picture of the interactions between interest groups and government. The ABA Task Force of Federal Lobbying Laws recently called for a version of contact disclosure focused on congressional offices and committees, rather than specific individuals,[53] and the Sunlight Foundation has developed a model Lobbying Transparency Act which would require reporting the names of the officials contacted.[54] The city of San Francisco amended its Lobbying Ordinance in 2010 to require monthly reports by registered lobbyists that include the name of each city officer with whom the lobbyist made a contact during the reporting period, the date of the contact, and the "local legislative or administrative action that the lobbyist sought to influence, including, if any, the title and file number of any resolution, motion, appeal, application, petition, nomination, ordinance, amendment, approval, referral, permit, license, entitlement, or contract, and the outcome sought by the client."[55]

An alternative approach would be to require officials to publicly report on their contacts with lobbyists. Professor Krishnakumar proposed this in her 2007 article,[56] and President Obama in his 2011 State of the Union Message called on Congress "to do what the White House has already done" and put online information about "when your elected officials are meeting with lobbyists" [57]-- although the proposal was rejected by Congressional leaders out of hand.[58] As the goal of transparency is to get a better public understanding of the interest group pressures on public officials, disclosure by officials of lobbyist contacts makes some sense. But focussing contact disclosure efforts on the lobbyists rather than the officials is likely to be more successful. Public officials may not always know whether the people with whom they are meeting are lobbyists – indeed, in some cases, whether an individual is to be treated as a regulated lobbyist may vary across, or within, reporting periods. Public officials need not ordinarily maintain detailed logs of all their meetings.

And enforcement of reporting requirements against public officials, including compliance with reporting time deadlines, is likely to be difficult. Registered lobbyists, by contrast, know who they are; are most likely keeping time logs in order to bill their clients; and already have to file periodic reports; while lobbying regulatory offices are likely to be more vigorous in enforcing requirements against private lobbyists than public officials. Moreover, resistance to adopting contact disclosure is likely to be far greater if the disclosure has to be made by the lawmakers themselves instead of the lobbyists.

The ABA Task Force Report recommends that registered lobbyists be required to report "all congressional offices, congressional committees, and federal agencies and offices contacted." As the Report observes, such disclosure "would directly serve the social interest in tracing the impact of lobbying on public decision-making." The Task Force considered but declined to recommend that the disclosure be extended to require the identification of specific individuals contact during a lobbying campaign on the grounds that "[t]he obligation to keep track of conversations with multiple staff members in a given office would be burdensome."

It could certainly be objected that requiring disclosure of specific contacts takes transparency too far, could discourage officials and their staff from having meetings that would provide them with useful facts and arguments concerning pending proposals, and could lead to a less informed government. Still, much as campaign contribution disclosure addresses the relationships between specific donors and candidates as well as the amounts provided, it might make sense for lobbying disclosure to identify more specifically the interactions between lobbyists and the public officials lobbied.

Second, lobbying disclosure could be expanded to provide more information about the client or principal retaining the lobbyist in situations where the client or principal is a coalition, umbrella organization, trade association, or other group acting on behalf of member organizations. In the campaign finance setting, the 2010 election witnessed extensive spending activity by organizations that were really composed of other organizations. The organization nominally responsible for the campaign spending filed the appropriate campaign reports indicating the amounts it had spent and the purposes of the spending, but these organizations with anodyne names did not disclose the organizations that were funding the spending. These could be an issue with respect to

lobbying, too, especially if lobbying disclosure is expanded to cover grassroots activity. Even without the disclosure of grassroots spending, the rise of lobbying by organizations composed of organizations was sufficiently serious that HLOGA amended the LDA to require the disclosure of any organization that contributes more than $5000 to a registered lobbyist or client in a quarterly period and "actively participates" in the planning, supervision or control of the registrant's lobbying activities. The United States Court of Appeals for the District of Columbia Circuit in *National Association of Manufacturers v. Taylor*[59] rejected a host of First Amendment arguments raised against the level and upheld its constitutionality. Although lobbying disclosure laws have generally avoided requiring disclosure of the donors to membership organizations that engage in lobbying subject to regulation, at least in part because of constitutional concerns about the impact of such disclosure on the freedom of association, the HLOGA provision, as sustained in *NAM v. Taylor*, presents a model that could be used by other jurisdictions.

Interest in this issue may be growing especially as coalitions of organizations seek to influence the legislative process, particularly through grassroots lobbying. In New York, which has experienced extensive grassroots lobbying by coalitions of organizations intending to influence state budget decisions, Governor Cuomo recently proposed requiring any organization that spends at least $50,000 and three percent of its total expenditures on lobbying to disclose any donor that contributes at least $5000.[60] A spokesman for the governor noted that "many groups fighting his proposals, such as the Alliance for Quality Education, which is backed by the teachers union . . . hide donor information." Cuomo's predecessor, David Paterson, whose budgets had also been the targets of critical television advertising, "first raised the issue last year by attacking groups that 'hide their donors behind walls of sanctimony.'" By going beyond the disclosure of major donors actively involved in organizational lobbying decisions and seeking to reach all major donors, whether involved in an organization's lobbying efforts or not, the Cuomo proposal is surely pushing the edge of the constitutional envelope. But his proposal underscores the interest in enhanced disclosure of the resources behind coalition lobbying.

Third, the ABA Task Force Report has proposed that federal lobbying law be amended to require registered lobbyists to report the names of all other persons or entities retained to provide "lobbying support" as well as the activities of these outside firms so retained. As the

Report points out,

> "modern professional lobbying campaigns often involve the participation of multiple firms. Their actions may provide polling, public relations work, coalition building, and even the strategic planning for a lobbying campaign, and they may include the participation of well-known public figures whose involvement in the cause would be of great interest to the public."

The disclosure of such "lobbying support" activity would provide a more complete and accurate picture of the scope of a lobbying effort. Moreover, implicit in the justification for the proposal provided by the ABA Task Force Report is the recognition that prominent former senators and members of the House of Representatives have avoided both having to register as lobbyists and the revolving-door restriction applicable to former members of Congress who become lobbyists by limiting their activities to "strategic planning for a lobbying campaign." The ABA Task Force proposal would, thus, both improve the quality of disclosure and address what is widely perceived to be a loophole in the lobbying law.

VIII. Conclusion

This Draft addresses only a limited number of issues implicated by any effort to formulate a set of principles intended to frame the regulation of lobbying. There are many other issues that could be addressed, including such basic questions as

- the definition of lobbying, which implicates the "strategic consultant" question;
- differences between lobbying the legislative and executive branches;
- the details of registration and reporting requirements;
- administration and enforcement of lobbying regulation requirements;
- restrictions on lobbyist-provided gifts, travel, meals, and entertainment to government officials;
- whether the level-playing-field goals underlying the principle against unfair influence requires consideration of proposals to find ways to "level up" the representation of underrepresented groups, as some scholars have recently suggested[61]
- and the interplay of lobbying with other government ethics issues.

Whether these are appropriate for inclusion in the Principles of Government Ethics and whether, if so, they ought to be treated in the chapter on Lobbying or elsewhere in the Principles, will have to await future consideration.

NOTES

1. See, e.g., Moffett v. Killian, 360 F. Supp. 228 (D. Conn. 1973); Fidanque v. Oregon Standards and Practices Comm., 969 p.2d 376 (Ore. 1998); ACLU of Illinois v. White, 692 F. Supp.2d 896 (N.D. Ill. 2010).

2. Marshall v. Baltimore & Ohio RR Co., 57 U.S. 314, 314-19 (1854)

3.Id.

4. Id. at 335

5. Id. at 336.

6. 59 U.S. 45, 54-56 (1864).

7.88 U.S. 441, 448-53 (1874).

8. See, e.g., Hazelton v. Sheckels, 202 U.S. 71, 78-79 (1906).

9. 275 U.S. 199, 205-06 (1927).

10.345 U.S. 41, 44-49 (1953). Justices Black and Douglas concurred in the result but would have held that the investigative resolution was unconstitutional.

11.Nicholas W. Allard, "Lobbying is an Honorable Profession: The Right to Petition and the Competition to be Right," 19 Stan. L. & Pol. Rev. 23, 48-49 (2008).

12. Thomas M. Susman, "Lobbying in the 21st Century – Reciprocity and the Need for Reform," 58 Admin L. Rev. 737, 742, 744-45 (2006).

13. William V. Luneburg, "Anonymity and its Dubious Relevance to the Constitutionality of Lobbying Disclosure Regulation," 19 Stan. L. & Pol. Rev. 69, 102 (2008).

14. "Lobbying Law in the Spotlight: Challenges and Improvements," Report of the Task Force on Federal Lobbying Laws, Section of Administrative Law and Regulatory Practice, American Bar Association (Jan. 3, 2011).

15. Jay Alan Sekulow & Erik M. Zimmerman, "Weeding Them Out By the Roots: The Unconstitutionality of Regulating Grassroots Issue Advocacy," 19 Stan L. & Pol. Rev. 164, 165 (2008).

16. Lloyd Hitoshi Mayer, "What is This 'Lobbying' That We Are All So Worried About?" 26 Yale L. & Pol. Rev. 485, 558-60 (2007).

17. Chip Nielsen, Jason D. Kaune, Jennie Unger Eddy, "State Lobby and Gift Laws," Practicing Law Institute, Corporate Law and Practice Course Handbook Series, 1760 PLI/Corp 677 (2009).

18. Young Americans for Freedom, Inc. v. Gorton, 522 P.2d 189, 192 (Wash. 1974).

19. Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 242 N.W.2d 3, 23 (1976).

20. Minnesota State Ethical Practices Board v. National Rifle Ass'n, 761 F.2d 509. 512-13 (8th Cir. 1985).

21. Florida League of Professional Lobbyists, Inc. v. Meggs, 87 F.3d 457, 461 (11th Cir. 1996).

22. Florida Ass'n of Professional Lobbyists, Inc. v. Division of Leg. Information Services, 525 F.3d 1073, 1080 (11th Cir. 2008).

23. Montana Automobile Ass'n v. Greely, 632 P.2d 300, 306-308 (Mont. 1981).

24. YAF v. Gorton, supra, 522 P.22d at 191.

25. Advisory Opinion, supra, 242 N.W2d at 23.

26. Cf. Eric Lipton, Wife's Charity Offers Corporate Tie to a Governor, N.Y. Times, March 7, 2011.

27. William V. Luneburg, "The Evolution of Federal Lobbying Regulation," 41 McGeorge L. Rev. 85, 114 (2009).

28. Allard, supra, at 60.

29. The cases examined in this paragraph include State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999); Arkansas Right to Life State PAC v. Butler, 29 F. Supp.2d 540 (W.D. Ark. 1998); State v. Dodd, 561 So.2d 263 (Fla. 1990); Trout v. State, 231 S.W.3d 140 (Mo. 2007); Shrink Missouri Gov't PAC v. Maupin, 922 F. Supp. 1413 (E.D. Mo. 1996); Emison v. Catalano, 951 F. Supp. 714 (E.D. Tenn. 1996).

30. Kimbell v. Hooper, 665 A.2d 44 (Vt. 1995); North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999).

31. Cases discussed in this paragraph include Fair Political Practices Comm. v. Superior Court, 599 F.2d 46 (Cal. 1979); Institute of Government Advocates v. Fair Political Practices Comm., 164 F. Supp.2d 1183 (E.D. Cal. 2001); State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999); Associated Indus. of Kentucky v. Comm., 912 S.W.2d 947 (Ky. 1995); Green Party of Connecticut v. Garfield, 616 F.3d 189 (2nd Cir. 2010); Preston v. Leake, 2010 WL 4153295 (E.D. N.C. 2010).

32. See Barker v. State of Wisconsin Ethics Board, 841 F. Supp. 255 (W.D. Wis. 255); Maryland Right to Life State Political Action Comm. v. Weathersbee, 975 F. Supp. 791 (D. Md. 1997).

33. Dorie Apollonio, Bruce Cain & Lee Drutman, Access and Lobbying: Beyond the Corruption Paradigm, 36 Hastings Const. L.Q. 13, 37 (2008).

34. Marianne Bertrand, Matilde Bombardini, Frencesco Trebbi, "Is It Whom You Know or What You Know? An Empirical Assessment of the Lobbying Process," ERLINK"http://ssrn.com/abstract=1748024"http://ssrn.com/abstract=1748024 (Jan. 2011 draft).

35. Public Citizen, The Bankrollers: Lobbyists' Payments to the Lawmakers they Court, 1998-2006 (2006), http://www.citizen.org/documents/BankrollersFinal.pdf.

36. Sources for this Section include Stacie L. Fatka and Jason Miles Levien, Note, Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution, 35 Harv. J. Legis. 559 (1998); Meredith A. Capps, "Gouging the Government": Why a Federal Contingent Fee Lobbying Prohibition is Consistent with First Amendment Freedoms, 58 Vand. L. Rev. 1885 (2005); Thomas M. Susman & Margaret Martin, Contingent Fee Lobbying: Inflaming Avarice or Facilitating Constitutional Rights?. 31 Seton Hall Legis. J. 311 (2006); NCSL, Ethics: Contingency Fees for Lobbyists, http://www.ncsl.org/default.aspx?tabid=15351 (June 2010).

37. See Florida League of Professional Lobbyists, Inc. v. Meggs, 87 F.3d 457, 462 (11th Cir. 1996); City of Hialeah Gardens v. John L. Adams & Co. 599 So.2d 1322 (Fla. Ct. App. 1992); Assoc'd Indus. of Kentucky v. Comm., 912, S.W.2d 947, 951 (Ky. 1995); Bereano v. State Ethics Comm., 944 A.2d 538 (Md. 2008).

38. Montana Automobile Ass'n v. Greely,632 P.2d 378, 392-94 (Mont. 1981).

39. See Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984); Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988).

40. Sources for this Part include Robert G. Vaughn. "Post-Employment Restrictions and the Regulation of Lobbying by Former Employees," chapter 24 of William V. Luneburg and Thomas M. Susman, The Lobbying Manual: A Complete Guide to Federal Law Governing Lawyers and Lobbyists (3d ed. 2005); Note, "Post-Employment Lobbying Restrictions on the Legislative Branch of Government: A Minimalist Approach to Regulating Ethics in Government," 65 Wash. L. Rev. 883 (1990); Michael H. Chang, "Protecting the Appearance of Propriety: The Policies Underlying the One-Year Ban on Post-Congressional Lobbying Employment," 5 Kan. J. L. & Pub. Pol. 121 (1995); Daniel G. Webber, Jr., "Proposed Revolving Door Restrictions: Limiting Lobbying by Ex-Lawmakers," 21 Okla. City U.L. Rev. 29 (1996); Jeni L. Lassell, "The Revolving Door: Should Oregon Restrict Former Legislators From Becoming Lobbyists?" 82 Ore. L. Rev. 979 (2003); United States v. Nassar, 476 F.2d 1111 (7th Cir. 1973); State v. Nipps, 419 N.E.2d 1128 (Ohio App. 1979); Brinkman v. Budish, 692 F.Supp.2d 855 (S.D. Ohio 2010).

41. Vincent Johnson, Regulating Lobbyists: Ethics, Law and Public Policy, 16 Cornell J. L. & Pub. Pol. 1, 32 (2006).

42. Id.

43. Quoted in Chang, supra.

44. Id.

45. See Jennifer Yachnin and Kate Ackley, "Hampton Case a Reminder of 'Revolving Door' Crimes," Roll Call, March 28, 2011.

46. Brooks Barnes and Michael Cieply, "Motion Picture Industry Group Names Ex-Senator Dodd as Its new Chief," N.Y. Times, March 1, 2011. To be sure, Senator Dodd's case is not unusual and top in-house lobbyists are often not lobbyists within the meaning of lobbying laws even when revolving door restrictions are not at issue. See, e.g., Edward Wyatt, "AT&T Lobbyist Faces Beltway Test in T-Mobile Deal," N.Y. Times, March 26, 2011 (AT&T's senior vice present for external and legislative affairs – the company's "chief lobbyist" – "is technically not a lobbyist").

47.United States v. Nasser, 476 F.2d 1111, 1115 (7th Cir. 1973).

48. State v. Nipps, 419 N.E.2d 1128, 1132 (Ohio. App. 1979).

49. 692 F.Supp.2d 855 (S.D, Ohio 2010).

50. Buckley v. Valeo, 424 U.S. 1, 83 (1976).

51. HLOGA, § 214 (1).

52. LDA, Section 2(1).

53. Lobbying Law in the Spotlight: Challenges and Improvements at 13-15.

54. Sunlight Foundation, Real Time Online Lobbying Transparency Act, http://publicmarkup.org/bill/real-time-online-lobbying-transparency-act/print/.

55.
San Francisco Lobbying Ordinance (2010) at sec. 2.110(c)(4) , http://www.sfethics.org/ethics/2009/12/lobbyist-ordinance-2010.html.

56. Anita S. Krishnakumar, Towards a Madisonian, Interest-Group Based Approach to Lobbying Regulation, 58 Ala. L. Rev. 513 (2007).

57. Remarks by the President in State of the Union Address, http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address, Jan. 25, 2011.

58. Russell Berman and Kevin Bogardus, "Obama's Call for Disclosure of Lobbying Visits Falls Flat," The Hill, Jan. 26, 2011. Rep Darrell Issa (R-Cal), who chairs the House Committee in

charge of government oversight contended that the President was being hypocritical, "noting reports that White House officials met with lobbyists at nearby coffee shops to avoid their own disclosure rules."

59. 582 F.3d 1 (D.C. Cir. 2009).

60. Kenneth Lovett, Cuomo Wants Lobbying Groups to be Required to Disclose Financial Backers," Daily News, March 13, 2011.

61. See Heather Gerken, Why Lobbying as the New Campaign Finance Reform, Election Law Blog, Feb. 9, 2011; Gerken, Leveling Up: A Public Finance Analog for Lobbying, Election Law Blog, Feb. 10, 2011; Dorie Apollonio, Bruce Cain & Lee Drutman, Access and Lobbying: Beyond the Corruption Paradigm, 36 Hastings Const. L.Q. 13, 46 (2008).