

Personal Contributions to Candidate Committees: A Solution to Quid Pro Quo Corruption

Over the past five years, lobbying reform has stood near the very top of our nation's agenda. Recent scandal and controversy, bolstered by the illegal activity and subsequent criminal convictions of several prominent figures, including lobbyist Jack Abramoff and Congressmen "Duke" Cunningham and Bob Ney, have poisoned the public's perception of the lobbying industry. Government corruption, then, was "the second-most important issue mentioned by voters in national surveys in 2008 and the most important issue among the electorate in the midterm election of 2006" (Thurber 4, 2010). Significantly, *lobbyists* are repeatedly seen as the foremost corrupting influence on government and the way Washington works (Thurber 4, 2010).

As such, President Obama campaigned throughout 2008 on a promise to eradicate this oft-mentioned "corrupting influence." More specifically, he vowed, "We are going to change how Washington works. They will not run our party. They will not run our White House. They will not drown out the views of the American people" (Obama, 2008). Once elected, he followed through with what seemed like sweeping lobbying and ethics reform. His policies centered on "three basic principles of sound government: transparency, accountability, and enforcement" (Thurber 21, 2010). Unfortunately, President Obama's reform effort ultimately left much to be desired.

Existing, unchanged areas of concern, including the problematic legal definition of lobbying, bundling controversy, and lackluster enforcement of existing laws, were recently highlighted by the American Bar Association's Task Force on Federal Lobbying Laws (2011). The Task Force, which offered much-needed recommendations in each of the aforementioned areas, sought to build upon President Obama's policies, in addition the Lobbying Disclosure Act of 1995 and the Honest Leadership and Open Government Act of 2007. The Task Force, however, failed to push hard enough in one key area: fundraising. In its 2011 report, it recommends that "a lobbyist should not be

permitted to lobby a Member of Congress for whom he or she has engaged in campaign fundraising during the past two years” (ABA Task Force, 2011). Significantly, however, it makes one exception, writing, “These prohibitions would not apply to personal monetary contributions to the campaign...The proposed rules aim principally to limit lobbyists’ fundraising from others, not to eliminate their ability to contribute to campaigns themselves” (ABA Task Force, 2011).

The Task Force’s recommendation, thus, primarily applies to the practice of bundling contributions for candidates’ campaigns. Bundling is, no doubt, a major target of lobbying and ethics reform, but one cannot overlook the potentially corrupting influence of personal contributions to candidate’s campaigns. In the following brief essay, I will examine proposed legislation to override registered lobbyists’ aforementioned ability to personally contribute to candidate committees, focusing on the problem at hand, in addition to the specific piece of legislation created to solve the problem and its goals, impact, and ultimate effectiveness.

Problem

Meredith McGehee, Policy Director at The Campaign Legal Center, succinctly defined the problem associated with lobbyists’ personal contributions to candidate committees at American University’s Public Affairs and Advocacy Institute and The Bryce Harlow Foundation’s “The Bryce Harlow Workshop on Ethics and Lobbying.” During a rousing lecture on the sources of ethical dilemmas in lobbying and campaign finance, she warned, “Anyone that can help you get elected will inspire a debt of gratitude” (2012a). This “debt of gratitude” gets to the heart of what Professor James Thurber and others refer to as Washington’s “Culture of Reciprocity” (Thurber 18, 2010). More specifically, he writes, “Reciprocity [“I will help you, if you will help me”] is one of the strongest imbedded customs in public life. It is directly related to the problems and ethical scandals that created the environment of reform” (Thurber 18, 2010).

In the case of campaign contributions, the problem arises when lobbyists personally contribute to the same government officials, namely Members of Congress, whom they also lobby in the post-election environment. Reformers specifically fear that these lobbyists may acquire an unfair advantage in the policymaking process due to their financial contributions. In other words, they fear that Washington's "Culture of Reciprocity" creates the opportunity for quid pro quo corruption (Thurber, 2012). Post-election, the theory follows, the elected official is grateful to "anyone that [helped him or her] get elected," which includes the lobbyists that made personal contributions to his or her candidate committee. As a result, these lobbyists – who now lobby the Member on specific pieces of legislation – may receive favorable treatment, not necessarily in the form of legislative results, but in terms of access to the elected official.

On this issue of "access buying," Robert Mutch, author of 1988's *Campaigns, Congress, and Courts*, argues, "...What we do find is the common observation that contributions buy access...Members of Congress are pressed from all sides by demands on their time, and are likely to give preferred treatment to campaign contributors" (172, 1988). Similarly, both Bertram Levine, author of 2009's *The Art of Lobbying*, and Jeffrey Berry and Clyde Wilcox, authors of 2009's *The Interest Group Society*, find evidence that campaign contributions may not necessarily determine legislative success, but they can determine which individuals or groups gain access. It is this "preferred treatment," then, that is the primary problem. Lobbyists – who work in extremely close proximity to elected officials by virtue of their job description – present undeniable potential for quid pro quo corruption via their ability to personally contribute to a candidate's campaign and then lobby the same candidate once elected to office.

Goals

When one proposes legislation that will prohibit lobbyists from personally contributing to candidate committees, the goals are quite clear. In order to further override the threat or perceived

threat of quid pro quo corruption, specifically “access buying,” registered lobbyists will be prohibited from making personal contributions to candidate committees. Through this prohibition, one hopes to greatly lessen the potential for quid pro quo corruption, in which lobbyists contribute to a candidate’s campaign and then lobby the now-elected official in the post-election environment, receiving special treatment or access by virtue of his or her contribution.

Reform

The proposed reform will specifically prohibit registered lobbyists from making personal contributions to candidate committees. While such a ban has not yet been enacted, previous examples of other prohibitions to candidate committees provide a template upon which this prohibition will be built. On the federal level, both the Supreme Court and the law, itself, provide precedence for effectively addressing the aforementioned “problem” of quid pro quo corruption and “access buying” in electoral politics. For example, the Tillman Act of 1907 prohibited corporations from making monetary contributions to candidate committees. Similarly, 1947’s Taft Hartley Act banned unions from making contributions to candidate committees, as well. 1971’s Federal Election Campaign Act, in tandem with its 1974 and 1976 amendments, further strengthened these prohibitions, while also banning additional sources of contributions, including government contractors and foreign nationals. In each case, the potential for corruption, namely the quid pro quo corruption described above, is cited as the reason for the ban.

In 1976, the Supreme Court gave further support to the prohibition of certain contribution sources due to the potential for quid pro quo corruption with its ruling in *Buckley v. Valeo*. Here, the majority upheld FECA’s limits on campaign contributions, citing – once again – the threat or perceived threat of corruption as the primary reason to limit one’s freedom of speech (i.e. freedom to contribute money). In other words, “threat or perceived threat of corruption” has been upheld as a constitutionally viable reason to withhold an individual or entity’s right to speak, or contribute in the

political sphere. Therefore, both previous federal statutes and Supreme Court decisions provide the groundwork for this proposed reform. Sources of contributions in close proximity to elected officials, such as government contractors, unions, and corporations, have already had their right to contribute to candidate committees rescinded due to a threat or perceived threat of corruption. Lobbyists, who also work very closely with elected officials, should receive similar treatment.

Moreover, one can also look to the state level for further precedence of a prohibition of lobbyist contributions to candidate committees. More specifically, legislation prohibiting lobbyists from making campaign contributions – to various degrees – has been enacted in several states, with California, Kentucky, and South Carolina enacting comprehensive bans on any and all contributions from lobbyists to elected state officers, candidates for elected state offices, and candidates' campaign committees (Norman-Eady, 2005). Because campaign finance law varies from state to state, the specifics of each measure naturally vary as well. Nonetheless, state-level statutes provide examples of existing policy options, in which the prevention of quid pro quo corruption was the chief problem to be addressed via the proposal and passage of legislation (Norman-Eady, 2005). In this case, the reform would seek to similarly ban registered lobbyists from making personal contributions to any candidate committee on the federal level.

Impact

If passed into law, would this reform successfully address the problem at hand? On its surface, the reform would absolutely succeed in prohibiting *registered* lobbyists from personally contributing to candidate committees. Therefore, the goals of the legislation would be successfully met. The problem, itself, is another story. Registered lobbyists would be prohibited from personally contributing, but the narrow legal definition of “a lobbyist” allows many of the individuals intended to be covered by this legislation to avoid its restrictions. As defined in The Lobbying Disclosure Act of 1995, a lobbyist is any individual that spends 20% of his time on “lobbyist activities,” has two

lobbying contacts (i.e. Congress, staff, and Executive Branch officials), and is paid \$5,000 per lobbyist or \$20,000 for an organization, semi-annually. Unfortunately, as Professor James Thurber laments, this definition is extremely lackluster because it omits many of the activities that also comprise lobbying, such as the management of lobbying campaigns, grassroots mobilization, survey research, policy analysis, and coalition building and maintenance (2010; 2012). As a result, although 12,633 people are currently registered lobbyists, Thurber estimates that over 100,000 people actually engage in some form of lobbying in Washington (2012). Therefore, if one seeks to prevent the possibility of quid pro quo corruption between lobbyists and candidates and elected officials, the legal definition of lobbying also needs to be reformed to include all relevant individuals. Otherwise, the previously identified problem will not be successfully addressed.

Fortunately, the ABA's Task Force on Federal Lobbying Laws recently proposed several recommendations to reform the definition and inspire more transparency in the lobbying community. As co-chair Joseph Sandler discussed, the Task Force recommended that the legal definition be changed to reduce two of the registration triggers, namely the lobbying time and number of contacts (2012a). More specifically, the Task Force suggested that the 20% rule be replaced with a quarterly 12-hour benchmark *and* the two contacts requirement be reduced to one contact (2011). While this reform would certainly not capture every individual engaged in some form of lobbying, it – coupled with greater enforcement, another hallmark of the Task Force's recommendations – would absolutely allow for more comprehensive representation than the current, aforementioned legal definition. With more comprehensive representation, this prohibition on registered lobbyists' personal contributions to candidate committees, then, would have a greater chance of solving the actual problem at hand.

With that said, this prohibition would also fail to fully address the problem without the passage of additional legislation concerning bundling. As previously mentioned, bundling is a popular act in which lobbyists fundraise on behalf of a candidate, ultimately delivering said candidate a rather large number of donations from various individuals. Significantly, this practice also presents

the opportunity for quid pro quo corruption, as Washington's "Culture of Reciprocity" is still at work. More specifically, a now-elected official may still feel a "debt of gratitude" to the lobbyists that raised quite a bit of money on his or her behalf throughout the campaign season. Therefore, the threat or perceived threat of corruption (i.e. "preferential treatment") still exists. Once again, this particular issue was addressed by the ABA's Task Force, which recommended, "A lobbyist should not be permitted to lobby a Member of Congress for whom he or she has engaged in campaign fundraising during the past two years" (2011). Ultimately, unless bundling activity, in addition to the currently problematic definition of a lobbyist, is also reformed, the problem identified with lobbyists' personal contributions to candidate committees will remain unsolved.

Evaluation

In the previous section, I addressed whether the reform would successfully meet the aforementioned goals and solve the aforementioned problem. Here, I focus on whether it is ultimately an effective, viable policy option. Is a prohibition on lobbyists' personal contributions to candidate committees even worth seeking? In discussing this proposed reform with various scholars and members of the Washington political community, one of the most frequently mentioned considerations was the constitutionality of the act. For example, American University's Sam Garrett commented, "I fear it wouldn't hold up in the courts. It would probably be considered a violation of first amendment rights" (2012). Similarly, Joseph Sandler, co-chair of the ABA's Task Force, said, "Banning lobbyists' contributions would be harder. It involves the Constitution. But it is absolutely the next step in lobbying reform" (2012b). So, the question becomes: Would this prohibition "hold up in the courts"?

Fortunately, the Supreme Court – in *Buckley v. Valeo* (1976) – has already ruled that limits on contributions to political committees are entirely constitutional if there is a threat or a perceived threat of corruption. In other words, a person's freedom to speak (i.e. make a political contribution)

can be limited to thwart corruption. Therefore, overall limits on contributions, in addition to prohibitions on contributions from corporations, unions, and government contractors, have withstood judicial review. A ban on lobbyists' contributions to candidate committees would seem to follow this trajectory. That is, if one can successfully argue that there is the threat or perceived threat of corruption, then the prohibition is likely to be considered constitutional. And, as previous sections demonstrate, this argument can be easily made considering the role of lobbyists, which require them to operate in close contact and proximity to elected officials.

With that said, The Campaign Legal Center's Meredith McGehee is still skeptical. She commented, "This is definitely a good idea, but I think the courts would overturn it. Recent decisions – such as *Citizens United* – seem to indicate that the Supreme Court is taking a more anti-regulatory stance on campaign finance law" (2012b). While Ms. McGehee is correct to question the Court's stance, one must remember that the Supreme Court's ruling in *Citizen United v. FEC* (2010) concerns independent spending – in the form of an independent expenditure or electioneering communication – by a corporation and union. It makes no mention of campaign contributions, which are still banned for both entities. As the Supreme Court's ruling in *Buckley v. Valeo* (1976) demonstrates, there has long been a distinction between contributing and spending, in which contribution limits and prohibitions have been considered constitutional when there is a threat or perceived threat of corruption in the transaction, or contribution.

In fact, perhaps the best indicator of the proposed prohibition's ultimate success is recent court rulings concerning state-level acts prohibiting lobbyists' contributions to candidate committees. In 2011, for example, the United States Court of Appeals for the Fourth Circuit upheld North Carolina's prohibition on lobbyists' contributions to a candidate already serving in office. In *Preston v. Leake* (2011), the Court found that the ban did not violate the First Amendment right of freedom of speech. Instead, the Court specifically noted that the prohibition is constitutional precisely because it is an anti-corruption measure. It also pointed out that "being a lobbyist was a matter of choice for the

plaintiff, a choice that came with a high level of regulatory and ethical requirements” (2011). While this decision addresses a state-level ban, it does, in fact, provide some insight into the potential direction of a decision concerning the constitutionality of a federal prohibition on lobbyists’ personal contributions to candidate committees.

Finally, stepping aside from the constitutionality of the prohibition, one must also consider whether the effort is likely to be passed in Congress. As Joseph Sandler also discussed, such decisions concerning fundraising limits may encounter various “institutional infrastructures” within Congress, outside of opinions concerning the legislation’s constitutionality (2012a). Despite public support for lobbying and ethics reform, Congress may be less likely to move on this prohibition, in addition to the ABA’s recommended limitation on bundling, because it limits their fundraising ability when – in the age of the permanent campaign – fundraising is of the utmost importance. In other words, Sandler argues, “It’s the members of Congress that want to allow lobbyists to give” (2012a). Ultimately, then, the prohibition will likely encounter major difficulty before the judicial review is even part of the proverbial equation.

With this potential difficulty in mind, Meredith McGehee suggests that a more modest approach, such as a reduced contribution limit for registered lobbyists, may be more realistic at this time (2012b). More specifically, McGehee proposed a reduced limit of \$200 per candidate committee per election (2012b). Significantly, reduced contribution limits for lobbyists have already been successfully enacted in various states around the country, most prominently in New York, where the state’s reduced limits were – unsurprisingly – declared constitutional by the United States Court of Appeals for the Second Circuit in *Ognibene v. Parkes* (2011). Overall, the proposed ban on lobbyists’ contributions to candidate committees would likely pass its most frequently mentioned test – judicial review – but it may fail to get to that stage due to unfavorable “institutional infrastructures” within Congress. As such, perhaps Ms. McGehee’s suggestion is the more viable policy option at this time.

Conclusion

In summary, this brief essay has addressed the problem associated with lobbyists' personal contributions to candidate committees, in addition to proposed legislation to address this problem, its goals, impact, and ultimate effectiveness. Despite the attractiveness of a full prohibition on registered lobbyists' contributions to candidate committees, I conclude that such a ban may be difficult to achieve at this time. The reform would likely pass judicial review, but it would encounter difficulty at the policymaking stage due to "institutional infrastructures" within Congress. Therefore, a partial ban, or reduced limit, ultimately strikes me as the more realistic policy option. Finally, in order to fully address the problem and achieve maximum effectiveness, reforms limiting lobbyists' bundling abilities and altering the legal definition of a lobbyist must be passed as well.

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