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The Scarlet "L": Lobbying Reform and the First Amendment

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THE FIRST YEAR OF THE OBAMA PRESIDENCY

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The Scarlet "L": Lobbying Reform and the First Amendment

Mona Sheth

The Name Heard 'Round the Nation

Barack Obama's campaign ban on contributions from lobbyists, executive ethics order, and American Recovery and Reinvestment Act (ARRA) lobbying restrictions may have resulted from the actions of one man: Jack Abramoff. Appearing before the U.S. District Court on January 3, 2006, "superlobbyist" Abramoff pled guilty to defrauding four different tribes out of millions of dollars, evading taxes, conspiring to bribe lawmakers, and inducing former Capitol Hill staffers to violate the one-year ban on lobbying their former bosses.[1] After reaching a plea agreement with government lawyers, Abramoff apologized. "Your Honor . . . I have profound regret and sorrow for the multitude of mistakes and harm I have caused . . . I only hope that I can merit forgiveness from the Almighty and from those I have wronged or caused to suffer."[2] The "multitude of mistakes" included bribing lawmakers with payments that totaled nearly $82 million (not to mention publicly insulting his Native American clients as "troglodytes," defined by Abramoff as a "lower form of existence").[3] At one point, he even worked both for and against a client with regard to approval for a casino.[4] When his house of cards fell, the Abramoff scandal had exposed a net of corruption that encompassed nearly half a dozen House and Senate

[1] Susan Schmidt & James V. Grimaldi, *Abramoff Pleads Guilty to 3 Counts*, WASH. POST, Jan. 4, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/01/03/AR2006010300474.html.
[2] *Id.*
[3] *See id.*; Mary Ann Akers, *Abramoff's Pet Names*, ROLL CALL, June 27, 2006, http://www.rollcall.com/issues/51_144/hoh/14025-1.html?type=printer_friendly.
[4] THE LOBBYING MANUAL 32 (William V. Luneburg, et al. eds., American Bar Association 2005) (2009).

members, congressional staffers, Interior Department officials, and lobbying and law firm associates.[5]

Members of both sides of the aisle could agree on one fact: 2006 was not a good year for Republicans. Former Majority Leader Tom "The Hammer" Delay resigned when indicted for money laundering and accepting illegal campaign contributions in 2005.[6] DeLay, the architect of the "K Street" strategy of extending Republican Party control in Washington, also influenced future lobbying reforms specifically designed to prevent such tactics from politicizing the city under one party control.[7] In October of 2006, Representative Bob Ney pled guilty to conspiracy and making false statements in relation to the Abramoff scandal.[8] Public perception quickly heated up against lobbyists. In a CNN exit poll conducted during the 2006 midterm elections, voters cited corruption and ethics over the Iraq war as the decisive issue in their vote.[9] And when the Democrats swept both Houses in November after a twelve-year hiatus, this perfect storm of events conspired to engender the strongest legislative response in lobbying reform since 1995.[10] As Abramoff began to serve prison time in Maryland, the newly installed Speaker, Nancy Pelosi, announced a "First Hundred Hours" agenda that prioritized reforming the now infamous industry of lobbying.[11]

The stage was set for a trend of events that would eventually lead to the subsequent vilification of the lobbying industry. While the enactment of the Honest Leadership and Open

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[5] Schmidt & Grimaldi, *supra* note 1.
[6] R. Jeffrey Smith, *DeLay Indicted in Texas Probe*, WASH. POST, Sept. 29, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/09/28/AR2005092800270.html.
[7] RONALD J. HREBENAR & BRYSON B. MORGAN, LOBBYING IN AMERICA 130 (2009).
[8] *Rep. Ney Pleads Guilty in Lobbying Scandal*, ASSOCIATED PRESS, Oct. 13, 2006, http://www.msnbc.msn.com/id/15249272/.
[9] *See Corruption Named as a Key Issue by Voters in Exit Polls*, CNN, Nov. 8, 2006, http://www.cnn.org/2006/POLITICS/11/07/election.exitpolls/.
[10] *See Bush, Dems Promise Cooperation as House Shifts*, CNN, Nov. 9, 2006, http://www.cnn.com/2006/POLITICS/11/09/election.main/index.html.
[11] *Id.*

Government Act of 2007 (HLOGA) in Congress shifted the lobbying industry towards heightened transparency and stronger ethics, future reforms of the executive branch threatened the constitutional rights of lobbyists. As the following pages summarize, the collective forces of the 2008 presidential campaign, executive ethics order, and stimulus restrictions also endangered the success of the congressional response. An examination of the Obama Administration's executive directives and an exploration of the constitutional issues implicated in the ARRA guidance on stimulus funds reveal that disclosure and enforcement are more effective (and constitutional) methods to reform the lobbying industry.

The Art of Lobbying and its Regulations

What does the broad term "lobbying" encompass? According to the American League of Lobbyists (ALL):

> Lobbying involves much more than persuading legislators. Its principal elements include researching and analyzing legislation or regulatory proposals; monitoring and reporting on developments; attending congressional or regulatory hearings; working with coalitions interested in the same issues; and then educating not only government officials but also employees and corporate officers as to the implications of various changes. What most lay people regard as lobbying—the actual communication with government officials—represents the smallest portion of a lobbyist's time; a far greater proportion is devoted to the other aspects of preparation, information and communication.[12]

Under HLOGA, to qualify as a lobbyist an individual must be (1) employed or retained by a client for financial or other compensation, (2) employed for services that include more than one lobbying contact, and (3) his or her lobbying activities[13] for that client must amount to 20% or

[12]American League of Lobbyists, *What is Lobbying?*, Sept. 8, 2009, http://www.alldc.org/publicresources/lobbying.cfm.

[13]THE LOBBYING MANUAL, *supra* note 4, at 75. Lobbying activities include both lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research for use in contacts, and coordination with the lobbying activities of others. Thus, assisting to draft legislation and conferring with clients as regards to strategy are included under the "activities" umbrella. As addressed later, grassroots lobbying is not included as an activity under HLOGA or the LDA.

more of the time that the individual spends on services to that client over a three month period.[14] The right to lobby stems from the First Amendment of the United States Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, *and to petition the Government for a redress of grievances.*" (emphasis added).[15]

Associations that hire lobbyists serve important and diverse functions. They allow citizens to unite their voices together to magnify and express their political concerns in an effective and strategic manner—to exercise their right of assembly and speech. Special interest groups (SIGs) range from non-profits, law firms, and corporations to unions, trade associations, professional associations, and consumer organizations.[16] Over 7,400 national associations are headquartered in Washington, D.C., and many of them employ both direct and indirect lobbying to promote their varied interests.[17] Gaining increased popularity, indirect lobbying often involves stimulating core constituencies and is often referred to as "grassroots lobbying."[18] Grassroots campaigns utilize direct mail, public relations, newspaper advertisements, web design (nicknamed "e-campaigns"), coalition building, and generating Internet traffic as techniques to advance the causes of a group.[19] With such a panoply of creative techniques (and money) at an association's disposal, lobbyists have wide latitude for unchecked corruption and abuse. Furthermore, the institutional relationships that SIGs have solidified with politicians and staffers over many years has ensured that the industry of lobbying continue unregulated until very recently.

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[14] 2 U.S.C. § 1602(10) (2007).
[15] U.S. CONST. amend. I.
[16] JOHN R. WRIGHT, INTEREST GROUPS AND CONGRESS, LOBBYING, CONTRIBUTIONS, AND INFLUENCE 19-22 (2002). An attached chart breaking down special interests and the percentage of lobbyists who represent them is included at the end of this article.
[17] *See generally* HREBENAR & MORGAN, *supra* note 7, at 9.
[18] *Id.* at 31.
[19] *See* Chris Frates, *House SCHIP Bill Widens Generation Gap*, POLITICO, Sept. 11, 2007, at 12.

Before the advent of the Obama Administration's reforms, Congress passed several bills to create greater public awareness of the efforts of paid lobbyists to influence the public decision-making process in both the legislative and executive branches of the Federal Government. On December 19, 1995 President Clinton signed into law The Lobbying Disclosure Act of 1995 (LDA), which took effect on January 1, 1996. According to a report written by the Congressional Research Service (CRS):

> The LDA requires any lobbyist who is compensated for his or her actions, whether an individual or firm, to register and to file with the Clerk of the House and the Secretary of the Senate semi-annual reports of their activities. These reports identify the name of the registrant lobbyist, client, and the broad issue areas in which lobbying was carried out.[20]

While the LDA implemented procedures to promulgate effective public disclosure by means of stronger administrative and enforcement provisions, the Act did not address grassroots campaigns such as the National Rifle Association's letter writing campaign to Congress.[21] The LDA also neglected to tackle "advisers" or "consultants" who devise lobbying strategies, a class that often includes former Members of Congress.[22] Moreover, the Act contained disparate filing requirements: LDA excluded reporting requirements for organizations such as the Pharmaceutical Research and Manufacturers of America (PhRMA) that provided seed money to small activist groups around the country to push their agenda.[23] Despite many shortcomings, LDA was the first substantive lobbying reform in fifty years since the 1946 Federal Regulation of Lobbying Act (which was declared unenforceable by the Department of Justice and contained frighteningly-sized loopholes).[24]

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[20] R. ERIC PETERSON, LOBBYING REFORM: BACKGROUND AND LEGISLATIVE PROPOSALS, 109TH CONGRESS 1 (Congressional Research Service 2006), *available at* http://www.fas.org/sgp/crs/misc/RL33065.pdf.
[21] Lobbying Disclosure Act of 1995, 2 U.S.C. 1601 § 1602 (1995).
[22] *Id.*
[23] Center for Responsive Politics, Lobbying: Influence Inc. 2000 http://www.opensecrets.org/lobby/lobby00/summary.php.
[24] THE LOBBYING MANUAL, *supra* note 4, at vii.

Twelve years after the enactment of the LDA and several lobbying scandals later, Majority Leader Harry Reid, Speaker Nancy Pelosi, and Senator Barack Obama presented HLOGA. HLOGA set forth amendments to the LDA, Federal Elections Campaign Act (FECA), Senate Rules, and House Rules.[25] Whereas LDA focused exclusively on disclosure rules, HLOGA created lobbying regulations ranging from gift bans to campaign contribution prohibitions. Known colloquially as the "Jack Abramoff Reform," HLOGA banned all gifts from lobbyists to congressional members and staffers, as well as privately financed travel, with a few minor exceptions.[26] The Act also provided for monetary civil penalties of up to $200,000 for failing to comply with lobbying laws—and a criminal penalty of up to five years of imprisonment for failing to comply with any HLOGA provision.[27] In the area of campaign reform, HLOGA mandated disclosure of lobbyists' donations to members' charities, established an online public database of lobbyist disclosure information, and instructed that businesses or organizations that contributed more than $5,000 and participated in lobbying with coalitions disclose their activities.[28] The "DeLay" reform to combat the evils of the "K Street Project" resulted in a prohibition on Members of Congress and staff from influencing hiring decisions of private entities based on partisan affiliation.[29] The legislation additionally included persons who supervised lobbying activities to the definition of "lobbyist" and increased the time between filings from semi-annual to quarterly.[30] Finally, lobbyists were required to disclose all contributions made to Members of Congress, federal candidates, political action committees

[25] The Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (codified in scattered sections of U.S.C.).
[26] 2 U.S.C. § 1605(d)(1)(G).
[27] 121 Stat. 735.
[28] *Id.* at 748.
[29] *Id.* at 766.
[30] *Id.* at 741.

(PAC), and political parties that exceeded $200.[31] Other major provisions addressed contribution "bundling"[32] by lobbyists and prohibited lobbyists from attending privately funded trips.[33]

The enactment of HLOGA was historic. The enforcement of HLOGA was more problematic. HLOGA imposed a requirement for annual audits by the Comptroller General of randomly selected registration forms and reports in order to determine compliance and recommend to Congress if it should conduct investigations.[34] House and Senate members were then to report violations to the Department of Justice for prosecution.[35] Since neither the Secretary of the Senate nor the Clerk of the House had formal enforcement authority, it fell upon the U.S. Attorney for the District of Columbia to prosecute offenses.[36] As of September 2008, there were over 4,000 referrals of potential LDA violations to the U.S. Attorney, but only a handful were prosecuted (GAO also noted that only 5 of 700 personnel were assigned LDA duties).[37] Although only two years have elapsed since its enactment, HLOGA's strong regulations necessitate tighter and more stringent enforcement if compliance is a desired objective of this novel regulation.

Closing out the press conference on HLOGA in the Library of Congress, then-Senator Obama declared:

> The hired guns on K Street who've been allowed to help write our laws have gotten exactly what they paid for—massive tax breaks for the oil companies, giveaways to the drug industry, and no-bid contracts for Gulf Coast reconstruction. Meanwhile, hardworking Americans . . . who can't afford their

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[31] *Id.* at 743.
[32] According to the Federal Election Commission, the term "bundling" is commonly used to describe the practice of an individual collecting several contributions and delivering them to a candidate or campaign. A party to be influenced usually credits the lobbyist for the contributions. All "bundled contributions" to a campaign committee, leadership PAC, or political party committee totaling more than $15,000 in the aggregate during a semiannual period must be reported by the recipient. http://www.fec.gov/law/law_rulemakings.shtml#bundling.
[33] *See* HREBENAR & MORGAN, *supra* note 7, at 181-83.
[34] *Id.* at 185.
[35] 2 U.S.C. § 1605.
[36] THE LOBBYING MANUAL, *supra* note 4, at 183-35.
[37] *Id.* at 187.

> own lobbyist wonder when someone in Washington will help them send their kids to college or pay their medical bills or guarantee their pension. It's time we answered their call.[38]

Senator Obama's rhetoric would foreshadow the aggressive attack on lobbyists and special interests during the 2008 presidential campaign—ushering in an era in Washington where all lobbyists were personified as cigar-chomping and golf-playing Abramoff caricatures. The debate surrounding disclosure, transparency, and enforcement that were so pivotal to the success of HLOGA were soon to be replaced by sound-bites and familiar rhetoric about "Washington culture."

The Race to the Bottom

During the presidential campaign, Senators McCain and Obama maintained that they were above the influence of lobbyists and delivered tough talk on staying "outside" Washington corruption. When then Senator Obama formally launched his campaign in 2007, he stated that his campaign would not accept money from PACs or federally registered lobbyists.[39] On June 5, 2008, the Democratic National Committee adopted the presumptive nominee's policy of barring contributions from federally registered lobbyists and PACs.[40] Mr. Nichols,[41] a lobbyist for the public interest sector, related his experience during the campaign: "I was at the Democratic National Convention, and all I wanted was an Obama t-shirt. They handed me a form and said: you need to confirm that you aren't a registered lobbyist. I handed the form back. I could have

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[38] *Democrats Pledge to Provide Honest Leadership, Open Government*, AMERICAN CHRON., Jan. 18, 2006, http://www.americanchronicle.com/articles/view/4947.
[39] Scott Helman, *PACs and Lobbyists Aided Obama's Rise*, BOSTON GLOBE, Aug. 9, 2007, http://www.boston.com/news/nation/articles/2007/08/09/pacs_and_lobbyists_aided_obamas_rise/.
[40] Foon Rhee, *DNC Bans Washington Lobbyist Money*, BOSTON GLOBE, June 5, 2008, http://www.boston.com/news/politics/politicalintelligence/2008/06/dnc_bars_washin.html.
[41] Interview with Mr. Nichols, President of a governmental affairs firm, in Washington D.C. (Oct. 2, 2009). Mr. Nichols (name altered for privacy purposes) is a solo lobbyist who represents non-profits and other public interests in the areas of health and education in both legislative consulting and direct lobbying for over twelve years, after working in the House for fifteen years in various committees.

bought it off someone else, but that money would not have benefitted the campaign." The form stated the following:

> 4) This contribution is not made from the funds of a political action committee 5) This contribution is not made from the funds of an individual registered as a federal lobbyist or a foreign agent, or an entity that is a federally registered lobbying firm or foreign agent. 6) The funds I am donating are not being provided to me by another person or entity for the purpose of making this contribution.[42]

After the campaign ended, the DNC and its project "Organizing for America" continued to stipulate that neither lobbyists *nor lobbyists who gave their money to another person* in order to support the Democratic Party could do so. Whether or not a distinction was made as to the nature of the lobbyist or whether the lobbyist may have wished to donate to the campaign for personal preferences, both the campaign and the Democratic Party refused donations, most likely to solidify the portrayal of the candidate and President at arm's length from SIGs. Sheila Krumholz, consultant at the nonpartisan Center for Responsive Politics, commented that the move was largely symbolic, since lobbyists are generally not a major source of campaign contributions.[43] On his first day in office, President Obama issued an Executive Order that governed the influence of lobbying in his Administration and agencies.[44] And on April 7, 2008, the Office of Management and Budget (OMB) issued a memorandum for the heads of all executive offices and agencies that detailed in specificity how to conduct themselves with registered lobbyists in relation to recovery funds.[45] Already on guard from campaign rhetoric,

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[42]Organizing for America, Make a Donation, 2009, https://donate.barackobama.com/page/contribute/dnc08ofamain?source=www_navbar.

[43] Matt Kelley, *DNC Will Refuse Funds From Lobbyists*, USA TODAY, June 6, 2008, http://www.usatoday.com/news/politics/election2008/2008-06-05-lobbyists_n.htm. PAC contributions typically amount to only 1% of the giving in a presidential campaign as well, and in spite of common myth lobbyists are neither as generous or numerous as other large donors. However, it is significant to note that labor unions are PACs and typically are a major source of funding for the DNC. *See* http://www.opensecrets.org/news/2008/06/obama-puts-lobbyists-pacs-on-d.html.

[44] *Obama's First Day: Pay Freeze, Lobbying Rules,* MSNBC (Jan. 21, 2008), http://www.msnbc.msn.com/id/28767687/.

[45] Tracking Change, ARRA- Restrictions on Lobbyists, Sept. 18, 2009, http://trackingchange.pbworks.com/ARRA+-+Restrictions+on+Lobbyists.

the $1.45 billion industry of K Street (roughly equivalent to the economy of Mongolia) and the lobbying-special interest Washington complex were paying close attention.

(Almost) no Lobbyists in the White House

President Obama's Executive Order 13490, titled "Ethics Commitments by Executive Branch Personnel," went further than any other presidential directive to govern the lobbying activities of executive personnel. In many respects, the Order's regulations mirrored HLOGA bans.[46] Appointees could not receive gifts from registered lobbyists (The Gift Ban), nor could they participate in any matter involving specific parties related to their former employer or clients (The Revolving Door Ban).[47] Lobbyists entering government, who were registered within two years before the date they were appointed, were prohibited from: (a) participating in any matter on which they lobbied the two years before employment, (b) participating in the specific issue area in which that particular matter falls, or (c) seeking employment with any executive agency that they lobbied the two years before appointment.[48] Appointees also could not communicate with former employees in their agency for a period of two years after leaving appointment.[49] Moreover, appointees had to agree not to lobby any covered executive branch official or non-career senior executive service appointee for the remainder of the Administration.[50] Finally, Section Three included a waiver provision that allowed the Director of OMB, in consultation with the Counsel to the President, to grant any appointee a written waiver.[51]

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[46] Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 21, 2009).
[47] 74 Fed. Reg. 4673.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 4675.

What did all these bans signify for those entering the Administration? Although President Obama had announced that lobbyists would not "find a job in my White House,"[52] he hired many prominent former lobbyists including Attorney General Eric Holder, Deputy Defense Secretary William Lynn, Domestic Policy Director Melody Barnes, and Secretary of Agriculture Tom Vilsack.[53] The numerous waivers bestowed upon registered lobbyists after the issuance of the Order supported the argument that the executive branch needed individuals knowledgeable about the structure of Washington politics and the development and implementation of policy.[54] Dave Wenhold, President of ALL, commented in an interview with the National Journal:

> Companies that succeed are ones that seek out the specialists (i.e. GM looks to recruit engineers that worked in Honda or Toyota) because they know what makes a company succeed. Who off the Hill or a non-registered lobbyist are you going to get to serve in your Administration as an appointee when … they cannot lobby anyone in the Administration for the whole term (4-8 years)? What happens to that individual's job prospects after the term of the Administration?[55]

The Obama Administration received praise and criticism for taking a strong stance. Reuters reported in September 2009 that congressional aides, industry executives, and watchdog groups believed that the rules have slowed Obama's ability to fill key government jobs, eliminated some highly qualified candidates, and kept away lobbyists who worry tougher "revolving door" rules could tie their hands in the future.[56] To others, Obama's revolving door ban only reflected similar restrictions placed on Capitol Hill staffers, to forego lobbying their

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[52] Bara Vaida, *Former Lobbyists Join Obama*, NAT'L J., Jan. 24, 2009, http://www.nationaljournal.com/njmagazine/ll_20090124_2562.php. In mid-2008, the then-candidate's staff began quietly reaching out to some individuals, suggesting that if they terminated their lobbying status or took a leave, they might be considered for administration posts, lobbyists told National Journal.

[53] Kenneth Voegl & Mike Allen, *Obama Finds Room For Lobbyists*, POLITICO, Jan. 30, 2009, http://www.politico.com/news/stories/0109/18128.html.

[54] *See, generally*, Bara Vaida, *supra* note 52.

[55] *National Journal's Under the Influence: Obama Signs Executive Order on Ethics*, NAT'L J., Jan. 21, 2009. http://undertheinfluence.nationaljournal.com/2009/01/obama-signs-executive-order-on.php.

[56] Andrea Shalal-Esa, *Obama Lobbying Rules Have Unintended Effects*, REUTERS, Sept. 13, 2009, http://news.yahoo.com/s/nm/20090913/pl_nm/us_obama_lobbying.

direct contacts for a "cooling off" period of one year.[57] Lobbyists were alarmed at the final regulation, which forbid lobbying for the time of the entire Administration, possibly a period of up to eight years. During his second term, former President Clinton rescinded the five-year agency-related lobbying ban placed on his Administration's employees because of complaints that they were having difficulty securing jobs.[58] Supporters of President Obama's measures, such as author Robert Kaiser, argued that the Obama regulations sought to remedy the deleterious nature of the revolving door:

> Young people were coming to Washington to work in the government merely to punch a ticket on their way to K Street—they saw public service as just a prelude to cashing in. And Obama's executive order says that if you work for me in the executive branch, you can't leave the government, become a lobbyist and come back and lobby my Administration for as long as it exists. [T]his would preclude any lobbying firm from hiring such a person, because no one wants to pay a high salary to someone who can't lobby for some indefinitely long period.[59]

The career plight of lobbyists was decidedly of less concern than another alarming, unintended consequence of the Executive Order: *deregistration*. Mr. Nichols spoke to this issue. "Lobbyists usually erred on the side of compliance—but now there was a real downside—people who expected to go work in the Administration are suddenly deregistering."[60] Another industry lobbyist said that he personally knew "of several companies and non-profit groups who had filed papers with Congress terminating the lobbyist status of people on their payrolls after realizing that they were being shut out."[61] Many non-profit and non-partisan organizations urged the Administration to exempt public interest lobbyists from job restrictions, and the Open

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[57] 18 U.S.C. 207.
[58] John Mintz, *Clinton Reverses 5-year Ban on Lobbying by Appointees*, WASH. POST, Dec. 29, 2000, http://www.encyclopedia.com/doc/1P2-552561.html.
[59] Robert Kaiser, *The K Street Conundrum: 'So Much Damn Money'*, NAT'L J., Mar. 2, 2009, http://www.nationaljournal.com/njonline/ii_20090302_9986.php.
[60] Interview with Mr. Nichols, *supra* note 41.
[61] Shalal-Esa, *supra* note 56.

Society Policy Center deregistered lobbyists almost immediately.[62] The Center for Responsive Politics recorded 12,553 federally registered lobbyists in 2009, down from 14,800 at the end of 2008, and below a record 15,137 in 2007.[63] Deregistration could also have occurred as a response to a recession and the shift into non-covered activities such as grassroots advocacy. Lobbyblog reported in November that lobbyists are continuing to drop their registration, perhaps opting to instead influence policy as "senior advisers" and "consultants."[64] The LDA and HLOGA were strong steps in increasing public awareness of lobbying and the activities of lobbyists. If the ethics rules caused panic and increased deregistration, then the end goals of both LDA and HLOGA were and are severely undermined. Already feeling stigmatized from the Executive Order and 2008 campaign, the lobbying industry was to come under further siege when the White House issued the oral communication ban on stimulus money.

Reform or Regression: The Administration's Guidelines on ARRA

On March 20, 2009, President Obama issued an Executive Branch-wide Memorandum entitled, "Ensuring Responsible Spending of Recovery Act Funds."[65] Section Three of the Memorandum outlined protocols for communications between agency officials and federally registered lobbyists.[66] According to Peter Orszag, Director of the OMB, the guidelines sought to promote transparency in the communications process and "facilitate federal agencies' merit-

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[62] *Id.*
[63] *Id.*
[64] Jenna Staul, *How the White House is Shuffling the Lobbyist Pecking Order*, HUFFINGTON POST, Nov. 11, 2009, http://www.huffingtonpost.com/2009/11/11/how-the-white-house-is-sh_n_353609.html.
[65] Memorandum for the Heads of Executive Departments and Agencies: Ensuring Responsible Spending of Recovery Act Funds, 74 Fed. Reg. 12,531 (Mar. 25, 2009), *available at* http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-20-09/.
[66] Memorandum from Peter R. Orszag, Director of the Office of Management and Budget (April 7, 2009), *available at* http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m-09-16.pdf.

based decision-making in awarding Recovery Act funds."[67] The Memorandum stated that an executive department or agency official should not consider the view of a lobbyist registered under the LDA concerning particular projects, applications, or applicants for funding under the Recovery Act unless such views were in writing.[68] Subpart B added that during any oral communication (in-person or telephonic) with any person concerning particular projects, applications, or applicants for funding under the Recovery Act, an executive department or agency official should inquire at the outset whether the individual communicating is a lobbyist registered under the LDA.[69] If so, the lobbyist could not attend or participate in the telephonic or in-person contact, but could submit a communication in writing.[70] Subpart C specified that all written communications from registered lobbyists concerning Recovery Act funds for particular projects, applications, or applicants should be posted publicly by the receiving agency or governmental entity on its website.[71] Subpart D clarified that an executive department or agency official could communicate orally with registered lobbyists concerning *general* Recovery Act policy issues; again provided that such oral communications did not relate to particular projects, applications, or applicants for funding.[72] The official must then document in writing: (i) the date and time of the contact on policy issues; (ii) the names of the registered lobbyists and the official(s) between whom the contact took place; and (iii) a short description of the substance of the communication.[73] The executive department or agency must post the communication on its

[67] Ensuring Responsible Spending of Recovery Act Funds, 74 Fed. Reg. 12,531.
[68] *Id.* at § 12,533.
[69] Ensuring Responsible Spending of Recovery Act Funds, 74 Fed. Reg. 12,533.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*

recovery website.[74] Finally, the Director of the OMB could review the implementation of Section Three after sixty days and forward any recommendations for modifications if needed.[75]

The reaction from the lobbying community was violent. A strange coalition of bedfellows united to petition the White House to remove the restrictions on lobbyist communications. Citizens for Responsibility and Ethics in Washington (CREW), the American Civil Liberties Union (ACLU), and the American League of Lobbyists (ALL) argued that the restrictions would penalize those who dutifully registered under LDA while allowing large corporations, unregistered lobbyists, and campaign donors to maintain unfettered communication with executive agencies.[76] They added that, in particular, the oral communication ban hurt public interests and many cities and smaller companies that relied on private lobbyists to navigate Washington.[77] Protest letters continued to flow from many non-profits and other interest groups to President Obama, asking him to rescind his memorandum. Concerns ranged from those who feared that companies that had a "foot in the door" at federal agencies would have an advantage over new entrants, to others who felt that the rules would slow the pace of spending because lobbyists often helped clients avoid paperwork errors and other mistakes that bog down funding applications.[78] The Administration countered by stating that registered lobbyists could communicate in writing, and that the guidelines would be assessed after sixty days.[79] Norm Eisen, White House Special Counsel to the President on Ethics and Governmental Reform, maintained that the oral ban was essential to promote public interests ahead of special

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[74] Ensuring Responsible Spending of Recovery Act Funds, 74 Fed. Reg. 12,533.
[75] *Id.*
[76] *See* Dan Eggen, *Public Interest Groups Decry Obama's Strict Lobbying Rules*, WASH. POST, Apr. 1, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/03/31/AR2009033104074.html.
[77] *Id.*
[78] *Id.*
[79] *Id.*

interests in Washington.[80] Other organizations such as the Sunlight Foundation touted the need for even more transparency in communications and argued that lobbyists should be required to provide more detailed information about their activities.[81] Ellen Miller, spokeswoman for the Sunlight Foundation, suggested: "They could put up a lobbyist cam in every office. There would be a lot of people really glued to that."[82] Many felt that the directive was confusing—unlike the legislative branch, where personal relationships with staffers and members were often key to advocacy, the executive branch was further removed from relationship-building practices such as fundraising.[83] At a lobbying forum hosted by George Washington University, Eisen ended the panel discussion by expressing that the Administration was open to gathering evidence on the impact of ethics rules and was open to hearing from lobbyists.[84]

Lobbyists were not as thrilled about the changes. Mr. Nichols emphasized that the burden was not on the lobbyist, but on the executive branch official to decide whether the question was general or specific and to document and declare the communication online.

> When the regulations were first issued, I called a friend of mine who worked at the White House. I wasn't looking to get the upper hand—I just had a general question on process—and she asked me if I was a registered lobbyist. [S]he then said that she could not talk to me. As a consequence, I did not get the information. I could have googled it—but Washington is about information and the information exchange. I called another friend at HHS and she said, please don't ask me anything specific, I will have to publish it on the internet. I felt that the officials were trying to get out from under the burden.[85]

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[80] Update on Lobbyists Contacts Regarding the Recovery Act, http://www.whitehouse.gov/blog/09/04/26/Update-on-Lobbyist-Contacts-Regarding-the-Recovery-Act/ (Apr. 27, 2009, 01:03 EST).
[81] Tom Spulak, *Lobbyists Worry New Restrictions Violate Rights*, HILL, April 28, 2009, http://thehill.com/business-a-lobbying/k-street-insiders/k-street-insiders/20182-lobbyists-worry-new-restrictions-violate-rights.
[82] Theresa Poulson, *White House's Eisen: K Street Rules Evolving*, NAT'L J., May 5, 2009, http://wwww.citizensforethics.org/node/39193.
[83] Tom Spulak, *supra* note 81.
[84] Theresa Poulson, *supra* note 82.
[85] Interview with Mr. Nichols, *supra* note 41.

In its petition to the White House, the lobbying community argued that with enforcement lacking under HLOGA, many organizations that did not register under the LDA or subsequently deregistered in response to the Executive Order could continue to communicate on behalf of their clients. Registered lobbyists (and their clients) would then bear the consequences.[86] Mr. Nichols also argued that lobbyists were needed in agency meetings to support their clients' goals:

> A colleague of mine [a registered lobbyist] accompanied the president of a university to a meeting, as a resource for the president, and was excused from the meeting. [T]he president of the university was depending on him for advice . . . for the president to make his case, he needed somebody along to be a translator [for the regulative and legislative language].[87]

While the Administration's goal of getting special interests under control was commendable (and formidable), many worried that not all corrupt activities fell under the umbrella of lobbying. Moreover, if the goal was to eliminate the corrupting influence that money played in politics, surely a broader and more comprehensive set of directives were needed to guide the allocation of stimulus money.[88] Although the above concerns were presented to OMB, ALL stressed that the restriction most acutely detrimental to the representation of clients was the oral communication ban and its questionable First Amendment implications. The subsequent analysis traces lobbying from its initial First Amendment foundations and then focuses specifically on the probability of the ARRA oral communication ban being upheld under current legal precedent.

The First Amendment

The Right to Petition

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[86] *Id.*
[87] Interview with Mr. Nichols, *supra* note 41.
[88] Gary Bass, *How to Improve Obama's Ethics & Lobbying Executive Order*, WASH. EXAMINER, May 6, 2009, http://www.washingtonexaminer.com/opinion/columns/More-OpEd-Contributors/How-to-improve-Obamas-ethics-and-lobbying-executive-order-44482042.html.

"Ambition must be made to counteract ambition."[89] As far back as 1215 A.D., when the Magna Carta outlined a "petition of right" that citizens possessed against their King, the assertion of an individual's grievance was considered a fundamental political right.[90] The right to petition has been subsumed into the other clauses of the First Amendment, notably those guaranteeing freedom of speech, assembly, and the press.[91] It is presently understood to protect a broad range of communications with governmental bodies and officials, including both legislators and members of the executive branch.[92] The right extends to the "approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature and arms of the executive)."[93] The right of assembly and petition was first addressed in the case *United States v. Cruikshank*, in which dicta declared: "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances . . . is an attribute of national citizenship . . . under the protection of, and guaranteed by, the United States."[94] Later cases directly cited lobbying as fundamental to allowing citizens to effectively petition their government.[95]

Before the landmark case *Eastern Railroad Presidents Conference v. Noerr Motor Freight* was decided in 1961, the Supreme Court had implied that lobbying was entitled to some

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[89] THE FEDERALIST NO. 51 (James Madison).
[90] THE CONSTITUTION OF THE UNITED STATES OF AMERICA ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES 1267 (Johnny H. Killian et al. eds., Congressional Research Service Library of Congress 2002) (1992).
[91] ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2272 (Leonard W. Levy et al. eds., MacMillan Reference USA 2d ed. 2000).
[92] *Id.* at 2273.
[93] *Id.* at 2274.
[94] THE CONSTITUTION OF THE UNITED STATES OF AMERICA ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES, *supra* note 90, at 1269.
[95] *See* Meyer v. Grant, 486 U.S. 414, 424 (1988); E.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

protection on First Amendment grounds.[96] In *Noerr*, the Supreme Court held immune from antitrust liability a combination of rail freight interests that was formed to pass legislation that would grant the members of the combination a competitive advantage over truckers.[97] Although *Noerr* avoided a full discussion of lobbyists' constitutional rights, it created precedent that "joint attempts to influence the passage of laws are exempt from the Sherman Act."[98] In *United Mine Workers v. Pennington*, the Court found that "joint efforts to influence" actions directed toward executive branch decisions, including regulation and purchasing decisions undertaken by federal agencies, were protected under the First Amendment.[99] *Noerr* and *Pennington* formulated the "Noerr-Pennington Doctrine." Courts have interpreted the doctrine to signify that business interests may combine and lobby to influence the legislative, executive, or judicial branches of government without violating the antitrust laws, because the right of petition protects those activities.[100]

In recent cases, the Supreme Court has yet to find an express constitutional right to "lobby," but has upheld its underlying First Amendment protections. In *Meyer v. Grant*, the Court upheld the right to pay individuals to circulate petitions and collect required signatures, and in *Lehnert v. Ferris Faculty Ass'n*, the Court held that the First Amendment protects an individual's decision whether to engage in or support political lobbying.[101] The complementary right of assembly "derives from the rights of the organization's members to advocate their

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[96] *See* Rumely v. United States, 345 U.S. 41 (1953); United States v. Harriss, 347 U.S. 612 (1954) (dismissing challenges to the Federal Regulation of Lobbying Act (FRLA) on basis that disclosure did not impinge First Amendment freedoms).
[97] *Noerr*, 365 U.S. at 145.
[98] Nicholas W. Allard, *Lobbying is an Honorable Profession: The Right to Petition and the Competition to be Right*, 19 STAN. L. & POL'Y REV. 18 (2008); *see Noerr*, 365 U.S. at 165 (holding that no violation of the Act can be predicated upon mere efforts to influence the passage or enforcement of laws).
[99] *See* United Mine Workers v. Pennington, 381 U.S. 657 (1965).
[100] *See Noerr*, 365 U.S. at 875; *Pennington*, 381 U.S. at 657.
[101] *See Meyer*, 486 U.S. at 414 (1988); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991).

personal points of view in the most effective way."[102] Finally, in *FEC v. Wisconsin Right to Life*, the Supreme Court held that the FEC could not constitutionally prohibit "grassroots lobbying" measures, such as television advertisements paid for by unions.[103] Unless such advertisements explicitly urged a vote for or against a particular candidate, such a restriction amounted to "censorship of core political speech."[104] History, precedent, and the broadening of First Amendment protections have protected the industry of public policy advocacy from an initial interpretation as "the right to petition" to the collective First Amendment rights of "freedom of association, speech, and petition." As detailed in the following section, the oral communication ban in ARRA threatened these established rights.

ARRA and the First Amendment

The March Memorandum issuing guidance on recovery funds banned communications between lobbyists and agency officials in regards to specific projects under ARRA. In response, ALL, CREW, and the ACLU threatened a lawsuit to challenge the First Amendment constitutionality of the ARRA oral communication ban (a threat later withdrawn when OMB modified the lobbying restrictions).[105] A constitutional analysis of the ARRA restrictions reveals that the oral ban violated lobbyists' First Amendment right to free speech. The following arguments scrutinize the oral ban under a First Amendment analysis and demonstrate why, under existing precedent, a court would most likely find an infringement of the right to free speech.

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[102] *See* Bucky v. Valeo, 424 U.S. 1 (1976); NAACP v. Alabama, 357 U.S. 449 (1958).
[103] FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007). As pointed out later, core political speech is the most protected form of expression under the First Amendment.
[104] *Id.* at 2666.
[105] *Lobbyists Fight Back: Accuse Obama of Demonization, Suggest Lawsuit in the Offing*, HUFFINGTON POST, Mar. 31, 2009, http://www.huffingtonpost.com/2009/03/31/lobbyists-fight-back-accu_n_181232.html.

Core political speech is the most protected form of speech under the First Amendment.[106] In *Meyer v. Grant*, the Court invalidated a Colorado statute that made it a crime to pay persons to circulate petitions in order to have an initiative placed on the ballot.[107] The Court declared, "[t]he prohibition of paid circulators trenches upon an area in which the importance of First Amendment protections is 'at its zenith.'"[108] The Supreme Court also stressed that discussion of public issues and debate on the qualifications of candidates were integral to the operation of government apparatus.[109] And as recently as 1999, *Buckley v. American Constitutional Law Foundation, Inc.* quoted language from *Meyer* stating "interactive communication concerning political change" was "core political speech."[110] Lobbying activities involving discussions regarding procurement of stimulus money on behalf of a client or entity directly involve core political speech that the above cases cite as sacrosanct under the First Amendment.[111] Communication with an agency official could include any of the following: requests (petitions, even) regarding a project, application, applicant, process, or policy question associated with ARRA. Such "interactive communication" that involves public issues and societal goals matches the very definition of core political speech as described in precedent—and therefore subjects it to the strict scrutiny analysis[112] of a court.

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[106] *See also* Rosenblatt v. Baer, 383 U.S. 75 (1966) (holding that the American system of government and the government itself may be criticized); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (finding that changes in the laws and constitution by peaceful and lawful means may be advocated); Kirksey v. City of Jackson, Mississippi, 663 F.2d 659 (5th Cir. 1981) (discussing how the protection of political speech is a primary function of the guaranty of freedom of speech).

[107] Meyer v. Grant, 486 U.S. 414, 424 (1988).

[108] Buckley v. Am. Const. Law Found., Inc., 525 U.S. 182, 183 (1999).

[109] *See* Buckley v. Valeo, 424 U.S. 1, 15 (1976) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966): "There is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs").

[110] *Buckley*, 525 U.S. at 86-87.

[111] *See* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("Speech concerning public affairs is more than self-expression; it is the essence of self government"); Vt. Soc'y of Ass'n Executives v. Milne, 779 A.2d 20, 24 (Vt. 2002) ("[I]t is beyond dispute that lobbying directly involves core political speech that lies at the heart of what the First Amendment was designed to safeguard"); Fidanque v. Oregon Gov't Standards & Practices Comm'n, 969 P.2d 376, 379 (1998) ("Lobbying is political speech, and being a lobbyist is the act of being a communicator to the legislature on political subjects").

[112] *See Meyer*, 486 U.S. at 421-22 ("Core political speech was. . . subject to highest First Amendment scrutiny").

Under a strict scrutiny analysis, the burden rests on the government to demonstrate that a compelling interest justified the restriction of a First Amendment freedom; and, the regulation must be narrowly tailored to avoid unnecessary abridgement of that First Amendment freedom.[113] The Memorandum's stated ends were to increase transparency and efficiency for ARRA program implementation and "empower" agency officials not to fund "imprudent projects," but rather "merit-based" programs that would achieve long-term public benefits.[114] The oral communication ban was not necessary to achieve these stated interests, nor was it narrowly tailored enough to avoid violating core political speech. First, agencies could have achieved full transparency by requiring all officials who communicated with any individual to fully disclose the content of that conversation, just as they are required to do with lobbyists' communications. Disclosure, not prohibition, is a more tailored approach to achieve transparency for all participating individuals.[115] Second, the decision to ensure that "merit-based" programs are chosen falls *wholly* in the discretion of the agency official. Internal agency directives that define what are a "prudent" and "long-term public interest" could guide agency officials to this end better than restricting the right of citizens to petition their government. Third, the oral communication ban both over- and under-includes in terms of achieving fiscal responsibility. It over-includes because it assumes that all lobbyists would promote imprudent decision-making and advocate for non-merits based funding; it under-includes because it assumes that unregistered lobbyists, governmental affairs consultants, corporate executives, and other persons would not back imprudent project funding. If several powerful lobbyists or lobbying firms had a disproportionate impact on the decision-making process, agencies could counsel officials to equally weigh all funding requests—such policy would

[113] *See* Buckley v. Valeo, 424 U.S. 1, 25 (1976). *See, e.g.*, Taxation with Representation v. Regan, 676 F.2d 715, 724 (1982).
[114] Ensuring Responsible Spending of Recovery Act Funds, 74 Fed. Reg. 12,531.
[115] Memorandum to CREW from Kelley Drye & Warren LLP And Georgetown Economic Services, LLC (April 24 2009): White House Lobbying Restrictions Relating to ARRA http://www.kelleydrye.com/media/CREW_Memo.pdf.

more effectively direct responsible decision-making than a speech ban laid down on an entire community of individuals who represent diverse interests.[116]

A content-based regulation distinguishes favored speech from disfavored speech on the basis of ideas or views expressed.[117] The distinction between a content-based and content-neutral regulation is fundamental: the Court has declared that "content based restrictions on speech must meet strict scrutiny, while content-neutral regulation only need meet intermediate scrutiny."[118] A content-based restriction turns on the viewpoint of the speaker or the subject matter of the speech. Of the two, a viewpoint restriction is the more grave offense, because it is viewed as government censorship of disfavored views.[119] The oral ban excluded a certain class of individuals—registered lobbyists—from interacting with officials, but allowed other individuals to unreservedly interact with those same officials on the very same subjects.[120] A court could interpret Section Three as a content-based, viewpoint restriction since it expressly singled out the communication of lobbyists as disfavored. In addition, the ban also regulated the subject matter of the speech. The prohibition specifically denied lobbyists the opportunity to orally discuss the funding for any specific ARRA project. Part viewpoint restriction and part subject-matter restriction, the communication ban would fail under a strict scrutiny analysis.

Content-based regulations of speech are presumptively invalid under the First Amendment.[121] The Supreme Court has further held viewpoint discrimination as the most

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[116] *See* attached chart at 31.
[117] Simon & Schuster, Inc. v. New York State Crime Victim's Board, 502 U.S. 105 (1991).
[118] Turner Broadcasting System v. Federal Communication Commission, 512 U.S. 622 (1994).
[119] Keith Werhan, Freedom of Speech: a reference guide to the United States Constitution (Dec. 2004). "A law that allowed restriction on a topic such as terrorism is a subject matter restriction . . . whereas a law that prohibited speech critical of the government's efforts to combat terrorism (and allowed speech that favored government's efforts) would be a viewpoint restriction."
[120] Memorandum to CREW from Kelley Drye & Warren LLP And Georgetown Economic Services, LLC (April 24 2009): White House Lobbying Restrictions Relating to ARRA http://www.kelleydrye.com/media/CREW_Memo.pdf.
[121] *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992) (citing cases); Am. Library Ass'n v. Reno, 33 F.3d 78, 84 (D.C. Cir. 1994).

egregious infringement of the First Amendment.[122] In the case *Nat'l Ass'n of Social Workers v. Harwood*, plaintiffs challenged the constitutionality of a Rhode Island House Rule that banned lobbyists from the floor of the House, but permitted all other members of the public to be present.[123] The district court found that "defendants are discriminatorily banning certain speakers, those who express the viewpoints of private organizations."[124] Similarly, the memorandum exempted one particular class of people based on disfavor and distrust of their practices—and would most likely be struck down under strict scrutiny.[125] Although subject-matter discrimination is considered less offensive than viewpoint discrimination, the Supreme Court has found that a government regulation based on the content of speech must be scrutinized carefully. The oral communication ban penalized lobbyists for asking about specific ARRA projects, applicants, and policies. The Supreme Court has noted repeatedly "[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas . . . from the marketplace."[126] In *Leathers v. Medlock*, the Court found that a tax is suspect under the First Amendment if it targets a small group of speakers, and it will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of a taxpayer's speech.[127] Moreover, it admitted that while differential burdens on groups of people are insufficient to raise First Amendment concerns, if the exemption is a "deliberate and calculated device" to penalize a certain group of speakers in order to suppress particular ideas, then the government has violated

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[122] *See* Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) (holding that school denying funding to a religious group but not others constituted viewpoint discrimination); *see also* Lamb's Chapel v. Center Moriches Union Free School Dist.,508 U.S. 384, 303 (1993) (holding that permitting school property to be used for the presentation of all views on an issue except those dealing with it from a religious standpoint constitutes prohibited viewpoint discrimination).

[123] National Ass'n of Social Workers v. Harwood, 874 F. Supp. 541, 530 (D.R.I. 1995), *rev'd on other grounds*, 69 F.3d 622 (1st Cr. 1995).

[124] *Id.* at 541-42.

[125] *Compare* City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750 (1988) (finding that a facial challenge under the First Amendment lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of the speech by suppressing disfavored speech or disliked speakers).

[126] *See Schuster*, 502 U.S. at 116 (quoting Leathers v. Medlock, 499 U.S. 439, 448-449 (1991)).

[127] *See Leathers*, 449 U.S. at 439.

the First Amendment.[128] The differential burden placed on speakers in regards to ARRA communications implies that the Administration indeed utilized the ban as a device to deny a certain group (lobbyists) the right to express ideas on a particularized and outlined subject. Moreover, this denial would have the effect of driving from the "marketplace" the views of citizens and groups who utilize lobbyists to advocate their position. In the case *Widmar v. Vincent*, the Supreme Court found that a university-created forum that excluded religious group participation violated free speech, even though the state argued that achieving separation of church and state was sufficiently compelling to justify its regulation.[129] Similarly, the application procedures for stimulus money created a forum in which citizens were allowed to interact to promote their interests—excluding a certain group would require strong justification from the government. Moreover, if achieving the separation of church and state was an unconvincing justification for regulation, it seems likely that a court would reject the government argument of "transparency" as sufficiently compelling. The government would then advance an argument that the regulation was content-neutral to secure intermediate scrutiny.

If petitioners lost on grounds of core political speech, viewpoint discrimination, and subject matter discrimination, they would have to argue that the ban was a content-neutral restriction of speech. A content-neutral restriction is regulation of expressive activity that the government justifies without reference to the content of the restricted speech and is subject only to an intermediate scrutiny analysis.[130] Instead of a categorical prohibition on a particular speech topic, content-neutral restrictions regulate the time, place, and manner appropriate for the speech,

[128] *See id.* at 453 (explaining that differential taxation of speakers and even members of the press does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas).
[129] Widmar v. Vincent, 454 U.S. 263 (1981).
[130] City of Renton v. Playtime Theatres, 475 U.S. 41 (1988).

allowing for it to exist in the public forum.[131] A content-neutral regulation is constitutional so long as it is justified without reference to the content of the regulated speech.[132] The three part test for intermediate scrutiny contains the following formula: 1) the government must show that the restriction serves an important governmental interest; 2) the restriction must be "narrowly tailored" to advance the identified public interest; and 3) the government must show that there are "ample alternative avenues of communication" for a speaker to deliver his or her message to the public.[133]

First, the government could argue that the lobbyists had a manner (written communication) and place (to agency officials) to direct their specific policy questions; furthermore, the content of the questions themselves were not regulated. Second, the government could demonstrate that transparency and merit-based decision-making were important interests. The final hurdle—to demonstrate that the restriction was "narrowly tailored" and that "ample alternatives of communication" existed—would prove more difficult. Some legal scholars have argued that ample avenues of communication are broadly construed. In response to the triumvirate's threatened lawsuit, Professor Luneburg pointed out that lobbyists were permitted to write agency officials anytime in support of their client's application for public monies, were not prevented from briefing their clients prior to meetings or telephone calls with agency officials on any matters relevant to the particular application, and could follow up client meetings with additional information to the official that clarified or amplified their client's position.[134] He also challenged the notion that the government would have difficulty justifying the burden imposed upon lobbyists and those whom they represented. "The burden that clients must take good notes or speak for themselves does not come [across as a great hardship] and is certainly not a violation of the

[131] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 3rd ed. 934 (2006).
[132] 832 Dorp. v. Gloucester Tp., 404 F. Supp. 2d 614 (D.N.J. 2005).
[133] Ward v. Rock Against Racism, 491 U.S. 781 (1988).
[134] William Luneberg, *The Obama Lobbying Directive: Steps in the Right Direction*, JURIST, May 2009, http://jurist.law.pitt.edu/forumy/2009/04/obama-lobbying-directive-steps-in-right.php.

Constitution since the persons most affected by the governments' actions are offered the opportunity to make their case in person." However, the Supreme Court has "voiced particular concern of laws that foreclose an entire medium of expression."[135] The stimulus regulations only allowed one other manner for lobbyists to communicate (in writing). Lobbyists did not have ample avenues of communication; moreover, writing requests could not take the place of actual substantive *discussion* that occurred between officials and petitioners. As courts have stated, direct communication functions as the most effective form of expression and best serves the client, who is the true petitioner.[136]

Section III probably violated lobbyists and their clients' freedom to petition the government and exercise free speech under the First Amendment. Under both a strict scrutiny and intermediate scrutiny analysis, the government would have difficulty demonstrating a harsh First Amendment violation in order to further stated goals of transparency without also subjecting others to similar restrictions. After these arguments were presented to OMB in the sixty-day comment period, the Administration proceeded to tailor the ARRA guidance more appropriately.

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[135] City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994) (holding that ordinance that banned all residential signs but those falling within one of ten exemptions violated the First Amendment, even though there were alternative channels by which plaintiffs could communicate the same message).

[136] *See Meyer*, 486 U.S. at 414 ("That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental , and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open 'more burdensome' avenues of communication does not relieve its burden on First Amendment expression. 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 doing so* (emphasis added)).

And then there was Change

The OMB released a memorandum containing updated guidance regarding communications with registered lobbyists on July 24, 2009.[137] After consulting with many advocacy groups, OMB modified its regulations. Most notably, OMB expanded the oral communication ban to cover all persons outside the federal government (not just federally registered lobbyists) who initiated oral communications concerning pending competitive applications under the Recovery Act.[138] This overall inclusion alleviated First Amendment concerns that the ban was a viewpoint restriction against registered lobbyists. Disclosure requirements would continue to apply to lobbyist communications in regards to specific ARRA questions, queries made at a widely attended gathering, and agency responses to questions from lobbyists about a proposal or bid.[139] In addition, the updated guidance reiterated that widely attended gatherings were open to all industries and professions. This clarification proved fundamental because press reports had indicated that agency officials had mistakenly excluded registered lobbyists from such informational sessions.[140] To summarize, logistical questions or discussion regarding Recovery Act funds were permitted at any time and in any context (i.e., how to apply for funding) and did not require posting since it did not involve "advocacy about a particular project." Public communications to officials at "widely attended gatherings" were allowed, although communications immediately before or after did *not* fall within the scope of this exemption. Next, no one, including a federally registered lobbyist, could communicate about a pending application for a competitive grant or other competitive form of financial

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[137] Memorandum from Peter R. Orszag, Director of the OMB (July 24, 2009), on Updated Guidance Regarding Communications with Registered Lobbyists about Recovery Act Funds, *available at* http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-24.pdf.
[138] *Id.*
[139] *Id.*
[140] *White House Clarifies Recovery Act Lobbying Rules*, Kelley Drye & Warren LLP, July 27, 2009, *available at* http://www.kelleydrye.com/resource_center/client_advisories/0489.

assistance, unless an agency official initiated the communication. "The purpose of this exception was to allow agency officials to obtain the information they needed or sought about pending applications in order to evaluate the applications."[141] If a particular prohibited oral communication took place, an agency official must post it on the Internet. Any oral communications with a LDA-registered lobbyist, who discussed any issue on behalf of a client in regard to stimulus policies, must also be posted on the Internet. Finally, all written communications from LDA-registered lobbyists on behalf a client that relate to Recovery Act policy or funding applications must be posted on the Internet—*this is exclusively applicable to lobbyists and no other category of individuals.*[142]

> Has all been remedied? Mr. Nichols commented upon the updated guidance.
>
> Whether you are a lobbyist affects the conversation. Maybe some agencies have read beyond the guidelines, or perhaps the staff does not completely understand the rules. When they do not comply with their own internal rules, it affects our business, clients, and issues. The regulation promoted the perception that a lobbyist is a lobbyist is a lobbyist, and there is no distinction as to type.[143]

The ban's expansion to all communicating parties eliminated First Amendment issues of under-inclusion and viewpoint restriction. With the most grave First Amendment concern assuaged, it was highly unlikely that lobbyists would bring suit on grounds of subject-matter restriction since courts have allowed content-based restrictions in certain settings. In addition, with all parties forced to communicate in writing, no one segment of society was denied a form of political speech that was available to others.

Asked whether it was easier to conduct business now that the restrictions had been relaxed, he responded "[I]n certain agencies, I don't set up the meeting—I encourage my client

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[141] Memorandum from Peter R. Orszag, Director of the OMB (July 24, 2009), on Updated Guidance Regarding Communications with Registered Lobbyists about Recovery Act Funds at 3, *available at* http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-24.pdf.
[142] *Id.* at 4.
[143] Interview with Mr. Nichols, *supra* note 41.

to set up the meeting. If I make the call they may not get the meeting. Just recently, a friend of mine who sits on the board of a non-profit and was asked to leave the meeting, even though none of the material in the meeting related to the stimulus . . . and he was not there in the capacity of a lobbyist."[144] Although First Amendment concerns have been alleviated by the new regulations, the combination of the Executive Order and ARRA restrictions may have promoted a chilling effect on the intercommunication between lobbyists and agencies.

Conclusion

As Abramoff serves his prison sentence, lobbyists of all shapes and sizes are experiencing the ramifications of his corrupt activities. A progression of reforms, beginning with the legislative response in HLOGA, escalating to an Executive Order, and culminating with ARRA restrictions, attempted to curb the undue influence of SIGs and moneyed interests. Did these good intentions go awry—and instead create hardships for the "little" guys—the solo lobbyists, smaller firms, and public interest groups? Supporters of the Administration's crackdown on lobbyists argue (fairly) that one directive cannot altogether eliminate the phenomenon of "influence peddling," and the only reasonable way to change Washington culture is through small incremental steps. However, the alliances struck between public interests, solo lobbyists, and associations on both sides of the aisle in order to fight the ARRA restrictions seem to indicate that the final measure had gone too far. Many public interest groups even pushed for a safe harbor for persons working for a tax-exempt charity or social welfare group who wished to work in the Administration or contact agency officials for ARRA. Officials could subsequently publish these waivers online in order to further the interest of public disclosure. Mr. Nichols

[144] *Id.*

ended the interview by responding to President Obama's quote that the "hired guns on K street wrote our laws, while hardworking Americans had no one to represent them in Washington."

> I agree and disagree. You look at some of the hand to hand warfare that goes on in the writing of legislation and the way it is written will benefit one industry or interest over another . . . [D]o you blame it on lobbyists? I blame it on the fact that they are corporations who have interests and have members representing them in Congress like everybody else. [W]hen do the little guys get their interests represented? That's what I do! Increased Pell Grants, direct loans, student aid programs…so what he misses is that there are some very strong advocates for those voices. There are two sides to the coin.[145]

To cure the perception that Washington had been overrun with SIGs, the Obama Administration endangered free speech, unnecessarily targeted the entire lobbying industry, and created restrictions to promote the illusion of distance from SIGs. To truly combat the influence of powerful lobbies, a more expansive and ubiquitous policy would have to be implemented in all White House policies and communications. Instead of a movement towards oversight, transparency, and distinction in an industry of professionals who represent many facets of society, all lobbyists fell under the Abramoff umbrella. Lobbying, like any other industry, should be subject to rules, regulations, and legal compliance. The 2007 legislative response towards transparency and disclosure allowed lobbyists to engage in the art of advocacy and was also upheld by the Supreme Court as a narrowly tailored means of serving governmental interests of transparency without hindering the right to petition. Further measures to strengthen and put teeth in HLOGA could aid in thwarting lobbying abuse and corruption. The creation of a legitimate enforcement division to track and penalize those who do not register or violate other HLOGA provisions would also advance the ends of long-term regulation. As Mr. Nichols remarked, the goal is to provide an incentive to err on the side of compliance, rather then fear negative consequences of being labeled a "lobbyist."

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[145] *Id.*

No single lobbyist or interest group has a monopoly on access and information; the political market responds to a multitude of pressures and constituencies vying for diverse legislative outcomes. In Washington, a lobbyist is only as good as his or her word. In a 2007 survey of 273 congressional staff personnel, 86% of respondents pointed to the importance of "consistently providing reliable information" when asked to identify the tactics of the best lobbyists—making credibility the single most important tactic.[146] Such commentary indicates that both society and the government are best served through uninhibited discourse. Indeed, allowing lobbyists to communicate to legislative and executive staff promotes a free flow of information that takes into account the petitions of all citizens. The cautionary tale of the ARRA restrictions serves as a warning: an administration cannot infringe First Amendment rights in order to censor a group of persons whose occupation serves a vital role in the political process. In the end, the final responsibility rests upon the government to listen to the requests of all interested parties and give equal weight to their petitions. L&P

[146] THE POLICY COUNCIL, CHANGING OF THE GUARD: 2007 STATE OF THE INDUSTRY FOR LOBBYING AND ADVOCACY 60-61(2007).

ATTACHMENT 1

Composition of Sampled Organizations Using Lobbyists

(These databases are a compilation of lobbyist filings from 1998 to the present, consisting of LD-2 filings maintained by the Secretary of the Senate, FEC filings, and CRP research. Available at opensecrets.org. Note that in Figure 1, the "Other" category is comprised of the following: public transit authorities (3%), public utility companies (2%), public commissions (2%), museums (2%), embassies 3%).)