

# LOBBYING IS AN HONORABLE PROFESSION: THE RIGHT TO PETITION AND THE COMPETITION TO BE RIGHT

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## INTRODUCTION

Lobbying is an honorable profession. In America and perhaps around the world, that simple statement is more likely to be a sarcastic punch line to a bad joke than a self-evident proposition. Low public esteem for lobbyists is hardly a modern phenomenon.<sup>1</sup> The reasons why lobbyists have been reviled throughout history are legion, including the simple, undeniable fact that in some notorious

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1. Some wags trace lobbying back to the Garden of Eden and suggest that it is, in fact, the oldest profession. After all, the Serpent persuaded Eve to eat the forbidden fruit, by portraying knowledge gained from the apple as a virtue rather than a vice. The first lobbyist's reward was to be punished by God by being forced to crawl on his belly in the dust for eternity. Thomas M. Susman, *Lobbying in the 21st Century—Reciprocity and the Need for Reform*, 58 ADMIN. L. REV. 737, 738 (2006) (quoting CHARLES B. LIPSEN & STEPHEN LESHER, *VESTED INTEREST: A LOBBYIST'S ACCOUNT OF WASHINGTON POWER AND HOW IT REALLY WORKS* 48 (1977)). By the so-called Gilded Age of the Grant Administration, corruption was so rampant that Walt Whitman described "lobbyists" as "crawling, serpentine men" in his memorandum on the Civil War. WALT WHITMAN, *MEMORANDA DURING THE WAR* (Peter Coviello ed., Oxford University Press 2004) (1876). The 1888 Dictionary of American Politics defined "the lobby" as "a term applied collectively to men that make a business of corruptly influencing legislators." See Donald Wolfensberger, *Factions and the Public Interest: Federalist No. 10* in 2001 (May 18, 2001) (unpublished essay), available at <http://www.wilsoncenter.org/events/docs/lobbyintro.pdf>. In the colorful words of a former Senator from a western state, to this day the public ranks lobbyists somewhere "lower than a snake's belly in a wagon rut."

cases lobbyists got their bad reputations the old fashioned way: they earned it.<sup>2</sup> However, more remarkable than the persistent image in the public consciousness of corrupt influence peddlers, is that today, while trust of professional lobbyists is particularly low, the number of lobbyists and the level of lobbying activity continues to rise. Highly touted new lobbying laws and rules have not dampened the demand and need for lobbying services. Instead, greater regulation has actually coincided with a sharp increase in professional lobbying, alongside an increase in related work by professionals with government-relations expertise representing clients facing oversight and public investigations. Indeed, an unintended consequence of new lobbying rules, enhanced enforcement, and stricter penalties is that what was once a cottage industry of government ethics and lobbying compliance training and counseling is suddenly a booming practice area for Washington law firms.<sup>3</sup> Since the new rules were issued, proliferating seminars and advice columns by practitioners, continuing legal education courses, and compliance training sessions are playing to packed audiences of lobbyists.<sup>4</sup> Observers who, depending on your

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2. For vivid descriptions of lobbying practices throughout American history, see, for example, 2 SENATOR ROBERT C. BYRD, *Lobbyists*, in THE SENATE, 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE, S. DOC. NO. 100-20 (Mary Sharon Hall ed., 1989), available at [http://www.senate.gov/legislative/common/briefing/Byrd\\_History\\_Lobbying.htm](http://www.senate.gov/legislative/common/briefing/Byrd_History_Lobbying.htm); Jan Witold Baran, *Can I Lobby You? Don't Let One Bad Abramoff Spoil the Whole Bunch*, WASH. POST, Jan. 8, 2006, at B1; Brian Wolly, WETA, *Washington Corruption Probe: History of Washington Scandals*, ONLINE NEWSHOUR, Feb. 23, 2006, [http://www.pbs.org/newshour/indepth\\_coverage/law/corruption/history.html](http://www.pbs.org/newshour/indepth_coverage/law/corruption/history.html) (covering Credit Mobilier, Abscam and the Keating 5, Teapot Dome, and the House Banking Scandal). See also Sarah Kellogg, *Fair Game: Politics, the Media & Scandal*, WASH. LAW., Nov. 2007, available at [http://www.dcb.org/for\\_lawyers/resources/publications/washington\\_lawyer/november\\_2007/fair\\_game.cfm](http://www.dcb.org/for_lawyers/resources/publications/washington_lawyer/november_2007/fair_game.cfm).

3. See Sarah Kellogg, *Congressional Upheaval: Lawyer-Lobbyists Ride the Political Riptide*, WASH. LAW., Apr. 2007, available at [http://www.dcb.org/for\\_lawyers/resources/publications/washington\\_lawyer/april\\_2007/lobbying.cfm](http://www.dcb.org/for_lawyers/resources/publications/washington_lawyer/april_2007/lobbying.cfm).

4. See Elizabeth Williamson, *Getting Around Rules on Lobbying: Despite New Law, Firms Find Ways To Ply Politicians*, WASH. POST, Oct. 14, 2007, at A1 (noting that the House and Senate Ethics Committees have fielded more than one thousand questions from lobbyists seeking guidance and answers and that hundreds of lobbyists have been attending seminars at Washington law firms); see also Birnbaum, *supra* note 4 (noting "that questions about what is and what is not permitted have flooded into law firms," that one firm was surprised when more than one hundred lobbyists jammed its largest meeting room beyond capacity for a two-hour briefing, and that this occurrence has repeated itself at law firms all over Washington, D.C.). Lawyer lobbyists will receive dozens of invitations to political compliance programs from CLE courses run by PLI, BNA, bar groups, and countless others. See, e.g., Bureau of Nat'l Affairs, Conference on Lobbying Law: The New Lobbying: A Sea Change for Lobbyists, Clients, and Regulators (Nov. 14, 2007) (information available at <http://legaledge.bna.com/PageManager.aspx?pageId=569>); Fed. Commc'ns Bar Ass'n, Conference: Lobbying the FCC and Congress; Ethical and Legal Considerations (Oct. 30, 2007) (information available at [www.fcba.org/newsletters/1/files/130/october\\_2007\\_news.pdf](http://www.fcba.org/newsletters/1/files/130/october_2007_news.pdf)); Cleta Mitchell, Audio Conference in Washington, D.C.: The New Lobbying and Ethics Reform Bill: Honest Leadership and Open Government Act of 2007 (Dec. 10, 2007); Practicing Law Inst., Corporate Political Activities Conference: Complying with Campaign

perspective, are either insightful or unfairly cynical (or both) say these lobbyists are trying to learn how to evade the law.<sup>5</sup> In reality, the widespread effort to learn about the new ethics rules, while inconsistent with popular myths about lobbying, is evidence supporting the themes advanced here: lobbyists work hard at their challenging profession. Today, lobbying is more necessary, widespread, and complicated than ever before. It is also more open, more professional, subject to more rules, and practiced with a greater degree of legal compliance.

The public is extremely suspicious of lobbyists: approximately eighty percent of Americans believe that lobbyists exercise undue influence on public policy.<sup>6</sup> Presidential candidates decry the role of lobbyists, and some will not accept their campaign contributions.<sup>7</sup> Today, like the 1970s Watergate era, the

Finance, Lobbying & Ethics Laws (Oct. 4-5, 2007) (The PLI handbook of the same title, revised annually, is an excellent reference guide.). Currently, it is hardly possible to pick up a publication read by Washington lawyers which does not contain a compliance advice column. See, e.g., C. Simon Davidson, Advice Column, *A Question of Ethics: Meals with Lobbyists Pose Unappetizing Compliance Questions*, ROLL CALL, Nov. 5, 2007, at 8; Sonia P. Foiss, *Understanding the New Rules of Lobbying*, LEGAL TIMES, Oct. 22, 2007, at 33; Nicholas G. Karambelas, *The Honest Leadership and Open Government Act of 2007*, WASH. LAW., Dec. 2007, at 31.

5. See Jeffrey H. Birnbaum, *Seeing the Ethics Rules and Raising An Exception*, WASH. POST, Oct. 23, 2007, at A17; see also Williamson, *supra* note 4.

6. *Corruption Named As Key Issue by Voters in Exit Polls*, CNN.COM, Nov. 8, 2006, <http://www.cnn.com/2006/politics/11/07/election.exitpolls/index.html>; Harris Interactive Survey: Feb. 6-12, 2007, in Roper Ctr. for Pub. Opinion Research, iPoll Databank, [www.ropercenter.uconn.edu/data\\_access/ipoll/ipoll.html](http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html) (retrieved Aug. 1, 2007); see Wolfensberger, *supra* note 1, at 1-3.

7. This was a theme in Woodrow Wilson's "Progressive" campaigns. Wolfensberger, *supra* note 1, at 3. It is likewise a theme present in Barack Obama's and John Edwards's runs for president. See *AFL-CIO Working Families Vote Presidential Forum* (MSNBC television broadcast Aug. 7, 2007) (video clip of candidates sparring over lobbyist money available at <http://youtube.com/watch?v=5xaWahAwiiU>); *Yearly Kos Presidential Leadership Forum* (internet broadcast Aug. 4, 2007) (video clip of Edwards, Clinton, and Obama debating lobbyists available at <http://www.youtube.com/watch?v=Isi6c2s353c>); see also Russell Berman, *Debate Turns Bitter: Clinton, Obama Fend Off Rivals*, N.Y. SUN, Aug. 8, 2007, at 1; *Clinton, Obama Spar at Labor Union Debate*, REUTERS, Aug. 8, 2007, <http://www.reuters.com/article/politicsNews/idUSN0727339220070808?feedType=RSS>; Catherine Dudge & Heidi Przybyte, *Clinton, Edwards Spar Over Lobbyists, Health Care at Debate*, Sept. 21, 2007, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ad7YBKbkxuSc>; Mike Glover & Liz Sidoti, *Obama, Edwards Criticize Clinton*, USA TODAY, Aug. 6, 2007, [http://www.usatoday.com/news/topstories/2007-08-06-84891926\\_x.htm](http://www.usatoday.com/news/topstories/2007-08-06-84891926_x.htm). In this lobbyist's experience, fundraisers for all candidates are eager to raise money from employees of lobbying firms and interest groups and from family and friends of lobbyists. Some have questioned the sincerity and practicality of Obama's pledges. See, e.g., *Meet the Press with Tim Russert: Interview with Senator Barack Obama* (NBC television broadcast Nov. 11, 2007); see also Lissa August, *Obama Won't Accept Money from Lobbyists . . . Or Will He?*, POLITIFACT.COM, Aug. 21, 2007, <http://www.politifact.com/truth-o-meter/article/2007/aug/21/Obama-lobby/>; Alexander Bolton, *Obama's K Street Project*, THE HILL, Mar. 28, 2007, at 1, available at <http://thehill.com/leading-the-news/obamas-k-street-project-2007-03-28.html>; Scott Helman, *PACS and Lobbyists Aided*

early 1990s prior to Republicans' wresting control of Congress from Democrats, and other watershed points in political history,<sup>8</sup> headlines about a spate of scandals involving members of Congress,<sup>9</sup> Executive Branch

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*Obama's Rise*, BOSTON GLOBE, Aug. 9, 2007, at A1; Alex Leary, *Obama Follows Fine Line To Stay Clear of Lobbyists*, ST. PETERSBURG TIMES, Aug. 16, 2007, at 1A; Justin Rood, *Despite the Rhetoric, Obama Pushed Lobbyists' Interests*, July 16, 2007, [http://blogs.abcnews.com/theblotter/2007/07/despite\\_rhetoric.html](http://blogs.abcnews.com/theblotter/2007/07/despite_rhetoric.html). Some have also accused Edwards of hypocrisy. See George F. Will, *Setting the Bar for Corruption*, WASH. POST, Nov. 18, 2007, at B7. Others point out how difficult it is to draw the line. See Mike Baker, *Edwards Returns Lobbyist Money*, TIME, July 24, 2007, <http://www.time.com/time/nation/article/0,8599,1646742,00.html?xid=feed-cnn-topics>; *Edwards Returns Lobbyists' Campaign Donations*, MSNBC, July 25, 2007, <http://www.msnbc.msn.com/id/19949362>; see also David Kirkpatrick, *Edwards's Embrace of Public Money May Be Limited*, N.Y. TIMES, Sept. 29, 2007, at A11; David Kirkpatrick, *McCain and Obama in Deal on Public Financing*, N.Y. TIMES, Mar. 2, 2007, at A15; Jeff Zeleny, *Obama Says New Rules Would Guide His Administration*, N.Y. TIMES, June 23, 2007, at A8. See generally Mike Schimpf, Letter to the Editor, *Contributing to Campaigns Is Rightful Role of Lobbyists*, THE HILL, Aug. 8, 2007, at 16, <http://hill6.thehill.com/letters/contributing-to-campaigns-is-rightful-role-of-lobbyists-2007-08-08.html> (discussing lobbyists' First Amendment right to contribute).

8. Political upheavals in the United States such as those experienced in 2006 come with some regularity and are typically preceded by highly politicized scandals. In modern times such "wave" elections occur every twelve years or so, often six years into an administration. The party out of power either gains control or significantly cuts into the other party's margin—usually picking up thirty to fifty seats in the House and five to ten seats in the Senate. 1958, 1966, 1974, and 1994 were wave elections. 2006 was too, even though the Democrats' margin of victory was not as great as they might have expected. Wave elections are often precipitated by a "perfect storm" of forces, including: 1) the conventional wisdom that "all politics is local" is temporarily swept away by a debate on national issues which dominates; 2) the party out of power is increasingly dissatisfied with the way things are going for them and is accordingly energized and unified; 3) the party in power is criticized for abandoning institutional order and running roughshod over the other party; 4) scandals erupt and provide a tipping point when the other factors are present. In 1958, it was White House Chief of Staff Sherman Adams's vicuña coat. 1966 was a bit different. Though there had been controversies in preceding years such as those over Bobby Baker and Justice Fortas, and the country was beginning to roil over the Vietnam War, the large pick-up of seats by Democrats may have been a correction for the anomaly of the large Republican wave in the opposite direction in 1964, which could not be sustained. 1974 was a reaction, in part, to Watergate. In 1994 it was the House banking and check kiting scandal and a sense that Democrats would not adhere to laws and rules that they imposed on everyone else in the country. The "Foley page" scandal, the Abramoff lobbying debacle, and other scandals provided a tipping point in the 2006 elections. See *infra* notes 9-12.

9. See, e.g., Susan Crabtree, *Cunningham Figure Continued Committing Crimes After Guilty Plea*, THE HILL, Dec. 3, 2007, at 8; Allan Lengel, *Jefferson Accused of Two More Schemes*, WASH. POST, Nov. 18, 2007, at A5; Tory Newmyer, *FBI Probes Continuing: Agents Examined Calvert's Records in July*, ROLL CALL, Nov. 19, 2007, at 1; see also Jonathan Allen, *Debts, Loans and a Legal Defense Trust Revealed in Jefferson Reports*, CQ TODAY, June 14, 2007; Susan Ferrechio, *Louisiana Democrat Charged in Bribe Plot*, CQ WEEKLY, June 11, 2007, at 1769; Dan Eggen & Paul Kane, *Alaska Senator's Home Is Raided*, WASH. POST, July 31, 2007, at A1; *Ethics Flap Hasn't Slowed Alaska Senator's Fundraising*, CQ TODAY, Oct. 23, 2007; Kathleen Hunter, *Ethics Panel Defers to Prosecutors, Suspends Jefferson Probe*, CQ TODAY, Aug. 6, 2007; Carl Hulse, *Ethics Panel*

officials,<sup>10</sup> legislative staff,<sup>11</sup> and notorious lobbyists<sup>12</sup> capture national

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*To Investigate Congressman on Conduct*, N.Y. TIMES, June 6, 2007, at A14; David Johnston & Jeff Zeleny, *Congressman Sought Bribes, Indictment Says*, N.Y. TIMES, June 5, 2007, at A1; Neil A. Lewis & David D. Kirkpatrick, *FBI Searches Home of California Lawmaker*, N.Y. TIMES, Apr. 19, 2007, at A23; Sara Lubbes & Lauren Phillips, *Ethics Flaps Could Stir Competition for Alaska Congressional Titans*, CQ TODAY, July 31, 2007; Kate Moran, *Ex-Call Girl, Flynt Keep Pressure on Vitter*, TIMES-PICTAYUNE, Sept. 12, 2007, at 1; Shailagh Murray & Allan Lengel, *The Legal Woes of Rep. Jefferson*, WASH. POST, Feb. 16, 2006, at A1; David Nather, *Frontier Friendships Entangle Alaska Politics*, CQ WEEKLY, Aug. 6, 2007, at 2348; Manu Raju & Elana Schor, *Colleagues Won't Judge Ted Stevens*, THE HILL, Aug. 1, 2007, <http://thehill.com/leading-the-news/colleagues-wont-judge-ted-stevens-2007-08-01.html>; *Rep. Doolittle To Fight Subpoena in Abramoff Probe*, WASH. POST, Sept. 28, 2007, at A4; *Scandal-Linked Senator Breaks a Week of Silence*, CNN.COM, July 17, 2007, <http://www.cnn.com/2007/POLITICS/07/16/vitter/index.html>; *Senator Craig and Prosecutor Tell Different Stories About Guilty Plea*, CNN.COM, Sept. 25, 2007, <http://www.cnn.com/2007/POLITICS/09/24/craig.arrest>; Philip Shenon, *Ex-Congressman Is Sentenced to 2-1/2 Years in Abramoff Case*, N.Y. TIMES, Jan. 20, 2007, at A8; Philip Shenon, *Federal Lawmakers from Coast to Coast Are Under Investigation*, N.Y. TIMES, July 27, 2007, at A16; Seth Stern & Alan K. Ota, *Court Orders Papers Returned to Rep. Jefferson*, CQ WEEKLY, Aug. 6, 2007, at 2380; *The Charges Against Jefferson*, CQ WEEKLY, June 11, 2007, at 1769; Marilyn W. Thompson, *For Craig and Others, a Caucus on the Potomac*, N.Y. TIMES, Sept. 28, 2007, at A18; Karl Vick, *I'll Sell My Soul to the Devil: Corruption Scandals Involve Alaska's Biggest Political Names*, WASH. POST, Nov. 12, 2007, at A1.

10. See, e.g., *United States v. Safavian*, 233 F.R.D. 12 (D.D.C. 2005) (order compelling discovery); MATTHEW CONTINETTI, *THE K STREET GANG: THE RISE AND FALL OF THE REPUBLICAN MACHINE* (2006); Edmund L. Andrews, *Ex-Interior Aide Pleads Guilty to Lying*, N.Y. TIMES, Mar. 24, 2007, at A9; Elizabeth Williamson, *CPSC's Ethics-Review Process for Travel Criticized by Experts*, WASH. POST, Nov. 6, 2007, at A3; Elizabeth Williamson, *Industries Paid for Top Regulators' Travel*, WASH. POST, Nov. 2, 2007, at A1; see also Glenn Kessler, *Rice Deputy Quits After Query over Escort Service*, WASH. POST, Apr. 28, 2007, at A1; John King & Brianna Keilar, *State Department Official Resigns over 'D.C. Madam.'* CNN.COM, Apr. 28, 2007, <http://www.cnn.com/2007/POLITICS/04/27/dc.madam/index.html>; *Recipient of Abramoff Bribes Gets Probation*, N.Y. TIMES, Jan. 10, 2007, at A19; Brian Ross & Justin Rood, *Senior Official Linked to Escort Service Resigns*, ABC NEWS: THE BLOTTER, Apr. 27, 2007, [http://blogs.abcnews.com/theblotter/2007/04/senior\\_official.html](http://blogs.abcnews.com/theblotter/2007/04/senior_official.html); Philip Shenon, *Ex-Official Is Not a Target of Abramoff Inquiry*, N.Y. TIMES, Feb. 15, 2007, at A23; Philip Shenon, *Man Linked to Abramoff Is Sentenced to 18 Months*, N.Y. TIMES, Oct. 28, 2006, at A9; Matthew Wald, *Federal Official Resigns in Inquiry of Escort Service*, N.Y. TIMES, Apr. 28, 2007, at A12.

11. See, e.g., Dan Eggen, *Ex-Aide to Ney Avoids Jail, Gets Probation*, WASH. POST, Aug. 17, 2007, at A4; *Ex-Staff Member To Plead Guilty in Lobbyist Case*, N.Y. TIMES, Apr. 24, 2007, at A23; *Guilty Plea in Congressional Bribe Case*, N.Y. TIMES, Feb. 27, 2007, at A15; Jason Leopold, *How They Got Caught: After Lobbyist Broke Off Engagement, Ex-Fiancée Told of Illicit Dealings to FBI*, RAW STORY, Jan. 3, 2006, [http://rawstory.com/news/2005/How\\_Jack\\_Abramoff\\_and\\_Michael\\_Scanlon\\_0103.html](http://rawstory.com/news/2005/How_Jack_Abramoff_and_Michael_Scanlon_0103.html); Brody Mullins, *End of the Affair: Behind Unraveling of Delay's Team, a Jilted Fiancée*, WALL ST. J., Mar. 31, 2006, at A1; Philip Shenon, *Former Top Aide to DeLay Pleads Guilty to Conspiracy*, N.Y. TIMES, Nov. 22, 2005, at A21.

12. See, e.g., Jeffrey H. Birnbaum & Dan Balz, *Case Bringing New Scrutiny to a System and a Profession*, WASH. POST, Jan. 4, 2006, at A1; Kevin Bogardus & Mike Soraghan, *'Wicked Witch' Targeted over a Dinner in Waikiki*, THE HILL, Dec. 5, 2007, at 1; James V. Grimaldi & Susan Schmidt, *Abramoff Pleads Guilty to 3 Counts*, WASH. POST, Jan. 4, 2006, at A1; James V. Grimaldi & Susan Schmidt, *The Fast Rise and Steep Fall of Jack*

attention. The cacophony of bad news drowns out the fact that the crooked lobbyists are deviant outliers who hardly represent the norm. Each of these scandals is, in a sense, an extreme example which should remind us that the public policy process is usually above board and honest. In Washington, D.C. alone there are approximately 85,000 attorneys, a large number of whom engage, to varying degrees, in public policy. At this writing, there were 35,844 registered lobbyists.<sup>13</sup> Exceedingly few of these men and women would even contemplate breaking an ethical rule or tolerate anyone who does.<sup>14</sup> The public policy work of these professionals rarely is noted by the press, and when it is, it is not because they had an ethical lapse. Those headlined for breaking the rules were caught and punished, and they did not prevail in bending the law and policy their way.<sup>15</sup> The bad guys not only violated public trust, but shortchanged those clients who were naïve enough to try to buy outcomes, because they did not, and in fact could not, deliver. The scandals we all read about were essentially political Ponzi schemes that collapsed, inevitably, under their own weight. The public policy arena is too complex and, as will be argued here, competition is too strong among vigilant adversaries for the quick fix to work. Results obtained by those reckless and foolish enough to shortcut the policy processes or to employ underhanded tactics, will not endure when uncovered, which regularly occurs. Public disclosure, through formal reporting

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*Abramoff*, WASH. POST, Dec. 29, 2005, at A1; Deborah Howell, *Getting the Story on Jack Abramoff*, WASH. POST, Jan. 15, 2006, at B6. See generally CONTINETTI, *supra* note 10.

13. R. ERIC PETERSEN, LOBBYING DISCLOSURE: THEMES AND ISSUES, 110TH CONGRESS 10 (2007). When perhaps the best known Washington lobbyist, Thomas Hale Boggs, Jr. went down to the Clerk of the House in the late 1960s to register, he became the sixty-eighth lobbyist on the list. Thomas Hale Boggs, Jr., Remarks at the Bryce Harlow Foundation Awards Dinner (Mar. 20, 2007), available at [http://www.bryceharlow.org/awards/boggs\\_remarks.cfm](http://www.bryceharlow.org/awards/boggs_remarks.cfm). A thoughtful study that tracks and analyzes the growth of lobbying over twenty-five years may be found in Lee Drutman, *The Business of America Is . . . Lobbying?: The Growth of Corporate Lobbying in American Politics 1981-2004* (Apr. 27, 2007) (unpublished paper), available at <http://www.polisci.berkeley.edu/grad/GradConference/papers/2007/7%20Drutman.pdf>.

14. This personal view is widely supported by the leading and most respected lawyer lobbyists. See Susman, *supra* note 1; Joel Jankowsky, *Lobbying and Lobby Reform: A Practitioner's Viewpoint*, EXTENSIONS (Carl Albert Cong. Research & Studies Ctr., Norman, Okla.), Fall 2006, <http://www.ou.edu/special/albertctr/extensions/fall2006/jankowsky.pdf>; Boggs, *supra* note 13; see also *In the Money* (CNN television broadcast Jan. 7, 2006) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0601/07/cnnitm.01.html>) (featuring remarks by Kenneth Gross on the Abramoff scandal).

15. According to Boggs, "The media dubbed Jack Abramoff a 'Super Lobbyist.' This characterization is incorrect and unfortunate. Unlike the vast majority of law abiding and ethical lobbyists, Abramoff delivered very little for his clients. Rather he was guilty of lying, cheating, and stealing from his clients. He was not a lobbyist, but rather a con artist who abused a system that on the whole functions pretty well. Jack Abramoff and others like him are lazy lobbyists, trying to buy influence rather than being willing to work hard on behalf of their clients. Good lobbyists are not successful because they buy favors, they are successful because they know the system and provide expertise." Thomas Hale Boggs, Jr., Remarks at the Patton Boggs LLP Post Election Forum (Nov. 9, 2006).

requirements or as a result of the work of journalists and watchdogs, is a powerful disinfectant.<sup>16</sup> Nevertheless, “reputations are easy to damage but difficult to repair” is an unfortunately apt cliché. It seems the bad conduct of some lobbyists has convinced the public that corrupt lobbyists are typical rather than exceptional, masking the routine work of those engaged in all aspects of making and implementing laws.<sup>17</sup>

Consequently, there is a great deal of myth and misperception about what public policy advocacy entails and the important role it plays in the democratic process. The simple truth is that our government cannot be bought.<sup>18</sup> If it were

16. While “pork” and “earmarks” are words used to describe the quintessential backroom deals sealed out of the public eye, these favors, if wasteful or unsavory, often surface, attract ridicule, and get nixed, as most recently was the case with the “Bridge to Nowhere” in Alaska, an approximately \$250 million earmark for a long bridge to an island with fifty residents, where a fifteen minute ferry ride already existed. See Press Release, Office of the Governor of the State of Alaska, Gravina Access Project Redirected (Sept. 21, 2007), available at <http://www.gov.state.ak.us/archive.php?id=623&type=1>; Press Release, Office of Senator Ted Stevens, Stevens Vehemently Opposes Coburn Amendment To Eliminate Alaska Bridges (Oct. 20, 2005), available at [http://stevens.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord\\_id=73d6f214-4950-4b3c-a3a5-974e3a0ae163&Region\\_id=&Issue\\_id=](http://stevens.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord_id=73d6f214-4950-4b3c-a3a5-974e3a0ae163&Region_id=&Issue_id=); see also Susan Crabtree, *Nelson and Martinez Back Reversal of Road Earmark*, THE HILL, Dec. 4, 2007, at 8 (reporting that Florida Senators seek to reverse controversial earmark in their state obtained by Alaska Senator for Florida developers); Rachel Kapochunas, *Sen. Stevens Casts Rumors Aside, Will Seek Re-election in Alaska*, N.Y. TIMES, Nov. 16, 2006, [http://www.nytimes.com/cq/2006/11/16/cq\\_1956.html](http://www.nytimes.com/cq/2006/11/16/cq_1956.html); Steve Quinn, *Alaska Abandons Controversial Ketchikan Bridge Project*, SEATTLE TIMES, Sept. 22, 2007, [http://seattletimes.nsource.com/html/localnews/2003897011\\_webbridge22.html](http://seattletimes.nsource.com/html/localnews/2003897011_webbridge22.html); Steve Quinn, *Without Earmark, Ketchikan Bridge Project Going Nowhere*, JUNEAU EMPIRE, Aug. 19, 2007, [http://www.juneauempire.com/stories/081907/sta\\_20070819015.shtml](http://www.juneauempire.com/stories/081907/sta_20070819015.shtml); Paul Singer & John Stanton, *GOP Plans a ‘Butcher Shop’ To Chop Earmarks*, ROLL CALL, Dec. 11, 2007, at 31.

This essay distinguishes advocacy relating to policy issues from the practice of obtaining funding for special projects known as earmarks and focuses on the former. The need for new rules to curb abuses in the earmark area is apparent. For a description and criticism of earmarks, including the practice of including them in “must pass” supplemental appropriations bills and in report language, see Danielle Knight, *Q&A with Sen. Tom Coburn, the Earmark Foe*, U.S. NEWS & WORLD REP., Nov. 8, 2007, <http://www.usnews.com/articles/news/politics/2007/11/08/qa-with-sen-tom-coburn-the-earmark-foe.html>.

17. See Kellogg, *supra* note 2. Lobbyists are not solely to blame for the low public opinion of government and politics, especially in what the incomparable political satirist Mark Russell called the “entertainment capitol of the world—Washington, D.C.” Lobbyists are certainly not the only “Rodney Dangerfields” of professionals inside the Beltway who get no respect: one of my own children, when introducing me to his first grade class during “Take Your Dad to School Day,” called me a “Public Serpent.” At the time I was working for Senator Edward M. Kennedy on the staff of the United States Senate Judiciary Committee.

18. Undeniably, this truth is not in keeping with perception or conventional wisdom as indicated, for example, in book titles by journalists, pundits, and other experts. See, e.g., HERBERT ALEXANDER, *CAMPAIGN MONEY: REFORM AND REALITY IN THE STATES* (1976); JEFFREY H. BIRNBAUM, *THE LOBBYISTS: HOW INFLUENCE PEDDLERS WORK THEIR WAY IN*

that easy—if all it took to prevail was to buy a few steaks, sponsor a golf trip, or make campaign contributions—then anyone could do it, and there would be no reason to hire a professional lobbyist to argue your case before lawmakers or to help you navigate through the procedural and political labyrinth. People working in Congress and the Executive Branch are honest and dedicated. They

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WASHINGTON (1993); JEFFREY H. BIRNBAUM, *THE MONEY MEN: THE REAL STORY OF FUNDRAISING'S INFLUENCE ON POLITICAL POWER IN AMERICA* (2000); PAT CHOATE, *AGENTS OF INFLUENCE* (1990); DAN CLAWSON, ALAN NEUSTADT & DENISE SCOTT, *MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE* (1993); CONTINETTI, *supra* note 10; ANN H. COULTER, *HIGH CRIMES AND MISDEMEANORS: THE CASE AGAINST BILL CLINTON* (1998); ELIZABETH DREW, *POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION* (1983); SUZANNE GARMENT, *SCANDAL: THE CULTURE OF MISTRUST IN AMERICAN POLITICS* (1992); WILLIAM GREIDER, *WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY* (1993); RUSSELL WARREN HOWE, *THE POWER PEDDLERS: HOW LOBBYISTS MOLD AMERICA'S FOREIGN POLICY* (1977); ARIANNA HUFFINGTON, *PIGS AT THE TROUGH: HOW CORPORATE GREED AND POLITICAL CORRUPTION ARE UNDERMINING AMERICA* (2004); BROOKS JACKSON, *HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS* (1990); BARBARA OLSON, *THE FINAL DAYS: THE LAST, DESPERATE ABUSES OF POWER BY THE CLINTON WHITE HOUSE* (2001); P.J. O'ROURKE, *PARLIAMENT OF WHORES: A LONE HUMORIST ATTEMPTS TO EXPLAIN THE ENTIRE U.S. GOVERNMENT* (1992); DREW PEARSON, *THE CASE AGAINST CONGRESS: A COMPELLING INDICTMENT OF CORRUPTION ON CAPITOL HILL* (1958); KEVIN P. PHILLIPS, *AMERICAN DYNASTY: ARISTOCRACY, FORTUNE AND THE POLITICS OF DECEIT IN THE HOUSE OF BUSH* (2004); LARRY SABATO, *PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES* (1985); KEN SILVERSTEIN, *WASHINGTON ON \$10 MILLION A DAY: HOW LOBBYISTS PLUNDER THE NATION* (1998); BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM* (2001); PHILIP M. STERN, *THE BEST CONGRESS MONEY CAN BUY* (1988); GEORGE THAYER, *WHO SHAKES THE MONEY TREE? AMERICAN CAMPAIGN FINANCING PRACTICES FROM 1789 TO THE PRESENT* (1973); EDWARD TIMPERLAKE & WILLIAM C. TRIPLETT, *YEAR OF THE RAT: HOW BILL CLINTON COMPROMISED U.S. SECURITY FOR CHINESE CASH* (2000); ROBERT WINTER-BERGER, *THE WASHINGTON PAY-OFF: AN INSIDER'S VIEW OF CORRUPTION IN GOVERNMENT* (1972).

Interestingly, some link the abandonment of “regular order” and parliamentary discipline in Congress to the growth of unethical behavior. See THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 170-75 (2006); Norman Ornstein & Thomas E. Mann, *If You Give a Congressman a Cookie*, N.Y. TIMES, Jan. 19, 2006, at A23. Departure from “regular order” is described as a response to pressure from increasingly ideological and partisan Members which involves ad hoc arrangements circumventing normal procedures for committees, reports, floor votes, and reliance on behemoth legislative omnibus packages that short circuit the normal committee procedures. See MANN & ORNSTEIN, *supra*, at 170; James A. Thurber, *Lobbying, Ethics, and Procedural Reforms: The Do Nothing Congress Did Nothing About Reforming Itself*, EXTENSIONS (Carl Albert Cong. Research & Studies Ctr., Norman, Okla.), Fall 2006, <http://spa.american.edu/ccps/getpdf.php?table=publications&ID=66>. Woodrow Wilson, in his 1885 doctoral dissertation, anticipated their insight, suggesting that the way Congress conducts its business can facilitate corruption: “The voter . . . feels that his want of confidence in Congress is justified by what he hears of the power of corrupt lobbyists to turn legislation to their own uses . . . . [And] he is not altogether unwarranted in the conclusion that these are evils inherent in the very nature of Congress, for there can be no doubt that the power of the lobbyist consists in great part, if not altogether, in the facility afforded him by the Committee system.” WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 132 (Johns Hopkins Univ. Press, 1981) (1885).

are also attuned to political constituencies.<sup>19</sup> Even if they are tempted to ignore ethics rules, those who ignore the public interest (and their political self-interest) do so at the peril of their careers.<sup>20</sup> Public policy advocates are also, with few exceptions, diligent and honest. Writing from the perspective of lawyer policy advocates who practice in law firms, this author has an even easier case to make than lobbyists who do not because lawyers thrive on compliance with rules, and must adhere to their own professional standards and canons of ethics. Like the Kosher hot dog company, lawyer lobbyists must “answer to a higher authority.”<sup>21</sup>

The public does not have to rely solely on the integrity of lawmakers and lobbyists to protect the public interest. Perhaps the most effective self-correcting mechanism in the policy process is the intense competition to be right. No single interest, no lobbyist, has a monopoly on access and information. Lawmakers and their staff, if they are any good, as most are, do not rely on a single source of information when making policy decisions. They indeed have multiple information resources, including their own research, think tanks, the Congressional Research Service, the Congressional Budget Office, the Joint Tax Committee, and so on. So, while lobbyists have an opportunity to influence policy decisions by informing lawmakers of their client’s view, they are generally not the only source a lawmaker relies on, and there is additionally

19. In Bryce Harlow’s words, “[T]he 535 individual Members of Congress [were] each rough, tough, and independent; each reporting only to his Maker and his constituency (and not necessarily in that order); each quite capable of a sudden, unexpected assault . . . for good reason, bad reason, or no reason at all.” BRYCE HARLOW, *CORPORATE REPRESENTATION* 5 (1984), available at [http://www.bryceharlow.org/resources/Corporate\\_Representation.pdf](http://www.bryceharlow.org/resources/Corporate_Representation.pdf).

20. California’s legendary politician, Assembly Speaker, and later State Treasurer Jesse Unruh put it, rather crudely, this way: “[I]f you can’t eat their food, drink their booze, \*\*\* their women, take their money and then vote against them, you’ve got no business being up here.” BILL BOYARSKY, *BIG DADDY: JESSE UNRUH AND THE ART OF POWER POLITICS* (2008) (Unruh may have been quoting Texans such as Molly Ivins and Sam Rayburn). Speaker Rayburn had his own take on the ethics of gifts. His rule was: “You just don’t take it unless you can eat it, drink it, or smoke it in twenty-four hours.” Interview by Jerry N. Hess with Robert G. Nixon, News Correspondent, International News Service 1930-1958, in Bethesda, Md. (Oct. 19, 1970), available at <http://www.trumanlibrary.org/orallhist/nixon3.htm>. Advertisements from a 1950s Pennsylvania newspaper show a usage similar to the one attributed to Unruh: “Drink Their Beer, Carry Their Signs, and Take Their Money, But Vote for a ‘Watchdog’ . . . by voting for Stephen Sinchak.” *Advertisement for Stephen Sinchak*, *MONESSEN DAILY INDEP.*, May 18, 1959, at 8.

21. The American League of Lobbyists has an “Ethics Code.” In 2002, Georgetown University’s Woodstock Theological Center published a foundation for a code of ethics, the so-called “Woodstock Principles.” WOODSTOCK THEOLOGICAL CTR., *THE ETHICS OF LOBBYING: ORGANIZED INTERESTS, POLITICAL POWER, AND THE COMMON GOOD* (2002). Upon admission to the bar, lawyers are bound by ethical rules of their profession and other requirements, such as continuing legal education, to stay abreast of change. They risk losing their license to practice for failure to do so. Bar counsel for each jurisdiction protect the public by processing complaints and prosecuting unethical attorneys. *See, e.g.*, Bill Ross, *Bar Counsel: Overcoming Your Fear of Bar Counsel*, *WASH. LAW.*, Dec. 2007, at 12. The publication also publishes monthly reports of disciplinary actions. *Id.*

no guarantee the lawmaker will even listen. As Hubert Humphrey said, “the right to be heard does not automatically include the right to be taken seriously.”<sup>22</sup> Moreover, another built-in safeguard is that no policy decision is ever final. What can be done, can be undone or changed. The examples of legislative or regulatory legerdemain in the dead of night outside of public view are a rare and endangered species. They occur infrequently, and when they do, they invariably do not survive the light of day unless supported by a substantial, credible, public-interest justification.<sup>23</sup> This competition to be right can be seen in large public policy debates, such as those over healthcare, energy, communications, education, taxes, immigration, privacy, defense, and national security. These debates involve numerous legitimate and competing interests and are fought out in a continuous, never-ending cycle in a number of different arenas. For example, the landmark Telecommunications Act of 1996<sup>24</sup> was enacted to rewrite and modernize over six decades of communications law. The

22. Senator Hubert H. Humphrey, Remarks Before the Young Democrats of Arizona (Sept. 10, 1966), *quoted in* SILENCING THE OPPOSITION: GOVERNMENT STRATEGIES OF SUPPRESSION OF FREEDOM OF EXPRESSION 194-95 (Craig R. Smith ed., 1996).

23. A serious exception has been the enormous growth of the use of so-called “earmarks.” An earmark is a “congressionally directed spending item, limited tax credit, or limited tariff benefit.” Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 521, 121 Stat. 735, 760. They have always been part of the system in the modern era, but in the last dozen years the practice has come to dominate the appropriations process. Since 1994, the number of earmarks has tripled, from 4126 in 1994 to 12,852 in 2006. Memorandum, Congressional Research Service, Earmarks in Appropriations Acts: FY1994, FY1996, FY1998, FY2000, FY2002, FY2004, FY2005 (Jan. 26, 2006) (on file with author). The ubiquitous nature of the practice has led to abuse. *See, e.g.*, David Johnston & David D. Kirkpatrick, *Deal Makers Detail the Art of Greasing the Palm*, N.Y. TIMES, Aug. 6, 2006; Press Release, Office of Senator Ted Stevens, *supra* note 16. This, in turn, is the reason why earmark reform has been such a big part of the debate over how to improve government ethics. In the 1980s President Reagan vetoed a spending bill because it had approximately 160 earmarked projects. *Id.* In 2006 the estimated 12,000 earmarks amounted to \$64 billion in spending bills. Johnson & Kirkpatrick, *supra*. Notwithstanding the new disclosure and conflict of interest rules for earmarks, the practice of earmarks is not abating. *See* Alexander Bolton, *Clinton Tops 2008 Rivals, Gets \$530M in Earmarks*, THE HILL, Nov. 9, 2007, at 1; Dana Milbank, *Bush Beholds the Power of Pork*, WASH. POST, Nov. 9, 2007, at A2; Jonathan Weisman, *A Bush Veto Is Overridden for the First Time*, WASH. POST, Nov. 9, 2007, at A4; *see also* Mary Ann Akers & Paul Kane, *Inside the Loop: Not All Those Earmarks Came from Democrats*, WASH. POST, Nov. 22, 2007, at A35; Alexander Bolton, *An Earmark Christmas: Lawmakers Deck Out Omnibus with Many a Spending Project*, THE HILL, Dec. 18, 2007, at 1; Alexander Bolton, *Sens. Cochran, Stevens Lead in Earmark Tally*, THE HILL, Dec. 4, 2007, at 1; Susan Crabtree, *House Republicans Press on in Attack on Earmarks*, THE HILL, Dec. 12, 2007, at 4; Manu Raju, *Obey Earmark Proposal Stirs Opposition from Both Parties*, THE HILL, Dec. 12, 2007, at 2; Mary Beth Sheridan, *Hoyer Is Proof of Earmarks’ Endurance: Md. Democrat’s Campaign Donors Among Grantees*, WASH. POST, Dec. 10, 2007, at A1; Mary Beth Sheridan, *Millions for D.C. in ‘08 Bills*, WASH. POST, Nov. 22, 2007, at B1; Paul Singer & Tory Newmyer, *Nearly 9,000 Earmark Requests in Omnibus*, ROLL CALL, Dec. 18, 2007, at 1; Elizabeth Williamson, *Spending Bill Still Stuffed with Earmarks, Democrats Had Vowed To Curtail Pet Projects*, WASH. POST, Dec. 21, 2007, at A1.

24. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

epic legislative battles over this law can be traced back almost two decades to the break up of the Bell telephone system, the emergence of subscription television, and the entry of satellites and new technology into the commercial market. In the days after enactment of the 1996 Act, over 180 regulatory proceedings were initiated at the Federal Communications Commission to determine how to implement the new law, court challenges were filed against the statute, and legislative efforts to revise the Act began anew. Additionally, since 1996 the explosion of e-commerce took the debate into new terrain to determine what rules should apply when you “slip down a worm hole” and communicate in cyber space. These shifting, unceasing policy battles continue to this day.<sup>25</sup> In the words of the *Saturday Night Live* character Roseanne Roseannadanna: “It’s always something.”

Or, for example, consider the fiercely competitive policy brawls in the 110th Congress over the State Children’s Health Insurance Program (SCHIP) and various features of Medicare. Those debates pitted “lobbyists” representing children, nurses, doctors, senior citizens, nursing homes, specialty hospitals, health businesses, insurance companies, tobacco companies, convenience stores, gas stations, states, foreign sovereigns, and the Administration against each other, all vying for different legislative outcomes. In addition to direct lobbying of members and staff on Capitol Hill, these interests used the full panoply of lobbying techniques including mobilizing grass roots support, building coalitions in key districts, running ads on cable and broadcast television and in print, and generating internet traffic on the topic.<sup>26</sup> The intensity and legitimacy of competition for policy outcomes is reflected in the variety of those who lobby for themselves or on behalf of others. Lobbyists not only represent wealthy businesses, but also small businesses, entrepreneurs, inventors, non-profits, children, the elderly, patients, crime victims, colleges and universities, hospitals, working men and women, religious organizations, countries, states, counties and cities, and multitudes of different interests. Lobbyists themselves can be government officials, lawyers, those working “in-house” for companies or non-profit organizations, and others hired to be advocates. It is true that in a technical sense, the statutory definition of lobbyist is narrow. Under the 1995 Lobbying Disclosure Act, a “lobbyist” who is required to register with Congress is defined as “any individual who is employed or retained by a client for financial or other compensation for

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25. This brief summary hardly does justice to the complexity of the telecommunications policy debates, which, for example, involved contentious issues of intellectual property rights. See, e.g., Nicholas Allard, *Must Carry and the Courts: Bleak House, the Sequel*, 13 *CARDOZO ARTS & ENT. L.J.* 139, 145 (1994). See generally PETER HUBERT, *LAW AND DISORDER IN CYBERSPACE (ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM)* (1997); CHARLES H. KENNEDY, *AN INTRODUCTION TO U.S. TELECOMMUNICATIONS LAW* (2d ed. 2001).

26. See Chris Frates, *House SCHIP Bill Widens Generation Gap*, *POLITICO*, Sept. 11, 2007, at 12.

services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than twenty percent of the time engaged in the services provided by such individual to that client over a three-month period.”<sup>27</sup> Obviously, this narrow statutory definition does not embrace the full range of players and the scope of activities involved in lobbying matters such as SCHIP reauthorization legislation.<sup>28</sup>

In an environment of fundamental honesty and dynamic competition to prevail, quick fixes and cutting corners are paths to failure. The successful practice of public policy is rooted in the mastery of procedures and the ability to explain how a given position advances the public interest. Like litigation, this advocacy work is conducted in a highly competitive, complex, and professional environment. The colorful popular image of the cigar-chomping, duck-hunting, joke-telling, martini-drinking door-opener overshadows the skills of the highly professional cadre of lawyer lobbyists. Even the most legendary of the “Super Lobbyists” who enjoy some of the aforementioned pleasures (never all at once) are usually the smartest, most prepared, hardest working people in the room.<sup>29</sup> In addition, what may or may not have worked for lobbyists in the past is beside the point. The profession, techniques, and rules of

27. Lobbying Disclosure Act of 1995 § 3, 2 U.S.C. § 1602(10) (2008). Note that the monetary threshold for registration as a lobbyist was recently cut in half—it is now \$2,500 for retainer lobbyists and \$10,000 for in-house lobbyists. See *Honest Leadership and Open Government Act of 2007* § 201, 2 U.S.C. § 1603(a)(3) (2008) (amending Lobbying Disclosure Act of 1995 § 4); OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, AMENDED GUIDE TO THE LOBBYING DISCLOSURE ACT (2007), available at [http://lobbyingdisclosure.house.gov/amended\\_lda\\_guide.html](http://lobbyingdisclosure.house.gov/amended_lda_guide.html) [hereinafter AMENDED LDA GUIDE]; Karambelas, *supra* note 4, at 31.

28. See ALLAN J. CIGLER & BURDETT A. LOOMIS, *INTEREST GROUP POLITICS* 10 (5th ed. 1998); Wolfensberger, *supra* note 1, at 4 (describing exponential expansion of lobbying participants and activities since the 1960s). Consider the large number of federal lawyers in government and private practice who are engaged in government relations issues on behalf of their own interests. See William N. Lafaree, *President's Message: Government Relations Programming Gives Us the Edge*, *FED. LAW.*, July 2007, at 3; see also C. Simon Davidson, *A Question of Ethics: Running the Traps on the Need To Register*, *ROLL CALL*, Dec. 3, 2007, at 6 (discussing who does and does not have to register); Tory Newmyer, *The Lobbyist Cometh: Revolving Door Restrictions Have Been Tightened But There Is Still Plenty a Former Senator Can Do*, *ROLL CALL*, Dec. 3, 2007, at 9 (discussing breadth of activity that does not run up against lobbying ban on ex-Members); Federal Bar Association Issues Agenda, <http://www.fedbar.org>.

29. Harlow put it this way: “A Washington Representative whose expertise is limited to a refined understanding of social small talk and various techniques of self-ingratiation is not likely to do well or last long in this maelstrom.” HARLOW, *supra* note 19; see also John Breau, *K Street Insiders: When They No Longer Call You ‘Senator,’* *THE HILL*, Jan. 24, 2007, at 15; D.C. Dossier: *Election Year or Not, Knowing the Unwritten Rules for Navigating the D.C. Maze May Be As Important As Knowing the Law*, *CHIEF LEGAL EXECUTIVE*, Spring 2004, at 9; Peter Keating, *What Top Lobbyists Can Do for You—And For How Much*, *CORPORATE BOARD MEMBER MAGAZINE*, Mar./Apr. 2003; Jankowsky, *supra* note 14; Susman, *supra* note 1; Burt Solomon, *Lobbying—The Rise of Patton Boggs*, *NAT’L J.*, Dec. 2004.

the road are evolving. One benefit of the public outrage over recent lobbying scandals is that the clients are better informed and skeptical of quick fixes and corner-cutting. They value representation by people and firms who they can rely on to do things the right way, and present their position while complying with ethics and campaign rules.<sup>30</sup> The 110th Congress adopted and enacted major changes for lobbying, including provisions for enhanced and more frequent enforcement, for conducting random audits, and for greater penalties.<sup>31</sup> Another major development is the heightened level of oversight and investigations by the 110th Congress cutting across all government agencies and all industries. Combined, these changes have in fact increased the demand for experienced, skilled, and effective representation before lawmakers. The emergent advocacy environment is likely to be one that puts an additional premium on credibility and honesty as well.

The objective of this essay is to chip away a bit at the widely held misconceptions concerning public policy advocacy and to encourage a more accurate and sophisticated understanding of lobbying as an honorable, worthwhile, and necessary endeavor. As this essay explains, public policy advocacy<sup>32</sup> is inextricably woven into the fabric of our constitutional system

30. See Kellogg, *supra* note 2.

31. See Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735. Earlier in the year, the House enacted a set of gift and travel rules changes. H.R. Res. 6, 110th Cong. (2007) (enacted). In January 2007, Speaker Nancy Pelosi also approved the creation of the “Special Task Force on Ethics Enforcement,” charged with exploring the creation of an outside ethics enforcement mechanism. See Press Release, Office of Speaker Nancy Pelosi, Pelosi Announces Special Task Force on Ethics Enforcement (Jan. 31, 2007), available at <http://speaker.house.gov/newsroom/pressreleases?id=0057>. The results of this initiative are in doubt. See Meredith McGoshee, *House Must Give Outside Ethics Panel Some Teeth*, ROLL CALL, Oct. 25, 2007, at 4; Tory Newmyer & Jennifer Yachnin, *New Ethics Law Already Under Fire*, ROLL CALL, Nov. 8, 2007, at 1; see also Stanley Brand, *New Ethics Office Doesn’t Need Subpoena Power*, ROLL CALL, Dec. 11, 2007; *Ethical Delay*, ROLL CALL, Nov. 19, 2007; Meredith McGehee, *Why Subpoena Power Is Key to Real Ethics Reform*, ROLL CALL, Dec. 6, 2007; Norman Ornstein, *New Ethics Proposal Isn’t Perfect, but It’s a Solid Step Forward*, ROLL CALL, Dec. 6, 2007, at 6; Thomas Spulak, *Outside Panel To Probe Ethics May Run Afoul of Constitution*, THE HILL, Dec. 12, 2007, at 26; Jennifer Yachnin & Rachel Van Dangen, *Ethics Office Draws Critics*, ROLL CALL, Nov. 20, 2007, at 1. A bill cosponsored by Senate Judiciary Committee Chairman, Senator Patrick Leahy (D-VT) and Senator John Cornyn (R-TX) would add one hundred million dollars in funds for Justice Department corruption investigations and prosecutions and would clarify illegal gratuity and “official act” definitions to simplify prosecutions. PUBLIC CORRUPTION PROSECUTION IMPROVEMENTS ACT, S. 1946, 110th Cong. (2007).

32. A friend and congressional expert offered several thoughtful comments for this essay but had a threshold problem; she said, “You are a lobbyist, not a public-policy advocate. You are not always, or even usually, arguing for public causes or working *pro bono* to advance the public interest. You are paid big bucks to represent large corporations.” Au contraire, if you are trying to argue what the law or rule should be, you are engaged in public-policy advocacy, no matter what or who your client may be. It’s an old chestnut to say, “The public interest is what my client wants. Special interests are what our opponents want.” Somewhere between naïve bias and sarcasm lies the truth: no one is the exclusive

because it plays a vital role in promoting effective representative government. The right to petition and the rights to free speech, to free press, and to free association, are fundamental pillars of democracy.<sup>33</sup> Indeed, impeding the ability of people to employ lobbyists to effectively petition governments can undermine these rights.<sup>34</sup> Additionally, this essay explains how public policy advocacy assists effective lawmaking and governance, describes the complex nature of the advocacy system, and illustrates the effect of new lobbying laws on the lobbying environment in Washington. Finally, this essay discusses the enhanced use of government oversight and investigations and the critical role lawyer-lobbyists have in these proceedings. Now, I am not above oversimplification, embellishment, or bald-faced exaggeration to make a point or to stimulate a needed dialogue. Yes, guilty as charged. However, naiveté is not a virtue of which I would expect to be accused, and I do not believe it belies the central premise of this essay.

#### I. CONSTITUTIONAL DIMENSIONS OF PUBLIC POLICY ADVOCACY

“[L]obbying has surely been around as long as there has been government itself.”<sup>35</sup> The practice of lobbying within the United States, along with its

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arbiter of the public interest. Whether you wear a white, gray, or black hat, your claim should depend on the merit of your case and whether your interest coincides with the public interest. Most often, results in public policy debates amount to accommodation of competing, legitimate interests, which is commonly described as compromise.

As Tom Boggs explained, Bryce Harlow would be the first to say “that all interests are special interests, whether you represent a corporation, its shareholders, its employees, its suppliers, [or if] you need a government bailout. Whether you represent trade unions or trade associations or whether you represent a group of native Hawaiians who need recognition to protect their cultural heritage. All interests are special in this town and they all need a voice and they all need representation. But what does that mean? That means that we have to do it well. It means that we have to do it openly with public scrutiny and that is basically [what we try to do].” Boggs, *supra* note 13. Harlow did say, “Business is not a malign influence—something evil called a special interest that harms public interest. Think about it: business is an indispensable pillar of our prosperity, of our strength as a nation, of our capacity to provide opportunity for mobility in our society, and for fulfillment of individual potentials. In short, business is the heart of America’s well-being.” Harlow, *supra* note 19, at 1.

33. See U.S. CONST. amend. I; see also *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United States v. Harriss*, 347 U.S. 612, 625 (1954); *United States v. Rumely*, 345 U.S. 41 (1953).

34. See *Meyer v. Grant*, 486 U.S. 414, 424 (1988); *Noerr*, 365 U.S. at 127. A minor, and perhaps trivial, example is a bill introduced by Senator Claire McCaskill (D-MO), S. 2177, 110th Cong. (2007). See Libby Copeland, *A Job That’s on the Line*, WASH. POST, Oct. 18, 2006, at C1; see also Bradley A. Smith, *Bundling Ban Would Unravel Free Speech*, POLITICO, Oct. 30, 2007, at 30. Indeed, one of the reasons that Congress relies more on “disclosure” than regulation of lobbying conduct is that disclosure treads more lightly on the First Amendment underpinnings of using lobbyists to petition the government.

35. See Susman, *supra* note 1, at 738; see also J.M. Norris, *Samuel Garbett and The Early Development of Industrial Lobbying in Great Britain*, 10 ECON. HIST. REV. 450, 450 (1958) (noting in the opening line that “lobbying is as old as government”).

shortcomings, is as old as our nation's government. The specific term may well have its American roots in the early nineteenth century, as lobbyists are widely thought to be named for those who would wait in the lobby of Washington, D.C.'s Willard Hotel to smoke a cigar with President Ulysses S. Grant or to meet Congressmen.<sup>36</sup> No matter when the term lobbyist was coined, the role of the public policy advocate was understood and considered by the Founders. Professor Burdett Loomis, in *Lobbying in Constitutional and Historical Contexts*, explains that the Framers of the Constitution, "steeped in their knowledge of legislative politics from state assemblies and the Continental Congress" were well aware of the "pressures that particular interests, like farmers, merchants, and churches, could put upon them."<sup>37</sup> In writing *Federalist No. 10*, undoubtedly the most famous statement on organized interests in the American republic, James Madison "did not view special interests, or 'factions' as he also called them, as an evil to be eradicated."<sup>38</sup> On the contrary, Madison explained that "the causes of faction" are "sown in the nature of man," removable only by "destroying the liberty which is essential to its existence."<sup>39</sup>

Recognizing the inevitability of "faction," the imperative for Madison and the Framers was to design a form of republican government that would provide a positive role for, but also a system of balances against, the work of organized interests. What Madison set forth was "an extraordinary theory of effective governance in which the principal legislative task of government is to regulate competing interests by involving the spirit of those interests in the ordinary operations of government."<sup>40</sup> To accomplish this, the Framers created a layered and intricate system of government whereby the separation of powers and the system of federalism would provide multiple opportunities for organized groups to influence the workings of government, but also multiple forums for "[a]mbition . . . to counteract ambition."<sup>41</sup> Reflecting upon the Framers' work, Professor Loomis writes that, "If, in drafting the Constitution, James Madison had consciously sought to create a governmental system that would

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36. American League of Lobbyists, What Is Lobbying?, <http://www.alldc.org/publicresources/lobbying.cfm> (last visited Apr. 1, 2008). The term "lobby" appears in the 1808 annals of the 10th U.S. Congress. Wolfensberger, *supra* note 1, at 2. It is also suggested that the term "lobby agents" may have come into use in the New York state capital in the 1830s. Doubtless, the term has even earlier roots in English parliamentarianism. The phrase is thought to have an antecedent in the seventeenth century British Parliament, where a large public waiting room off the House of Common was known as the "lobby." *Id.* A colorful depiction of the lobby and long bar of the Willard Hotel, and its place in political lore of the nation's capital, may be found throughout GORE VIDAL, *LINCOLN* (1984).

37. Burdett A. Loomis, *From the Framing to the Fifties: Lobbying in Constitutional and Historical Contexts*, EXTENSIONS, Fall 2006, at 1.

38. Wolfensberger, *supra* note 1.

39. THE FEDERALIST NO. 10 (James Madison) (Mentor Book ed. 1962).

40. Wolfensberger, *supra* note 1.

41. THE FEDERALIST NO. 10 (James Madison), *supra* note 39.

encourage—indeed dictate—that lobbying would become central to policymaking, he could have scarcely done a better job.”<sup>42</sup>

For the Founders, however, the right to petition the government was not only inevitable or even central to the new Republic, but also elemental to the governance of a free people. The Declaration of Independence pointedly complained to King George III:

In every stage of these Oppressions, We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People.<sup>43</sup>

The compromise to secure ratification of the Constitution included adding the Bill of Rights in 1791. In that document one finds the roots for the practice of public policy advocacy—the First Amendment guarantees of free speech, press, association, and the right to petition: “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.”<sup>44</sup>

In the modern era, constitutional issues played a major role in shaping lobbying regulation. Subsequent amendments to the Federal Regulation of Lobbying Act of 1946, the first codified lobbying regulation in the United States, largely stalled in the face of persistent concerns about First Amendment encroachments.<sup>45</sup> In hearings leading to the passage of the landmark Lobbying

42. Loomis, *supra* note 37.

43. THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776). This theme may be traced to the Magna Carta which King John was forced to sign in 1215 C.E. by nobles whose right to petition had been blocked by the king.

44. U.S. CONST. amend. I. One might ask whether the negative phrasing of the text, which speaks of a right to petition to seek redress of grievances, somehow limits the right to complain only after the fact about government action. However, since adoption of the First Amendment, the right to petition has not been limited to a right to complain or criticize existing or past government actions or policies, but rather embraces advocating new proposals, change, and affirmative actions, as well.

[E]arly Americans uniformly regarded the right as ‘implied in the very nature of republican government’ and as a ‘birthright’ worthy of constitutional protection at both the federal and state level . . . . In Virginia, the home of Madison and many of the other intellectually dominant figures at the Constitutional Convention and First Congress, the colonists exercised the right inveterately. The Journals of the Virginia House of Burgesses state that petitions ‘concerning almost any conceivable subject,’ from changing the tobacco laws to prohibiting horse racing on the Sabbath, flooded the colonial legislature.

....

When, in 1836, Congressmen sympathetic to slavery sought to silence debate on abolition by laying on the table all petitions dealing with slavery without any official notice, John Quincy Adams erupted with a forceful, eloquent defense of an untrammelled right of petition. Adams asserted that not even ‘the most abject despotism’ would ‘deprive the citizen of the right to supplicate for a boon, or to pray for mercy.’

Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right To Lobby*, 16 HARV. J.L. & PUB. POL’Y 149, 182-183 (1993) (emphasis added).

45. See Steven A. Browne, *The Constitutionality of Lobby Reform: Implicating*

Disclosure Act of 1995, the first major lobbying regulation after the 1946 Act, Chairman John Bryant (D-TX) stated his Committee's intention "to provide for the effective disclosure of the efforts of paid lobbyists . . . while continuing to afford the fullest opportunity to the people to exercise their right to petition their Government . . . and to express their opinions freely and provide information to the Government."<sup>46</sup> Indeed, in the recent debates leading to the enactment of the Honest Leadership and Open Government Act of 2007, Representative Dan Burton (R-IN) reminded his colleagues that "the First Amendment to the Constitution specifically provides the opportunity for interest groups . . . to participate in public policy making" and cautioned that "any proposed law related to regulating lobbying must strike a balance between open, transparent, and accountable governance and the rights of lobbyists, on their own, or on behalf of a client, to exercise constitutionally guaranteed rights."<sup>47</sup>

The Supreme Court's treatment of lobbying and its constitutional status has been complex and nuanced, but it is nonetheless clear that the Court also recognizes lobbying and lobbying regulation to implicate core First Amendment guarantees. Beginning with *Rumely v. United States*,<sup>48</sup> and its challenge to the Federal Regulation of Lobbying Act (FRLA), the Court made an "implicit acknowledgement that lobbying is entitled to some protection on First Amendment grounds, albeit [on] grounds that still remained unexamined."<sup>49</sup> In *United States v. Harriss*,<sup>50</sup> also a challenge to the FRLA, the Court again "skirted the pivotal question of precisely which rights lobbyists do enjoy,"<sup>51</sup> though it held that the Act's disclosure provisions, when narrowly construed, did not unduly impinge upon First Amendment "freedom[s] to speak, publish and petition the government."<sup>52</sup> Later, in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*,<sup>53</sup> the Court for the first time recognized the right to petition involves critical First Amendment rights, but once more "avoided a full discussion of the nature of lobbyists' constitutional rights."<sup>54</sup> The unanimous Court in *Noerr* did, however, establish the critical

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*Associational Privacy and the Right To Petition the Government*, 4 WM. & MARY BILL RTS. J. 717, 723 (1995).

46. Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 528 (2007) (quoting *Lobbying Disclosure Act of 1993: Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 103d Cong. 1 (1993) (opening statement of Rep. John Bryant, Chairman, Subcomm. on Admin. Law & Governmental Relations)).

47. *Lobbying Reform*, U.S. FED NEWS, Aug. 17, 2007.

48. 345 U.S. 41 (1953).

49. See Thomas, *supra* note 44, at 193.

50. 347 U.S. 612 (1954).

51. See Thomas, *supra* note 44, at 193.

52. *Harriss*, 347 U.S. at 625.

53. 365 U.S. 127 (1961).

54. Thomas, *supra* note 44, at 165.

precedent that “joint attempts to influence the passage of laws are exempt from the Sherman Act”<sup>55</sup> While *Noerr* created an exception to the Sherman Act with respect to attempts to influence legislative decisions, the Court in *United Mine Workers v. Pennington*<sup>56</sup> extended the protection of “joint efforts to influence” actions directed toward executive branch decisions, including regulation and purchasing decisions undertaken by federal agencies. As the Court wrote in *Pennington*, “[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.”<sup>57</sup> Predictably, questions as to the scope of the *Noerr-Pennington* doctrine continued to confront the Court. One such challenge to the doctrine led to the Court’s important decision that “sham” lawsuits or proceedings lacking any purpose to actually obtain government action, and intended solely to harm a competitor by limiting access to administrative and judicial proceedings, did not fall under the doctrine.<sup>58</sup> Nonetheless, the doctrine remains robust with respect to legitimate efforts to influence policy. Even the most critical commentators will only go so far as to argue that the “exemption from antitrust laws established by the *Noerr-Pennington* line of cases . . . [should be] limited to activity protected by the constitutional right to petition.”<sup>59</sup>

The more recent case of *Regan v. Taxation with Representation of Washington*<sup>60</sup> generally followed prior jurisprudence, but its concurring opinions took a notable step towards integrating an express “right to lobby” within the First Amendment. In *Regan*, the Court upheld the IRS’s decision to deny tax-exempt status to a “public interest” organization heavily involved in lobbying, holding that there was no constitutional obligation to subsidize lobbying activity. The concurring opinion by Justice Blackmun, however, joined by Justices Brennan and Marshall, began with the express presumption that “[l]obbying is protected by the First Amendment.”<sup>61</sup> Of course, the majority’s non-recognition of a separate, “judicially created” right to lobby does not mean that public policy advocacy is not in fact sustained and protected by generalized First Amendment guarantees.<sup>62</sup> Indeed, some commentators would prefer that the Court move in a more proactive direction, largely to bring greater order and consistency to state lobbying regulations.<sup>63</sup>

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55. Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 81 (1977); see *Noerr*, 365 U.S. at 135 (holding “no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws.”).

56. 381 U.S. 657 (1965).

57. *Id.* at 670.

58. *Cal. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 516 (1972).

59. Fischel, *supra* note 55, at 81.

60. 461 U.S. 540 (1983).

61. *Id.* at 552.

62. Browne, *supra* note 45, at 751.

63. See Thomas, *supra* note 44.

While the Supreme Court has thus been cautious in finding an express constitutional “right to lobby,” a look at related precedents demonstrate that underlying First Amendment protections in this domain are substantiated. In *Meyer v. Grant*,<sup>64</sup> for example, the Court upheld the right to pay individuals to circulate petitions and collect required signatures, holding that “the First Amendment protects the right not only to advocate [one’s] cause but also to select what one believes to be the most effective means for so doing”<sup>65</sup>—including, as one commentator has noted, “hiring a lobbyist.”<sup>66</sup> In *Lehnert v. Ferris Faculty Ass’n*,<sup>67</sup> a case addressing a union’s abilities to use member dues to engage in “political lobbying,” the Court held that the First Amendment protects an individual’s decision whether to engage in or support political lobbying, such that a union cannot force its members to engage in lobbying activities not related to its core mission.

The right of “associational privacy” represents a further source of protection for lobbying and related advocacy. First developed in *NAACP v. Alabama*<sup>68</sup> and applied to campaign finance regulations in *Buckley v. Valeo*,<sup>69</sup> the right of associational privacy “derives from the rights of the organization’s members to advocate their personal points of view in the most effective way.”<sup>70</sup> As the court wrote in *NAACP v. Alabama*, “[i]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters . . . . In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.”<sup>71</sup> While “this analysis has not been applied to lobby laws by the Supreme Court[,] . . . the rationale and logic is applicable.”<sup>72</sup>

Recent developments involving *Buckley* and ensuing cases have carved out greater protection for activity regulated by the FEC. The first major shift in the campaign finance landscape after *Buckley* was *McConnell v. FEC*,<sup>73</sup> upholding the Bipartisan Campaign Finance Reform Act (BCRA) and, among other

64. 486 U.S. 414 (1988).

65. *Id.* at 424. These cases suggest that there could be constitutional arguments, in addition to common sense reasons, to question pending legislation that would prohibit the use of line waiters or placeholders to assure a seat in congressional hearings. Get in Line Act, S. 2177, 110th Cong. (2007); see also *The Daily Show: Wait and Switch* (ComedyCentral television broadcast Jan. 18, 2008) (video clip available at <http://www.thedailyshow.com/video/index.jhtml?videoId=148056>).

66. Krishnakumar, *supra* note 46, at 528.

67. 500 U.S. 507 (1991).

68. 357 U.S. 449 (1958).

69. 424 U.S. 1 (1976) (per curiam).

70. *Id.* at 74.

71. *NAACP v. Alabama*, 357 U.S. at 462.

72. Browne, *supra* note 45, at 736.

73. 540 U.S. 93 (2003).

elements, its provisions banning independent advertising within a period proximate to an election. On June 25, 2007, however, the Supreme Court held in *FEC v. Wisconsin Right to Life*,<sup>74</sup> that the FEC could not constitutionally prohibit “grassroots lobbying” measures, such as television advertisements paid for from corporate or union treasuries in the weeks before an election. As the Court explained, unless those advertisements explicitly urged a vote for or against a particular candidate, such a restriction amounts “to censorship of core political speech.”<sup>75</sup> Indeed, the Court’s most recent pronouncement only further confirms that public policy advocacy—both at the grassroots level and within the chambers of Congress—enjoys a vital and protected place in our constitutional law and democratic system.<sup>76</sup>

## II. PUBLIC POLICY ADVOCACY AND EFFECTIVE GOVERNANCE

Public policy advocacy is not only part of the constitutional system, but also plays a vital role in promoting effective representative government. By providing focused expertise and analysis to help public officials make informed decisions and often bridging the gaps in divided and gridlocked government, lobbyists sustain and advance the policy process.

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74. 127 S. Ct. 2652 (2007).

75. *Id.* at 2666.

76. A point beyond the scope of this essay that may be worth future consideration, is to compare and contrast the First Amendment protections applicable to lobbying with the scope of the Sixth Amendment guarantee to the assistance of counsel in the defense of criminal prosecutions, which are somewhat analogous. Certainly the need for and usefulness of an advocate in both forums is analogous: the procedural and substantive complexity of the judicial proceeding at the trial and appellate levels is indeed matched by the complexity of the lawmaking process, and just as one is unlikely to effectively defend herself pro se in a court of law, one is equally unlikely to effectively advocate for a policy position without knowledge and experience in legislative affairs. And though different rights and values are on the line in a court of law versus in the public policy context, it is doubtless true that legislative and administrative decisions have a profound impact on people’s lives and livelihoods. However, the Sixth Amendment guarantees the right to counsel in criminal proceedings (there is no such right for civil proceedings, which may be even more analogous to public policy advocacy, given that fundamental liberty interests may not be on the line). A related point involves the extent to which the guarantees are express. While the First Amendment guarantees an individual’s right to petition, there is no explicit mention of a paid intermediary. The Sixth Amendment also grants an affirmative right (right to counsel), while the First Amendment is largely stated in the negative as a prohibition (“Congress shall make no law”). So there are limits on the ability to draw on the Sixth Amendment to argue, in constitutional terms, that there should be affirmative right to a hire lobbyist. On the other hand, within the First Amendment you do indeed see a solicitousness for the effective exercise of these rights, such that laws cannot be made that unduly and unjustifiably burden its guarantees. *See Meyer v. Grant*, 486 U.S. 414, 424 (1988); *Buckley v. Valeo*, 424 U.S. 1 (1976); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). Perhaps it is also relevant to consider how courts and the public might view restrictions that would impede people to hire lawyer advocates in civil proceedings. Would concerns about such restrictions apply to restrictions on the use of lobbyists in legislative and regulatory settings?

The most basic function of the lobbyist is to educate by providing information, and it is axiomatic that legislators benefit when they can consider information from a broad range of interested parties. The increasing scope and complexity of legislation and regulation as the United States evolves and becomes ever more entwined in a global community has further magnified the importance of lobbyists' expertise. As Thomas Susman explains, "Government has become sufficiently complex that, without the information lobbyists bring to legislators, decision making would be—at best—poorly informed."<sup>77</sup> It is true, as one former highly regarded Senate aide and now chief lobbyist for a major university points out,<sup>78</sup> that members of Congress and staff are not dependent on lobbyists' information and often do their own research. However, lobbyists often have information not available to members and staff, and they perform a critical function by confirming information and even informing lawmakers of unintended consequences of their proposals. Without such feedback, legislators and regulators might fail to achieve their objectives and could even do more harm than good. It is sometimes the case that without input from the erstwhile "beneficiary" of a new law or regulation, the provision would produce unwelcome results.

Despite the increase in the scale and complexity of governance, the number of staffers in congressional offices has remained nearly the same over the past twenty years. Interestingly, experience is spread thin. Study data suggests that tenured expertise on congressional staffs is actually declining. Between 1991 and 2001, for example, the average time a senate staff member held his or her position dropped by twenty-nine percent.<sup>79</sup> Kenneth Gross, a leading expert on lobbying and election law, frames the issue this way: "The truth of the matter is that legislation in Washington is extraordinarily complex . . . [and] [t]he staff available to members, both House and Senate is very limited. And the only way that they can really get to the bottom of a lot of complex issues is to rely on lobbyists. And of course lobbyists have conflicting views. They're the industry lobbyists and those who are opposing the industry. And they can gather this information."<sup>80</sup> The volume and speed of policy and process powered by modern information technology, and subject to 24/7 news in an ever shortening cycle, creates a new role for lobbyists. They can assist by sifting information and noise, putting information into a coherent framework, and by challenging

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77. Thomas M. Susman, Presentation at the Woodstock Theological Center Conference on the Ethics of Lobbying: Lobbying: Ethical, Though Not Bound by the Common Good (Oct. 24, 2002) (transcript available at <http://woodstock.georgetown.edu/publications/report/r-fea72.htm>).

78. She prefers in an overabundance of modesty not to be acknowledged by name.

79. CONGRESSIONAL MGMT. FOUND., SENATE STAFF EMPLOYMENT STUDY: SALARY, TENURE, AND DEMOGRAPHIC DATA: 1991-2001 (2002), available at [http://www.cmfweb.org/storage/cmfweb/documents/CMF\\_Pubs/cmfsenatesalarystudy1991-2001.pdf](http://www.cmfweb.org/storage/cmfweb/documents/CMF_Pubs/cmfsenatesalarystudy1991-2001.pdf).

80. Gross, *supra* note 14.

or checking facts on impossibly short time deadlines.<sup>81</sup>

For largely these reasons, congressional staff members—and especially senior staff members—recognize the importance of professional public policy advocacy. According to a survey of 113 congressional staff personnel conducted and reported by The Policy Council, more than two thirds of staffers surveyed view lobbyists as either “necessary to the process,” as “collaborators,” or as “educators.”<sup>82</sup> Indeed, The Policy Council reported that senior, tenured staff were most likely to recognize the importance of lobbyists to the policy system: “nearly half of all senior policy staff surveyed viewed lobbyists as partners, collaborators, or educators.”<sup>83</sup>

Public policy advocates also play an important role in advancing the policy process beyond gridlock and partisan division. The level of partisan bickering and animosity within Washington is at one of the worst points in history, and willingness to compromise between the parties and their members is an increasingly infrequent occurrence.<sup>84</sup> However, it is during such times that lobbyists are uniquely able to bridge the gap of divided government. In some cases lobbyists are the only ones who can overcome the impasse by shaping and building consensus on positions that accommodate competing interests. They can play a significant role in bringing together factions of the two parties or the Administration. Indeed, as long as the federal government remains divided, and as long as America remains a diverse, pluralistic democracy, lobbyists will help find a path through the political tangle.<sup>85</sup>

From another vantage, public policy advocacy is also essential to the ability of individuals, interest groups, and businesses to successfully petition

81. If lobbyists contribute to the cyber noise, as their adversaries and others are quick to point out, their efforts can backfire. *See, e.g.*, Jeffrey H. Birnbaum, *Constituents' Email on XM Deal Not Well Received*, WASH. POST, Nov. 22, 2007, at D1. Lobbyists can be helpful in that staff can be overwhelmed, and Congressmen are often not technology savvy. *See* Garret M. Graff, *Don't Know Their Yahoo from Their YouTube*, WASH. POST, Dec. 2, 2007, at B1 (noting that “most of the leaders of Senate committees had already graduated from college by the time TVs had become widespread in American homes in the 1950s). *See* data in an “exploratory” study of how lobbyists use technology, RICHARD GOLDMAN, DEP'T OF INFO. SERVS., UNIV. OF MD., BALTIMORE COUNTY, INFORMATION TECHNOLOGY IN LOBBYING: SURVEY RESULTS, TECHNICAL REPORT (2007).

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

83. *Id.*

84. It would be difficult to find disagreement. *See, e.g.*, RON BROWNSTEIN, THE SECOND CIVIL WAR: HOW EXTREME PARTISANSHIP HAS PARALYZED WASHINGTON AND POLARIZED AMERICA (2007); *see also* Patrick O'Connor, *Parties Find Partisanship Irresistible*, POLITICO, Oct. 30, 2007, at 1; Bara Vaida et al., *Special Report—Potholes on K Street*, NAT'L J., Mar. 25, 2006, at Part V (noting the exceptionally partisan, poisonous atmosphere in Washington and citing the Policy Council survey noting that of 115 lobbyists surveyed by the Council, ninety percent think that partisanship in Washington is greater than ever before, and seventy-two percent thought that partisanship makes it harder to accomplish their objectives).

85. *See D.C. Dossier, supra* note 29.

and monitor their government. Lobbyists play a critical “intermediating role”<sup>86</sup> by enabling people and businesses to understand how government works and what government is working on, and then helping these people and businesses identify and communicate their interests to the government in an effective manner. Again, “as the scope of government increases and a larger and larger number of individuals and businesses are touched by government regulations,”<sup>87</sup> sophisticated involvement in the policy process has become even more critical. One observer notes,

One of the biggest challenges for people when they’re faced with a public policy issue is defining what the issue is from the perspective of people in government. I think the main thing a client should be looking for in a lobbyist or government relations consultant is for help to think the way people in government have to think when they’re looking at an issue. It’s the only way you’re going to win the day on an issue.<sup>88</sup>

According to Stanley Hart:

There isn’t enough understanding by business of the constraints facing government. What government needs is a kind of real political advice that is based not just on what business wants, but what government can deliver, and what everyone can settle for. Business lobbies generally govern badly. Business still comes to scream if something gores its ox. But there still isn’t enough analysis of why government takes a particular stand on policy, and depending on the source of that stand, whether it can be adjusted or not.<sup>89</sup>

These sentiments illustrate how the increasing complexity of government further supports the need for skilled policy advocates to enable the public to effectively monitor, comprehend, and petition the government.

For these reasons, lobbying has become an increasingly ubiquitous activity, and the advocacy environment has become correspondingly more diverse. According to Susman, “There are . . . expanding numbers of interest groups generally involved in lobbying, including public interest organizations, leaving few . . . without a Washington lobbyist.”<sup>90</sup> Indeed, growing numbers of interests are represented in Washington, D.C. For example, a compilation of national “cause lobbyist” organizations (those organizations who advocate for or against a particular cause (i.e., environmentalism) instead of on behalf of a corporation) documents that there are approximately five hundred such lobbying organizations actively lobbying in Washington, D.C. alone.<sup>91</sup> Although the “set of organized political interests continues to be organized

86. *Id.* at 42.

87. Kellogg, *supra* note 3 (quoting Professor Ross Baker).

88. Hillwatch, Lobbying Quotes, <http://www.hillwatch.com/pprc/quotes/lobbying.aspx> (last visited Apr. 1, 2008) (quoting Sean Moore).

89. *Id.* (quoting Stanley Hart).

90. Susman, *supra* note 1, at 742.

91. See Kathi Carlisle Fountain, Political Advocacy Groups: A Directory of United States Lobbyists, <http://www.vancouver.wsu.edu/fac/kfountain/> (last visited Apr. 1, 2008).

principally around economic matters,”<sup>92</sup> there is little question that pluralism has taken hold among those organized to petition our government, and that pluralism is a healthy safeguard for representative government.

### III. THE WORKINGS OF THE ADVOCACY SYSTEM

While the lobbying profession’s constitutional pedigree and institutional value are in and of themselves important, it is instructive to have an accurate picture of how the advocacy system operates to fully understand its role. The reality is much different than the conventional or popular wisdom that lobbying is a simple, linear process whereby campaign contributions and other “favors” lead to relationships of special access and influence, which subsequently form the bedrock of essentially quid pro quo deal making. In reality, successful advocacy ultimately depends on the lobbyist’s ability to explain how a given position advances the public interest, to respond to counter arguments advanced by persuasive and skillful advocates, and to do so credibly, consistently, and concisely. As opposed to a simple or a linear model of influence, the lobbying profession is in fact a multi-faceted and competitive enterprise, on large issues almost always requiring Rubik’s Cube-like, multi-dimensional, and multi-phase advocacy strategies.<sup>93</sup> If lobbying were as crude an art as its mythology suggests, none of this would be the case.

### IV. A LOBBYIST’S JOB IS COMPLEX

First, meeting with and communicating with government officials usually represent only a small portion of a lobbyist’s time. A far greater portion of time is generally devoted to other aspects of preparation: 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, developing strategy and evaluating tactics, and communicating with clients about the implications of various policies, proposals, and developments.<sup>94</sup>

Second, as a lobbyist, who you represent and what you have to say on their

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92. Kay Lehman Schlozman, Benjamin I. Page, Sidney Verba & Morris P. Fiorina, *Inequalities of Political Voice*, in *INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN* (Lawrence Jacobs & Theda Skocpol eds., 2005).

93. Like a mild heart-attack, a “small issue” is someone else’s. In truth, there are very few policy issues, large or small, which are easy to lobby. Like two credit courses in college, on a “small issue” you still end up doing three credits worth of work, even though your client typically only pays for two.

94. See, e.g., Boggs, *supra* note 13. It may be obvious to note that lobbyists work full weeks through the year while Congress and state legislatures are not in session and frequently are “out of town.” A recent survey offers some measure of the number of hours lobbyists work. See GOLDMAN, *supra* note 81, at 6-7.

behalf are more important than who you are.<sup>95</sup> The Policy Council's survey of 113 senior-level congressional staff directly asked respondents how lobbying most influences members' opinions. The most prominent response, offered by forty percent of respondents, identified the key to successful lobbying as providing a "more persuasive analysis of the issue on the merits." In addition, another thirty-six percent of respondents pointed to "explanations of the issue in terms of constituent interests," while eighteen percent identified "education on issue and the implications of alternative vote outcomes."<sup>96</sup> Interestingly, even professional lobbyists underestimated the importance of persuasive argumentation on the merits, overemphasizing the importance of constituent interests. Summarizing their findings, The Policy Council writes that, "[l]obbyists' best approach appears to be argument, debate—literally advocacy."<sup>97</sup> Kenneth Gross takes the point a step farther, noting that lobbyists do "provide an important cog in the process. There are the bad apples. But your ordinary, run of the mill lobbyists, doing their job, working for a corporation, working for a public interest group, working for a labor organization, [are] an important part of the process here in Washington."<sup>98</sup>

Third, part and parcel of persuasion on the merits is the advocate's reputation and credibility. As explained by my colleague Darryl Nirenberg, who held several senior staff positions in the United States Senate:

[L]obbying is by necessity honorable, because a lobbyist is only as good as his reputation. A reputation is built by being forthcoming and honest. If you don't provide the full story or all the information, not only will you not be trusted, but your reputation will reflect this. And then doing your job will become impossible.<sup>99</sup>

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95. Cautioning humility and perspective, Harlow warns that "[a] Washington representative needs to recognize and accept the fact that whatever it is that he represents is much more important to the political animals in this town than his own personality and atmospherics." HARLOW, *supra* note 19, at 7.

96. THE POLICY COUNCIL, *THE MORE THINGS CHANGE: EFFECTIVE POLICY ADVOCACY IN AN ERA OF HYPER-DEMOCRACY* 107 (2006) [hereinafter THE POLICY COUNCIL, THE MORE].

97. *Id.*

98. Gross, *supra* note 14.

99. Interview by Jared Fleisher with Darryl D. Nirenberg, Deputy Chair, Patton Boggs Pub. Policy and Admin. Law Practice, in Washington, D.C. (July 2007). A forthcoming book by Bertram J. Levine, a long-time lobbyist, who, since retirement, has joined the faculty of Colgate University, buttresses Nirenberg's insights. The book is a study on what makes lobbyists effective from the perspective of the people who they lobby: Members of Congress and staff. See BERTRAM J. LEVINE, *EFFECTIVE LOBBYING FROM THE INSIDE LOOKING OUT* (forthcoming 2008). Professor Levine reviewed a late draft of this essay and commented that there are a plethora of quotes by Members on Congress supporting the very first sentence of this essay. Presumably he will include these in his book. He is also skeptical of both the power of disclosure to curb abuse, and the power of money to corrupt. He points out that "visible lobbying activity is just the tip of the iceberg. There will never be full disclosure. At some point you have to rely on the integrity of the members. The same is true for contributing. It is not fair for a member to defend a bad decision by blaming a lobbyist, the 'devil made me do it.'" Telephone interview with Bertram Levine, Professor, Colgate

Nirenberg's insight is confirmed on many fronts. Bryce Harlow, the "unofficial dean of Washington corporate representation" until his retirement in 1978, put it this way:

The coin of lobbying, as of politics, is trust . . . truth telling and square dealing are of paramount importance in this profession. If [one] lies, misrepresents, or even lets a misapprehension stand uncorrected—or if someone cuts his corners too slyly—he is . . . dead and gone, never to be resurrected or even mourned.<sup>100</sup>

Gross explains that "to be a credible lobbyist in Washington, D.C., you have to provide credible, valuable information. You just don't go in there with a couple cigars and a glass of bourbon and schmooze. That's not the way you get your reputation in this town."<sup>101</sup> The Policy Council's data confirm the point. In its 2007 survey, which included 273 congressional staff personnel, eighty-six percent 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. According to the survey, the most effective lobbyists are those who provide credible information in a concise fashion and who also present and address the opposing view.<sup>102</sup>

Fourth, while a persuasive message and a credible messenger are necessary for successful advocacy, they are hardly sufficient. The modern advocacy environment is extremely competitive and strategies for successful influence are necessarily complex and multi-dimensional, requiring the messenger to also be a procedural expert grounded in the substance of the issue at hand. Indeed, "[t]o successfully work the Hill today, lobbyists need to be substantive policy experts and communications strategists able to run lobbying efforts like a sophisticated political campaign"<sup>103</sup>—lobbying is an enterprise that demands "a multitude of strategic and intellectual skills, and adeptness at tactics and communications,"<sup>104</sup> all conducted at warp speed.

#### V. NAVIGATION OF THE PUBLIC POLICY-MAKING PROCESS IS ALSO CHALLENGING

For an even better understanding of the complexity of the advocacy process it is important to view the process from both an external and an internal perspective.<sup>105</sup> The external perspective, what might be called indirect

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University (Dec. 13, 2007).

100. HARLOW, *supra* note 19, at 6.

101. Gross, *supra* note 14.

102. THE POLICY COUNCIL, CHANGING, *supra* note 82, at 60-61.

103. Vaida et al, *supra* note 84.

104. *Id.*

105. See Lyn Withey, Lobbying in the United States (2002) (power point presentation), available at [http://www.bryceharlow.org/resources/Withey\\_presentation.ppt](http://www.bryceharlow.org/resources/Withey_presentation.ppt) (discussing

advocacy, 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. According to Policy Council data, seventy-six percent of congressional staff report they are seeing more coalitional efforts than ever before, and eighty-five percent of congressional staff think coalition building in lobbying is an effective tactic to present a united front for diverse groups.<sup>106</sup>

Lobbying activity is also highly and increasingly complex from an internal legislative perspective. In the 1960s, when there were dramatically fewer lobbyists, power within Congress was also much more concentrated. Even though Republican party leadership had tightened its reigns considerably prior to losing control in the 2006 elections, the networks of power within the legislative and executive branches are diffuse and often overlapping, more so in our current closely “divided” government. It is rarely now the case, if it ever was, that to get something done, you need only convince one powerful member of Congress or hire one well-connected and influential lobbyist.<sup>107</sup> Public policy advocates thus have to be aware of who the key legislative players are and how they approach a given subject, when determining the best path by which to advance a proposal. Lobbyists also have to be strategic about their own goals and have to tailor them to the political and policy context. Most importantly, public policy advocates have to be experts in the often abstruse routines and procedures of government decision-making. An effective lobbyist must understand “the rules of how the various institutions work, internally and with each other” and more generally must “have a clear fix . . . on how the government actually works, how the pieces fit together, how things get done.”<sup>108</sup>

#### VI. PUBLIC POLICY ADVOCACY HAS BECOME INCREASINGLY COMPETITIVE

Thus, the difficulty of public policy advocacy is an important counterpoint to the mythology of “how things work” in Washington. A second, related, counterpoint involves the increasing competitiveness of the advocacy environment by any measure. An illustration of this is the increase in lobbyists and lobbying expenditures. Between 2000 and 2004 alone, the number of lobbyists in Washington more than doubled, from approximately 16,000 to almost 35,000.<sup>109</sup> Lobbying expenditures reached a new high in 2006, totaling

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direct and indirect lobbying).

106. THE POLICY COUNCIL, *CHANGING*, *supra* note 82, at 110.

107. Boggs, *supra* note 13.

108. HARLOW, *supra* note 19.

109. See Jeffrey H. Birnbaum, *The Road to Riches Is Called K-Street*, WASH. POST,

at least \$2.44 billion, and many major law firms' lobbying expenditures were dramatically higher during the 110th Congress.<sup>110</sup> In addition, fifty-three percent of associations and forty-seven percent of corporations surveyed by The Policy Council report increasing their lobbying budget within the past three years.<sup>111</sup> In such a "hyper-pluralistic" competitive advocacy environment, misdeeds and misinformation do not often go unnoticed, and opposing views are quick to be presented. Indeed, "there are more people going into [congressional] offices every day. On almost every issue, you've got somebody who's been hired on both sides coming in."<sup>112</sup>

While such competitiveness is generally a positive development, a corollary to this phenomenon is the increased competition for staff and members' time. This raises the question of "access," which dominates the language and lore of lobbying. According to the prevailing popular view, access is most always a function of campaign contributions, either by a Political Action Committee (PAC) or by a lobbying firm. Experience and data, however, suggest otherwise. For example, of the ninety-nine staffers who responded to a Policy Council question about access, only thirteen percent rated PAC support for the member as a determining factor, and just one percent deemed it the most important. On the contrary, the most important determinant of access was reported to be the "importance of the organization to the member's state or district," cited by fifty-six percent of respondents. Interestingly, the second most important determinant was a reputation for providing credible, reliable information.<sup>113</sup>

Despite the ready availability of access and meetings regardless of party affiliation and campaign contributions, it is unrealistic to dismiss the role of campaign contributions in the lobbying process. Indeed, past research confirmed a connection between PAC contributions and lobbying access, though the shift since then from "wholesale" fundraising by a handful of entities to "retail" fundraising on a mass scale has clearly altered the underlying dynamics.<sup>114</sup> Nonetheless, the more important point is what money definitively

June 22, 2005, at A1.

110. See DRUTMAN, *supra* note 13.

111. THE POLICY COUNCIL, CHANGING, *supra* note 82, at 26.

112. Vaida et al., *supra* note 84 (quoting lobbyist John Buscher). One of the most outrageous transgressions by the Abramoff gang was that they took opposite sides on the same issue. See CONTINETTI, *supra* note 10; MANN & ORNSTEIN, *supra* note 18, at 175. Once, a former chairman of the Senate Commerce Committee, who will remain unnamed, found that his scheduler had inadvertently arranged for representatives of two different industries to meet with him on two completely different topics at the same time. "Come on in, I've got two ears," reportedly was his reply. The lobbyists, who will not be named here either, declined, respectfully.

113. THE POLICY COUNCIL, THE MORE, *supra* note 97, at 31.

114. For a summary of early research, see John R. Wright, *PAC Contributions, Lobbying, and Representation*, 51 J. POL. 713 (1989). See also CLAWSON, *supra* note 18 (concluding that "[t]he PAC plays its most crucial role in helping the corporation to gain

does *not* do. Scholars of all stripes have confirmed time and time again that “money does not buy votes,”<sup>115</sup> and for most lobbyists, this idea is entirely “alien to [their] . . . way of doing things.”<sup>116</sup> The dirty little secret is that money buys you less than it would appear and less than many politicians would lead you to believe. Candidates are caught in an excruciating dilemma, in which they must convey to contributors that their contributions are worthwhile, yet refrain from acting or exercising their official duties because of contributions. Indeed, often members of Congress will bend over backwards to avoid the appearance of a conflict or quid pro quo. Thus, contributions can become the gift that keeps on taking. It costs you when you give, and it costs you when an official will not take up your cause in order to avoid even the appearance of being influenced by money.

Unfortunately, scandals involving attempts to buy outcomes create the inaccurate impression that the practice is widespread and taint public policy advocates indiscriminately. According to data from the Pew Research Center for the People and the Press conducted in January 2006, for example, eighty-one percent of respondents believe it is common for lobbyists to bribe members.<sup>117</sup> In reality, it is important to note that this is nearly impossible because the fundraising environment is as competitive and as pluralistic as the lobbying environment. This competitive environment counters any illusions that someone can simply buy a Member’s support. It is also important to understand that, to a significant degree, making campaign contributions is like “sprinting in place.” With the demand for contributions ever escalating as campaign costs continue to rise, donors by and large are only keeping up with one another.<sup>118</sup> Some liken the campaign finance setting for lobbyists to a small-town fire department: volunteering is part of being in the town—and the only unique recognition you often get is a special hat. It’s something you have to do, and the recognition for the effort is not very thrilling. When you do give, all too often it encourages the rapacious rascals to ask shamelessly and relentlessly for more; creating resentment by the contributor and resentment by

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access, but even here there is no one-to-one correspondence between money and outcome” after interviewing thirty-eight directors of corporate PACs).

115. See AM. POLITICAL SCI. ASS’N, *AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY* 12 (2004), available at <http://www.apsanet.org/imgtest/taskforcereport.pdf> (confirming that “[r]esearch does not support the idea that specific votes in Congress are directly determined by campaign contributions”).

116. Vaida et al., *supra* note 84.

117. THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, *DEMOCRATS HOLD HUGE ISSUE ADVANTAGE: AMERICANS TAKING ABRAMOFF, ALITO AND DOMESTIC SPYING IN STRIDE* (2006), available at <http://people-press.org/reports/pdf/267.pdf>; see also Public Citizen, *Recent Public Opinion Polls on Ethics in Government*, [http://www.citizen.org/congress/govt\\_reform/ethics/congethics/articles.cfm?ID=14945](http://www.citizen.org/congress/govt_reform/ethics/congethics/articles.cfm?ID=14945) (last visited Apr. 1, 2008).

118. For survey data on this topic, see THE POLICY COUNCIL, *THE MORE*, *supra* note 97, at 127.

the candidate or their fundraiser when the contributor declines the follow up request. Another way that a contribution is “the gift that keeps taking” is that it allows other candidates to “discover” you as a target for solicitations. For these reasons, “a surprising number of lobbyists admit flat-out that they hate the system as it is, and would even endorse a complete campaign finance overhaul, which perhaps might even include a prohibition of political contributions by professional lobbyists.”<sup>119</sup>

#### VII. THE NEW ENVIRONMENT FOR LOBBYING: MORE OF THE SAME OR A NEW OPPORTUNITY FOR IMPROVEMENT?

The most significant change to the advocacy environment—both symbolically and substantively—is the enactment of a major government reform law and accompanying new lobbying and ethics rules for the House of Representatives and the Senate. Tightening up ethical standards was almost the first order of business of the 110th Congress.<sup>120</sup> By August 2007, the House and Senate had reached an agreement on ethics reform legislation and passed the Honest Leadership and Open Government Act (HLOGA) which President Bush signed into law.<sup>121</sup> This law makes numerous changes to the Standing

119. Vaida et al., *supra* note 84. The author, for one, would be first in line to support a prohibition of paid lobbyists from making campaign contributions, especially if it resulted in multilateral disarmament. This has always been a source of personal envy in that my journalist friends may decline to give for professional reasons. See Susman, *supra* note 1, at 739; see also Jankowsky, *supra* note 14 (making a tongue-in-cheek, if not wistful, suggestion for a prohibition). A prohibition for hired lobbyists might be akin to state and local prohibitions on “Pay to Play” contributions in the municipal bond context or for lawyers appearing before elected judges.

120. On January 5, 2007, the House enacted significant changes in the Rules of the House. Ethics Reform Resolution, H.R. Res. 6, 110th Cong. (2007) (enacted). The new rules contained in H.R. Res. 6 § 502 expand the deposition authority of the House Committee on Oversight and Government Reform which helped lead to a substantial increase in the number and pace of investigations. Among other things, H.R. Res. 6 enacts additional restrictions on gifts from lobbyists and private entities that employ lobbyists as well as new restrictions on privately funded travel. The resolution also enacts new legislative procedural rules which will affect the enactment of budget and tax legislation, including earmark reform. Many grey areas remain and the House Committee on Standards of Official Conduct promulgated guidelines on both gift and travel restrictions. The travel rules of the Ethics Reform Resolution were effective March 1, 2007, while other rules were effective immediately. The Senate passed its reform bill, S. 1, 110th Cong. (2007), on January 18, 2007 by a vote of 96 to 2. 153 CONG. REC. S746 (2007) (Senate Rollcall Vote No. 19). The House followed suit, passing its version of the reform legislation, H.R. 2316, 110th Cong. (2007), on May 24, 2007 by a vote of 396 to 22. 153 CONG. REC. H5776 (2007) (House Rollcall Vote No. 423).

121. Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735. On July 31, 2007, the House voted 411 to 8 to pass the bill. 153 CONG. REC. H9210 (2007) (House Rollcall Vote No. 763). On August 2, 2007, the Senate cleared it 83 to 14. 153 CONG. REC. S10723 (2007) (Senate Rollcall Vote No. 294). President Bush signed HLOGA into law on September 14, 2007. Statement on Signing the Honest Leadership and Open Government Act of 2007, 43 WEEKLY COMP. PRES. DOC. 1209 (Sept. 14, 2007). It is

Rules of the Senate regarding gifts, travel, and earmarks which substantially conform the senate rules to changes previously enacted by the House at the beginning of the congressional session.<sup>122</sup> Among other things, HLOGA also makes changes to post-employment restrictions for members and staff of both Houses and the Executive Branch—so-called “revolving door” provisions<sup>123</sup>—and amends the Lobbying Disclosure Act (LDA).<sup>124</sup> The LDA amendments of HLOGA require lobbyists to: file more frequent reports,<sup>125</sup> disclose campaign

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interesting to note that the changes that the House chose to make to its own rules contained in Title III and elsewhere in HLOGA were done as an exercise of the constitutional rule-making power of the House. The new rules do not require Senate approval or a presidential signature, even though they were contained in a statute enacted in that way. HLOGA § 306. The House expressly reserved its constitutional right to change these rules at any time, in the same manner and to the same extent as in the case of any other rule of the House. *Id.*

122. Compare HLOGA of 2007, Pub. L. No. 110-81, 121 Stat. 735, with H.R. Res. 6, 110th Cong. (2007) (enacted). Further rules, changes, and clarifications were adopted in H.R. Res. 363, 110th Cong. (2007) (enacted) (use of private aircraft) and H.R. Res. 437, 110th Cong. (2007) (enacted) (attendance at charitable events). From the outset many have questioned how extensive the changes really are and their likely impact. See Jeff Horowitz, *Out of the Money: Congress Finally Passed a Comprehensive Lobbying Bill, But Will Anything Really Change?*, LEGAL TIMES, Aug. 13, 2007, at A1; see also *supra* note 31 regarding delay in establishing the Ethics Review Panel proposed by Speaker Pelosi.

123. **House and Senate Restrictions.** HLOGA prohibits Senators for two years, and House Members and elected officers of the House for one year, from contacting, on behalf of another, Members or employees of either House of Congress with the intent to influence official action. The current restrictions on Senate staff, which prohibit for one year communications to a staff person’s former office or Committee with the intent to influence, are expanded to cover the entire Senate. Former Members and employees are to be notified of their restrictions by the Clerk of the House and Secretary of the Senate. The restrictions become effective at the adjournment of the first session of the 110th Congress or Dec. 31, 2007, whichever comes first. HLOGA § 101, 18 U.S.C. § 207.

**Executive Branch Restrictions.** HLOGA extends the current one-year restriction on post-employment contacts by “Very Senior Executive” personnel to two years. This new restriction is effective at the adjournment of the first session of the 110th Congress or Dec. 31, 2007, whichever comes first. *Id.*

**Private Employment Decisions.** HLOGA also creates a criminal offence to get at the purported objective of the “K Street Project,” that is, the interference, solely on the basis of partisan political affiliation, by Members or employees of Congress in the employment decisions or practices of private entities. Such interference is punishable by fine and/or imprisonment up to fifteen years, and possible disqualification from holding public office. This provision is effective on date of enactment. *Id.* § 102, 18 U.S.C. § 227.

**Disclosure of Employment Negotiations.** Members are prohibited from negotiating directly or having any agreement for future employment until his or her successor is elected, unless they notify the Committee on Standards of Official Conduct within three days of the commencement of negotiations or agreement. Highly paid officers and employees of the House are similarly restricted. Similar restrictions apply to the Senate. This provision is effective on date of enactment and shall apply to negotiations begun on or after that date. *Id.* § 301, H.R. RULE XXVII.

124. See AMENDED LDA GUIDE, *supra* note 27.

125. **Quarterly Filing and Miscellaneous Changes.** Lobbying reports are to be filed quarterly beginning with reports covering the first quarter of 2008. To conform to the new reporting period, the income thresholds are reduced by half. Reports are required to be filed

contributions,<sup>126</sup> and report bundling of contributions.<sup>127</sup> The amendments also increase civil penalties and provide criminal penalties for violations of the LDA.<sup>128</sup> Violations are to be referred by the House and Senate to the Department of Justice.<sup>129</sup> HLOGA also provides, for the first time, for random LDA audits by the Comptroller General.<sup>130</sup> Overall, HLOGA regulates the

electronically beginning with the first quarter of 2008. Lobbyists who formerly held covered official positions must disclose them for twenty years. Reports are to be publicly available in a searchable and sortable database. A similar requirement is implemented for the Foreign Agents Registration Act (FARA). Entities that are controlled by state or local governments are to be identified. Referrals to the U.S. Attorney for non-compliance are to be made public. Quarterly filing is effective with the first quarter of 2008. HLOGA §§ 201, 208-209 (codified in scattered sections of 2 U.S.C.).

**Coalition Reporting.** LDA reports must disclose coalition Members who contribute more than \$5000 and who actively participate in the lobbying activities, rather than, in whole or major part, planning, supervising, and controlling such activities. This is effective with the first quarter of 2008. *Id.* § 207 (codified in scattered sections of 2 U.S.C.).

**126. Reports and Certifications by Lobbyists and Organizations.** HLOGA requires organizations and persons required to register under the LDA and employees of organizations required to be listed as lobbyists to report the names of political committees established or controlled by the registrant and its employees. In addition, the names of candidates, officeholders, leadership PACS, or political party committees that receive contributions of \$200 or more from the registering entity and its employees must be reported. Furthermore, contributions to events honoring covered officials, entities established or controlled or designated by a covered official, or to pay the costs of an event held by or honoring a covered official must be reported. These reports are not required if the recipient is required to report the receipt of the funds to the FEC. Contributions to other entities such as Presidential library committees and inaugural committees are also required to be disclosed. Persons or organizations filing reports must certify that they are familiar with the congressional rules on gifts and travel and have not provided a gift to a Member or employee in violation of the rules. The reports are initially semi-annual, effective with the first half of 2008. However, a "Sense of Congress" provision calls for the reports to be made quarterly. This provision is effective with the report due for the first semi-annual period of 2008. *Id.* § 203, 2 U.S.C. § 1604.

**127. Reports of Bundled Contributions.** Candidate committees, leadership PACs, and political party committees are required to disclose bundled contributions from LDA registrants, individuals registered as lobbyists, and political committees established or controlled by such persons. To be reported, bundled contributions must exceed \$15,000. The requirement is effective three months after the FEC issues final regulations to implement the requirement. *Id.* § 204, 2 U.S.C. § 434

**128. Increased Civil and Criminal Penalties.** HLOGA amends the LDA to provide for increased civil penalties for failure to comply with the filing requirements of the LDA. In addition a registered lobbyist may not make a gift or provide travel that the lobbyist knows may not be accepted by a Member or employee. Criminal penalties now apply to violating this and any other provision of the LDA. This is effective on date of enactment. New criminal penalties are provided for knowingly and corruptly failing to comply with any provision of the amended LDA. These penalties are effective on the date of enactment. *Id.* § 211, 2 U.S.C. § 1606.

**129. Disclosure of Enforcement.** *Id.* § 210, 2 U.S.C. § 1605.

**130. Audit.** The Comptroller is to conduct annual random audits of publicly available registrations and reports of lobbyists, lobbying firms and registrants. The Comptroller may request information from registrants. Annual reports are required. Audit authority applies to reports for the first quarter of 2008. *Id.* § 213, 2 U.S.C. § 1614.

actions of lobbyists, elected officials and their staffs, appointed office holders, and other government employees. Perhaps the primary mechanism relied on to accomplish reform is the Act's heightened requirements for public disclosure, such as the new LDA requirements, and for bundled contributions and earmarks.<sup>131</sup>

Given the breadth and depth of the changes governing how lobbying will be conducted,<sup>132</sup> as would be expected, there are considerable gray areas and

131. **Earmark Reform.** The Bill adds a new Senate Rule which provides that it is not in order to vote on a motion to proceed to a bill or resolution reported by a Committee unless the Chairman or the Majority Leader identifies each directed spending item, limited tax benefit, and limited tariff benefit including the name of the Senator requesting the item, and the information is available forty-eight hours before the vote. Identical provisions apply to bills and resolutions not reported by a committee. If the manager of a conference report or the Majority Leader fails to comply with these disclosure requirements, and a point of order is sustained, the report is set aside. With respect to amendments which contain directed spending, limited tax or tariff benefits, the sponsor of the amendment shall make a disclosure report available as soon as practicable. Senators who request earmarks must identify the recipient of the earmark, the purpose of the earmark, and a certification that neither the Senator nor the Senator's immediate family has a pecuniary interest in the item. New directed spending in conference reports are subject to a point of order. Points of order may be waived by three-fifths vote, or by joint agreement of the two leaders for points of order against Committee reported bills, bills not reported by committee, and amendments. Effective on date of enactment. *Id.* § 521, S. RULE XLIV.

**Procedures Regarding Conference Reports,** *Id.* § 511. The Rules of the Senate (Rule XXVIII) are amended to provide that if matter which was agreed to by both Houses is stricken from a bill, a point of order lies and, if sustained, the bill is recommitted to conference. In the case of new matter inserted in the report, a point of order lies and if sustained, the Senate may disagree and concur with a further amendment to the House amendment which is the portion of the conference report that was not stricken by the point of order. Conference reports must be available forty-eight hours before they may be considered. The leaders may jointly waive this requirement. Points of order may be waived by three-fifths vote. A ruling in favor of a point of order may be overturned by a three-fifths vote. Conferees may not include matter not committed to them either House but may make germane modifications. Effective on date of enactment. Ironically, as the first session of the 110th Congress winds down, congressional Republicans have used this provision to block efforts to approve spending bills. There are other provisions designed to increase the openness of congressional action. *See Id.* § 512 (disclosure of holds). Members who object to proceeding to the consideration of a matter must notify their leader in writing. Not later than six days after such notification, the objection must be submitted to the Congressional Record and placed on the Senate Calendar. Effective of date of enactment. *Id.* § 511 (amending S. RULE XXVIII).

**Sunshine Provisions.** Transcripts of open Committee and Subcommittee proceedings must be available not later than twenty-one days after the meeting occurs. This provision is effective ninety days after enactment. Motions to recommit must be made in writing. HLOGA states that it is the sense of the senate, *Id.* § 515, that conference committees should hold regular and open meetings and that the text of the report shall not be changed after conferees have signed signature sheets. *Id.* § 513 (amending S. RULE XXVI).

132. Other significant changes in the HLOGA include:

**House Spouse Restrictions.** Members whose spouses are lobbyists must prohibit their staff from making a lobbying contact with the spouse. Effective on date of enactment. *Id.* § 302 (amending H.R. RULE XXV).

much uncertainty about how these rules will be applied to a myriad of situations. No doubt there will be refinements and further changes to the new rules.<sup>133</sup> It is apparent there are many unexpected small and large questions and

**Senate Spouse Restrictions.** Members whose spouses are lobbyists must prohibit their staff from making lobbying contacts with the spouse, with a grandfather for spouses lobbying prior to marriage to a Member or one year prior to the Member's most recent election. *Id.* § 552 (amending S. RULE XXXVII).

**Consultant Conflict of Interest.** If an individual who is paid by the House as a consultant is also employed by a firm or business, the individual's firm or business may not lobby the Committee that employs the individual. Effective on date of enactment. *Id.* § 303 (amending H.R. RULE XXIII).

**Public Travel and Financial Disclosure.** The Clerk of the House is required to post on the Clerk's public website the advance authorizations, certifications, and disclosures which are required in connection with privately funded travel under Rule XXV of the House. Members may omit certain personal information. The first report will be posted Aug. 1, 2008 for information received by June 1, 2008. *Id.* § 304, 2 U.S.C. § 104e.

**Restrictions on Lobbyists During Conventions.** During the official dates of National Party Conventions, a Member may not participate in an event honoring the Member if the event is directly paid for by a registered lobbyist or an entity that employs a lobbyist, unless the Member is a candidate for President or Vice President. The Standing Rules of the Senate are amended similarly. Effective on date of enactment. *Id.* § 305 (amending H.R. RULE XXV); *Id.* § 542 (amending S. RULE XXXV).

**Gift Ban.** Members and staff may not accept gifts from lobbyists and entities that employ lobbyists under the current \$49.99 per occasion provision. Members and staff may accept gifts under the specific exemptions currently in the Rules such as widely attended events, home state products, receptions and others specified in Rule XXXV. Effective on date of enactment. *Id.* § 206, 2 U.S.C. § 1613; *Id.* § 541 (amending S. RULE XXXV).

**Travel Reform.** Senate Rule XXXV is amended to conform substantially the Senate restrictions to those of the House. Travel may not be accepted from lobbyists, registered foreign agents, and entities that employ them except as provided in the Rule. The amended Rule permits reimbursement for one day events in connection with the official duties of the Member, and permits reimbursements from 501(c)(3) organizations. Trips under these exceptions require pre-approval and the Select Committee on Ethics is directed to issue guidance and regulations as to minimum lobbyist involvement in arranging the trip, lobbyist accompaniment on travel, reasonable expenses, circumstances under which a trip may be extended, and for evaluating other aspects of requested travel. Reimbursement rates for charter aircraft increased to the charter rate from the current comparable first class rate. Privately paid travel is to be disclosed on the website of the Secretary of the Senate for travel occurring after January 1, 2008. Travel restrictions are effective the later of sixty days after date of enactment or sixty days after Ethics Committee guidelines are issued. *Id.* § 206, 2 U.S.C. § 1613; *Id.* § 544 (amending S. RULE XXXV).

**Attendance at Constituent Event.** HLOGA amends the Standing Rules of the Senate to permit a Member to accept free attendance at home state events which are sponsored by constituents of the Member, if the cost is less than fifty dollars and if the Member participates as a speaker or performs a ceremonial function. Lobbyists may not attend the event. *Id.* § 545 (amending S. RULE XXXV).

**Private Aircraft.** A candidate for federal office or the candidate's campaign committee may not make an expenditure for air travel unless the aircraft is an FAA certified charter plane or the candidate or committee pays the charter rate, or pro rata rate if used by multiple candidates. This provision is effective for flights taken on or after date of enactment. *Id.* § 601, 2 U.S.C. § 439a.

133. Under the new gift and travel rules, Members of Congress were faced with the

some unintended consequences, some bemusing, some serious. For example, the seemingly simple principle that, under the gift rules, lobbyists may not pay for a member of Congress's or a staff member's meal is complicated by a long list of exceptions.<sup>134</sup> Moreover, deep metaphysical contemplation may be required to interpret some of the rules, to wit: when a covered official eats in a group and wishes to pay for the meal, it is very debatable how to calculate the "proportionate share" of the cost.<sup>135</sup> As trivial as the question may seem, it is a rule the ethics committees take seriously, warning Members and staffers to be "especially careful" about "small group" and "one-on-one" meals."<sup>136</sup> Speaking of tête-à-têtes, romance on Capitol Hill will never be quite the same. During a recent compliance briefing, one lobbyist asked whether he was permitted under the new rules to pick up the tab on a blind date, or on a first date with a person working for a member of Congress and, finally, the question he really cared about, whether dates with his current girlfriend who works for a

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prospect that they would not be able to continue the practice of booking multiple airline reservations and then canceling all but one of the reservations on the day of travel without incurring a fee. See Mary Ann Akers & Paul Kane, *Airlines No Longer Letting Senators Travel Like Senators*, WASH. POST, Sept. 13, 2007, at A17; Paul Kane, *Capitol Briefing: Senators get Multiple-Ticket [sic] Benefit Restored*, WASH. POST, Oct. 5, 2007, [http://blog.washingtonpost.com/capitol-briefing/2007/10/senators\\_get\\_multipleticket\\_ben.html](http://blog.washingtonpost.com/capitol-briefing/2007/10/senators_get_multipleticket_ben.html). In addition they postponed the effective date of some aspects of the travel rules. See *supra*, note 132. It is probable that the parties will seek clarification, if not relaxation, of the new rules governing presidential nominating conventions. (Note that the guidance on how the event complies with the gift rule, which is the heart of the matter, won't be out until 2008.) See Anna Palmer, *Will Lobbyists Still Party Hard in 2008? New Ethics Casts Pall over Convention*, ROLL CALL, Nov. 5, 2007, at 1. On December 11, 2007, the House issued guidance on participation by Members in certain events during National Conventions. See H. COMM. ON STANDARDS OF OFFICIAL CONDUCT, 110TH CONG., MEMORANDUM ON MEMBER PARTICIPATION IN CERTAIN EVENTS TAKING PLACE DURING A NATIONAL POLITICAL CONVENTION (Dec. 11, 2007), available at <http://ethics.house.gov/Media/PDF/Memo%2012-11-07.pdf>; see also Susan Crabtree, *Party on Carefully, Says Panel*, THE HILL, Dec. 13, 2007, at 1; Anna Palmer, *Ethics Clears Way for Convention Politics*, ROLL CALL, Dec. 13, 2007, at 1. Legislation has been introduced to tighten bribery and gratuity laws, to eliminate the loophole some defendants rely on, claiming that alleged bribes were not accepted in their official capacity or related to any specific action. For a discussion concerning the need for this legislation, see Meredith McGhee, *Guest Observer: Why Subpoena Power Is Key to Real Ethics Reform*, ROLL CALL, Dec. 6, 2007, at 4; Norman Ornstein, *New Ethics Panel Isn't Perfect, but Is a Solid Step Forward*, ROLL CALL, Dec. 5, 2007, at 6; Susan Schmidt, *Ruling Will Cripple Probes of Lawmakers, U.S. Says*, WASH. POST, Nov. 21, 2007, at A3.

134. H.R. RULE XXV; S. RULE XXV.

135. C. Simon Davidson, *Meals with Lobbyists Pose Unappetizing Compliance Questions*, ROLL CALL, Nov. 5, 2007, at 8. As awkward as it may be, asking for a separate check might be the best approach.

136. See H. COMM. ON STANDARDS OF OFFICIAL CONDUCT, 110TH CONG., HOUSE ETHICS MANUAL (2008), available at [http://ethics.house.gov/Media/PDF/2008\\_House\\_Ethics\\_Manual.pdf](http://ethics.house.gov/Media/PDF/2008_House_Ethics_Manual.pdf) [hereinafter HOUSE ETHICS MANUAL]; S. SELECT COMM. ON ETHICS, 108TH CONG., SENATE ETHICS MANUAL (2003), available at <http://ethics.senate.gov/downloads/pdf/manual.pdf> [hereinafter SENATE ETHICS MANUAL].

Senator had to be “Dutch.”<sup>137</sup> A lively debate among the experts ensued. The consensus answers were: probably no, probably no, and probably no. To this observer, it seemed the questioner was a bit disappointed to learn he did not have an ironclad excuse to make his girlfriend share date expenses. This hapless fellow could have a more daunting obstacle to overcome should the relationship ripen into a desire to wed. A reasonable reading of the rules suggests that an aspiring groom will not only have to speak to his intended’s parents, but also ask permission and obtain a waiver of the gift rules from the Senator employing his would-be fiancée prior to giving her an engagement ring.<sup>138</sup> Some of the other questions about meals arising would make moral

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137. Patton Boggs LLP, Corporate Political Activity Compliance Briefing (Sept. 6, 2007) (information available at <http://www.pattonboggs.com/compliance07>).

138. See Birnbaum, *supra* note 4; see also Jeffrey H. Birnbaum, *Inside the Loop*, WASH. POST, Oct. 16, 2007, at A17. Watchdog Fred Wertheimer says no permission is needed, since the rules already exempt engagement rings. But Patton Boggs expert Darryl Nirenberg disagrees, saying that asking permission in advance is the wiser course. Nirenberg’s analysis follows: First, the exemption in the Rules for gifts exchanged by individuals who are engaged does not cover gifts between individuals who are not yet engaged or who are in the process of getting engaged. Second, the impact of HLOGA shifts the burden of complying with the gift rule from solely the staffer receiving the gift to both the lobbyist giving the gift and the staffer receiving it. The inclusion of criminal and civil penalties in HLOGA makes it prudent for the lobbyist to ask permission rather than running the risk of having to beg for forgiveness. Both the House and Senate (by inference) exempt from gift restrictions those gifts exchanged by individuals who *are* engaged. However, one traditionally does not become “engaged” until after the ring has been offered and accepted, so that anything provided before getting engaged or while in the process of getting engaged is not the same as gifts provided between individuals who are already engaged. It is before the engagement is formalized which is the issue—an issue which both Chambers have addressed, either formally or informally. The *Senate Ethics Manual* makes clear that “[t]he rule does not similarly exempt gifts given because of a significant, personal, dating relationship (short of a formal engagement), but the Committee has granted a waiver which generally (with important limitations) permits a Member, officer, or employee to accept gifts from an individual with whom the Member, officer, or employee enjoys a significant, personal, dating relationship.” SENATE ETHICS MANUAL, *supra* note 136, at 29. The footnote for this clause refers to Interpretative Ruling No. 439 for a discussion of waivers in which “the important limitations” are disclosed. Interpretative Ruling No. 439 makes clear that: “The Committee has also concluded that if the individual giving the gift has a direct interest in legislation . . . a waiver is only appropriate if the acceptance of the gift has been disclosed in writing to the supervising Senator and approved by the Senator.” S. Select Comm. on Ethics Interpretative Ruling No. 439 (June 18, 1990), *reprinted in* SENATE ETHICS MANUAL, *supra* note 136, at 296. Interestingly, this ruling came a few years after another ruling which specifically noted a portion of the legislative history of the senate gift rule, in which the only example of a gift for which a waiver would be appropriate involved an engagement ring from one individual with an interest in legislation to a senate staffer. S. Select Comm. on Ethics Interpretative Ruling No. 437 (Dec. 15, 1987), *reprinted in* SENATE ETHICS MANUAL, *supra* note 136, at 294. So, the legislative history and ruling of the Senate Ethics Committee both support the position that the acceptance of an engagement ring is something which is not automatically permissible, but rather, would require a waiver. The House has a rule similar to the Senate’s, exempting from the gift restrictions, by reference, gifts exchanged by individuals who are engaged. There are no interpretative rulings on points in this area for the House. In addition, the gift manual for the Committee on Standards of Official Conduct has

philosophers, Jesuits, and atom splitters proud. A lawyer attending a League of Lobbyists meeting speculated, presumably in jest, whether the meal prohibition permitted running up a large bar tab for congressional guests because the rules only mention meals and are silent about drinks.<sup>139</sup> Then there is the question of when eating food amounts to a meal. Under the rules, if a Congressman attends a widely attended reception and consumes finger food—food that does not require a knife and fork—and does not sit down, she is probably not violating the prohibition of an illegal gift of a meal.<sup>140</sup> One lobbyist asked for an Ethics Committee’s ruling on whether he could continue to invite Congressmen to a weekly Bible study where he served coffee, juice, and pastries. The advice he received was to carry on with beverages but not to serve pastries, thus avoiding the prospect that ethics would get in the way of religion. No wonder Washington caterers now advertise themselves as “Gift Rule Compliant.”<sup>141</sup>

An unfortunate, but perhaps unavoidable consequence of the new rules, or perhaps the fanfare over the new rules, is that they reinforce the view that politicians and lobbyists are corrupt, and unless you micromanage every aspect of their behavior they will do the wrong thing. To hearken back to Jesse Unruh’s standards,<sup>142</sup> it is demeaning if not mildly insulting to imply that influence can be bought, and bought so cheaply as some of the new

not been updated to take into account the rules changes recently adopted by the House. According to individuals associated with the Committee, the House interpretation is similar to that of the Senate in that the offering of a ring by a lobbyist in the process of getting engaged is one which would require a waiver from the Committee, which is routinely provided. Interestingly, the Committee, unlike its Senate counterpart, apparently does not recognize as acceptable gifts over \$250 given pursuant to a “long term relationship.” It is correct that the ban and waiver have been around for years. What has changed is that the stakes have been raised dramatically, and the burden shifted such that the gift giver now has a responsibility, under the threat of civil and criminal penalties, to assure that any gift provided a staffer falls within the rules as permissible. Since the rulings and legislative history in the Senate and the practice in the House all make clear that the granting of a ring in the process of getting engaged is not clearly specified as permissible under the rules, and rather is something for which a waiver is appropriate, the lobbyist, with criminal and civil penalties potentially in the practice, should secure a waiver prior to giving the ring.

139. See Birnbaum, *supra* note 5.

140. H.R. RULE XXV; S. RULE XXV. See Birnbaum, *supra* note 5. It will be interesting to see if the exceptions to the new travel restrictions from which non-profits are exempt (including public universities and colleges) become a loophole that is abused. See Osita Inogebu, *Reform Fails To Close University Loophole*, LEGAL TIMES, May 14, 2007, at 18.

141. For example, Sean Clancy, owner of Just Fresh Bakery Café and Market, has come up with a menu that adheres to the “toothpick” caveat of the ruling. All the food on the Just Fresh’s catering menu is offered at a “nominal fee” in bite-sized pieces. See Lois Romano, *Serving in the House and Keeping Up With a Household, a Catering Lawyer Who can Parse House Ethics Rules*, WASH. POST, Feb. 15, 2007, at A25. HLOGA may prove to be a bigger downer than the Grinch at holiday celebrations. See Kate Ackley & Tory Newmeyer, *Ethical Partying: Toothpicks Signify New K Street Holiday Style*, ROLL CALL, Dec. 5, 2007, at 9; C. Simon Davidson, *A Question of Ethics: Holiday Party Guest Lists: Check Them Twice*, ROLL CALL, Nov. 19, 2007, at 8.

142. See *supra* note 20.

prohibitions suggest. Moreover, the new rules and the attendant uncertainties and anxiety over fraternizing with lobbyists will, no doubt, at least in the short term, increase the insularity of members of Congress and strengthen the bubble that sometimes keeps the outside world at bay. A more serious problem with the new rules, perhaps the most serious consequence, is that they do not address campaign and fundraising activities. 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 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 and consider the costs of the meal an in-kind campaign contribution. Which is worse? Lobbyists may not travel or arrange travel, say to a ski resort with a Congressman, unless perhaps the trip is related to campaign fundraising.<sup>143</sup> Without listing a litany of other examples, the obvious point is that unless Congress addresses the role of money in elections, it will be very difficult for the spirit and intent underlying HLOGA to completely prevail.

HLOGA is worthwhile both symbolically and in reality. No set of rules can prevent those who are intent on breaking the law from intentional, knowing violations. They can, however, set normative standards and have an educational value. Rules can discourage wrongdoing. Prevention is enhanced in a number of ways, through the seriousness of the public debate and its educational value and by the degree of certainty of enforcement and punishment for violations. While there have always been bad lobbyists, and there always will be, the prospects of greater disclosure and increased enforcement of the rules, are serious and reasonable responses to the abuses of this era. Those aspects of HLOGA, while imposing greater burdens and costs on lobbyists, have the most promise of improving the culture and public perception of lobbying at the federal level.

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143. Other loopholes to the travel rules might be exploited. For example, there is apparently some discussion about whether a lobbyist's employees can arrange travel that lobbyists themselves would be prohibited from doing, whether lobbyists can take advantage of the exemptions to the travel rules granted to colleges and nonprofits, and whether the one-day limit on "fact finding" tours can be side-stepped. See Birnbaum, *supra* note 5.

VIII. OVERSIGHT AND INVESTIGATIONS<sup>144</sup>

The upsurge in congressional oversight investigations in the 110th Congress has introduced an important wrinkle into the professional advocacy environment. Alongside the new ethics rules, this development reinforces the culture of compliance with law. It also brings to the forefront the role of advocates with dual backgrounds in law and lobbying. This role further exemplifies aspects of the profession that are simply not part of the popular image of such practitioners.

Corporations and their counsels, in particular, find themselves in an unprecedented atmosphere of corporate investigations, prosecutions, oversight, and individual criminal liability. In July 2007, the U.S. Department of Justice marked the fifth anniversary of the creation of the Corporate Fraud Task Force by highlighting over 1200 corporate fraud convictions, including convictions of over 200 CEOs, 23 general counsels, 53 CFOs, and 129 vice presidents.<sup>145</sup>

However, this is not the only source of heightened scrutiny and investigations. The leadership of the current Congress made the need for oversight into intelligence, waste, fraud, abuse, pharmaceuticals, and defense contracts a staple of the midterm elections. In a January 2006 *Washington Post* article by then-Democratic leader of the House Nancy Pelosi (now Speaker of the House) regarding intelligence oversight, Pelosi wrote: “The uproar concerning President Bush’s admission that he authorized the National Security Agency (NSA) to conduct certain electronic surveillance affecting people in the United States is a wake-up call for intensive congressional oversight of intelligence activities.”<sup>146</sup> Similarly, in a letter to then-Senate Majority Leader Bill Frist, current-U.S. Senate Majority Leader Harry Reid urged Frist to ensure that the Senate Intelligence Committee began to exercise oversight of Bush Administration intelligence activities, stating “effective congressional oversight would help our intelligence agencies deliver the accurate and unbiased intelligence that is so essential to America’s success in the global war on

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144. This section is based primarily on articles and presentations given in 2007 by the Patton Boggs LLP Investigations Practice. *See, e.g.*, DeMaurice F. Smith, Nicholas Allard & Robert Luskin, *Under Pressure: The New Congress and What You Need To Know To Prepare for a Congressional Investigation* (2007) (unpublished briefing paper), available at <http://www.pattonboggs.com/News/detail.aspx?news=429>; *see also* Andrew Glass, *Oversight and Foresight*, POLITICO.COM, Feb. 7, 2007, <http://www.politico.com/news/stories/0107/2579.html>; Mark Wegner, *Insiders Spell Out Hill Commandments: Thou Shalt Not Stonewall Panel Probes*, CONGRESSDAILY AM, Mar. 9, 2007; *When Congress Comes Knocking*, METROPOLITAN CORP. COUNS., Mar. 2007, at 33.

145. Press Release, Dep’t of Justice, Fact Sheet: President’s Corporate Fraud Task Force Marks Five Years of Ensuring Corporate Integrity (July 17, 2007), available at [http://www.usdoj.gov/opa/pr/2007/July/07\\_odag\\_507.html](http://www.usdoj.gov/opa/pr/2007/July/07_odag_507.html).

146. *See* Nancy Pelosi, *The Gap in Intelligence Oversight*, WASH. POST, Jan. 15, 2006, at B7.

terror.”<sup>147</sup>

At the beginning of its term, Congress put governmental agencies and companies on notice, declaring that it intended to utilize its constitutional power to engage in an aggressive series of oversight hearings. This prediction has now become a reality, resulting in a staggering list of oversight hearings and calls for further investigation.<sup>148</sup> Congress has armed itself with new rules to expand investigatory power, increased its strength with experienced and professional staff (including law enforcement officers) to conduct investigations, and given chairmanships to seasoned Members who have broad public support for ensuring accountability and compliance. The current chairs of the committees, who set both the agenda and protocols, are extremely experienced in oversight hearings and the unique parliamentary procedural rules. Chairmen Henry A. Waxman (D-CA), John D. Dingell, Jr. (D-MI), Charles B. Rangel (D-NY), John Conyers, Jr. (D-MI), Edward J. Markey (D-MA), Ralph Bradley “Brad” Miller (D-NC), Edward M. Kennedy (D-MA), Patrick Leahy (D-VT), Joseph R. Biden, Jr. (D-DE), and others are supported by seasoned staffs and in some cases federal prosecutors detailed to the committee staff who have proven track records in conducting criminal investigations. Moreover, committees, in general, notably increased their investigative staffs. In addition further important signals came quickly with the change in party control: the House Oversight and Government Reform Committee was granted the right to subpoena witnesses for depositions conducted by staff—a power long dormant in the House since the Army-McCarthy hearings in 1954 which revealed abuses of congressional investigations.<sup>149</sup> Representative Waxman even added the term “oversight” back into the Committee’s formal title.

The 110th Congress delivered on its oft-stated oversight promises. The Democratic majority has led hundreds of full committee hearings on oversight since the 110th Congress convened. These hearings are on everything from safe and affordable generic biotech drugs, to interference with climate science, to FDA food safety efforts. After twelve years of one-party rule in the legislative branch, plus more than six years of one-party rule in the executive branch, issues which were long ignored were now being brought front and center. During the spring and summer of 2007 alone, seven Fortune 500 companies

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147. See Letter from Harry Reid, U.S. Senate Democratic Leader, to Bill Frist, U.S. Senate Majority Leader (Mar. 1, 2006), available at <http://democrats.senate.gov/newsroom/record.cfm?id=252015&>.

148. See, e.g., Committee on Oversight and Government Reform, Issues and Investigations, <http://oversight.house.gov/investigations.asp> (last visited Apr. 1, 2008); Jonathan Weisman, *White House Feels Waxman’s Oversight Gaze*, WASH. POST, Oct. 25, 2007, at A1.

149. Ethics Reform Resolution, H.R. Res. 6, 110th Cong. (2007) (enacted). According to former Senate Parliamentarian Robert Dove, in the Senate, staff routinely conduct depositions.

received “the call” to appear before Congress, along with many other companies. They have been forced to defend business practices, profits, and operations in a public paradigm with few rules protecting trade secrets, attorney client privilege, self-incrimination, discovery of internal documents, and inquiries into pending or collateral investigations or proceedings. The Oversight Committees are also expected to further explore government contract fraud, consumer fraud, energy prices, food safety, pharmaceutical pricing, student loans, health care, and the financial services industry, among other areas.

As for the upsurge itself, according to a White House spokesperson, the administration has been subject to about an average of six oversight hearings a day since the Democrats took control of Congress in November 2006.<sup>150</sup> The administration was quick to paint the choice for more oversight as an either/or choice by Congress between legislating and investigating—pointing out that, as of the summer recess in 2007, Democrats had so far passed only six major bills while holding more than six hundred oversight hearings.<sup>151</sup> However, while there is often a direct and correlating relationship between more oversight, investigations, and legislation (such as with legislation to overhaul financing of higher education) there can also be an inverse relationship between oversight and investigations on one hand and passing legislation on the other—as an election year approaches.<sup>152</sup>

Institutional and political dynamics help fuel increased levels of activity. Facing self-imposed fiscal constraints, including the institution of the so-called “PayGo” rule (where spending increases and tax reductions have to be paid for by some revenue offset for the additional cost), the encumbered legislative terrain made oversight and investigations a path of relatively lesser resistance for the Democrats.<sup>153</sup> In a sense, oversight and investigations became “lower hanging fruit” than passing legislation. As a result of campaign promises in the 2006 midterms, moreover, Members, at least at the start of the 110th Congress,

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150. See Klaus Marre, *White House Questions Dems’ Zeal for Oversight*, THE HILL, July 5, 2007.

151. *Id.*

152. For example, the investigations into the student loan industry led by Senator Kennedy’s staff, by Representative George Miller’s staff, and by New York State Attorney General Andrew Cuomo were like a legislative blitzkrieg that not only generated “findings” as a predicate for the need for the legislation, but were skillfully and effectively used to propel the legislation toward enactment. Pressure and publicity through release of information about the investigations generated support and discouraged legislators from aligning themselves with the industry. The impacts of the investigations were one factor leading to the extremely lopsided votes when the bill passed. See Pub. L. No. 104-104, 11 Stat. 56 (1996) (codified at 47 U.S.C. § 151 *et seq.*) (which was passed by the House on July 7, 2007 by a vote of 273-149 and by a vote of 78 to 18 by the Senate and signed into law by President Bush on September 27, 2007).

153. H.R. Res. 6 § 405 (Pay-As-You-Go Point of Order amending H.R. RULE XXI). The Senate adopted a similar rule.

are now in Washington for a full work week—in contrast to recent Congresses. If they cannot legislate, they have the time to investigate. From a political standpoint, the Democrats, in taking control, needed to make gains to combat extremely low approval ratings for Congress. In a constrained legislative environment, oversight is an outlet for congressional activity. In essence, investigations and oversight are what the Congress turned to in an effort to restore its image and to appear productive.

From an advocacy perspective, this shift in congressional focus requires a parallel shift in Washington's representation of clients. While it is true that you cannot lobby your way out of an investigation, it is also the case that traditional litigation expertise is not necessarily adequate preparation for handling public investigations. What is needed are people who have both political and legal expertise.

While most corporate entities have established relationships with first-rate litigation firms, public investigations differ widely from federal litigation in terms of procedure, strategies, outcomes, and other factors. To the outsider, and even the experienced lawyer, watching a congressional committee in action may remind someone of Thomas A. Edison's quip: "Hell, there are no rules here—we're trying to accomplish something." However, there are rules, customs, precedents, and procedures that are peculiar to this venue. While aspects of both litigation and lobbying play an important role, a congressional investigation is *neither* lobbying nor litigation—it is a unique animal derived from the constitutional nature of the legislative branch.

The limits on a congressional committee are few and its powers broad. The scope of subpoenas, eliciting witness testimony, and questioning under oath are difficult to manage, and unlike the judicial process, there is no final arbitration or judgment by a neutral fact-finder. Instead, the process of narrowing the scope of an investigation, limiting burdensome subpoenas, and managing issues of privilege and confidentiality is typically conducted through means of negotiation and incremental accommodation. It employs certain skills carried over from litigation, but which are also aided by experience, relationships, and established credibility.

Congress has also granted itself new powers that enhance its overall investigatory ability. For example, new rules provide for staff depositions outside of the District of Columbia and reestablishing the applicability of federal false statement criminal liability to such testimony. This provision drastically expands the ability to gather information and subjects witnesses to the possibility of federal criminal prosecution or investigation if a law enforcement officer believes that the testimony was false. It allows for more pervasive questioning by staff and eliminates many of the time restraints that existed in a formal hearing while also providing a basis for false statement and perjury prosecutions by federal authorities.

Negotiating, accommodating, and designing a comprehensive response to a congressional investigation is essential. Committee staff may be open to

negotiating or at least engaging in a discussion on the scope of requested material, the treatment of confidential material, and the problem of privileged or proprietary information that provides them with an efficient way of investigating the matter without being overwhelmed with collateral or irrelevant material.

In this new climate of risk, the experiences of participants on both sides of the equation matter, and similar to lobbying, developing credibility can be the “best currency” for corporations or individuals. Any potential subject of a congressional investigation should ask itself and its counsel critical preliminary questions that focus on this overall strategy—intelligence gathering, credibility with staff, experience with multi-faceted investigations, reputation, and knowledge of the congressional process.

A traditional lobbying firm or in-house government relations office may be extremely capable of handling legislative issues and hearings, and adept at politics, but nevertheless may lack the skills and experience necessary to manage a congressional investigation. Many government investigations do feed off of one another or run parallel to each other, and can then trigger a criminal or civil investigation. A company’s legal team must be capable in all these areas—in lobbying, risk assessment, regulatory compliance, and criminal and civil litigation—and be able to work with other lawyers who may be representing the company’s interests in other proceedings or investigations.

As many cases have proven in the past, company and witness statements and answers in a congressional investigation often become statements and answers that are admitted to in subsequent proceedings. Accordingly, congressional oversight hearings present a factual and legal “minefield” where careful preparation is vital and even more careful steps are required. This makes it important to consider having, for example, careful coordination with SEC counsel with respect to public filings, counsel who may be involved in collateral civil or criminal litigation or investigations, employment counsel who may be addressing issues of disgruntled employees or prospective whistleblowers, or compliance counsel.

In sum, specific experience and skill—not just lobbying and not just litigating—are the major factors determining who will survive, let alone prevail, in public investigations. An effective defense team is composed of legislative experts who specialize in protecting clients’ interests in the context of congressional oversight hearings and investigations, who can ensure access and advance warning, who can evaluate and manage criminal, civil, and regulatory exposure, and who can provide a vigorous defense in the most public of formal tribunals. Additionally, it is also critical that the defense team be bipartisan because successful representation requires an understanding of the investigative process from both parties point of view, and because the political environment is continually changing—often in an unpredictable way.

## CONCLUSION

Lobbying can be fixed. No double entendre intended. Admittedly that statement is a verbal *trompe l'oeil*. Its meaning depends on one's perspective. The point of view advanced here is that lobbying is an honorable profession. For the most part, public policy advocacy is necessary, difficult work performed by law-abiding, highly skilled professionals who help government arrive at better-informed, and hopefully better, decisions. Good lobbyists can contribute a lot to good government. The practice is hardly perfect. There is plenty of room for improvement, especially concerning the public perception that the system is rotten, and by throwing the covers back on how lobbying and government decision making works, both curb abuses and afford the public a better understanding of the public policy process.

The seriousness of purpose Congress demonstrated by adopting, on a bipartisan basis, sweeping lobbying and ethics rule changes, and by vigorously holding governmental and private sector entities and individuals accountable through heightened oversight and investigations are important steps. However, if Congress fails to apply to itself the new ethical standards that it expects other to adhere to, progress will be lost. There is a compelling need to improve the appropriations process and to come to terms with abuses that can result from "earmarks." In the modern era, earmarks have existed for a long time, and they are likely to continue. A question to be debated is whether earmarks should be allowed to dominate the appropriations process as they do now. The challenge is to determine how to allow appropriations for special projects outside of the normal budget process to occur in an open, more rational way, without conflicts of interest. Another serious concern is the perverse incentive the new lobbying and ethics rules give to lobbyists to rely even more heavily on fundraising, which is governed by a separate set of laws, as a means to interact and curry favor with lawmakers.

Ultimately, further improvement in the way lobbying is conducted and the reputation of the profession is in the hands of lobbyists themselves. Lobbyists should in good faith make every effort to comply with the letter and spirit of the new laws, and to advise their clients to do so. They need to learn the new lobbying and ethics rules and take them as seriously as they do their advocacy. Searching for and exploiting loopholes is a fool's errand that does not gain much, if any, competitive advantage and is damaging to both the individual errant lobbyists and the entire tribe. Intentionally violating the law is a course of reckless self-destruction that ultimately benefits no one: the three-card monte lobbyists and their shills ultimately get spotted and punished, and unlike the hucksters of sidewalk card games, they rarely win. Beyond altruism, there is a very practical reason why lobbyists should observe the law and rely on the quality of their efforts in the practice: if they lack integrity and cannot be trusted, they have no career and will be run out of town with no tears wasted.

This essay attempts to help bridge the gulf between the inaccurate

perception and the reality of what public policy advocacy entails: to debunk the myth and magic of lobbying. The strong constitutional underpinnings for the use of lobbyists to petition the government, bolstered and balanced by free speech and free press rights that not only challenge government, but also uncover and criticize inappropriate lobbying, exist for good reasons. One reason is that effective lobbying is an important part of our pluralistic democracy and can lead to improved and politically acceptable government decisions. This essay also tries to dispel the popular belief that lobbyists operate at the nexus of campaign contributions, personal access, relationships, and quid pro quo deal-making. Instead, modern lobbying is a highly competitive, complex, and professionalized enterprise. Credibility, accuracy, flexibility, and brevity (well, three out of four at least) are important tools, more so than campaign contributions and personal relations. Lobbying not only requires skill and hard work, but is increasingly multidimensional, given the increased complexity of the world in which we live, the increased diffusion of power and complexity of government, the speed and volume of public policy, and the proliferation of competing, well-represented adversaries.

Very thoughtful critics, the author's sons, worry that while a case can be made that there is nothing inherently dishonorable about lobbying, it is perhaps an insurmountable task to demonstrate that lobbying is honorable. (Experts everywhere. Mercifully, my architecture school graduate student daughter confined her comments to the format of the footnotes.) To the critics, cynics, and agnostics, it may be said simply that working in a constitutionally recognized pursuit and helping others to make their case to lawmakers to the best of one's ability and according to the rules is indeed honorable. There is honor in doing a good thing as well as you can. More so if the job is truly tough and the odds are long. There is honor in helping to find a solution to public policy problems, which is another way to describe lobbying.

Moreover, to young adults beginning their careers, lobbying is a worthwhile career. When interviewing prospective associates for our firm, one of the most frequently asked questions is, "how many hours will we have to work?" This is fundamentally and profoundly the wrong question. Especially because, given the DNA of the candidates we see, and the way they are wired, they will inevitably be working hard no matter where they work, and no matter which career they choose. The right questions are: Is the work interesting and enjoyable? Is it important? And does what you do make a difference? When considered in light of these questions, lobbying work is an extremely attractive and honorable career option, not just hypothetically or abstractly for someone else, but even for one of your own children. With apologies to Willie and Waylon, "Mamas, please let your babies grow up to be lobbyists."

From another perspective, most of the traditional practice of law includes answering the question: *what is the law?* For litigation, the answer to that question determines who wins and who loses under a particular set of facts. For corporate lawyers, it determines how you "paper" the deal, draft the contract, or

negotiate the lease. Public policy advocacy lobbying involves answering the question: *what should be the law?* And that, for the right kind of lawyer—a lawyer who is fascinated by the intersection of law, politics, and client interests—is an extremely attractive line of work, especially because the answer to the question necessarily involves achieving a consensus about what is in the public interest.

Yes. Lobbying is an honorable profession.