Micah Escobedo

Government 524: The Bryce Harlow Workshop on Ethics and Lobbying

Spring 2019

Improving the Auditing Power of the Government Accountability Office

Problem

Lobbying permeates every aspect of American life, serving as both an originator and facilitator of legislation, and it's been here since the Founding Fathers convened in Philadelphia. It is also incredibly problematic and open to unethical influence…and even illegal activity. The biggest problem—I argue—is that the Government Accountability Office (GAO) is limited in its auditing power. Requiring GAO to expand its enforcement power and improve the disclosure process would shed much-needed light on dark loopholes in the world of DC lobbying, while also preserving First Amendment liberties.

The lobbying industry in Washington is massive, which in and of itself is not technically a problem. As of 2018, there were more than 11,500 Washington, D.C.-based lobbyists registered under the Lobbying Disclosure Act (including amendments made via the Honest Leadership and Open Government Act of 2007)[1]. Spending surpassed $3.4 billion that same year, more than 2.5 times the amount spent in 1998. (*See Graphic A on p. 8 for these numbers*) These figures, however, are only part of the story. Thanks to an easily evaded classification system, unregistered lobbyists can circumvent that system, while registered lobbyists can legally get

[1] For the full text of the LDA, see the Senate's webpage of the Lobbying Disclosure Act of 1995

away with underreporting. Under the current system, lobbying is carefully—too carefully—defined. (*See Table A on p. 9*)

First, the 20-percent time threshold mentioned in the LDA is so specific and narrow that it has led to the creation of the phrase "nineteen percenters."[2] These not-lobbyist lobbyists (usually in corporate "government affairs/relations" departments) ensure (or at least record) that the amount of time spent lobbying on the job accounts for no more than 19 percent of their time. This loophole allows thousands of "lobbyists" to legally avoid registration. Thus, total lobbying spending is likely much bigger than the reported $3.42 billion.[3]

Second, there's a glaring problem in how information is collected by GAO. As seen in the Office's 2017 GAO-18-388 report to Congress[4], lobbying firms can easily—and conveniently—omit important records relating to their activities. The report's methodology included the following:

> *"To assess the extent to which lobbyists **could provide** evidence of their compliance with reporting requirements, we examined…" (p. 36)*
>
> *The mandate **does not require us to identify lobbyists who failed to register and report** in accordance with the LDA requirements, or determine for those lobbyists who did register and report whether all lobbying activity or contributions were disclosed. Therefore, this was outside the scope of our audit." (p. 41)*

[2] The Bryce Harlow Workshop on Ethics and Lobbying at American University, February 2 and 9, 2019: Guest lecturers referred to "nineteen percenters" as lobbyists who fell under the 20-percent threshold outlined in the Lobbying Disclosure Act.

[3] Lobbying Database, OpenSecrets.org (Latest data as of February 2019)

[4] 2017 LOBBYING DISCLOSURE: Observations on Lobbyists' Compliance with Disclosure Requirements, Government Accountability Office, March 2018

Exactly what was examined is not the point – it's *how* it was examined. "Could provide" and "does not require us to identify lobbyists who failed to register and report" are the key phrases. If a firm simply can't (or won't) provide the necessary records, GAO is essentially powerless. Joshua Rosenstein, Partner at Sandler Reiff Lamb Rosenstein & Birkenstock, P.C., confirmed this when he noted that this is rooted in GAO's structure. "They're limited by statute and don't require lobbying firms to maintain all records for auditing purposes."[5] Rather than report violations for this refusal to show records, the information is basically classified as lost and GAO is left with a gaping hole in its report.

We don't have a full picture in knowing who has the ears of our elected leaders, nor is GAO compelled to report lobbying violators by name. The excerpts from the report aren't just examples of legal semantics – they represent a failure of our government to inform us of who is influencing the policymaking process. They represent a willful ignorance on the government's part in the effort to ensure transparency. This has to change.

Goals

The motivation for the proposed change doesn't come from a place of anti-lobbying fervor. On the contrary – it's out of respect for our entire political system. After all, lobbying is a critically important and constitutionally protected reality of the political process. Thomas Nownes (2013) cites four reasons for this: the diversity of the population, First Amendment protections for free association and speech, the federal system itself, and the separation of powers. "America's unique governmental system, together with constitutional freedoms and diversity, make it an ideal place for the proliferation of interest groups." (Nownes, 2013)

[5] I spoke with Joshua at his Washington, D.C. office (Sandler Reiff Lamb Rosenstein & Birkenstock, P.C.) on February 21, 2019

Lobbying isn't the problem – lackluster enforcement and disclosure requirements are. The goals of any reform need to start there. An enhanced GAO would give the American public a more complete picture of who is influencing the policymaking process and who is violating the LDA. All lobbyists, regardless of the amount of time spent lobbying, should be labeled and registered as such. There should be no grey area. Additionally, all necessary records of lobbying activities and contacts should and must be kept for auditing purposes. Failure to comply should and must be met with consequences beyond "well, we tried."

Reform

Addressing this failure in enforcement and oversight can be achieved through minor but significant changes to the Lobbying Disclosure Act. First, the 20-percent threshold should be eliminated altogether. Not only does it place an arbitrary and confusing number on a very focused activity – it misses a large amount of that activity. It is so specific that it creates a loophole even a novice lobbyist can easily utilize. The American Bar Association's Task Force on Federal Lobbying Laws had a similar recommendation in their 2011 report. "[W]e propose that Congress retain the first condition (two or more lobbying contacts) but delete the second (the twenty percent rule). The second precondition to registration renders the LDA significantly under-inclusive … the twenty percent test applies only to 'lobbying activities,' which is a broad term, but nevertheless does not encompass significant aspects of a lobbying campaign such as providing strategic advice to clients and stimulating grassroots support for the lobbying campaign." (American Bar Association. Task Force on Federal Lobbying Laws Section of Administrative Law and Regulatory Practice, 2011, p. 10)

Second, all lobbying firms must be required to maintain records of their contacts and activity. Every email, meeting invite, correspondence, and any other record should be available for GAO auditing. Currently, there are no consequences for firms that are unable to produce their records. As highlighted in the 2017 GAO-18-388 report, GAO is only able to review documents it receives, and they don't name violators. It cannot subpoena them (nor should it start). However, firms that fail to comply should be automatically reported by name to Congress, perhaps in a separate report and process. From there, Congress—the Secretary of the Senate and Clerk of the House—would then refer the violations to the Department of Justice – no exceptions.

This leads to my final reform proposal: shifting Department of Justice jurisdiction from the U.S. Attorney's Office for the District of Columbia to the Public Integrity Division. The U.S. Attorney's Office for D.C. handles heinous crimes like murder. Under the current system, it also handles LDA violations, which is impractical and a diversion of resources. The Public Integrity Division is a much more appropriate office for such referrals, especially since it exists to handle political corruption. All three of these proposals would require an amendment to LDA, one similar to the Honest Leadership and Open Government Act of 2007 (HLOGA). Given the nature of the changes, the Public Integrity Division would need to receive additional manpower and resources to handle an expected increase in violations and investigations. In other words, this would be HLOGA 2.0.[6]

Impact

[6] For the full text of HLOGA, see the congressional webpage on HR 2316 (Honest Leadership and Open Government Act of 2007)

The immediate impact of these reforms would be an increase in the number of registered lobbyists (and reported expenditures) in Washington, D.C. HLOGA's passage in 2007 resulted in the largest annual number of lobbyist registrations since the LDA's passage in 1995: almost 15,000. (*See Graphic A on p. 8*) Interestingly and not surprisingly, the number has since decreased and stabilized to around 11,500 for the last few years. Graphic A on page 8 is a visual example of an industry adapting to laws intended to shed sunlight on a world that prefers to work in the dark. But the increase can also be seen as a positive development. The threat of increased penalties and frequency of filing requirements, thanks to HLOGA, compelled more lobbyists than ever before to comply. Additionally, lobbying expenditures haven't grown like they did in the years leading up to HLOGA's passage. In fact, they've stayed relatively stable.

Of course, the increase in sunlight would undoubtedly lead to more adaptation. Would lobbyists attempt to reclassify themselves as something else entirely? Would HLOGA 2.0 simply lead to more unforeseen loopholes? It's possible. But that possibility doesn't negate the fact that more public awareness of lobbying activity is good for the country. Under a HLOGA 2.0, all lobbying, regardless of the time or dollar amount, would be a matter of public record. We the people would have a clearer idea of who is behind deregulatory agendas as well as bills/laws that seem to favor a specific group of people.

Conclusion

Lobbying, for better and worse, is part of the American political system. It has been since the beginning and will continue to be as long as the republic exists. It is protected under the First Amendment and, as Nownes (2013) notes, its flourishing is uniquely American and an expression of our values. But the current lack of enforcement and disclosure requirements from

GAO translate to an unacceptable amount of shadow influence on lawmakers. Reforms are needed, especially in a post-*Citizens United* world.

Proposed reforms to the LDA include: eliminating the 20-percent rule and including all lobbyists who conduct contacts and engage in lobbying activity, regardless of the time spent on such actions, in the same category; requiring the maintenance by lobbying firms of all records pertaining to lobbying activity and contacts for GAO auditing purposes or face the possibility that they will be referred for violations; and changing the Department of Justice unit responsible for investigating LDA violations from the U.S. Attorney's Office to the Public Integrity Division.

These changes, implemented through an amendment to the LDA, would go a long way to ensuring government transparency. All lobbyists—from those who spend under 20 percent of their time lobbying to those who spend much more—would be categorized together, streamlining GAO audits and easing public confusion. Most importantly, GAO would have the metaphorical teeth to report violations and refer them to Congress (and, in turn, the Department of Justice). Any change to the law must be made in the public interest, not for what is most convenient for the well-connected. Thomas Susman, paraphrasing Benjamin Franklin, put it best in his 2008 essay for the *Stanford Law & Policy Review*: "The challenge is ours to ensure that lobbying and campaigning do not work together to undermine independent decision-making by legislators and subvert the public good. *We can do it. We can keep it.*" (Susman, 2008)

Appendix

Graphic A (Retrieved from the Lobbying Database on OpenSecrets.org)

Table A

Definitions from the Lobbying and Disclosure Act of 1995

Lobbyists	Lobbying activity
*"…any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, **other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided** by such individual to that client over a six month period."*	*"…lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others."*
Lobbying contact (lobbying in action)	
"…any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to: the formulation, modification, or adoption of Federal legislation (including legislative proposals); the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government; the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or the nomination or confirmation of a person for a position subject to confirmation by the Senate."	

Sources

American Bar Association. Task Force on Federal Lobbying Laws Section of Administrative Law and Regulatory Practice. (2011). *Lobbying Law in the Spotlight: Challenges and Proposed Improvements*. Retrieved from Blackboard Course Reserves

Center for Responsive Politics' Lobbying Database on OpenSecrets.org. https://www.opensecrets.org/lobby/index.php (last updated January 24, 2019)

Government Accountability Office. (Mar. 2018). *2017 Lobbying Disclosure: Observations on Lobbyists' Compliance with Disclosure Requirements*. (Publication No. GAO-18-388). Retrieved from https://www.gao.gov/assets/700/690988.pdf

Honest Leadership and Open Government Act of 2007, 110th Cong. (2007) (Retrieved from https://www.congress.gov/bill/110th-congress/house-bill/2316/text)

Lobbying and Disclosure Act of 1995, 104th Cong. (1995) (Retrieved from https://www.senate.gov/legislative/Lobbying/Lobby_Disclosure_Act/TOC.htm)

Nownes, A. J. (2013). The Evolution of Interest Groups in the United States. *Interest Groups in American Politics: Pressure and Power*. (pp. 28-32). New York, NY. Routledge.

Susman, T. M. (2008). Private Ethics, Public Conduct: An Essay on Ethical Lobbying, Campaign Contributions, Reciprocity, and the Public Good. *Stanford Law & Policy Review, 19*(10), 22. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297480

Special:
The Bryce Harlow Workshop on Ethics and Lobbying at American University, February 2 and 9, 2019: Guest lecturers referred to "nineteen percenters" as lobbyists who fell under the 20-percent threshold outlined in the Lobbying Disclosure Act.

Conversation with Joshua at his Washington, D.C. office (Sandler Reiff Lamb Rosenstein & Birkenstock, P.C.) on February 21, 2019