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The Second Annual Distinguished Lecture on Administrative Law and Regulatory Practice: Lobbying in the 21st Century – Reciprocity and the Need for Reform

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THE SECOND ANNUAL DISTINGUISHED LECTURE ON ADMINISTRATIVE LAW AND REGULATORY PRACTICE

LOBBYING IN THE 21ST CENTURY— RECIPROCITY AND THE NEED FOR REFORM

THOMAS M. SUSMAN*

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INTRODUCTION

I am delighted to be here this morning to share with you a few observations and insights on lobbying that I have gleaned from over twenty-five years as a lawyer-lobbyist and twelve before that as a congressional staffer.

I can still remember the first lobbyist I ever met in Washington, Chuck Lipsen, who joked that his mother would tell her friends he was doing time in prison rather than admit he was a Washington lobbyist. Chuck wrote a book in which he discussed his experience as a lobbyist. He comments:

Folklore has it that the oldest profession is prostitution. I always thought it was lobbying. The serpent in the Garden of Eden talked Eve into trying the apple from the Tree of Knowledge by successfully portraying knowledge as a virtue rather than the vice that God had made it out to be.

For his efforts, the serpent was punished by God by being forced from then on to crawl on his belly in the dust. To much of the public mind, lobbyists belong alongside the serpents.¹

I do not know about the Garden of Eden, but lobbying has surely been around as long as there has been government. Lobbyists today perform a constitutionally recognized activity, are acknowledged to be highly influential in the legislative and political processes, and are subject to broad statutory disclosure mandates and intense media scrutiny.

Why then does lobbying have such a bad reputation? Why are lobbyists so reviled? A recent *Legal Times* article quoted an editorial referring to lobbyists as “money-changers . . . who change money into legislation” and need to be expelled from the “secular temple.”²

Books about lobbying and politics in Washington bear such titles as “The Best Congress Money Can Buy,”³ “Washington on \$10 Million a Day,”⁴ one of my favorite titles, “Parliament of Whores,”⁵ and simply “Scandal.”⁶

1. CHARLES B. LIPSEN & STEPHAN LESHNER, VESTED INTEREST: A LOBBYIST'S ACCOUNT OF WASHINGTON POWER AND HOW IT REALLY WORKS 48-49 (1977) (proffering that the public may dislike the tactics and clients of lobbyists, but their causes are not necessarily “wrong or evil”).

2. Joe Crea, *Straight Talk Express Travels Down K Street*, LEGAL TIMES, Mar. 27, 2006, at 18 (refuting the claim that if Senator John McCain had won his presidential bid he would have reduced the lobbyists' power in Washington).

3. PHILIP M. STERN, THE BEST CONGRESS MONEY CAN BUY (1991).

4. KEN SILVERSTEIN, WASHINGTON ON \$10 MILLION A DAY (1998).

5. P.J. O'ROURKE, PARLIAMENT OF WHORES (1991).

6. SUZANNE GARMENT, SCANDAL: THE CULTURE OF MISTRUST IN AMERICAN POLITICS (1992).

Why does lobbying have such a bad name? Is it the company we keep—politicians? Do we just make easy targets for media to attack? Are the do-gooders out there looking for fall-guys on whom to blame government's ills? Or do we, as a profession, really lack a moral compass?

The answer is probably a little of each of the above. But I think it is instructive to keep in mind that history tends to support the picture, painted by press reports and some advocacy groups, of lobbying as inevitably corrupt and lobbyists as invariably corrupting of government. Some of the textbooks on Congress do not even index “lobbying”—only “special interests.”⁷

What is wrong with special interests? While I have always believed that my clients' interests coincide with the “public interest” and that our opponents are the “special interests,” I admit that the term carries a derogatory connotation. Polls consistently find that the public believes special interests have too much influence. One Harris poll found that 74% of respondents thought lobbyists have too much power in Washington.⁸ The same poll found that 53% of respondents thought that opinion polls have too much influence on Washington.⁹

I. HISTORICAL PERSPECTIVE ON LOBBYING

My view is that lobbying in our nation's Capitol today is more transparent, honest, ethical, and—to the legislature—valuable than it is across the states, in any other country in the world, and than it ever has been before in this country. I have had experience with state legislatures from Texas to Massachusetts. I have seen legislative bodies in action in Southeast Asia, Europe, and Latin America. And I have read volumes on the history of lobbying in the United States. The press has most widely reported the activities of lobbyists that pervert the system and undermine our confidence in it, from the early tariff battles through Credit Mobilier, from Teapot Dome to the “5-percenters,” from Koreagate and Abscam to the Keating Five, and more recently Jack Abramoff and friends.

7. See, e.g., ABNER J. MIKVA & PATTI B. SARIS, *THE AMERICAN CONGRESS: THE FIRST BRANCH* (1983) (failing to index “lobbyists”).

8. See *Large Majorities of U.S. Adults Continue to Think That Big Companies, PACs, and Lobbyists Have Too Much Power and Influence in Washington*, Harris Interactive, Dec. 1, 2005, http://www.harrisinteractive.com/harris_poll/index.asp?PID=616 (conducting a telephone poll of 1,011 U.S. adults between November 8, 2005 and November 13, 2005 to determine which groups have power and influence in Washington).

9. See *id.* (comparing the influence of opinion polls on Washington to several other types of influences including big companies, political action committees, the news media, and labor unions). See generally JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* (2002) (detailing Americans' beliefs about politics and proposing that Americans desire a “stealth democracy,” where democratic procedures exist but are not routinely visible).

It is not just that many members of Congress have, throughout time, been crooked or ethically challenged. Our standards have changed, and for the better. Let me offer but one illustration from 150 years ago: We all recall Daniel Webster, that great statesman and opponent of slavery, whom Steven Vincent Benet portrayed as such a moral exemplar that he could defeat Satan himself in a courtroom battle, with Satan selecting the jury.¹⁰ Today, Webster would be indicted for being on retainer for the Bank of the United States while simultaneously serving in the U.S. Senate.¹¹

Senator Robert Byrd's series of essays on the history of the Senate includes an essay that vividly describes lobbying in the early days of our country.¹² Byrd cites what he calls "an altogether appropriate epigram for the lobbying," stated by Samuel Colt while lobbying for a patent extension bill on his pistol: "To reach the heart or get the vote, the surest way is down the throat."¹³ Another historian of that period observed that Colt paid a contingent fee "of \$10,000 to one congressman for which the latter . . . refrained from attacking the patent extension bill."¹⁴ Colt's lobby had headquarters in various hotels "where wine and food were free and plentiful."¹⁵ His lobbyists passed out "handsome and beautifully decorated revolvers which Colt had made up for the purpose but he also kept more attractive bait in the persons of three charming ladies who were professionally known as Spiritualists" who were "very active in 'moving with the members' of Congress."¹⁶ There also were ladies "of less spiritual nature, known as 'chicks,'" and they apparently moved with the members in different ways.¹⁷

Lest one think that only modern businesses have a monopoly on hiring large cadres of lobbyists to advance their issues, it was estimated that railroad operator Tom Scott hired 200 lobbyists for the congressional

10. See Stephen Vincent Benet, *The Devil and Daniel Webster*, available at <http://www.gckschools.com/vhs/eng3/fall/romantic/danwebread.htm> (last visited Oct. 10, 2006).

11. See JAMES DEAKIN, *THE LOBBYISTS* 52-53 (1966) (recounting that the day after one of Webster's great speeches in the Senate on behalf of the bank, bank president Nicholas Biddle handed Webster \$10,000, which Webster and others at the time did not consider unethical).

12. Robert C. Byrd, Senate Majority Leader, "Lobbyists," Sept. 28, 1987, in 2 *THE SENATE, 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE* (U.S. Senate Bicentennial Publ'n 1989), available at http://www.senate.gov/legislative/common/briefing/Byrd_History_Lobbying.htm.

13. *Id.*

14. KARL SCHRIFTGIESSER, *THE LOBBYISTS: THE ART AND BUSINESS OF INFLUENCING LAWMAKERS* 10 (1951).

15. *Id.*

16. *Id.*

17. See *id.* (recounting the lobbying techniques employed by the "most brazen" lobbyists of the time who fought with Congress for patent renewals of revolvers, reapers, and the rubber vulcanizing process).

session beginning in 1876.¹⁸ It is little wonder, then, that the Supreme Court refused to enforce a contingent fee lobbying contract in 1874 because it was among those condemned categories of contracts that are “inconsistent with sound policy and good morals.”¹⁹ Comparing such an agreement with contracts calling for vote-buying, bribery, obstruction of justice, and fraud, the Court found illegitimate, if not corrupt, an agreement “for the sale of the influence and exertions of the lobby agent to bring about the passage of a law”²⁰ The Court continued:

If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interest, the moral sense of every right minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.²¹

No matter how titillated—or disgusted—we may be by the reports of Jack Abramoff or Duke Cunningham,²² it is still easy to see how much cleaner and more professional lobbying has become in the twenty-first century. Against this backdrop, I will catalog briefly how lobbying has changed and why. Then, I will provide a few thoughts on what I see as the biggest challenge to any reform efforts, while suggesting a few reforms myself.

II. CHANGES IN THE LOBBYING LANDSCAPE

Let me first identify some of the most obvious and serious changes in the lobbying landscape over the past few decades. For now, my point of reference is my arrival in Washington in the late 1960s, not the history books. I will initially outline what I think are the beneficial, or at least benign, changes and then turn to the not so benign. The predicate to this catalog, however, must be the undeniable observation that the power, influence, and reach of the federal government itself has been vastly expanding. While this phenomenon is evident to all, its value remains subject to debate, so I will not attempt to place it in one column or another.

18. See Byrd, *supra* note 12 (relating how a large number of lobbyists were hired to gain a “sympathetic hearing for legislative aims”).

19. *Trist v. Child*, 88 U.S. (21 Wall.) 441, 448 (1874).

20. *Id.* at 451.

21. *Id.*

22. See, e.g., Shawn Zeller, *The Vibe of a Bribe*, CQ WEEKLY, Jan. 9, 2006, at 74 (describing the Abramoff scandal and the luxurious goods that Cunningham purportedly received as bribes); Terence Samuel, *Snake Eyes for “Casino Jack,”* U.S. NEWS & WORLD REPORT, Aug. 29, 2005, at 34 (cataloging the charges against Abramoff and his relationships to members of Congress).

A. First, the Positive Changes

There are now more women, minorities, and young people engaged in lobbying.²³ In fact, there are many more lobbyists generally,²⁴ leading to a healthy competitiveness that is clearly good for us, our clients, and the public. There are also expanding numbers of interest groups generally involved in lobbying,²⁵ including public interest organizations, leaving few—including those who lack financial resources or who support little-known or unpopular causes—without a Washington lobbyist.²⁶ Lobbying is now considered a profession, and lobbyists have their own association and ethics code.²⁷ There is also widespread availability of education and training for lobbyists and would-be lobbyists.²⁸ Technology has revolutionized grassroots lobbying.²⁹ Direct mail with long waits for responses has given way to Internet organizing, websites, blogs, banners, and more.³⁰ Technology also allows instant communication of drafts and developments from Capitol Hill.

Additionally, there is much greater transparency through the Lobbying Disclosure Act, campaign finance disclosure requirements, and financial reporting requirements for officials.³¹ We have cablecast floor debate³² and

23. See Jeffrey H. Birnbaum, *Women, Minorities Make Up New Generation of Lobbyists*, WASH. POST, May 1, 2006, at D1 (observing that increasing numbers of women in government and an emphasis on strong research and case-building skills have contributed to more opportunities for women and minorities in lobbying).

24. See generally Alex Knott, *Industry of Influence Nets More than \$10 Billion*, The Center for Public Integrity, Apr. 7, 2005, available at <http://publicintegrity.org/lobby/report.aspx?aid=675> (noting that special interest groups and lobbyists reported spending more than \$10.8 billion since 1998 and hired a few thousand former government employees to lobby federal policy).

25. See R. ERIC PETERSEN, *LOBBYING REFORM: BACKGROUND AND LEGISLATIVE PROPOSALS*, 109TH CONGRESS, CRS REPORT RL33065, at CRS-2 (Mar. 23, 2006), available at <http://www.fas.org/sgp/crs/misc/RL33065.pdf> (indicating that special interest groups are using alternative marketing techniques to generate public interest).

26. See WOODSTOCK THEOLOGICAL CTR., *THE ETHICS OF LOBBYING: ORGANIZED INTERESTS, POLITICAL POWER, AND THE COMMON GOOD* 26 (2002) (noting “As the number of [interest] groups soars, the relative power of all groups declines.” (quoting THOMAS F. PATTERSON, *THE VANISHING POWER: PUBLIC INVESTMENT IN AN AGE OF UNCERTAINTY* (Knopf, 2002))).

27. See American League of Lobbyists’ Code of Ethics, at <http://www.alldc.org/ethicscode.htm> (last visited Oct. 10, 2006) (outlining a model ethical code to be used by lobbying organizations).

28. See Chuck Raasch, *Lobbyists Work to Rebuild Industry’s Shredded Image*, USA TODAY, Jan. 22, 2006, available at http://www.usatoday.com/news/washington/2006-01-22-lobbyists-rehabilitation_x.htm (referring to the American League of Lobbyists’ voluntary certificate program and college intern program).

29. See John Cochran, *A New Medium for the Message*, CQ WEEKLY, Mar. 13, 2006, at 652, 653 (observing that technology has made lobbying “faster, cheaper and easier”).

30. See Jeffrey H. Birnbaum, *Hanson Holds E-Advocacy Advantage*, WASH. POST, Jan. 24, 2005, at E1 (calling Internet lobbying “now the fastest growing and arguably the most potent form of persuasion in the nation’s capital”).

31. See, e.g., Joe Crea, *Lobby Disclosures Rules Praised by Some, Panned by Others*, INFLUENCE, Dec. 7, 2005, http://www.influence.biz/cgi-bin/display_news.pl?&id=20051129132717. The Center For Responsive Politics, for example, maintains a

can view committee hearings at our desks.³³ More former members of Congress are entering the lobbying profession.³⁴ I view this as a positive development, since members now see more of their former colleagues pass through the revolving door to the lobbying community, mitigating the “us versus them” perspective that may once have jaded perceptions. While many identify the rapidly revolving door between government and the private sector as a problem,³⁵ I think it enriches both sectors in the long run. I also am untroubled over the “reverse revolving door,” though I think a member pushing an agenda he had as a lobbyist shows poor judgment, in the least.³⁶

The media now covers lobbying as a business, rather than only when there has been a scandal or crime committed. Two examples are the *Washington Post* and *Legal Times*. At one time, lobbyists tried to avoid public disclosure of their revenues; now, being on a top-ten *Forbes* or *Influence* list³⁷ is great for marketing, even for law firms. On the subject of media, the public now has many more opportunities to access more diverse views on politics and policy via blogs, cable, and Internet news. Executive branch decisionmaking is now viewed as fair game for lobbyists, not just administrative law practitioners and a few high-level fixers. Grassroots organizing and public relations campaigns also accompany many rulemaking proceedings.³⁸

comprehensive, searchable database of federal lobbying registration and reporting data. See Lobbying Database, <http://www.opensecrets.org/lobbyists/index.asp> (last visited Oct. 10, 2006).

32. See C-SPAN, <http://www.c-span.org/> (follow 109th Congress hyperlink) (last visited Oct. 10, 2006).

33. See Capitol Hearings, <http://www.capitolhearings.org/> (last visited Oct. 10, 2006).

34. See Julie Reynolds, *Lawyer Lobbyists*, WASH. LAWYER, Jan. 2006, at 34, 38 (citing a recent Public Citizen study that found 215 former members of Congress registered as active lobbyists); see also Raasch, *supra* note 28 (citing a Public Citizen study that found that since 1998, 43% of members who left Congress have become lobbyists).

35. See Elizabeth Brown, *More Than 2,000 Spin Through Revolving Door*, The Center for Public Integrity, Apr. 7, 2005, <http://www.publicintegrity.org/lobby/report.aspx?aid=678> (expressing the view of Rep. Robert Andrews that a potential conflict of interest arises when “those still in public office may feel a temptation to consider a prospective employer’s needs”).

36. See Sheryl Gay Stolberg, *Lobbyist Turns Senator but Twists Same Arms*, N.Y. TIMES, Feb. 28, 2006, at A1 (questioning South Dakota Senator John Thune’s introduction of language into a transportation bill that would increase federal loan money available to small railroads). Senator Thune was a lobbyist for a small South Dakota railroad company in 2003 and 2004, and his former employer would be able to apply for a \$2.5 billion government loan under the program. *Id.*

37. See, e.g., *The Influence 50*, LEGAL TIMES, Mar. 20, 2006, at 18 (ranking “Lobby shops and law firms with the highest revenues from lobbying in 2005”).

38. See, e.g., *Grassroots Lobbying Issue Hits the FEC and the Courts*, Apr. 18, 2006, <http://www.ombwatch.org/article/articleview/3385/> (declaring that “OMB Watch joined 17 organizations in urging the FEC to immediately initiate rulemaking to exempt grassroots lobbying communications from the election-law restrictions on broadcast advertising”).

Many nongovernmental organizations take an interest in politics, government, and lobbying and help monitor, analyze, disclose, and advocate issues relating to lobbying.³⁹ This is as good for lobbying as it is for government. Power has been disbursed from a few in leadership positions to larger numbers of members, which leads to the need for lobbying teams, coalition building, specialization, and grassroots advocacy for most legislative efforts. I believe that this reflects a sophistication and maturity of the lobbying profession.

B. Next, the Negative Changes

On the other side of the ledger, there have been changes that are not so positive. The polarization of Congress has led to partisanship as a litmus test for lobbyists, carried to its heights—or perhaps depths—with the infamous K Street Project.⁴⁰ Likewise, the election of increasingly ideological members with little institutional loyalty⁴¹ and the nearly total ideological homogeneity of the two parties have lamentably led to the increasing importance of ideology in lobbying activities.⁴²

Campaign costs have become so monumental that members must spend most of their time raising money, leaving less time for legislating and mixing outside of fundraisers.⁴³ For all the fuss over meals, gifts, and travel provided by lobbyists to members, nothing trumps writing checks, hosting or attending fundraisers, delivering bundled checks, or acting as

39. See, e.g., The Center for Public Integrity, <http://publicintegrity.org/about/about.aspx?act=mission> (last visited Oct. 9, 2006) (asserting that the goal of the Center's journalism is to "make institutional power more transparent and accountable"); OMB Watch, <http://www.ombwatch.org/> (last visited Oct. 9, 2006) (declaring a mission "to promote open government, accountability and citizen participation"); Political Money Line, <http://www.politicalmoneyline.com/cgi-win/indexhtml.exe?MBF=whatwedo> (last visited Oct. 9, 2006) (announcing that the organization has "the expertise to analyze and summarize the movement of political money to and from the national level").

40. See generally MATTHEW CONTINETTI, *THE K STREET GANG: THE RISE AND FALL OF THE REPUBLICAN MACHINE* 42-61 (2006) (denouncing the K Street Project as "The Republican Takeover of the Lobbying Industry"). For a description of the data maintained by the K Street Project, see <http://www.kstreetproject.com> (Aug. 7, 2006).

41. See generally JULIET EILPERIN, *FIGHT CLUB POLITICS: HOW PARTISANSHIP IS POISONING THE HOUSE OF REPRESENTATIVES* (2006).

42. See *THE INTEREST GROUP CONNECTION: ELECTIONEERING, LOBBYING, AND POLICYMAKING IN WASHINGTON* 212 (Paul S. Hermanson et al. eds., 1998) (stating that interest groups are "more closely identified with one party and one ideology than at any time in the recent past"); see also David E. Rosenbaum, *At \$500 an Hour, Lobbyist's Influence Rises With G.O.P.*, N.Y. TIMES, Apr. 3, 2002, at A1, A17 (citing from a press report that Jack Abramoff "says he represents only those who stand for conservative principles").

43. See STEVEN S. SMITH, JASON M. ROBERTS & RYAN J. VANDER WIELEN, *THE AMERICAN CONGRESS* 7 (Cambridge Univ. Press, 4th ed. 2005) (estimating that an average Senator must raise \$22,000 per week during a six-year term and an average Representative must raise \$10,000 per week during a two-year term to fund a reelection campaign).

treasurer of a reelection committee.⁴⁴ And that is too bad, because it has joined lobbying to the hip of campaign finance, making lobbyists a principal source of fundraising for candidates. The nexus between fundraising and legislation that once was considered off-limits is now standard operating procedure, and lobbyists line up before legislators at fundraising events like the favor-seekers before Don Corleone.

Although I do not view coalitions in themselves as pernicious, I do condemn the practice of hiding the identity of substantial contributions to lobbying campaigns behind false fronts.⁴⁵ The Lobbying Disclosure Act misses most of these hidden contributions completely. And I also lament that grassroots lobbying expenditures totally escape federal reporting.⁴⁶

While we are on the subject of transparency, despite the sunshine initiatives of the 1970s and C-SPAN, the work of congressional committees seems to have become more, not less, shrouded. Members actually used to discuss and debate provisions of the bills in subcommittee and committee mark-ups, but no longer. Further, the faster revolving door for staffers has several adverse consequences, including the loss of institutional memory, a shallower knowledge base, greater reliance on lobbyists for information, and higher expectations for being wined and dined.

Congressional ethics oversight and enforcement has atrophied to the point that much of the reporting of abuses or corruption of the system merely reflects members' unwillingness to abide by their own rules.⁴⁷ The

44. See John Cochran, *The Influence Implosion*, CQ WEEKLY, Jan. 16, 2006, at 174, 178–79 (citing a Public Citizen analysis that found in the last election cycle 171 lobbyists contributed \$12 million, not counting money raised); see also *id.* at 179 (citing a Center For Public Interest October 2005 report that found lobbyists have served as treasurers of at least 800 politically active committees and sixty-eight campaign committees in the past six years).

45. See Jeffrey H. Birnbaum, *Lobbying Under the Cloak of Invisibility*, WASH. POST, Mar. 7, 2005, at E1 (decrying the fact that political organizations have found legal ways to avoid disclosing donor information and “are operating in the shadows”); *Lobby Reform & Grassroots Lobby Disclosure: Good for Nonprofits*, Feb. 28, 2006, <http://www.ombwatch.org/article/articleview/3306> (praising proposed legislation that would require disclosure by lobbying groups that spend more than \$10,000 per quarter on lobbying).

46. WILLIAM V. LUNEBURG & THOMAS M. SUSMAN, *THE LOBBYING MANUAL* 45-46 (3d ed. 2005).

47. See Norman Ornstein & Thomas E. Mann, *Lobbying Reform: If You Give a Congressman a Cookie*, N.Y. TIMES, Jan. 19, 2006, at A23 (hypothesizing that a decreasing respect for the rules of regular order in Congress has contributed to tolerance of unethical behavior in lobbying); see also Knott, *supra* note 24 (contending that many lobbyists violate the rules by failing to file necessary disclosure forms, filing them after the deadlines, filling them out improperly, or failing to fill them out completely).

Senate recently twice voted down creation of a more independent Office of Public Integrity,⁴⁸ and the House Ethics Committee has been sighted less often in recent years than Elvis Presley.⁴⁹

The larger numbers of lobbyists and interest groups, combined with members being in town less, makes the overall noise level high and makes it more difficult for people to be heard by Congress. In 2004, for example, Congress received nearly 201 million messages, 90% via e-mail.⁵⁰ It is little wonder that lobbyists need to turn up the volume when looking for ways to be heard by legislators.

Equally significant—and negative—have been the changes in Congress itself that make the job of lobbying more difficult and often pervert the traditional processes.⁵¹ A couple of years ago, the *National Journal* explored the “institutional trends” of the “modern-day legislative” branch—most of which “have been exacerbated or have accelerated since 1995”—which include: the disintegration of the committee process; the greater concentration of power in the hands of House leaders; the increasing use of the House rules to deny the minority a full debate or votes on its views; the increasing use of filibusters, amendments, and holds to clog up the legislative works in the Senate; the lack of true debate in the Senate; the breakdown of the budget process; the heavy reliance on riders to the must-pass appropriation bills as a crutch to act on significant policy issues; the refusal by appropriators to fully fund authorization bills; the tendency toward government-by-CR (Continuing Resolution); the majority party’s abuse of the conference committee; the lack of true bipartisanship

48. See Martin Kady II, *Chambers in No Rush on Lobbying Bills*, CQ WEEKLY, Mar. 6, 2006, at 605 (noting that opposition from both parties led the Senate’s Homeland Security and Governmental Affairs Committee to remove a proposal to create “an independent Office of Public Integrity within the legislative branch” from a recent bill); Tory Newmyer, *Lobbying Bill: Back on Track?*, ROLL CALL, Mar. 28, 2006, at 1, 20 (noting that members of the Senate Ethics Committee opposed the creation of the Office of Public Integrity because it would “strip them of their authority and invite political abuses”).

49. See Bill Moyers, *Restoring the Public Trust*, TOM PAINE COMMON SENSE, Feb. 24, 2006, http://www.tompaine.com/articles/2006/02/24/restoring_the_public_trust.php (referring to the House Ethics Committee as “the watchdog that seldom barks and rarely bites”).

50. See Cochran, *supra* note 29, at 654 (citing a Congressional Management Foundation study); see also Jeffrey H. Birnbaum, *Finding Fault with Logic of Congress’s E-Mail Plan*, WASH. POST, June 12, 2006, at D1 (decrying the fact that Congress has recently taken action to reduce the number of e-mails sent and screen out cookie cutter e-mails by requiring web-users to complete a logic puzzle before composing or sending a web-based e-mail); *id.* (finding that on just one day when use of the logic puzzle was monitored, users went on to send a message only 19% of the time the puzzle was viewed); see also Jessica Azulay, *Congress’s New Anti-spam Measures Confound Interest Groups*, NEW STANDARD, June 16, 2006, <http://newstandardnews.net/content/index.cfm/items/3299> (condemning the software as a potential “barrier to democracy”).

51. For a perceptive and current assessment of our legislature’s malaise as well as proposed solutions, see THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006).

and the polarization of Congress; and the inability or unwillingness of Congress to make thorough use of its oversight powers to keep the executive branch in check.⁵²

Absent from this lengthy list from just a couple of years ago is the remarkable rise of earmarks. The appropriations process is now dominated by earmarks, which have always been a part of the scene but never have been so ubiquitous. The Congressional Research Service identified around 3,000 earmarks worth \$19.5 billion in 1996; by 2005 the number had reached almost 13,000, valued at \$64 billion.⁵³ It is little wonder that between 1998 and 2004 the number of clients registered on budget and appropriations matters went from 1,665 to 3,759.⁵⁴

All of this has led to a continuing decline of public confidence and trust in government and in politicians—and to an increasing skepticism and cynicism that adversely affect public participation in the process and respect for both the institution of government and the results of lawmaking.

III. WHAT DO WE DO ABOUT IT?

It is easy to create a laundry list of the problems that beset lobbyists and lobbying these days, but the challenge lies in figuring out what to do. I do not have the answers, and I have no intention of rehashing the many proposals advocated and considered as part of the current lobbying and ethics reform debates on the Hill.⁵⁵ However, I think we need to understand one principle better if we are ever to craft workable answers: the principle of reciprocity.

In 1971, psychologist Dennis Regan conducted an experiment involving two subjects who were asked to rate the quality of paintings as part of an art appreciation project.⁵⁶ One rater was the subject of the experiment, and the other participant was one of Dr. Regan's assistants. In some cases Dr. Regan's assistant brought a soft drink to the subject during a break; in

52. See Richard E. Cohen, Kirk Victor & David Baumann, *The State of Congress*, NAT'L J., Jan. 10, 2004, at 86, 86-87 (asserting that regardless of party affiliation, many congressional insiders and outside experts agree with these trends).

53. See Jonathan Weisman, *Proposals Call for Disclosure of Ties to Lobbyists*, WASH. POST, Mar. 27, 2006, at A4 (attributing these earmarks to lobbyists who "muscle their way into the process" and declaring that the effect is that "many constituents believe they have no choice but to retain [a lobbyist] if they hope to obtain funding").

54. *Federal Budget and Appropriations*, The Center for Public Integrity, <http://www.publicintegrity.org/lobby/profile.aspx?act=issues&year=2003&is=BUD> (last visited Oct. 9, 2006).

55. See generally R. ERIC PETERSEN, LOBBYING AND RELATED REFORM PROPOSALS: CONSIDERATION OF SELECTED MEASURES, 109TH CONGRESS, CRS REPORT RL33293 (Mar. 23, 2006); Petersen, *supra* note 25.

56. Dennis T. Regan, *Effects of a Favor and Liking on Compliance*, in J. EXPERIMENTAL SOC. PSYCHOL. 627 (Robert M. Krauss ed., 1971).

others he did not. In some cases the assistant was particularly nice to the subject; in others he was surly. Then, at the end of the process, the assistant offered to sell some raffle tickets to the subject. Overwhelmingly, the assistant sold more tickets to the subjects to whom he had given the drink. When a drink was not offered, not surprisingly the subjects served by the likable assistant bought more tickets. But one remarkable finding was that for those who received the soda, it made no difference whether they liked the assistant or not: the subjects who disliked the assistant bought as many tickets as those who liked him.

This and other studies are explored by Professor Robert Cialdini in his volume on “Influence.”⁵⁷ Cialdini observes of this study that, “For those who owed [the assistant] a favor, it made no difference whether they liked him or not; they felt a sense of obligation to repay him, and they did.”⁵⁸ Cialdini also discusses various aspects of the reciprocity rule: For example, “[a] person can trigger a feeling of indebtedness by doing us an *uninvited* favor.”⁵⁹ Further, “[a] *small* initial favor can produce a sense of obligation to agree to a substantially larger return favor.”⁶⁰ Another consequence of the rule is that we feel “an obligation to make a concession to someone who has made a concession to us.”⁶¹

Members of Congress insist that the problem with gifts and entertainment is not that votes could ever be bought, but that the perception of unseemly gift-taking does not rest comfortably with the public. They are only partly right. That congressional fundraising invitations hail opportunities for participants to enjoy world class golf or the Grand Ole Opry suggests that members fully understand that if they offer lobbyists an especially enjoyable experience, they are more likely to get a contribution in return.

Most lobbyists readily admit that gifts, entertainment, travel, and contributions to campaigns, leadership PACs (political action committees), and favorite charities are motivated out of something more than charitable instincts or commitment to good government. We are expected by members to “pay to play,” and we do so expecting, at least, opportunities for access in return. Cialdini reports what he calls “the remarkably bald-faced admission by businessman Roger Tamraz at congressional hearings

57. ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* (Allyn & Bacon, 4th ed. 2001).

58. *Id.* at 23; *see id.* at 176 (finding that “people prefer to say yes to individuals they know and like” and reporting that “increased familiarity through repeated contact with a person is yet another factor that usually facilitates liking. This relationship holds true principally when the contact takes place under positive rather than negative circumstances.”). This is a concept that lobbyists instinctively understand.

59. *Id.* at 30 (emphasis added).

60. *Id.* at 33 (emphasis added).

61. *Id.* at 37.

on campaign finance reform. When asked if he felt he received a good return on his contribution of \$300,000, he smiled and replied, ‘I think next time, I’ll give \$600,000.’⁶² Yes, members and staff may insist that gifts and contributions do not buy a thing, but lobbyists find more truth in the comments made recently by Neil Volz, an associate of Jack Abramoff, when he testified: “When I was on Capitol Hill, I was given tickets to sporting events, concerts, free food, free meals. In return, I gave preferential treatment to my lobbying buddies.”⁶³

Both legislators and the public deserve some defense against the power of the reciprocity principle. But, despite my own commitment to ethical lobbying, I fear that the public good is no match for money and the near automatic reciprocation it engenders, and that distresses me.

Lobbying that respects the values and purposes of governmental institutions, that adheres to high ethical standards, and that advances rather than undermines educated and ethical decisionmaking by legislators—this is the kind of lobbying that I see as advancing the public good,⁶⁴ rather than lobbying calculated to exploit the principle of reciprocation.

Hence the challenge to us all: How do we cabin, if not neutralize, the reciprocity principle in the world of legislative decisionmaking? Here are my personal proposals, many of which will be familiar to those who follow lobbying reform efforts.

First, we can prevent reciprocity from gaining a foothold by instituting a near-zero tolerance for gifts, meals, and entertainment paid for by lobbyists and their employers. Although there will have to be exceptions, these rules should apply to events and be set at low thresholds. California has a “hamburger rule” allowing lobbyists to spend \$10 per month on legislators’ meals,⁶⁵ while Massachusetts allows \$50.⁶⁶ Rules such as these would avoid much of the potential discomfort members experience when considering the effects of rejecting a constituent’s hospitality.

62. *Id.* at 26.

63. Susan Schmidt, *Former Ney Aide Details How Abramoff Treated “Champions,”* WASH. POST, May 31, 2006, at A7 (exploring Abramoff’s and his colleagues’ methods of identifying high-level government contacts who were receptive and “doling out the favors and seeking special treatment”).

64. *Cf.* WOODSTOCK THEOLOGICAL CTR., *supra* note 26, at 84 (finding “[t]he pursuit of lobbying must take into account the common good, not merely a particular client’s interests narrowly considered”).

65. Mary Curtius, *States Offer Grim Look at Curbing Corruption*, L.A. TIMES, Feb. 28, 2006, at A9 (noting that the California rules are “more stringent than the ones in Congress” and “require[] lawmakers, their staff and lobbyists to take a course on ethics every two years”).

66. *See Introduction to the Conflict of Interest Law for the Public Officials and Public Employees*, Massachusetts State Ethics Commission, http://www.mass.gov/ethics/public_sector.html (last visited Oct. 9, 2006) (articulating general rules that public officials and employees of Massachusetts must follow).

Second, we need greater transparency. Cialdini proposes that the best defense against the overwhelming influence of the reciprocity rule is to recognize it so we can diffuse its energy.⁶⁷ The most important step we can take to assist both legislators and the public in unmasking the principle of reciprocity at work is to insist on full and immediate disclosure of everything of value flowing from a lobbyist to a member or staff, in either the lobbying or campaign arena. That includes the employer or principal, as well as the actual registered lobbyist, and it should include money raised by the lobbyist, as well as checks written by him or her, for campaigns. In addition, a corollary here is greater disclosure of grassroots and coalition lobbying expenditures so that clearer lines can be drawn between those who pay and those who lobby.

Third, we should do what we can to level the playing field and equalize access to those in Congress. We can do this, in part, by extending and making more impermeable the cooling-off period for former members and staff, by limiting access perks by former member lobbyists, and by prohibiting lobbyists from holding campaign committee positions. We can also do it by insisting that Congress do more of the public's business in public and according to the regular order procedurally.

Finally, we should insist on an enforcement regime that carries consequences for both lobbyists and legislators. That means not simply continuing criminal enforcement of our quid-pro-quo bribery and gratuities statutes. It also means that an Office of Public Integrity should exist for each house of Congress. And it means imposing misdemeanor penalties on lobbyists whose conduct results directly and knowingly in a violation of the gift rules by members or staff.

I did not lightly arrive at this last proposal, which would apply to me as well as to the flagrant abusers of existing rules. This past spring I taught a lobbying ethics class to sixty lobbyists for the American League of Lobbyists. I asked the group whether any one of them had ever refused to pick up a check for a congressman or staff member, even when they knew that the amount of their guest's tab exceeded the \$50 limit. The response was a uniform silence. The risk of alienating or offending by saying "No" looms large, while any adverse consequence of taking out the credit card is far too remote. We cannot overcome legislators' historical reluctance to punish one another for violating the ethics laws and rules.⁶⁸ But we can

67. Cialdini, *supra* note 57, at 46 (explaining that simply ignoring a request from a person who granted a favor will cause a person to "suffer the brunt of the rule's force upon our deeply conditioned feelings of fairness and obligation").

68. *Three Decades of Scandal and Repercussion*, CQ WEEKLY, Jan. 23, 2006, at 239, 239 (charging that "only three House members were reprimanded in the Korean lobbying scandal of the 1970s, though as many of [sic] 115 lawmakers were suspected of taking illicit payments").

create consequences for lobbyists' reluctance to cause such violations, and give ourselves cover for insisting on splitting the check or billing for the sports tickets or travel.

CONCLUSION

Finally, a note of caution: Some propose the seemingly clear solution of separating all lobbying and lobbyists from campaigns. This strikes me as not unlike Georgia's effort in the nineteenth century to outlaw all lobbying.⁶⁹ Too often, each round of reform generates new problems. After all, we know that the PAC emerged only after Congress' efforts to limit contributions by individuals, unions, and corporations in the 1970s. And "527 organizations" were born of the latest round of campaign finance reform.⁷⁰ That is why I hesitate to offer public financing as the magic scalpel for separating campaign finance from lobbying, and why I am leery of limiting fundraising by members to their home districts or by senators to the last eighteen months of their term.

Nonetheless, I believe Congress may be missing an opportunity to use the public's heightened interest in what is going on now in Washington to take some giant steps toward needed reforms of lobbying and the legislative process. I am concerned about the continuing decline of public trust and confidence in government though, as I suggested earlier, I do not attribute this decline solely to the activities of lobbyists.

Most lobbyists understand government, love politics, respect our institutions of government, and benefit from the very forces that characterize democracy. We may not be the primary cause, but we certainly share the responsibility for how things became the way they are. And we thus share the responsibility to work towards improving the processes and institutions that we know, and often exploit, so well.

69. Schriftgiesser, *supra* note 14, at 20 (recounting that in its Constitution of 1877, Georgia "declared lobbying to be a crime").

70. A general description of the 527 Committee can be found at http://www.sourcewatch.org/index.php?title=527_committee.

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