

# REFORM THROUGH EXPOSURE

## INTRODUCTION

By mid-April 2006, Congress had introduced fifty-one bills to reform the relationship between lobbyists and legislators.<sup>1</sup> The Jack Abramoff lobbying scandal, among others, proved the motivating force behind this flurry of activity.<sup>2</sup> Abramoff, a once-powerful “super-lobbyist,”<sup>3</sup> pled guilty in January 2006 to charges of fraud, tax evasion, and conspiracy to bribe public officials.<sup>4</sup> As a lobbyist, Abramoff spent large amounts of money on travel and entertainment for “favoured lawmakers,”<sup>5</sup> including a series of notorious Scottish golfing trips.<sup>6</sup> These gifts were not the only ways in which Abramoff threw money into the system;<sup>7</sup> his “lobbying” techniques also included making and coordinating campaign contributions to legislators.<sup>8</sup> Abramoff thrived financially from his lobbying activities, collecting around \$80 million in lobbying fees from Indian tribes to represent them on opposite sides of the same issue.<sup>9</sup>

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<sup>1</sup> RONALD D. UTT, THE HERITAGE FOUNDATION, A PRIMER ON LOBBYISTS, EARMARKS, AND CONGRESSIONAL REFORM 2 (2006), <http://heritage.org/Research/Budget/bg1924.cfm> (click PDF icon). The Honest Leadership and Open Government Act of 2007 (HLOGA), which revises current lobbying regulation, was signed into law on September 14, 2007. Pub. L. No. 110-81, 121 Stat. 735 (2007). HLOGA’s revisions to current regulation are discussed *infra* Part V.B–D.

<sup>2</sup> Jeffrey H. Birnbaum, *Lobbyists Won’t Like What Pelosi Has in Mind*, WASH. POST, Oct. 30, 2006, at D1; Jill Zuckman, *House Cools on Lobbying Reform*, CHI. TRIB., Feb. 21, 2006, § 1, at 3.

<sup>3</sup> *After Jack Abramoff: It’s Corruption, Stupid*, ECONOMIST, Jan. 7, 2006, at 13, 13.

<sup>4</sup> Susan Schmidt & James V. Grimaldi, *Abramoff Pleads Guilty to 3 Counts: Lobbyist to Testify About Lawmakers in Corruption Probe*, WASH. POST, Jan. 4, 2006, at A1. Jack Abramoff has been cooperating with officials regarding a federal investigation into his conduct and has yet to be sentenced on these charges. Posting of Justin Rood to The Blotter, <http://blogs.abcnews.com/theblotter/2007/08/abramoff-still-.html> (Aug. 28, 2007, 13:00 EST).

<sup>5</sup> *After Jack Abramoff*, *supra* note 3, at 13; *see also* THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 186 (2006) (noting Abramoff’s lavish spending).

<sup>6</sup> Schmidt & Grimaldi, *supra* note 4, at A1.

<sup>7</sup> *Lobbying Reform: Proposals and Issues: Hearing Before the S. Comm. on Homeland Sec. & Governmental Aff.*, 109th Cong. 87–88 (2006) [hereinafter *Hearing Before the S. Comm. on Homeland Sec. & Governmental Aff.*] (statement of Fred Wertheimer, President, Democracy 21).

<sup>8</sup> *Id.*

<sup>9</sup> *After Jack Abramoff*, *supra* note 3, at 13.

The Abramoff scandal, among others, also demonstrates that lobbyists are not the only political actors who abuse the system. After resigning from Congress, Representative Bob Ney admitted to accepting campaign contributions and other gifts in exchange for taking official action on behalf of Abramoff's clients.<sup>10</sup> In a separate scandal, former Representative Randy Cunningham was convicted of bribery for selling earmarks.<sup>11</sup> Even former congressional staff members were involved in the Abramoff scandal.<sup>12</sup>

These scandals illustrate the potential for abuse inherent in a system where money and politics are so closely linked.<sup>13</sup> The risk of unfavorable government action<sup>14</sup> and the potential windfall of earmarks for special projects incentivize special interest groups to pour money into lobbying efforts.<sup>15</sup> From 2000 to 2005, annual expenditures by lobbyists increased 30% to \$2.1 billion dollars.<sup>16</sup> Since lobbyists are not required to disclose all expenditures, that figure may understate the trend; some estimate the true figure is closer to \$8 billion per year.<sup>17</sup>

Lobbying efforts include both lobbyists and their clients making campaign contributions to legislators.<sup>18</sup> Legislators need increasing amounts of money to campaign;<sup>19</sup> they rely on lobbyists' fundraising efforts to meet these needs.<sup>20</sup>

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<sup>10</sup> Matt Apuzzo, *Lobbyist Abramoff to Report to Prison*, ABCNEWS.COM, Nov. 14, 2006, <http://abcnews.go.com/Politics/wireStory?id=2653225>.

<sup>11</sup> Marcia Clemmitt, *Pork Barrel Politics: Do Earmarks Lead to Waste and Corruption?*, 16 CONG. Q. RESEARCHER 529, 531 (2006). See *infra* notes 128–131 and accompanying text for a definition of “earmark.”

<sup>12</sup> Schmidt & Grimaldi, *supra* note 4, at A1.

<sup>13</sup> See THOMAS E. MANN & NORMAN J. ORNSTEIN, THE REFORM INST., RESTORING ORDER: PRACTICAL SOLUTIONS TO CONGRESSIONAL DYSFUNCTION 13 (2006), available at <http://www.reforminstitute.org/uploads%5Cpublications%5CRestoringOrderFinal.pdf> (describing the numerous scandals of the 109th Congress).

<sup>14</sup> JEFFREY H. BIRNBAUM, THE MONEY MEN 88 (2000).

<sup>15</sup> John H. Fund, Op-Ed., *Time for a Time-Out?*, WALL ST. J., Sept. 18, 2006, at A19; see also *Pork and Scandals: Hobbling the Lobbyists*, ECONOMIST, Jan. 28, 2006, at 29 (noting that the number of lobbyists in D.C. has increased “because federal spending has grown larger and more wasteful”).

<sup>16</sup> *Hearing to Examine Procedures to Make the Legislative Process More Transparent Before S. Comm. on Rules & Admin.*, 109th Cong. 2 (2006) [hereinafter *Hearing Before S. Comm. on Rules & Admin.*] (statement of Dr. James A. Thurber).

<sup>17</sup> *Id.*

<sup>18</sup> John R. Wright, *Interest Groups, Congressional Reform, and Party Government in the United States*, 25 LEGIS. STUD. Q. 217, 218 (2000).

<sup>19</sup> Andy Sullivan, *Congress Campaign Cost Expected to Set Record*, REUTERS, Oct. 24, 2006, <http://elections.us.reuters.com/top/news/usN24211633.html>.

<sup>20</sup> *Lobbying Reform: A Tap on the Wrist*, ECONOMIST, May 20, 2006, at 34.

Based on campaign finance disclosures, congressional candidates spent close to \$1 billion in the 2006 congressional election.<sup>21</sup>

Lobbyists and legislators are also a closely-knit group because of preexisting relationships.<sup>22</sup> A significant number of legislators and their staff move from public service into the lobbying profession.<sup>23</sup> Current legislators and staff also have family members in the lobbying profession.<sup>24</sup>

However, most of the interactions and connections between lobbyists and legislators remain hidden from public view. Despite the prevalence and importance of money, the regulatory scheme in place before September 2007 took only minimal steps to expose the course of money through the system.<sup>25</sup> Although lobbyists play a role in the legislative process, their interactions with legislators were, for the most part, not disclosed to the public.<sup>26</sup> The dearth of public information made it difficult to discern the impact of the relationship between lobbyists and legislators.<sup>27</sup> This Comment advocates disclosure as the best method to both expose and reform the impact that lobbyists have on the legislative process.

In order to understand the need for disclosure, this Comment first describes the scope of the relationship between legislators and lobbyists and the impact that their relationship has on the political system. Part I describes the cozy relationship these groups enjoy. Part II details the returns that these groups expect and receive from this relationship and the consequences of that relationship on the political system. Part III first outlines how this relationship was regulated before September 2007 and then discusses the inadequacies of this regulatory regime. Part IV illustrates the risks inherent in reform by analyzing the history of campaign finance reform. Finally, Part V provides a justification for disclosure as a method of regulation. That Part highlights certain provisions of the Honest Leadership and Open Government Act of 2007, which made changes to the existing regulation. It then discusses how the new regulatory regime may improve the existing situation, as well as where the regulatory regime falls short or has the potential to create further problems.

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<sup>21</sup> Press Release, Fed. Election Comm'n, Congressional Campaigns Spend \$966 Million Through Mid October (Nov. 2, 2006), <http://www.fec.gov/press/press2006/20061102can/20061102can.html>.

<sup>22</sup> See *infra* Part I.

<sup>23</sup> See *infra* notes 29–30 and accompanying text.

<sup>24</sup> See *infra* note 31.

<sup>25</sup> See *infra* Part III.B.

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

## I. THE COZY RELATIONSHIP BETWEEN LOBBYISTS AND LEGISLATORS

There is a perception of “cozy relations” between lobbyists and legislators.<sup>28</sup> Two phenomena support this perception. First, preexisting relationships between lobbyists and legislators entwine the two groups. Many former legislators and their staff move from the public sector to jobs with lobbying firms. From 1998 to 2004, 43% of legislators who left public service later registered as lobbyists.<sup>29</sup> Thousands of former legislative staffers have become lobbyists as well.<sup>30</sup> Legislators and key staff also have family members within the lobbying industry.<sup>31</sup>

Apart from the preexisting relationships, Congress has intentionally strengthened the tie between itself and the lobbying industry.<sup>32</sup> For example, the K Street Project was an effort to increase the number of lobbyists sympathetic to Republicans in the lobbying industry in order to increase overall campaign contributions to Republicans.<sup>33</sup> As part of the K Street Project, certain Congresspersons attempted to manipulate employers into hiring individuals that the Congresspersons had picked.<sup>34</sup> Often, these picks included former legislative staff members.<sup>35</sup> This effort was successful, leading to a mutually beneficial relationship between lobbyists and Republican legislators.<sup>36</sup>

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<sup>28</sup> Peter H. Stone, *Lobbyists on a Leash?*, 28 NAT'L J. 242, 242 (1996) (quoting political science professor James Thurber commenting on LDA reform).

<sup>29</sup> Press Release, Pub. Citizen, Members of Congress Increasingly Use Revolving Door to Launch Lucrative Lobbying Careers (July 27, 2005), <http://www.citizen.org/pressroom/release.cfm?ID=1999>.

<sup>30</sup> BIRNBAUM, *supra* note 14, at 190.

<sup>31</sup> Matt Kelley & Peter Eisler, *Family Ties: Relatives Have 'Inside Track' in Lobbying for Tax Dollars*, USA TODAY, Oct. 17, 2006, at 1A (“Lobbying groups employed 30 family members last year to influence spending bills that their relatives with ties to the House and Senate appropriations committees oversaw or helped write.”).

<sup>32</sup> Norman Ornstein, *A Watchdog That Didn't Bark*, LEGAL AFF., Mar.–Apr. 2006, at 18, 18. Jack Abramoff, from the lobbying side, also sought to recruit staff from “key congressional offices.” MANN & ORNSTEIN, *supra* note 5, at 235 (citing author Mann’s own congressional testimony).

<sup>33</sup> Ornstein, *supra* note 32, at 18; *see also* MANN & ORNSTEIN, *supra* note 5, at 183–85 (describing the K Street Project); Birnbaum, *supra* note 2 (same).

<sup>34</sup> MANN & ORNSTEIN, *supra* note 13, at 13.

<sup>35</sup> *Id.*

<sup>36</sup> Ornstein, *supra* note 32, at 18–19 (“The relationships cultivated among lobbyists, lawmakers, and congressional staff went well beyond supplying campaign cash. If top lobbyists have always been able to influence the development and language of legislation . . . their impact in the past several years has amounted to a quantum leap beyond that.”).

The second phenomenon that supports the perception of cozy relations is the crucial campaign fundraising role that lobbyists play.<sup>37</sup> Lobbyists themselves donated around \$22 million to congressional candidates in 2004.<sup>38</sup> Lobbyists are not just the contributors—they are also the fundraisers.<sup>39</sup> Lobbyists can spend a significant portion of the workday encouraging their clients to contribute to legislators.<sup>40</sup> Another way that lobbyists act as fundraisers is by “bundling.”<sup>41</sup> To bundle, a lobbyist solicits and collects campaign contributions from clients and others.<sup>42</sup> Bundling has become “a pillar of the modern campaign.”<sup>43</sup> A federal ceiling of \$2100<sup>44</sup> caps campaign contributions to individual candidates,<sup>45</sup> but the lobbyist who delivers the bundle of checks can take credit for the entire contribution.<sup>46</sup>

Lobbyists also “host” fundraisers for candidates.<sup>47</sup> Moreover, lobbyists have been treasurers of numerous political committees, “including the campaign committees or leadership PACs of at least 39 sitting members of Congress.”<sup>48</sup>

Due to rising campaign costs, legislators are constantly in need of money for re-election.<sup>49</sup> Legislators rely heavily on lobbyists for this campaign

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<sup>37</sup> *Lobbying Reform: A Tap on the Wrist*, *supra* note 20, at 34.

<sup>38</sup> The Center for Responsive Politics, <http://www.opensecrets.org/industries/indus.asp?Ind=K02> (follow “Money to Congress” hyperlink; then choose “2004” from the “Election cycle” drop-down menu) (last visited Mar. 4, 2008).

<sup>39</sup> BIRNBAUM, *supra* note 14, at 8 (“[S]ome raise funds for coarsely self-interested reasons, especially professional lobbyists.”).

<sup>40</sup> Peter Katel, *Lobbying Boom: Should the Influence Industry be Regulated More Closely?*, 15 CONG. Q. RESEARCHER 613, 617 (2005) (quoting former legislator-turned-lobbyist Thomas Downey).

<sup>41</sup> David D. Kirkpatrick, *Senate Bill Puts Campaign Gifts in the Spotlight*, N.Y. TIMES, Jan. 20, 2007, at A1.

<sup>42</sup> See ANTHONY GIERZYNSKI, MONEY RULES: FINANCING ELECTIONS IN AMERICA 46 (2000).

<sup>43</sup> Kirkpatrick, *supra* note 41.

<sup>44</sup> 2 U.S.C. § 441a(a), (c) (2006).

<sup>45</sup> See GIERZYNSKI, *supra* note 42, at 46 (discussing “bundling” practice as used by individuals and groups).

<sup>46</sup> See *id.*

<sup>47</sup> BIRNBAUM, *supra* note 14, at 103.

<sup>48</sup> Dana Milbank, *For Would-Be Lobbying Reformers, Money Habit Is Hard to Kick*, WASH. POST, Jan. 26, 2006, at A6 (citing Center for Public Integrity).

<sup>49</sup> Sullivan, *supra* note 19 (noting the 18% increase in estimated campaign cost from 2002 to 2006 is higher than the 13% inflation rate during that time).

cash.<sup>50</sup> The campaign cash connection between legislators and lobbyists strengthens the perception of a cozy relationship.<sup>51</sup>

The implication of these cozy relations is that lobbyists and legislators derive substantial benefit from them. The next Part explores the potential and actual benefits of these relationships and fundraising activities, as well as the consequences of this cozy relationship.

## II. THE RETURNS AND CONSEQUENCES

### A. *The Returns from the Cozy Relationship*

Access to legislators and influence over the legislative process are “the two fundamental goals of all interest groups.”<sup>52</sup> These two goals are not always distinct; *access* is a malleable word that is often used interchangeably with *influence*.<sup>53</sup> For the purposes of this Comment, “access” refers to when a lobbyist is “in a *position* to affect” legislative action, whereas “influence” refers to *actually* affecting legislative action.<sup>54</sup>

First, this section briefly addresses how the relationships between lobbyists and legislators facilitate achievement of these twin goals of access and influence. The section then explores the role campaign contributions play in the process.

#### 1. *Relationship Returns*

A preexisting relationship with a legislator may provide a lobbyist with both access and influence.<sup>55</sup> Prior to 2007, the regulatory scheme imposed a one year “cooling-off period” before legislators and certain staff could lobby their former colleagues.<sup>56</sup> This regulation implicitly recognized that these

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<sup>50</sup> *Id.*; *Lobbying Reform: A Tap on the Wrist*, *supra* note 20, at 34 (“[Lobbyists] are the main conduits for precious campaign dollars.”).

<sup>51</sup> *Lobbying Reform: A Tap on the Wrist*, *supra* note 20, at 34

<sup>52</sup> See JOHN R. WRIGHT, *INTEREST GROUPS AND CONGRESS* 75 (1996).

<sup>53</sup> *Id.* at 76–77; see FRANK J. SORAUF, *MONEY IN AMERICAN ELECTIONS* 313–14 (1988) (“‘[A]ccess’ has always been a slippery word, sometimes serving in fact as a code word for palpable, demonstrated influence.”).

<sup>54</sup> See WRIGHT, *supra* note 52, at 81.

<sup>55</sup> Matt Kelley & Peter Eisler, *Little Accountability in Earmarks*, USA TODAY, Oct. 17, 2006, at 2A.

<sup>56</sup> 18 U.S.C. § 207(e)(1)–(2) (2006), amended by 18 U.S.C.A. § 207(e)(1)–(2) (West 2007); see also David L. Boren, *A Recipe for the Reform of Congress*, 21 OKLA. CITY U. L. REV. 1, 14 (1996) (referring to one year prohibition as a “cooling off period”).

individuals may have had an inherent advantage in accessing legislators and, thus, influencing the legislative process.<sup>57</sup>

Family relationships between lobbyists and legislators also threaten the ideal of equal access to legislators and create an air, if not a reality, of impropriety.<sup>58</sup> Although an individual legislator may take measures to minimize the appearance of, or the reality of, influences created by such family relationships,<sup>59</sup> “it’s ‘both impossible and preposterous’ to believe that relatives who are lobbyists don’t influence their family members.”<sup>60</sup>

## 2. *Fundraising Returns*

A strong public perception prevails that campaign contributions have a powerful effect on legislators.<sup>61</sup> Lobbyists expect some return from their campaign contributions and fundraising activities.<sup>62</sup> However, the influence that contributions actually have over legislators is difficult to ascertain from the information publicly available.<sup>63</sup>

Numerous studies have attempted to pinpoint the legislative returns derived from campaign contributions.<sup>64</sup> Many of these studies focus on whether contributions have an effect on actual legislative votes.<sup>65</sup> Although the results

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<sup>57</sup> See Boren, *supra* note 56, at 14 (finding the regulation insufficiently addresses the “valuable contacts” a staff member makes while employed by Congress).

<sup>58</sup> See Kelley & Eisler, *supra* note 55, at 2A (“‘Lobbyists rule the legislative process. But lobbyists who are family members really have the inside track.’”) (quoting Ellen Miller, the executive director of a budget watchdog group).

<sup>59</sup> Kelley & Eisler, *supra* note 31, at 2A (recounting Representative C.W. Young’s stated approach of not accepting campaign contributions from clients represented by his daughter-in-law’s lobbying firm).

<sup>60</sup> *Id.* (quoting Ronald Utt, researcher for The Heritage Foundation). Congress is unique among the branches in its failure to explicitly regulate this area. *Id.* (noting that the other branches have explicit rules regarding nepotism and lobbyists).

<sup>61</sup> See SORAUF, *supra* note 53, at 307–08 (noting the cliché “the best Congress money can buy”).

<sup>62</sup> Stephen Ansolabehere et al., *Are PAC Contributions and Lobbying Linked? New Evidence from the 1995 Lobbying Disclosure Act*, 4 BUS. & POL. 131, 131 (2002) (“The lion’s share of [campaign contributions from interest groups] goes to those already in office, suggesting that groups contribute in order to influence congressional decisionmaking.”).

<sup>63</sup> See *id.* at 142.

<sup>64</sup> Stephen Ansolabehere et al., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 112 (2003).

<sup>65</sup> *Id.* at 112, 113 tbl. 1.

of these studies vary, “the evidence that campaign contributions lead to a substantial influence on votes is rather thin.”<sup>66</sup>

Even though contributions may not have a large impact on actual voting behavior,<sup>67</sup> there are other possible ways for contributions to affect the legislative process.<sup>68</sup> Money can achieve more subtle forms of influence— “[t]he relationship between contributions and government action is much more complicated than mere quids and quos.”<sup>69</sup>

The Supreme Court has recognized the more subtle influence campaign contributions can have on the legislative process.<sup>70</sup> While upholding the expenditure limits contained in the Bipartisan Campaign Reform Act of 2002,<sup>71</sup> the Supreme Court reiterated that corruption of elected officials was more than simply “cash-for-votes exchanges.”<sup>72</sup> Instead, corruption included “undue influence on an officeholder’s judgment.”<sup>73</sup> The Court found examples of such influence in contributions that resulted in access to legislators<sup>74</sup> and “manipulations of the legislative calendar” that had a direct impact on legislation.<sup>75</sup>

#### *a. Campaign Contributions and Access*

A generally accepted proposition is that campaign contributions and fundraising activities buy a lobbyist access to a legislator.<sup>76</sup> Bundling, in particular, is seen as a “potent tool” that lobbyists wield to gain access to legislators.<sup>77</sup> Legislators themselves organize small gatherings (meals, trips)

<sup>66</sup> *Id.* at 116; *see also* Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 798 (1990) (“[T]he scientific evidence that political money matters in legislative decision making is surprisingly weak.”).

<sup>67</sup> *See supra* note 66 and accompanying text.

<sup>68</sup> *See infra* notes 70–75 and accompanying text.

<sup>69</sup> *See* BIRNBAUM, *supra* note 14, at 5.

<sup>70</sup> *McConnell v. FEC*, 540 U.S. 93, 150 (2002).

<sup>71</sup> Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified primarily in scattered sections of 2 and 47 U.S.C.).

<sup>72</sup> *McConnell*, 540 U.S. at 143.

<sup>73</sup> *Id.* at 150 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)) (internal quotations omitted).

<sup>74</sup> *Id.* (noting that “[e]ven if . . . access [does] not secure actual influence, it certainly [gives] the ‘appearance of such influence’” (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001))). Contributing money to a legislator’s campaign with the simple intent to gain access does not constitute bribery. Jason D. Kaune, Note, *Exporting Ethics: Lessons from Russia’s Attempt to Regulate Federal Lobbying*, 20 HASTINGS INT’L & COMP. L. REV. 815, 819 (1997).

<sup>75</sup> *McConnell*, 540 U.S. at 150.

<sup>76</sup> Ansolabehere et al., *supra* note 62, at 131–32.

<sup>77</sup> Kirkpatrick, *supra* note 41, at A1.

where a donor receives time with a legislator in return for a campaign contribution.<sup>78</sup>

However, the extent to which campaign contributions actually buy access to a legislator is difficult to ascertain because the access is “unobservable.”<sup>79</sup> Prior to 2007, the regulatory scheme did not require sufficient disclosure of contacts between legislators and lobbyists and fundraising activities to allow observation of the “actual exchanges.”<sup>80</sup> Using what information was available, one study found evidence that supported the proposition that campaign contributions buy access.<sup>81</sup>

Contrary to the lack of statistical evidence,<sup>82</sup> plenty of anecdotal evidence supports the proposition that contributions buy access. Fundraising events organized by lobbyists and legislators exemplify one exchange of campaign contributions for access; a campaign contribution gets the lobbyist into an event to meet with the legislator.<sup>83</sup> Insiders have also testified that campaign contributions buy access even without a fundraising event.<sup>84</sup>

Conversely, lobbyists fear that the failure to donate will result in a cold shoulder.<sup>85</sup> One feature of the K Street Project was the compilation of data on lobbyists and their campaign contributions.<sup>86</sup> Using this information, legislators could assess “how to treat certain lobbyists.”<sup>87</sup> Former congressman Tom DeLay’s actions provide a good illustration.<sup>88</sup> Although not explicitly stated, lobbyists related that “DeLay and his people often made clear that [the lobbyists should] either contribute to Republican candidates or find themselves in legislative Siberia—unable to make their cases to the Republicans who held sway in Congress.”<sup>89</sup>

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<sup>78</sup> Jeffrey H. Birnbaum, *The Hill’s Revolving-Door Rules Don’t Work in Both Directions*, WASH. POST, Jan. 16, 2007, at A17.

<sup>79</sup> WRIGHT, *supra* note 52, at 145.

<sup>80</sup> Ansolabehere et al., *supra* note 62, at 142.

<sup>81</sup> *Id.* at 152.

<sup>82</sup> See SORAUF, *supra* note 53, at 314.

<sup>83</sup> See Jeffrey H. Birnbaum & John Solomon, *Democrats Offer Up Chairmen for Donors*, WASH. POST, Feb. 24, 2007, at A1 (detailing a blitz of receptions designed to raise money for the Democratic and Republican parties).

<sup>84</sup> Ansolabehere et al., *supra* note 62, at 132.

<sup>85</sup> Mary Beth Regan et al., *PACs Cross the Street*, BUS. WK., Apr. 10, 1995, at 94, 97.

<sup>86</sup> Katel, *supra* note 40, at 624.

<sup>87</sup> *Id.* (discussing comments of Representative Thomas Davis).

<sup>88</sup> See BIRNBAUM, *supra* note 14, at 77.

<sup>89</sup> *Id.*

Although lobbyists place a premium on gaining access to legislators,<sup>90</sup> the value of this access is not self-evident, and the definition of “access” varies.<sup>91</sup> Some define access simply as contact made with a legislator or their staff and measure access by the *quantity* of time spent in contact.<sup>92</sup> Others hold access to a higher standard by defining it as a “close working relationship” with legislators and staff, emphasizing the *quality* of time spent in contact.<sup>93</sup>

Professor John Wright proposed two different depictions of “access” placed on a continuum between no access and actual influence.<sup>94</sup> These depictions “represent qualitatively different relationships between a legislator and [lobbyist].”<sup>95</sup> Under the first depiction, a lobbyist will make efforts to place himself in a favorable “position” vis-à-vis the legislator.<sup>96</sup> These efforts include establishing a reputation as a legitimate source of information in a specific area, “cordial working relationships,” and social relationships.<sup>97</sup> Lobbyists also use campaign contributions as part of these efforts.<sup>98</sup> This favorable position benefits the lobbyist in two significant ways: first, the lobbyist can receive inside information about legislative workings; second, the lobbyist is poised to make “specific appeal[s]” in the future.<sup>99</sup> Under the second depiction of access is the “specific appeal,” where a lobbyist attempts to gain a legislator’s support on a particular matter.<sup>100</sup>

Lobbyists do provide legislators with valuable information, such as information about the will of the people<sup>101</sup> or information that aids a legislator in properly evaluating an issue.<sup>102</sup> Access affords the lobbyist an opportunity

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<sup>90</sup> See, e.g., Thomas B. Edsall et al., *Pioneers Fill War Chest, Then Capitalize*, WASH. POST, May 16, 2004, at A1, A16 (quoting lobbyist calling access his “bread and butter”).

<sup>91</sup> WRIGHT, *supra* note 52, at 76–77.

<sup>92</sup> *Id.* at 76.

<sup>93</sup> *Id.* at 77 (quoting JOHN MARK HANSEN, *GAINING ACCESS: CONGRESS AND THE FARM LOBBY, 1919–1981*, at 22 (1991)).

<sup>94</sup> *Id.* at 77–80.

<sup>95</sup> *Id.* at 77.

<sup>96</sup> *Id.* at 78.

<sup>97</sup> WRIGHT, *supra* note 52, at 78.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 78–79.

<sup>100</sup> *Id.* at 79.

<sup>101</sup> Scott Ainsworth, *Regulating Lobbyists and Interest Group Influence*, 55 J. POL. 41, 44 (1993).

<sup>102</sup> WRIGHT, *supra* note 52, at 198 (“[S]trategic acquisition and use of information” are “essential components of successful lobbying.”); Alan L. Feld, *Congress and the Legislative Web of Trust*, 81 B.U. L. REV. 349, 358 (2001) (positing that information is one of the “major assets” a lobbyists uses to gain “access and support”).

to present his case.<sup>103</sup> Although some argue that lobbyists gain access *because of* their informational value,<sup>104</sup> the anecdotal evidence suggests that information is not the only valuable commodity that a lobbyist wields.

*b. Campaign Contributions and Influence*

Another firmly held belief is that fundraising efforts and campaign contributions are a primary source of a lobbyist's ability to influence.<sup>105</sup> Special interests hire lobbyists to effect change in the legislative process on their behalf, and lobbyists use fundraising and campaign contributions in their effort to accomplish this task.<sup>106</sup> Though individual contributions may not be sufficient to exert influence, the bundled contributions lobbyists can provide are much more persuasive.<sup>107</sup>

Evidence does not consistently substantiate the proposition that money buys votes.<sup>108</sup> However, as the Supreme Court has recognized, the influence of money is not always this blatant.<sup>109</sup>

An example of a more subtle exchange is found in Richard Hall and Frank Wayman's study on the effects of campaign contributions.<sup>110</sup> Recognizing that previous studies did not wholly support the proposition that campaign contributions buy votes,<sup>111</sup> the study instead tested the hypothesis that contributions "mobilize [legislative] bias in committee decisionmaking."<sup>112</sup> The study tested both a "mobilization hypothesis" and a "demobilization hypothesis."<sup>113</sup> The former predicted that contributions to legislators who were likely already on the donor's side would result in that legislator working harder advocating in committee on the donor's behalf.<sup>114</sup> The latter predicted that

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<sup>103</sup> SORAUF, *supra* note 53, at 314.

<sup>104</sup> *See supra* note 102.

<sup>105</sup> *See, e.g.*, Kirkpatrick, *supra* note 41, at A1 ("It is the capacity for fund-raising that gives lobbyists their power.") (quoting the policy director of the Campaign Legal Center).

<sup>106</sup> *See* David D. Kirkpatrick, *Democrats Split on How Far to Go with Ethics Law*, N.Y. TIMES, Nov. 19, 2006, § 1, at 1 (quoting Chellie Pingree, Common Cause president, commenting that reform focusing on "free giveaways in Congress . . . is sort of skirting the issue of how campaign funds are shaping the legislative process").

<sup>107</sup> BIRNBAUM, *supra* note 14, at 18–19.

<sup>108</sup> *See supra* note 66.

<sup>109</sup> *See supra* notes 70–75 and accompanying text.

<sup>110</sup> Hall & Wayman, *supra* note 66.

<sup>111</sup> *Id.* at 798.

<sup>112</sup> *Id.* at 799.

<sup>113</sup> *Id.* at 806.

<sup>114</sup> *Id.* at 814.

contributions given to “likely opponents” would result in that legislator *not* working as hard *against* the donor’s position.<sup>115</sup>

The choice of focus for this study was based on the assumption that campaign contributors “are rational actors [who seek] to maximize their influence”<sup>116</sup> and should, therefore, donate money to legislators on the committee level with an expectation to change the donee’s level of involvement.<sup>117</sup> The study focused on a legislator’s level of involvement, instead of the legislator’s actual vote, because a legislator’s participation in committees is often more important, and easier to affect, than how a legislator actually votes.<sup>118</sup> Involvement is more important because the legislator’s single vote is usually not as crucial to the final outcome as all of the other work that transpires at the committee level.<sup>119</sup> A legislator’s involvement is easier to affect than a legislator’s vote because the legislator has more discretion in how he allocates his time and resources, whereas his choice of vote is “highly constrained” by a number of factors.<sup>120</sup>

Under this model, campaign contributors donate to responsive legislators to purchase “services” such as internal lobbying and favorable drafting.<sup>121</sup> Essentially, the legislators and their staff become agents working on behalf of the donor.<sup>122</sup> The value of access in this case is that it “stimulat[es] agency.”<sup>123</sup>

Drawing from staff interviews and markup records on three issues in three different House committees, the authors concluded that contributions had an effect on legislative effort.<sup>124</sup> Though the evidence did not support the demobilization hypothesis in all cases, it consistently supported the mobilization hypothesis.<sup>125</sup> Rather than contributions resulting in a specific vote, the contributions resulted in legislators working harder on the donor’s behalf.<sup>126</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> Hall & Wayman, *supra* note 66, at 798.

<sup>117</sup> *Id.* at 801–02.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 802.

<sup>120</sup> *Id.* at 801–03 (factors include allocation of resources, professional goals, influence of colleagues, and demands of constituents).

<sup>121</sup> *Id.* at 802.

<sup>122</sup> Hall & Wayman, *supra* note 66, at 803.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 804.

<sup>125</sup> *Id.* at 809, 811.

<sup>126</sup> *Id.* at 799, 809.

c. *A Specific Influence—Earmarks*

Special interests hire lobbyists not only to influence the outcome of legislation but also to secure earmarks.<sup>127</sup> An earmark is the “allocation of resources to specifically-targeted beneficiaries.”<sup>128</sup> These designations appear in the text of bills and accompanying reports of appropriations, direct spending, and tax legislation.<sup>129</sup> Earmarks included in the text of legislation legally bind federal agencies to the specified allocation.<sup>130</sup> Most earmarks are found in the accompanying committee reports, which, although not legally binding on federal agencies, are frequently effectuated by the agencies.<sup>131</sup> The number of earmarks added into spending bills has increased significantly since the 1990s, from 892 in 1992 to 13,997 in 2005.<sup>132</sup> The corresponding cost of these earmarks has increased as well, from \$2.6 billion to \$27.3 billion.<sup>133</sup> With the increasing availability of earmarks, the number of companies and local governments that have hired lobbyists to “pursue earmarks” more than doubled between 2000 and 2005.<sup>134</sup>

Although earmarks are used to “woo voters”<sup>135</sup> in the legislators’ home districts, they are also viewed as a method to reward campaign contributors.<sup>136</sup> It is arguably easier to reward campaign contributors with earmarks than with other legislative outcomes.<sup>137</sup> Unlike legislation, an earmark will not necessarily be the subject of a separately scrutinized vote.<sup>138</sup> A legislator’s vote is dictated by many factors, including past voting behavior, constituency pressures, and fear of public backlash.<sup>139</sup> Moreover, matters subject to a vote

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<sup>127</sup> Fund, *supra* note 15, at A19 (“Earmarks have also dramatically expanded lobbying.”).

<sup>128</sup> ROBERT KEITH, CONG. RESEARCH SERV., FEDERAL BUDGET PROCESS REFORM IN THE 110TH CONGRESS: A BRIEF OVERVIEW 5 (2007), available at <http://fpc.state.gov/documents/organization/80722.pdf>.

<sup>129</sup> *Id.*

<sup>130</sup> SANDY STREETER, CONG. RESEARCH SERV., EARMARKS AND LIMITATIONS IN APPROPRIATIONS BILLS 1 (2004), <http://www.rules.house.gov/archives/98-518.pdf>.

<sup>131</sup> *Id.*

<sup>132</sup> MANN & ORNSTEIN, *supra* note 5, at 174–77 (2006).

<sup>133</sup> *Id.*

<sup>134</sup> See Fund, *supra* note 15, at A19 (noting an increase from 1,865 in 2000 to 4,000 in 2005). One study of earmarks designated in 2005 showed that “[o]n average, companies generated roughly \$28 in earmark revenue for every dollar they spent lobbying.” Eamon Javers, *Inside the Hidden World of Earmarks*, BUS. WK., Sept. 17, 2007, at 56, 56.

<sup>135</sup> Christi Parsons, *Senate OKs Tougher Ethics Bill 96-2*, CHI. TRIB., Jan. 19, 2007, at 4.

<sup>136</sup> Clemmitt, *supra* note 11, at 534 (quoting Thomas Mann).

<sup>137</sup> See *id.* at 534 (quoting Ronald Utt, researcher for The Heritage Foundation).

<sup>138</sup> *Id.*

<sup>139</sup> Hall & Wayman, *supra* note 66, at 801.

must contend with the opposition.<sup>140</sup> Earmarks, on the other hand, do not consistently face these impediments because they are often anonymously slipped into conference reports, which are not the subject of a vote.<sup>141</sup> Thus, lobbying to obtain an earmark promises easier returns.<sup>142</sup>

The lobbying and legislative spheres are closely knit. As shown above, this is a symbiotic relationship.<sup>143</sup> Lobbyists provide legislators with needed campaign cash, and these campaign contributions help lobbyists achieve their goals of access and influence. The repercussions of this relationship, however, are not always beneficial to those outside of this relationship and to the political system itself.

### *B. The Consequences of the Cozy Relationship*

This section first addresses the benefits and drawbacks resulting from interest group involvement in the legislative process. This section next addresses the harm to our system of government from the corruption and perception of corruption inherent in the relationship between lobbyists and legislators.

#### *1. Interest Groups: The Good and the Bad*

Representatives' responsiveness to special interests is not intrinsically antidemocratic.<sup>144</sup> Moreover, interest groups have important, beneficial roles in the legislative process.<sup>145</sup> Interest groups and the lobbyists who speak for them "increase rather than decrease the public's role in government."<sup>146</sup> By representing a range of perspectives on a given issue, these groups "enhance"

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<sup>140</sup> Clemmitt, *supra* note 11, at 534 (quoting Ronal Utt, researcher for The Heritage Foundation).

<sup>141</sup> See *infra* notes 225–233 and accompanying text.

<sup>142</sup> Clemmitt, *supra* note 11, at 534.

<sup>143</sup> BIRNBAUM, *supra* note 14, at 4.

<sup>144</sup> See Elizabeth Garrett, *The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and in Congress*, 27 OKLA. CITY U. L. REV. 665, 669 (2002) (stating that it is difficult to "determin[e] when members of Congress are *too* compliant with the wishes of some of their constituents and when congressional members are properly responsive to the people who elected them"); see also Peter W. Schroth, *Corruption and Accountability of the Civil Service in the United States*, 54 AM. J. COMP. L. (SUPP.) 553, 553 (2006) ("[W]hat one side sees as corruption may be exactly what the other sees as accountability.").

<sup>145</sup> WRIGHT, *supra* note 52, at 199.

<sup>146</sup> James M. DeMarco, Note, *Lobbying the Legislature in the Republic: Why Lobby Reform Is Unimportant*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 599, 599 (1994); see also WRIGHT, *supra* note 52, at 199 ("Without interest groups, legislators would . . . seem even more distant from their constituents.").

the public's "control over government."<sup>147</sup> These groups can also communicate directly to legislators the "electoral salience" of an issue<sup>148</sup> and its various possible resolutions.<sup>149</sup>

Interest groups also provide legislators with "expert information" about issues<sup>150</sup> and the policy consequences of a given action.<sup>151</sup> This information increases Congress members' legislative proficiency.<sup>152</sup> Moreover, interests groups can draw legislative attention to problems that would otherwise go unaddressed.<sup>153</sup>

Over the past few decades, the number of interest groups has increased dramatically, which, in turn, has increased the "legitimacy and integrity" of the process.<sup>154</sup> Interest groups' lobbying on both sides of an issue creates an inherent check on their power.<sup>155</sup> Arguably, that balance can prevent interest groups from "distort[ing] the public interest and manipul[at]ing the political process to their advantage."<sup>156</sup>

Nevertheless, interest groups can be seen as an obstacle to a well-functioning democracy,<sup>157</sup> even outside of concerns about corruption.<sup>158</sup> Although the number and diversity of interest groups have dramatically increased, the central view to which these groups adhere is fairly narrow because of how they are managed and funded.<sup>159</sup> Allowing this narrow segment a greater voice in the legislative process can result in decisions that are contrary to the public good.<sup>160</sup> Specifically, unjustified earmarks

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<sup>147</sup> DeMarco, *supra* note 146, at 600.

<sup>148</sup> Ainsworth, *supra* note 101, at 44.

<sup>149</sup> WRIGHT, *supra* note 52, at 199.

<sup>150</sup> HOPE EASTMAN, *LOBBYING: A CONSTITUTIONALLY PROTECTED RIGHT* 18 (1977) (quoting Senator Charles Percy).

<sup>151</sup> WRIGHT, *supra* note 52, at 199.

<sup>152</sup> *Id.*

<sup>153</sup> David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 150.

<sup>154</sup> WRIGHT, *supra* note 52, at 191.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Strauss, *supra* note 153, at 150 ("[M]ost people also agree that interest groups are sometimes not healthy, because they can bring about results that are inconsistent with the public interest.").

<sup>158</sup> *Id.* at 149.

<sup>159</sup> See John B. Judis, *The Pressure Elite: Inside the Narrow World of Advocacy Group Politics*, AM. PROSPECT, Spring 1992, at 15, 16. Even though new organizations have more members than they have in the past, "they have a far more tenuous connection to those whom they claim to represent directly." *Id.* Furthermore, Judis contended that even the groups funded by individuals, rather than corporations, tended to be individuals that are "white, wealthy, and at least middle-aged." *Id.*

<sup>160</sup> Strauss, *supra* note 153, at 150.

misallocate funds, diverting money from more important projects.<sup>161</sup> Even worse, these earmarks may be simply a waste of money.<sup>162</sup>

Special interest involvement in the legislative process affects not only the outcomes of the process but also the integrity of the process itself. The close relationship between lobbyists and legislators, and the money that interest groups pour into lobbying and campaign contributions, result in corruption and the perception of corruption.

## 2. *Corruption and the Perception of Corruption*

A well-functioning democracy depends on the integrity of the system and the people's confidence in the integrity of the system.<sup>163</sup> Corruption in government weakens the system,<sup>164</sup> and the public's perception of corruption evinces a lack of confidence.<sup>165</sup> The relationship between lobbyists and legislators has resulted in both corruption and the perception of corruption.

During the tenure of the 109th Congress, some former legislators pled guilty to bribery, while others were being investigated for the crime.<sup>166</sup> Bribery is illegal; no person can offer, nor can a legislator accept, anything of value in return for taking, or failing to take, any official action.<sup>167</sup> The definition of corruption is not limited to simple bribery, such as the exchange of money for a specific vote.<sup>168</sup> As shown above, there is evidence that more subtle forms of corruption exist, such as the sale of access or legislative efforts.<sup>169</sup>

Regardless of the extent of actual corruption in the current system, the public perceives that the system is corrupt. The American public lacks confidence in Congress in part because of its relationship with lobbyists.<sup>170</sup> The revolving door between Congress and the lobbying industry contributes to

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<sup>161</sup> MANN & ORNSTEIN, *supra* note 5, at 177.

<sup>162</sup> See Shailagh Murray, *For a Senate Foe of Pork Barrel Spending, Two Bridges Too Far*, WASH. POST, Oct. 21, 2005, at A8 (recounting battle over Alaska's earmark for the "Bridge to Nowhere"—\$223 million earmarked to fund the building of a bridge to "connect one small town to a tiny island").

<sup>163</sup> See *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976).

<sup>164</sup> *Id.*

<sup>165</sup> See *id.* at 27 (noting that avoiding the appearance of corruption is crucial for maintaining confidence in representative government).

<sup>166</sup> MANN & ORNSTEIN, *supra* note 13, at 13.

<sup>167</sup> 18 U.S.C. § 201(b) (2006) (proscribing bribery of public officials).

<sup>168</sup> See *supra* notes 70–75 and accompanying text.

<sup>169</sup> See *supra* Part II.A.2.

<sup>170</sup> MANN & ORNSTEIN, *supra* note 13, at 1.

the public perception of corruption.<sup>171</sup> Further, the public perceives that lobbyists shower legislators with free gifts, meals, and travel.<sup>172</sup> Scandals involving earmarks have only heightened the public perception that campaign contributions buy earmarks.<sup>173</sup> To the public, earmarks appear to be a “positive-feedback loop of lobbying, campaign cash and legislative paybacks.”<sup>174</sup>

The concept of selling access is “offensive.”<sup>175</sup> Even if access does not result in actual influence over the political process, the sale of access implies that it does.<sup>176</sup> Overall, there is a general public perception that money buys influence.<sup>177</sup>

### III. THE HISTORY OF LOBBYING REGULATION AND ITS FAILINGS

The suspicion of interest groups playing too large a role in the democratic process is not new.<sup>178</sup> The First Amendment, however, guarantees every citizen freedom of speech and the right to petition the government.<sup>179</sup> Lobbying legislative officials and contributing to their campaigns are exercises of these First Amendment rights.<sup>180</sup> Restrictions on First Amendment rights are generally subject to strict scrutiny review.<sup>181</sup> Therefore, any regulation restricting lobbying and campaign contributions must be narrowly tailored to further a compelling government interest.<sup>182</sup> The Supreme Court has found both corruption and the perception of corruption sufficiently important

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<sup>171</sup> Boren, *supra* note 57, at 16 (referencing scholar’s testimony in support of cooling off periods).

<sup>172</sup> Kirkpatrick, *supra* note 106, § 1, at 1.

<sup>173</sup> Clemmitt, *supra* note 11, at 531; *see* Parsons, *supra* note 135, at 4 (noting that abuse of the earmark process “has contributed to public suspicion of how business gets done in Washington”).

<sup>174</sup> Clemmitt, *supra* note 11, at 534 (quoting representative of watchdog group) (internal quotations omitted).

<sup>175</sup> *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1713 (1999).

<sup>176</sup> *McConnell v. FEC*, 540 U.S. 93, 154 (2003).

<sup>177</sup> SORAUF, *supra* note 53, at 307.

<sup>178</sup> *See, e.g.*, Kenneth D. Katkin, *Campaign Finance Reform After Federal Election Commission v. McConnell*, 31 N. KY. L. REV. 235, 237–40 (2004) (describing Founding Fathers’ concerns and the history of regulation).

<sup>179</sup> U.S. CONST. amend. I.

<sup>180</sup> *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976).

<sup>181</sup> RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 15.7, 427–28 (1999).

<sup>182</sup> Katkin, *supra* note 178, at 237.

government interests to justify regulation of lobbying and campaign finance.<sup>183</sup> The intermingling of the lobbying and legislative worlds has resulted in corruption and the perception of corruption.<sup>184</sup>

First, this Part gives an overview of the regulatory scheme that Congress intended to control the relationship between lobbyists and legislators prior to September 2007. Next, it describes the inadequacies of that regulatory scheme.

A. *Pre-2007 Regulation of the Cozy Relationship Between Legislators and Lobbyists*

Until 1995, the Federal Regulation of Lobbying Act of 1946 directly regulated lobbyists.<sup>185</sup> The Act required those who fell under the definition of “lobbyist” to register and disclose certain information.<sup>186</sup> Court interpretation, however, narrowed the scope of who was required to register, rendering this measure largely ineffectual.<sup>187</sup> At the time, many lobbyists treated registration as voluntary.<sup>188</sup>

The public’s perception of corruption aggravated the situation. The public perceived that lobbyists bought influence over legislators using gifts such as tickets to sports events, travel, and lavish meals.<sup>189</sup> A “cloak of secrecy” covered the relationship between lobbyists and legislators, further contributing to the public’s perception of corruption.<sup>190</sup>

After a history of failed attempts at reform,<sup>191</sup> Congress enacted the Lobbying Disclosure Act of 1995 (LDA)<sup>192</sup> to prevent corruption<sup>193</sup> and the

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<sup>183</sup> See *Buckley v. Valeo*, 424 U.S. 1, 28 (1976). While not discussing whether the statute in question meets strict scrutiny review, the Court does note that it is focused to address the problems of large donations, where corruption is a possibility. *Id.*

<sup>184</sup> See *supra* Part II.B.2.

<sup>185</sup> Phil Kuntz, *Lobby Bill Would Plug Holes but Depends on Good Will*, 52 CONG. Q. WKLY. REP. 103 (1994).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* (quoting S. REP. NO. 103-37).

<sup>189</sup> Stone, *supra* note 28, at 243.

<sup>190</sup> WRIGHT, *supra* note 52, at 197–98 (quoting Senator Carl Levin).

<sup>191</sup> Kuntz, *supra* note 185, at 103.

<sup>192</sup> 2 U.S.C. §§ 1601–1612 (2006), amended by Honest Leadership and Open Government Act, Pub. L. No. 110-81, 121 Stat. 735 (2007).

<sup>193</sup> Stone, *supra* note 28, at 242 (“Congress’s goal [in enacting the LDA] was to put lobbyists on a tighter leash.”).

appearance of corruption<sup>194</sup> surrounding lobbying practices. The LDA broadened the scope of those required to register as lobbyists with Congress.<sup>195</sup> It required lobbyists to disclose the client<sup>196</sup> and issues<sup>197</sup> on which lobbying efforts would be focused. The LDA also required a lobbyist to supplement initial disclosures with semi-annual reports disclosing specific issues which were targeted and the compensation received for these lobbying activities.<sup>198</sup>

Complimenting the regulations in the LDA were statutes<sup>199</sup> and congressional rules<sup>200</sup> that indirectly regulated lobbying by governing the conduct of legislators and certain of their staff. With the LDA, both chambers reformed their gift rules<sup>201</sup> dictating what members of Congress may accept and from whom, though they did not place an outright ban on gifts.<sup>202</sup> Under these rules, legislators could accept from certain individuals a single gift worth less than \$50, though total gifts from that individual had to be less than \$100 in a given year.<sup>203</sup> The rules also covered travel and meals provided by non-congressional sources.<sup>204</sup> Although the House and Senate “gift” rules were riddled with exceptions, “gifts” from lobbyists were severely restricted.<sup>205</sup>

Legislators and certain members of their staff were also required to abide by “cooling off” periods.<sup>206</sup> For one year after leaving office, legislators were

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<sup>194</sup> WRIGHT, *supra* note 52, at 197–98 (quoting Senator Levin).

<sup>195</sup> See 2 U.S.C. § 1602(10) (2006) (defining “lobbyist”), *amended by* 2 U.S.C.A. § 1602(10) (West 2007); Stone, *supra* note 28.

<sup>196</sup> 2 U.S.C. § 1603(b)(2) (2006).

<sup>197</sup> *Id.*

<sup>198</sup> See § 1604(a)–(b) (2006), *amended by* 2 U.S.C.A. § 1604(a)–(b) (West 2007) (making reporting requirements quarterly, rather than semi-annually).

<sup>199</sup> See 5 U.S.C. § 7353 (2006) (prohibiting legislators from “solicit[ing] or accept[ing] anything of value from a[n interested] person” with exceptions that Congress may establish by internal rules); 18 U.S.C. § 207(e) (2006) (proscribing lobbying activity for a period of time after leaving the Hill for legislators and certain staff).

<sup>200</sup> See S. Rule 35, cl. 1–3 (governing gifts prior to amendment by HLOGA); H. Rule 25 cl. 5 (governing gifts prior to amendment by H. Res. 6); *see also* JACK MASKELL, CONG. RESEARCH SERV. LOBBYING CONGRESS: AN OVERVIEW OF LEGAL PROVISIONS AND CONGRESSIONAL ETHICS RULES 10–19 (2001), *available at* <http://moneyline.cq.com/flatfiles/editorialFiles/moneyLine/reference/crs/lobbying/crs2001.pdf> (giving an overview of congressional rules of ethics).

<sup>201</sup> Stone, *supra* note 28.

<sup>202</sup> See *supra* note 200.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> MASKELL, *supra* note 200, at 10–17.

<sup>206</sup> 18 U.S.C. § 207(e)(1)–(2) (2006), *amended by* 18 U.S.C.A. § 207(e)(1)–(2) (West 2007). A “cooling off period” is where individuals are prohibited from directly lobbying former colleagues. PUB. CITIZEN, PROPOSED REFORMS REGARDING THE DISCLOSURE AND REGULATION OF FEDERAL LOBBYING 6 (2005), <http://www.lobbyinginfo.org/documents/Reforms.pdf>. Cooling off periods for committee staff were governed by 18 U.S.C. § 207(e)(3) (2006), *amended by* 18 U.S.C.A. § 207(e)(3) (West 2007).

prohibited from lobbying any member or employee of Congress.<sup>207</sup> Similarly, certain congressional staff members were required to abstain from lobbying anyone in their former office for one year.<sup>208</sup> Finally, if a lobbyist had been a legislator or staff member within two years of registering as a lobbyist, this fact was required to be disclosed in the registration form.<sup>209</sup>

## *B. How the Regulation Failed*

Congress intended for the disclosures required by the LDA to make the public aware “of the efforts of paid lobbyists to influence the public decisionmaking process.”<sup>210</sup> Despite this effort, the relationship between lobbyists and legislators remains under a “cloak of secrecy.”<sup>211</sup> The persistent lack of transparency, leading to corruption and the perception of corruption, stemmed from two inadequacies in the pre-2007 system of regulation. First, that regime did not require sufficient information to expose the true nature of the relationship between lobbyists and legislators. Second, the actual system of disclosure hampered any attempt to make the needed information available to the public.

### *1. An Incomplete Picture*

The information required by the LDA did not expose the cozy relationship between lobbyists and legislators. From the required disclosures, it was impossible to discern whether a lobbyist was buying or a legislator was selling access.<sup>212</sup> Although lobbyists are subject to campaign finance laws,<sup>213</sup> the LDA did not require the lobbyist to disclose personal contributions made to the legislator or the bundling and other fundraising performed on behalf of the legislator.<sup>214</sup> Moreover, although legislators were required to disclose individual contributions from lobbyists, they were not required to disclose lobbyists’ bundling or other fundraising coordination activities.<sup>215</sup>

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<sup>207</sup> 18 U.S.C. § 207(e)(1) (2006), amended by 18 U.S.C.A. § 207(e)(1) (West 2007).

<sup>208</sup> *Id.* § 207(e)(2), amended by 18 U.S.C.A. § 207(e)(2) (West 2007).

<sup>209</sup> 2 U.S.C. § 1603(b)(6) (2006), amended by 18 U.S.C.A. § 1603(b)(6) (West 2007).

<sup>210</sup> *Id.* § 1601.

<sup>211</sup> Stone, *supra* note 28.

<sup>212</sup> Ansolabehere et al., *supra* note 62, at 142 & nn.17–18.

<sup>213</sup> See 2 U.S.C. § 441a (2006) (capping individual contributions).

<sup>214</sup> See *id.* § 1603(b) (contents of registration form), amended by 2 U.S.C.A. § 1603(b) (West 2007); *id.* § 1604(b) (2006) (contents of semi-annual reports), amended by 2 U.S.C.A. § 1604(b) (West 2007).

<sup>215</sup> See *id.* § 434 (2006), amended by 2 U.S.C.A. § 434 (West 2007).

Not only was the money trail unclear but also the actual contacts made between lobbyists and legislators remained completely behind closed doors. In disclosure reports, lobbyists were only required to designate the chamber contacted during the reporting period, not individual offices, committees, or legislators and staff.<sup>216</sup> Without information on fundraising efforts and specific contacts made, the public could not monitor the exchange between lobbyists and legislators.

This lack of information also made it more difficult to monitor whether legislators were selling influence over the legislative process.<sup>217</sup> Inadequate disclosures of campaign financing were compounded by the lack of specificity of what legislation lobbyists actually targeted.<sup>218</sup> The LDA required lobbyists to disclose the “specific issues” that were targeted and “to the maximum extent practicable, a list of bill numbers.”<sup>219</sup> The Clerk of the House emphasized that the specific bill numbers alone were “not adequate” to comply with the requirement that “specific issues” be disclosed.<sup>220</sup> However, even though the Clerk of the House and Secretary of the Senate were responsible for monitoring LDA disclosures, neither had the power to truly enforce these provisions.<sup>221</sup> One review of lobbying disclosures revealed that the information provided on issues that lobbyists targeted was not sufficiently specific to determine the amount of lobbying money spent in a given area of legislation.<sup>222</sup>

The influence of preexisting relationships was also difficult to monitor under the previous regime. Although the LDA required a lobbyist to disclose former employment with Congress at registration, this requirement only covered employment held within two years of registration.<sup>223</sup> That timeframe

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<sup>216</sup> See *id.* § 1604(b)(2)(B) (2006).

<sup>217</sup> See PUB. CITIZEN, *supra* note 206. Factors other than inadequate information on campaign financing and contacts with lobbyists make this a particularly difficult area to monitor. Ainsworth, *supra* note 101, at 43. For example, the causal connection between campaign contributions and legislative action can be the reverse; donors may contribute because of the legislator’s past actions, not to influence the legislator’s future actions. See *id.*

<sup>218</sup> See PUB. CITIZEN, *supra* note 206, at 2 (noting that though required, specific issues and bill numbers are often omitted from disclosure reports).

<sup>219</sup> 2 U.S.C. § 1604(b)(2)(A) (2006).

<sup>220</sup> Guide to the Lobbying Disclosure Act, Office of the Clerk, [http://lobbyingdisclosure.house.gov/lda\\_guide.html](http://lobbyingdisclosure.house.gov/lda_guide.html) (last visited Oct. 25, 2007).

<sup>221</sup> Shawn Zeller, *Lobbying’s Small Slap, Huge Wrist*, 64 C.Q. WKLY. 307 (2006).

<sup>222</sup> Kevin Baron, *Lobbying Disclosure Forms Provide an Incomplete Picture*, BOSTON GLOBE, Oct. 5, 2004, at A16.

<sup>223</sup> 2 U.S.C. § 1603(b)(6) (2006), amended by 2 U.S.C.A. § 1603(b)(6) (West 2007).

did not address the full scope of a lobbyist's past employment with Congress.<sup>224</sup>

The lack of transparency in the earmark process further shrouded the relationship between lobbyists and legislators. Legislators seeking earmarks should have made written requests for the earmarks to the appropriate committee and then publicly justified these designations.<sup>225</sup> There was no requirement, however, that the legislator designate sponsorship of the earmark.<sup>226</sup> Further, most appropriations earmarks appeared in committee reports that were not available to legislators until immediately before a vote.<sup>227</sup> Essentially, these earmarks were never subject to deliberation.<sup>228</sup>

Legislators did use earmarks to help their constituents, and in such circumstances, they would have had an incentive to disclose sponsorship of earmarks.<sup>229</sup> Earmarks, though, were also a boon for lobbyists.<sup>230</sup> However, the system did not require any disclosure of the lobbyist seeking the earmark or the legislator sponsoring it.<sup>231</sup> At times, the actual recipient of the earmark was not even apparent from the language used to designate the funds.<sup>232</sup> The anonymity of this process certainly exposed the process to abuse and made it difficult to monitor whether earmarks truly were bought and sold.<sup>233</sup>

Finally, despite the tight restrictions on gifts, lobbyists found ways to operate around them.<sup>234</sup> Although legislators were required to file disclosures of travel plans, Congress did not make these forms electronically available to the public.<sup>235</sup> Furthermore, although individual lobbyists were prohibited from funding travel, lobbyists could still coordinate and arrange such travel.<sup>236</sup> Members of Congress were not required to publicly disclose "gifts" other than

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<sup>224</sup> PUB. CITIZEN, *supra* note 206, at 5.

<sup>225</sup> Jeffrey H. Birnbaum, *Earmark—It's \$\$\$, Not Body Art*, WASH. POST, Feb. 3, 2006, at A17.

<sup>226</sup> KEITH, *supra* note 128, at 5.

<sup>227</sup> Clemmitt, *supra* note 11, at 532–33 (quoting Senator Tom Coburn).

<sup>228</sup> *Id.* at 538.

<sup>229</sup> *See id.* at 531.

<sup>230</sup> *See supra* notes 127–38 and accompanying text.

<sup>231</sup> KEITH, *supra* note 128, at 5.

<sup>232</sup> Clemmitt, *supra* note 11, at 542.

<sup>233</sup> *Id.* at 534.

<sup>234</sup> *Hearing Before the S. Comm. on Homeland Sec. & Governmental Aff.*, *supra* note 7, at 87–88, 92–93 (statement of Fred Wertheimer, President, Democracy 21).

<sup>235</sup> *See* MASKELL, *supra* note 200, at 5 (proposed reform required an electronic database of this information).

<sup>236</sup> *Hearing Before the S. Comm. on Homeland Sec. & Governmental Aff.*, *supra* note 7, at 92 (statement of Fred Wertheimer, President, Democracy 21).

travel. Although the gift rules severely restricted “gifts” from lobbyists, critics charged that loopholes in the rules still allowed lobbyists to “spend lavishly on lawmakers” in this area.<sup>237</sup>

## 2. System Failure

The system—originally intended to facilitate public disclosure of the required information—suffered from multiple failings, which rendered it inadequate to achieve the goal of transparency. Under the LDA, the Secretary of the Senate and Clerk of the House were charged to develop “computerized systems designed to minimize the burden of filing and maximize public access to materials filed under this chapter.”<sup>238</sup> The reality, however, was that through 2006, Congress had not efficiently processed the lobbying disclosure forms, which resulted in “filing fiascos” and delay.<sup>239</sup> Moreover, once the reports were publicly available, “the limited search functions” did not provide the public with “a complete picture of lobbying” efforts.<sup>240</sup>

Another system failure was that senators were not required to submit campaign finance disclosure forms electronically.<sup>241</sup> This failure resulted in a needlessly complicated procedure. Most senators compiled contribution and expenditure disclosures electronically and printed them.<sup>242</sup> These hard copies were then scanned into the computer to transmit them electronically to the FEC.<sup>243</sup> The FEC then printed out the disclosures and sent a second set of hard copies to an outside contractor for manual input into an electronic database.<sup>244</sup> This convoluted chain resulted in filings that were hard to read because of “repeated format changes” and inaccurate because of human input errors.<sup>245</sup> Because of the delay imposed by this process, contributions made on the eve of an election were kept from public scrutiny until after voters had already gone

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<sup>237</sup> Jonathan Weisman & Jeffrey H. Birnbaum, *Senate Passes Ethics Package*, WASH. POST, Jan. 19, 2007, at A1.

<sup>238</sup> 2 U.S.C. § 1605(a)(3)(B).

<sup>239</sup> Thomas M. Susman, *Congress' Lobbying Report Electronic Filing Fiasco*, ROLL CALL, Sept. 6, 2006, at 8; see also MANN & ORNSTEIN, *supra* note 5, at 235 (“[T]he abuses of Abramoff . . . were initially detected by journalists in spite of, not thanks to the official reporting and disclosure systems.”) (citing author Mann’s own congressional testimony).

<sup>240</sup> Baron, *supra* note 222, at A16.

<sup>241</sup> Jim Drinkard, *Senate System Drags Out Financial-Data Disclosure*, USA TODAY, Mar. 6, 2006, at 6A.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

to the polls.<sup>246</sup> The disclosures, when they were finally available, took the form of enormous online documents that were not word-searchable.<sup>247</sup>

Compliance and enforcement of lobbying disclosure was also lax.<sup>248</sup> Although the Secretary of the Senate and Clerk of the House were charged with managing the disclosure system, neither had the power to investigate or penalize violations.<sup>249</sup> Further, the Secretary and Clerk were “notoriously generous with . . . filing deadlines,” which could result in years of delay.<sup>250</sup>

The previous approach to regulation suffered from a lack of transparency and, therefore, failed to achieve its purpose.<sup>251</sup> Scandals such as Abramoff’s illustrated the regulatory regime’s failure to prevent actual corruption,<sup>252</sup> and the general public’s negative view of Congress illustrated its failure to prevent the appearance of corruption.<sup>253</sup> The system needed to be reformed.

#### IV. A CAUTIONARY TALE FOR REFORM—THE HISTORY OF CAMPAIGN FINANCE REGULATION

Money and politics are inextricably linked.<sup>254</sup> Thus, efforts to regulate expenditures in this realm rarely have their intended effect.<sup>255</sup> Instead of curbing or controlling expenditures, regulation drives money into areas that are less regulated or unregulated.<sup>256</sup> This phenomenon has often been explored in the area of campaign finance regulation.<sup>257</sup> The shifting course of money in response to regulation is known as the hydraulic effect. In light of the hydraulic effect, reform which targets political money is unable to control the money flowing into the system. This Part first recounts the history of

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<sup>246</sup> *Id.*

<sup>247</sup> Jeffrey H. Birnbaum, *Support for Electronic Filing of Senate Candidates’ Campaign-Finance Records Gains Momentum*, WASH. POST, Sept. 18, 2006, at D1 (describing viewing the disclosures on-line as a “process like rummaging through thousands of disorderly papers in a very large box”).

<sup>248</sup> Zeller, *supra* note 221 at 307.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> See Part II.B.2.

<sup>252</sup> *Id.*

<sup>253</sup> See *supra* Introduction and Part II.B.2. for a discussion of Abramoff and other scandals.

<sup>254</sup> See Gil Troy, *Money and Politics: The Oldest Connection*, 21 WILSON Q. 14, 16 (1997) (“In the United States of America . . . politics is about power, and money is a form of power. Despite the best efforts of reformers, past, present, and future, it is impossible to remove all influence of money in politics.”).

<sup>255</sup> See Garrett, *supra* note 144, at 665.

<sup>256</sup> See *id.* (“A system that leaves possible avenues of spending unregulated encourages the money to flow into the unregulated canals.”).

<sup>257</sup> See, e.g., Issacharoff & Karlan, *supra* note 175.

campaign finance reform to illustrate the “hydraulic quality” of money in politics<sup>258</sup> and then addresses the repercussions of this type of reform.

The Watergate Scandal prompted the “modern era” of campaign finance regulation.<sup>259</sup> The preceding regulatory scheme had insufficiently “deter[ed] unseemly fundraising and campaign practices,”<sup>260</sup> prompting Congress to enact the Federal Election Campaign Act Amendments of 1974 (FECA).<sup>261</sup> Under FECA, individual contributions were capped at \$1,000, and candidates were required to disclose certain contribution information.<sup>262</sup>

The regulation contained in FECA proved ineffective because political actors discovered loopholes.<sup>263</sup> Instead of decreasing the amount of money in the political system, the regulation merely changed the form of that money.<sup>264</sup> FECA succeeded in reducing the use of “hard money”—money which is subject to the contribution caps.<sup>265</sup> However, the use of “soft money”—money not subject to FECA contribution limits—“increased exponentially.”<sup>266</sup> Although soft money was not given directly to candidates, it still had the same effect as hard money.<sup>267</sup>

In an attempt to close this loophole,<sup>268</sup> Congress enacted the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>269</sup> BCRA raised the hard money contribution limits in place since 1976,<sup>270</sup> but it subjected all money raised and

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<sup>258</sup> Garrett, *supra* note 144, at 666.

<sup>259</sup> Katkin, *supra* note 178, at 239.

<sup>260</sup> *McConnell v. FEC*, 540 U.S. 93, 118 (2003).

<sup>261</sup> Katkin, *supra* note 179, at 239. *See generally* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended in scattered sections of 2, 5, 18, 26 and 47 U.S.C.).

<sup>262</sup> *McConnell*, 540 U.S. at 118–19 (citing *Buckley v. Valeo*, 519 F.2d 821, 831–34 (D.C. Cir. 1975)). In *Buckley v. Valeo*, the Supreme Court upheld FECA’s contribution and disclosure requirements, but struck down its regulation of candidate expenditures. 424 U.S. 1, 58–59 (1976).

<sup>263</sup> *See* Katkin, *supra* note 178, at 240 (“[C]ampaign finance lawyers grew increasingly sophisticated at discovering the loopholes in the Act.”).

<sup>264</sup> *McConnell*, 540 U.S. at 124.

<sup>265</sup> *Id.* at 122–24.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 126 (“The solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA’s limitations on the source and amount of contributions in connection with federal elections.”).

<sup>268</sup> *Id.* at 129 (“[Congress] agreed that the ‘soft money loophole’ had led to a ‘meltdown’ of the campaign finance system that had been intended ‘to keep corporate, union and large individual contributions from influencing the electoral process.’”) (quoting S. REP. NO. 105-167, vol. 4, at 4611 (1998)).

<sup>269</sup> Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified primarily in scattered sections of 2 and 47 U.S.C.).

<sup>270</sup> 2 U.S.C. § 441a (2006).

spent by national party committees to federal contribution limits, thus essentially eliminating the use of soft money.<sup>271</sup>

While upholding BCRA's contribution limits on soft money, the Supreme Court recognized that the spirit of these measures would likely be circumvented.<sup>272</sup> That is exactly what happened.<sup>273</sup> For example, the Democratic Party created a "shadow party of private . . . organizations" that could operate just as the Democratic Party had operated before the restrictions put in place by BCRA.<sup>274</sup> As before, reform failed to block the flow of money but instead rerouted it into different channels,<sup>275</sup> again illustrating the hydraulic quality of money.

Reform that targets money has two critical drawbacks besides its ineffectiveness. First, transparency and accountability suffer because the same activity which had once been public moves into the private sphere.<sup>276</sup> Regulation encourages "money to flow into the unregulated canals[, and t]hese new streams can be relatively hard to discover and publicize."<sup>277</sup> Second, the increased regulation may have the unintentional effect of increasing the need for money in the political system.<sup>278</sup> Political actors with greater resources may be able to flourish in the new system, while others may labor under the increased burden of regulatory compliance.<sup>279</sup> These smaller players cannot as easily afford the costs associated with exploiting the new system, such as developing new strategies and legal advice.<sup>280</sup>

These phenomena from campaign finance regulation and reform demonstrate principles that apply equally well to the regulation and reform of lobbying. Lobbying and campaign finance are two sides of the same coin, partly because of the common components of politics and money and partly because of the major role lobbyists play in campaign financing. Therefore, any

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<sup>271</sup> 2 U.S.C. § 441i (2006).

<sup>272</sup> *McConnell*, 540 U.S. at 224 ("We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet.").

<sup>273</sup> Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 157 (2005).

<sup>274</sup> *Id.*

<sup>275</sup> *See id.* The goal of the BCRA was to regulate the use of soft money, not to reduce the amount of money in the campaign process. MANN & ORNSTEIN, *supra* note 5, at 181.

<sup>276</sup> *See* Kang, *supra* note 273, at 157.

<sup>277</sup> Garrett, *supra* note 144, at 666.

<sup>278</sup> *See* Kang, *supra* note 273, at 158–59.

<sup>279</sup> *Id.* (discussing the disparate impact BCRA had on political actors).

<sup>280</sup> *See id.*

approach to lobbying reform should take these unintended consequences into consideration.

## V. REFORMING THE RELATIONSHIP

The previous regulatory scheme was inadequate to combat corruption and the appearance of corruption in the system because it did not sufficiently expose the relationships between lobbyists and legislators<sup>281</sup> or the returns created by these relationships.<sup>282</sup> To address these two evils without creating new ones, reform should focus on increased disclosure. The first section addresses the benefits of reform efforts focused on disclosure. The next section presents highlights of the reform passed by the 110th Congress and discusses the benefits of the new law. The final section addresses the new law's nondisclosure-oriented measures and shows how they fail to effect meaningful lobbying reform.

### A. *The Justification of Disclosure*

Greater transparency in the relationship between lobbyists and legislators will help combat corruption and the perception of corruption.<sup>283</sup> In the words of Justice Brandeis, “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”<sup>284</sup> Disclosure of contacts with lobbyists to “the light of day” decreases corruption by making it more difficult to conduct and conceal corrupt behavior.<sup>285</sup> With more subtle forms of corruption,<sup>286</sup> disclosure facilitates public monitoring of the interactions between lobbyists and legislators so that the public may hold officials who are “too compliant” accountable at the polls.<sup>287</sup> Finally, as more information pertaining to the relationship between lobbyists and legislators is disclosed, the public's perception of corruption is reduced because opportunities for corrupt behavior decrease.<sup>288</sup>

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<sup>281</sup> See *supra* Part III.B.

<sup>282</sup> See *supra* Part II.A.

<sup>283</sup> See *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

<sup>284</sup> *Id.* (quoting LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (Nat'l Home Library ed., 1933)) (internal quotations omitted).

<sup>285</sup> See *Garrett*, *supra* note 144, at 674 (discussing disclosure generally); see also *Buckley*, 424 U.S. at 67.

<sup>286</sup> See *supra* notes 70–75 and accompanying text.

<sup>287</sup> See *Garrett*, *supra* note 144, at 674–75 (discussing disclosure generally).

<sup>288</sup> See *Buckley*, 424 U.S. at 27 (citing *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)).

*B. Honest Leadership and Open Government Act of 2007*

On September 14, 2007, President Bush signed into law the Honest Leadership and Open Government Act.<sup>289</sup> This section highlights a few of the numerous changes HLOGA makes to the regulation of the relationship between lobbyists and legislators.<sup>290</sup>

First, HLOGA requires more frequent and detailed disclosures from lobbyists. Under the new regulation, lobbyists must file the required reports quarterly, rather than semiannually.<sup>291</sup> In these quarterly reports, lobbyists must now disclose previous employment with Congress during the past twenty years,<sup>292</sup> instead of the past two years, as previously required.<sup>293</sup>

HLOGA also mandates a new semiannual report.<sup>294</sup> This report requires information regarding political committees lobbyists established or controlled, certain campaign contributions lobbyists have made,<sup>295</sup> and “payments for events or to entities connected with government officials.”<sup>296</sup> HLOGA also requires lobbyists to submit certifications that they “ha[ve] not provided, requested, or directed a gift, including travel, to a Member of Congress or an officer or employee of either House of Congress with knowledge that receipt of the gift would violate” Congressional gift and travel rules.<sup>297</sup> Finally, both quarterly and semiannual reports must now be filed electronically.<sup>298</sup>

Under HLOGA, legislators must now report the names of lobbyists who act as bundlers.<sup>299</sup> It defines a bundled contribution as two or more individual contributions, excluding the lobbyist’s own individual contribution, totaling more than \$15,000 in a semiannual period.<sup>300</sup> In order to be considered a

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<sup>289</sup> Pub. L. No. 110-81, 121 Stat. 735 (2007).

<sup>290</sup> For simplicity’s sake, this Part refers to HLOGA when discussing reform. Other changes were made through House Resolution 6, passed January 4, 2007, which made changes to the House’s internal ethics rules. H.R. Res. 6, 110th Cong. (2007). Where House Resolution 6, rather than HLOGA, effected a reform, this will be noted in the citation.

<sup>291</sup> HLOGA § 201(a), 121 Stat. at 741.

<sup>292</sup> *Id.* § 208, 121 Stat. at 748.

<sup>293</sup> *Supra* note 223 and accompanying text.

<sup>294</sup> HLOGA § 203(a), 121 Stat. at 742–44.

<sup>295</sup> *Id.* § 203(a), 121 Stat. at 742–43.

<sup>296</sup> JACK MASKELL, CONG. RESEARCH SERV., LOBBYING LAW AND ETHICS RULES CHANGES IN THE 110TH CONGRESS 4 (2007), available at [http://openers.com/rpts/RL34166\\_20070907.pdf](http://openers.com/rpts/RL34166_20070907.pdf).

<sup>297</sup> HLOGA § 203(a), 121 Stat. 743–44.

<sup>298</sup> *Id.* § 205, 121 Stat. at 746.

<sup>299</sup> *Id.* § 204(a), 121 Stat. at 744–46.

<sup>300</sup> *Id.*

bundler, the lobbyist must actually forward the contributions or receive credit for them “through records, designations, or other means of recognizing that a certain amount of money has been raised by the person.”<sup>301</sup> Legislative history indicates that Congress intended the bundling provision to require disclosure not only when a lobbyist sends bundled contributions but also when he or she hosts a fundraiser at which the threshold \$15,000 is collected.<sup>302</sup> HLOGA charges the Federal Election Commission (FEC) with promulgating rules to implement the bundling provision which will clarify the scope of disclosure HLOGA requires.<sup>303</sup> These disclosures will be electronically available on the FEC’s website and linked electronically to the disclosures filed by lobbyists.<sup>304</sup>

Due to changes implemented by HLOGA and by a 2007 House resolution, rules in both the House and Senate now place sweeping bans on gifts from lobbyists and from private entities that employ them.<sup>305</sup> The rules also prohibit all travel that is “planned, organized, or arranged by or at the request of a lobbyist,”<sup>306</sup> unlike previous rules that banned only that travel that was paid for by lobbyists.<sup>307</sup> The travel funding prohibition is binding on any entity that retains lobbyists, unless it is a charitable organization (Senate rules)<sup>308</sup> or an “institution of higher education” (House rules).<sup>309</sup> Finally, the Secretary of the Senate and Clerk of the House are required to make travel disclosures publicly available on the Internet.<sup>310</sup>

The new law also addresses the revolving door between the legislative and lobbying spheres. HLOGA extends the cooling-off period for Senators from one to two years.<sup>311</sup> Also, certain “senior” Senate staff members will now be prohibited during a one-year cooling-off period from lobbying any senator or senator’s office, not just the staffer’s former office.<sup>312</sup>

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<sup>301</sup> *Id.* at 746.

<sup>302</sup> 153 Cong. Rec. S10699 (daily ed. Aug. 2, 2007) (statements of Senators Obama and Feingold).

<sup>303</sup> *Id.* § 204(a), 121 Stat. at 745.

<sup>304</sup> HLOGA § 204(a), 121 Stat. at 745.

<sup>305</sup> *Id.* § 541, 121 Stat. 766–67 (amending Senate rules); H.R. Res. 6, 110th Cong. § 203 (2007) (amending House rules).

<sup>306</sup> HLOGA § 544, 121 Stat. at 768; H.R. Res. 6, 110th Cong. § 206(a) (2007).

<sup>307</sup> *See supra* note 236 and accompanying text.

<sup>308</sup> HLOGA § 544(a), 121 Stat. 768.

<sup>309</sup> H.R. Res. 6, 110th Cong. § 206 (2007).

<sup>310</sup> HLOGA § 546, 121 Stat. at 772; H.R. Res. 6, 110th Cong. § 206 (2007).

<sup>311</sup> HLOGA § 101(b)(3), 121 Stat. at 737.

<sup>312</sup> *Id.*

Finally, the Senate has changed internal rules that will increase the transparency of the earmark process. The Senate now requires that any earmark, and the name of the Senator requesting the earmark, be publicly available on the Internet at least forty-eight hours before a vote on the legislation containing the earmark.<sup>313</sup>

HLOGA also makes changes regarding enforcement of lobbying regulation. For example, lobbyists must certify compliance with Congressional gift and travel rules<sup>314</sup> and HLOGA makes knowing violations of these Congressional rules a crime.<sup>315</sup> Furthermore, the Department of Justice must now submit an “enforcement report” twice a year to Congress in which it discloses the number of actions and convictions for violations of lobbying regulation.<sup>316</sup> Also, the Comptroller General of the United States must file an annual report regarding compliance with the LDA based on random audits of lobbying disclosures.<sup>317</sup>

Although these changes address some of the deficiencies that plagued the previous regime, the HLOGA still leaves certain gaps. The next section highlights areas of the law that address previous gaps in regulation and how they may solve certain problems. It also discusses the ways in which the new disclosure requirements fall short.

### *C. HLOGA: Gaps Filled and Left Open*

Required disclosures should encompass the information necessary to allow the public to monitor the effect that lobbyists have on the legislative process. Determining whether lobbyists buy access or influence over the legislative process was not apparent from the previous statutory regime because of insufficient information regarding, among other things, the role lobbyists played in campaign financing and the contacts made between lobbyists and legislators.<sup>318</sup>

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<sup>313</sup> *Id.* § 521, 121 Stat. at 760–61.

<sup>314</sup> *See supra* note 297 and accompanying text.

<sup>315</sup> HLOGA § 206(a), 121 Stat. at 747.

<sup>316</sup> *Id.* § 210, 121 Stat. at 749. This report, however, will not contain information about these enforcement actions which is not already publicly available. *Id.*

<sup>317</sup> *Id.* § 213, 121 Stat. at 750.

<sup>318</sup> Ansolabehere et al., *supra* note 62, at 142.

### 1. *Towards a Complete Picture*

New disclosure requirements under the HLOGA should facilitate the monitoring of the sale of access and influence by increasing disclosure regarding the role a lobbyist plays in financing campaigns. Lobbyists play an integral role in campaign financing,<sup>319</sup> yet before HLOGA, the only required public disclosure appeared in a legislator's disclosure of a lobbyist's independent campaign contribution.<sup>320</sup> Now, legislators will be required to disclose bundling activities performed by lobbyists.<sup>321</sup> As the previous section explained, this disclosure could include both bundling done by lobbyists forwarding contributions to legislators, as well as bundling done by lobbyists hosting fundraisers.<sup>322</sup> The disclosure of bundling activities "could expose a potent tool that lobbyists use to gain access on Capitol Hill."<sup>323</sup> The heightened disclosure required regarding campaign finance will also help the public monitor the sale of influence over the legislative process because the public will have greater information of lobbyists' campaign financing activities.<sup>324</sup> Although these disclosures may not change the role that lobbyists play in fundraising,<sup>325</sup> exposing these connections will increase the public's ability to monitor legislators' subsequent behavior for signs of any favoritism.<sup>326</sup>

Although HLOGA better exposes the money trail, HLOGA does not require one necessary piece of information—the actual contacts between lobbyists and individual legislators. Disclosing specific contacts between lobbyists, legislators, and congressional staff would be the next step in allowing the public to monitor the process.<sup>327</sup> Currently, lobbyists must only disclose whether they contacted the House or Senate.<sup>328</sup> However, lobbyists should be required to disclose specific meetings with individual legislators and

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<sup>319</sup> *Lobbying Reform: A Tap on the Wrist*, *supra* note 20, at 34.

<sup>320</sup> 2 U.S.C. § 434 (2006), *amended by* 2 U.S.C.A. § 434 (West 2007).

<sup>321</sup> *See supra* note 299 and accompanying text.

<sup>322</sup> *See supra* note 302–303 and accompanying text.

<sup>323</sup> Kirkpatrick, *supra* note 41, at A1.

<sup>324</sup> *See* Issacharoff & Karlan, *supra* note 175, at 1720.

<sup>325</sup> Kirkpatrick, *supra* note 41, at A1 (addressing disclosure on bundling). *But see id.* ("Hopefully, requiring disclosure will begin to break the nexus between lawmaking and the efforts by lobbyists to enhance their influence by channeling money from special interests.") (quoting Representative Christopher Van Hollen).

<sup>326</sup> *See* Buckley v. Valeo, 424 U.S. 1, 67 (1976); Kirkpatrick, *supra* note 41, at A1 ("[C]alling attention to [fundraising] relationships could focus new scrutiny on [legislators'] votes.").

<sup>327</sup> *See Hearing Before S. Comm. on Rules & Admin.*, *supra* note 16, at 5 (statement of Dr. James A. Thurber); Katel, *supra* note 40, at 621.

<sup>328</sup> 2 U.S.C. § 1604(b)(2)(B) (2006).

their staff.<sup>329</sup> Without this information, HLOGA's reforms to expose lobbyists' roles in campaign financing and a more lengthy record of lobbyists' histories of congressional employment<sup>330</sup> are not as meaningful; thus, greater specificity of contact information would reveal if a campaign contribution or a preexisting relationship affords access to legislators.<sup>331</sup>

The increased transparency in the Senate's earmark process is also a step in the right direction. The earmark process suffered from a lack of transparency.<sup>332</sup> There is nothing inherently wrong with earmarks;<sup>333</sup> earmarking helps fund legitimate, worthwhile programs that may otherwise go unnoticed by federal agencies.<sup>334</sup> However, prior to the HLOGA, the system presented ample opportunity for abuse.<sup>335</sup> The new rules require a senator to publicly disclose sponsorship of earmarks,<sup>336</sup> which should increase the "shame factor" associated with supporting wasteful projects, thus decreasing corruption in this area.<sup>337</sup> The disclosures, however, should also include the contacts made by lobbyists on behalf of the beneficiary of the earmarks or the lobbyist employed by the beneficiary of the earmark.<sup>338</sup> Although earmark reform falls short, the focus is properly on disclosure. Restricting receipt of earmarks based on the lobbyist or lobbying firm employed by the recipient would be both over- and under-inclusive.<sup>339</sup>

To illustrate, former staff members of Senator Feinstein from California lobby on behalf of California cities.<sup>340</sup> It is not inherently wrong for a legislator to direct earmarks to her state—that legislator likely has a unique understanding of where the money needs to go.<sup>341</sup> Prohibiting an earmark because of the relationship between the legislator and the lobbyist, therefore,

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<sup>329</sup> See *supra* note 327.

<sup>330</sup> See *supra* note 292 and accompanying text.

<sup>331</sup> See Ansolabehere et al., *supra* note 62, at 142 (access).

<sup>332</sup> See *Hearing Before S. Comm. on Rules & Admin.*, *supra* note 16, at 5–6 (statement of Dr. James A. Thurber).

<sup>333</sup> MANN & ORNSTEIN, *supra* note 5, at 177 (“[P]ork itself is not evil or even necessarily bad. Some of it is the price of getting things done in Congress, and much of it is beneficial to society.”).

<sup>334</sup> Clemmitt, *supra* note 11, at 535 (quoting a Washington lawyer).

<sup>335</sup> See Kirkpatrick, *supra* note 106, § 1, at 1 (anonymity of the earmark process); see also Fund, *supra* note 15, at A19 (“Earmarks by the thousands inevitably bring scandals by the dozens.”).

<sup>336</sup> See *supra* note 313 and accompanying text.

<sup>337</sup> See FUND, *supra* note 15, at A19.

<sup>338</sup> MANN & ORNSTEIN, *supra* note 13, at 7.

<sup>339</sup> See Garrett, *supra* note 144, at 675 (discussing campaign finance regulation).

<sup>340</sup> Kirkpatrick, *supra* note 106, § 1, at 1.

<sup>341</sup> See Zuckman, *supra* note 2, §1 at 3 (“[S]upporters [of earmarks] say no one knows districts as well as their representatives, so it makes sense for them to direct money to important projects there.”).

would restrict this legitimate, beneficial use of the system.<sup>342</sup> On the other hand, abuses of the system, such as the earmark scandal involving former Representative Randy Cunningham,<sup>343</sup> would not be prevented because of the identity of the lobbyist. With disclosure, the public can decide whether the unique combination of legislator, earmark, and lobbyist fails the test of propriety.<sup>344</sup>

Furthermore, an outright ban on earmarks could drive the practice even further into the shadows.<sup>345</sup> For example, the 2007 spending bill passed without earmarks.<sup>346</sup> This, however, was not the end of the story. Legislators and staff directly contacted federal agencies to ensure that earmarks contained in previous legislation would still be carried out.<sup>347</sup> Although the Bush Administration subsequently “clos[ed] the door to hidden earmark requests,” and the Office of Management and Budget emphasized that only earmarks within legislative text should be honored,<sup>348</sup> this response illustrates how easily a ban could be circumvented.

## 2. *Upgrading the System*

These increased disclosures, discussed above, should be publicly available in a single “user friendly” system. To facilitate timely public disclosure, all disclosure should be made electronically.<sup>349</sup> Electronic forms would increase the accuracy of disclosures by avoiding a series of format changes and input error.<sup>350</sup> They would also make the process more efficient, thereby making the information accessible to the public in a timelier manner.<sup>351</sup> The HLOGA

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<sup>342</sup> See Garrett, *supra* note 144, at 675 (discussing campaign finance regulation).

<sup>343</sup> Clemmitt, *supra* note 11, at 531.

<sup>344</sup> See *id.* at 548 (quoting Ronald Utt, researcher for The Heritage Foundation); see also Garrett, *supra* note 144, at 675 (“[D]isclosure can allow voters to tailor their behavior accordingly.”) (discussing disclosure generally).

<sup>345</sup> Gail Russell Chaddock, *How Democrats Work with Tight Purse*, CHRISTIAN SCI. MONITOR, Feb. 2, 2007, at 3–4 (quoting spokesman for watchdog group who finds “there’s a danger that members of Congress may lobby agencies directly to get projects funded”).

<sup>346</sup> Kimberley A. Strassel, Op-Ed., *It’s a Trough Life*, WALL ST. J., Feb. 9, 2007, at A10.

<sup>347</sup> *Id.*

<sup>348</sup> Press Release, Citizens Against Gov’t Waste, CAGW Praises Administration Directive to End Secret Earmarks (Feb. 16, 2007), <http://www.cagw.org/site/News2?page=NewsArticle&id=10482>.

<sup>349</sup> *Hearing Before the S. Comm. on Homeland Sec. & Governmental Aff.*, *supra* note 7, at 94 (statement of Fred Wertheimer, President, Democracy 21).

<sup>350</sup> See *supra* notes 241–47 and accompanying text.

<sup>351</sup> See *supra* notes 241–47 and accompanying text.

takes great steps in this area by requiring all lobbyists to make their disclosures electronically.<sup>352</sup>

The government should integrate the electronic disclosure systems to allow cross-referencing between lobbying, campaign finance, and earmark disclosures. Separate disclosure systems, which are not fully searchable, do not facilitate public awareness of the connections between lobbyists and legislators. Although many private groups work to make the separate disclosures available online,<sup>353</sup> the public should not have to depend on these watchdogs. The government should make this database available on the Internet and “fully searchable.”<sup>354</sup> Although the HLOGA does require the FEC to electronically cross-reference campaign financing disclosures with lobbying disclosures,<sup>355</sup> the government should integrate all required disclosures into one database in order to fully expose the relationship between lobbyists and legislators. In enacting the LDA, Congress found that “responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decisionmaking process.”<sup>356</sup> In order to accomplish this goal, Congress should draw and expose the connections between itself and the lobbying industry.

Finally, the HLOGA increases enforcement measures, which is a necessary part of reform. Before the HLOGA, many questioned whether the government enforced the lobbying regulations and congressional ethics rules.<sup>357</sup> The HLOGA has increased the likelihood of enforcement through a variety of measures.<sup>358</sup> Enforcement is important because it not only decreases actual corruption but also because the public will have greater confidence that regulations and rules are actually being enforced, which should decrease the perception of corruption.<sup>359</sup>

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<sup>352</sup> See *supra* note 298 and accompanying text.

<sup>353</sup> See, e.g., Center for Responsive Politics, Travel Database, <http://www.opensecrets.org/travel/index.asp>.

<sup>354</sup> *Hearing Before the S. Comm. on Homeland Sec. & Governmental Aff.*, *supra* note 7, at 94 (statement of Fred Wertheimer, President, Democracy 21).

<sup>355</sup> See *supra* note 304 and accompanying text.

<sup>356</sup> 2 U.S.C. § 1601 (2006).

<sup>357</sup> Katel, *supra* note 40, 622 (questioning enforcement of LDA disclosures).

<sup>358</sup> See *supra* notes 314–17 and accompanying text.

<sup>359</sup> See Woodrow Wilson Int'l Ctr. for Scholars, *Congressional Ethics Enforcement: Is Congress Fulfilling Its Constitutional Role*, [http://www.wilsoncenter.org/index.cfm?topic\\_id=1412&fuseaction=topics.item&news\\_id=217925](http://www.wilsoncenter.org/index.cfm?topic_id=1412&fuseaction=topics.item&news_id=217925) (citing Professor Dennis Thompson advocating for an external ethics commission because “[w]ithout credible enforcement, the rules may be observed, but the public will not have confidence in the enforcement process”).

#### D. *The Unintended Consequences of Bans*

One step taken by the HLOGA that could prove ineffective, or even detrimental, is the ban on gifts from lobbyists. As campaign finance reform has illustrated, nondisclosure-oriented regulation, while well-intentioned, has had little success and can have unintended consequences.<sup>360</sup> Nondisclosure-oriented reform may have similar effects if used to regulate the relationship between lobbyists and legislators.

Although a ban on gifts and travel may “be an important symbolic step . . . in restoring the public’s esteem in Congress,”<sup>361</sup> these perks most likely do not have a determinative influence on legislators.<sup>362</sup> Furthermore, although a symbolic step, the gift ban may not have an actual impact on the relationship between lobbyists and legislators.<sup>363</sup> The numerous exceptions to the gift ban allow lobbyists to operate in this realm in spite of the ban, as long as the gift is structured in accordance with an exception.<sup>364</sup> For example, legislators can still be the “guest of corporations and lobbyists” as long as the gift is received indirectly.<sup>365</sup> Since the ban has taken effect, companies have bought tickets to “black-tie galas,” and instead of handing the tickets directly to legislators, “the companies donated the tickets back to the charity sponsors, with the names of recipients they wanted to see and sit with at the galas.”<sup>366</sup>

A ban on gifts would likely drive money into other areas.<sup>367</sup> When the LDA was enacted, along with the tightened gift regulation, lobbyists knew immediately how the money that had been spent on wining and dining could be redirected “into other political channels.”<sup>368</sup> Regardless of restrictions placed on gifts, “lobbyists [will] find other ways to maintain access to members of Congress and to do favors for them.”<sup>369</sup> For instance, the ban only affects

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<sup>360</sup> See *supra* Part IV.

<sup>361</sup> See WRIGHT, *supra* note 52, at 198.

<sup>362</sup> See *supra* note 106; see also *Hearing Before S. Comm. on Rules & Admin., supra* note 16, at 1 (statement of Robert D. Hynes) (“Both watching Members from inside the institution and working with them as a lobbyist[.] . . . I have never known a lunch or dinner to influence a decision.”).

<sup>363</sup> See Jeffrey H. Birnbaum, *Congressman, It’s (Still) on Us: The Ethics Law’s Many Loopholes*, WASH. POST, Aug. 14, 2007, at A11.

<sup>364</sup> *Id.*

<sup>365</sup> Elizabeth Williamson, *Getting Around Rules on Lobbying*, WASH. POST, Oct. 14, 2007, at A1.

<sup>366</sup> *Id.*

<sup>367</sup> WRIGHT, *supra* note 52, at 198 (“[A] ban on gifts would force lobbyists to find other ways to maintain access to members of Congress and to do favors for them.”); Stone, *supra* note 28.

<sup>368</sup> See Stone, *supra* note 28.

<sup>369</sup> WRIGHT, *supra* note 52, at 198.

meals a lobbyist buys a legislator “for lobbying purposes,” whereas restrictions on meals that are a part of fundraising events remain untouched.<sup>370</sup>

A ban on gifts might also have a disproportionate impact on groups with fewer resources, which use smaller gestures to maintain relationships with legislators.<sup>371</sup> Gifts may not have a direct influence on Congress members, but “they are useful to lobbyists for keeping communication channels open.”<sup>372</sup> As noted before, the ban does not have an effect on meals related to fundraising events.<sup>373</sup> Therefore, under the ban, groups with the resources to tie meals with campaign contributions will have an advantage over those without similar resources. Moreover, meals accompanied by a campaign contribution are “a better deal for lobbyists.”<sup>374</sup>

Rather than an outright ban, which may bring negative consequences, full public disclosure that is adequately enforced would allow the public to determine the propriety of the action.<sup>375</sup> Legislators should provide full disclosure of the gifts and meals<sup>376</sup> sponsored by lobbyists and their clients. An explicit ethical framework for legislators is necessary so that “lowest-common-denominator ethics” do not prevail.<sup>377</sup> This ethical framework also contributes to the public’s confidence in the legislature.<sup>378</sup> However, Congress does not need to ban gifts and travel in order to achieve these benefits.<sup>379</sup> The existing regulation should be revised to require lobbyists and legislators to make complimentary disclosures of gifts.<sup>380</sup> A benefit of requiring such complimentary disclosure would be the inherent check of matching the

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<sup>370</sup> Birnbaum, *supra* note 363 (discussing comments made by Paul A. Miller, former president of the American League of Lobbyists).

<sup>371</sup> *Id.*

<sup>372</sup> WRIGHT, *supra* note 52, at 198.

<sup>373</sup> See *supra* note 370 and accompanying text.

<sup>374</sup> Birnbaum, *supra* note 363 (quoting Paul A. Miller, former president of the American League of Lobbyists).

<sup>375</sup> See Garrett, *supra* note 144, at 675 (discussing campaign finance regulation).

<sup>376</sup> *Hearing Before S. Comm. on Rules & Admin.*, *supra* note 16, at 1 (statement of Robert D. Hynes) (advocating a “straightforward reporting requirement” for meals, in lieu of “current restrictions”).

<sup>377</sup> Ann McBride, *Ethics in Congress: Agenda and Action*, 58 GEO. WASH. L. REV. 451, 454 (1990).

<sup>378</sup> See *id.* (“Fundamental and far-reaching codes of conduct . . . rebuild the public trust in Congress and its Members.”).

<sup>379</sup> See *Hearing Before S. Comm. on Rules & Admin.*, *supra* note 16, at 3–4 (statement of Dr. James A. Thurber) (arguing that the focus of reform in this area should be on enforcement of existing gift rules and ensuring that travel financed by private interests is “legitimate” and “educational”).

<sup>380</sup> *Id.* (statement of Robert D. Hynes) (proposing lobbyists’ and legislators’ disclosure of meals with legislators and their staff).

congressional disclosure against the lobbying disclosure.<sup>381</sup> Focusing on disclosure will expose these practices to public judgment, perhaps even “moderating” the excess.<sup>382</sup>

A final drawback of nondisclosure-oriented regulation, such as the ban on gifts, is that additional regulation may serve to increase a lobbyist’s power.<sup>383</sup> The more complicated the system becomes, the more power it vests in lobbyists who understand how to navigate it because people need to seek their assistance.<sup>384</sup> Some argue that the BCRA’s ban on soft money resulted in lobbyists playing an increased role in campaign fundraising,<sup>385</sup> in part because the ban on large soft money contributions increased the importance of lobbyists who could bundle smaller hard-money contributions as replacements.<sup>386</sup> Increasing the power of lobbyists who know how to work the system is not going to advance any of the goals of reform.

## CONCLUSION

Although campaign contributions are a currency in the relationship between lobbyists and legislators,<sup>387</sup> reform should not focus on regulating this money because of the negative repercussions such as those exemplified by the hydraulics of campaign finance reform.<sup>388</sup> Instead, the focus should concentrate on unearthing the ways money is used in this relationship in order to monitor and reform its resulting influence.<sup>389</sup> Disclosure is the most effective way to right what is wrong in this case.<sup>390</sup>

A disclosure-based regulatory scheme has benefits other than those of decreasing corruption and the appearance of corruption; the increased availability of information will “also serve the more concrete objective of empowering voters so that they use their vote effectively.”<sup>391</sup> Greater

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<sup>381</sup> See *id.* (noting that if both lobbyists and members are required to report information on meals, the information *should* match up).

<sup>382</sup> See *id.*

<sup>383</sup> See Katel, *supra* note 40, at 619–21 (quoting political science professor Larry Sabato).

<sup>384</sup> Stone, *supra* note 28 (“[T]here’s nothing like new rules to cause business on K street to snowball.”).

<sup>385</sup> John M. deFigueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 616 (2005); Katel, *supra* note 40, at 619.

<sup>386</sup> Katel, *supra* note 40, at 620–21.

<sup>387</sup> See *supra* Part II.A.2.

<sup>388</sup> See Garrett, *supra* note 144, at 665–67.

<sup>389</sup> See *supra* Part V.D (discussing the negative consequences of bans).

<sup>390</sup> See *supra* Part V.A, C–D.

<sup>391</sup> Garrett, *supra* note 144, at 675 (discussing campaign finance reform).

information about the source of financial support helps voters determine what a legislator actually stands for.<sup>392</sup> The media, among others, will facilitate this outcome by processing the information and bringing it to the voters' attention.<sup>393</sup> The increased accountability resulting from this will serve to strengthen the system even further.<sup>394</sup>

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<sup>392</sup> *Id.* at 678–81.

<sup>393</sup> Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 298 (2005).

<sup>394</sup> Garrett, *supra* note 144, at 691–92 (discussing campaign finance reform).

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