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"Lobbying Activities" and Presidential Pardons: Will Legislators' Efforts to Amend the LDA Lead to Increasingly Hard-Lined Jurisprudence?

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Promoting a bill to regulate lobbying activity related to presidential pardons, Senator Arlen Specter said the following on the Senate floor:

> Former President Jimmy Carter called the pardon of fugitive commodities trader Marc Rich "disgraceful," and Democratic Representative Henry Waxman said that "the failures in the pardon process should embarrass every Democrat and every American." The outrage over former President Clinton's last minute pardons is bi-partisan . . . The pardons of Marc Rich and Pincus Green have sparked . . . public outrage, and rightly so.[1]

Much to Senator Specter's vexation, the lobbying that results in such presidential pardons slips below the media's radar primarily because of a controversial loophole in the Lobbying Disclosure Act of 1995 ("LDA").[2] The Act currently does not require those lobbying for presidential pardons to register and have their activities regulated as lobbyists.[3] Likewise, the LDA also does not require that contributions to

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1. 148 CONG. REC. S3154-55 (daily ed. Mar. 29, 2001).

2. Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 (Supp. 1996).

3. *Id.* The Act defines "lobbying contact" in a way that such contact would not cover one who is lobbying for a presidential pardon. Specifically, "lobbying contact" is defined by the LDA as:

> [A]ny 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—
> (i) the formulation, modification, or adoption of Federal legislation (including legislative proposals);
> (ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;
> (iii) 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
> (iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.
> 2 U.S.C. § 1602(8)(A).

presidential libraries be disclosed.[4] Such absence of a requirement to disclose library contributions also sparked controversy at the end of the Clinton administration, when the Senate Judiciary Committee discovered that Denise Rich, Marc Rich's wife, gave "at least $450,000 to former President Clinton's library foundation."[5] These two perceived gaps in coverage by the LDA instigated controversy in the final days of the Clinton administration,[6] and led to the proposal of Senator Specter's S. 645, which seeks to strengthen the LDA.[7]

Recent attention to the improprieties of lawmakers and executive officials, combined with these perceived loopholes in the Act, certainly stimulated heated discussions on both the House and Senate sides of Capitol Hill, and encouraged Senator Specter to propose S. 645, entitled "[a] bill to require individuals who lobby the President on pardon issues to register under the Lobbying Disclosure Act of 1995 and to require the President to report any gifts, pledges, or commitments of a gift to a trust fund established for purposes of establishing a Presidential library for that President after his or her term has expired."[8] The proposal seeks to curtail such transactions that, to some, resemble bribery too closely.[9] The bill would amend the LDA,[10] which requires those who make more than one "lobbying contact" for an employer or client to register as a

4. 2 U.S.C. § 1601. See also 148 CONG. REC. S3154 (daily ed. Mar. 29, 2001), in which Senator Specter states that "donations, pledges or commitments [to presidential libraries] are not currently subject to disclosure, creating a situation where individuals could make large contributions to the President's library foundation in the hope of influencing favorable action by the President."

5. 148 CONG. REC. S3156 (daily ed. Mar. 29, 2001). The report also indicates that "Beth Dozoretz, former finance chair of the Democratic National Committee who pledged to raise $1 million for the Clinton library, also worked on the Rich pardon." *Id.*

6. *See* Kenneth P. Doyle, *Specter Bill Would Require Disclosure of Lobbying on Pardons, Gifts to Library*, MONEY & POLITICS (BNA), Apr. 2, 2001 (reviewing Rich pardon controversy and summarizing Senator Specter's proposed amendment); *see also* T.R. Goldman, *Pardon Me, But Is That Lobbying?*, INFLUENCE, Mar. 21, 2001, at 11 (focusing on how the Specter amendment would force disclosure of lobbying for presidential pardons).

7. 148 CONG. REC. S3154-56 (daily ed. Mar. 29, 2001); see also the House of Representatives' version of S. 645, the Clemency Lobbying Disclosure Act, H.R. 5131, 107th Cong. (2002), which was proposed July 16, 2002 by Rep. Burton (R-IN), the Chairman of the House's Government Reform Committee, and referred to the Committee on the Judiciary upon its introduction. The bill only requires disclosure of "a request or petition for a grant of executive clemency," and does not address disclosure of contributions to presidential libraries, as the Senate bill does. *Id.* at §2. Similarly, H.R. 577, 107th Cong. (2002), which passed the House in February of 2002, mandates disclosure of "sources and amounts of any funds raised for presidential archival depository." 148 CONG. REC. H122 (daily ed. Feb. 5, 2002).

8. S. 645, 107th Cong. (2001).

9. *See* 148 CONG. REC. S3155 (daily ed. Mar. 29, 2001) (stating that Hugh Rodham "took more than $400,000 for his limited work on the clemency requests for Almon Glenn Braswell and Carlos Vignali, Jr., and Roger Clinton, who is reportedly under investigation for trying to peddle access to the White House in relation to pardons . . . .").

10. Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 (Supp. 1996).

lobbyist.[11] Although the LDA greatly expanded the range of activities that require registration as a lobbyist, the Act, as it currently exists, does not apply to those lobbying for presidential pardons.[12]

Once a lobbyist registers because he has the statutory "lobbying contacts" requiring him or her to register, that lobbyist must report information about his lobbying activities.[13] S. 645 seeks to strengthen the definition of "lobbying activities" by making communications with a president or his staff about "the issuance of a grant of executive clemency," be it "a pardon, commutation of sentence, reprieve, or remission of fine," official lobbying activity under the LDA.[14]

This Comment will predict the jurisprudence that would result if Senator Specter's bill were to pass and become law. This Comment will begin by tracing the evolution of lobbying laws, and the judicial interpretations thereof, until the enactment of the LDA, while briefly acknowledging the First Amendment right to lobby as suggested in *Buckley v. Valeo*[15] and recognizing the resulting tension between regulations such as the LDA and the constitutional right to free speech. Then, this Comment will examine the language of the LDA, and courts' interpretations of the statute, while concluding that such interpretation can vary substantially depending on the state in which it is interpreted, and typically includes recognition of the loopholes that the LDA attempted (perhaps unsuccessfully) to close, as seen in *Gmerek v. State*

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11. *Id.* § 1602(10). Section 1602(7) of the Lobbying Disclosure Act of 1995 defines "lobbying activities" as "lobbying contacts and efforts in support of such [lobbying] 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." *Id.*

12. *Id.* § 1601 (Supp. 1996). *See* 148 CONG. REC. S3155 (daily ed. Mar. 29, 2001), in which Senator Specter adamantly presented his opinion that those lobbying for presidential pardons should be required to register as lobbyists, stating that:

> Roger Clinton was . . . reportedly involved in several attempts to get paid for getting pardons for his friends. This matter . . . is reportedly being investigated by [a] U.S. Attorney. . . . It remains to be seen what she will find, but we don't have to wait for the end of her investigation to know that if an individual trades on his access to the White House to make money, that's lobbying, and he or she should be required to register as a lobbyist.

13. Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1603–1604 (Supp. 1996). *See* WILLIAM H. MINOR, CORPORATE LOBBYING: FEDERAL AND STATE REGULATION A-9 (BNA Corporate Practice Series Portfolio No. 25-2d, 1999) (stating that the term "lobbying activities" is interpreted to apply to far more activities than the term "lobbying contacts" in the LDA. For instance, "lobbying activities" functions as the term under which the amount of money that must be reported for a semiannual period, as opposed to the term "lobbying contacts").

14. S. 645, 107th Cong. (2001).

15. 424 U.S. 1 (1976). The Supreme Court declared in *Buckley* that the State's interest of deterring corruption or the appearance of corruption "from large individual financial contributions" was compelling enough to warrant largely upholding the Federal Election Campaign Act of 1971. *Id.* at 25-26, 143.

Ethics Commission.[16] Next, this Comment will focus on Senate Bill S. 645, which seeks to amend the LDA in order to provide more guidance about registration and reporting requirements than the previous law, and attempts to regulate the way in which individuals employ lobbyists. In particular, this Comment will address the legislative findings that prompted S. 645, as well as the two-fold purpose of the bill: to require registration pursuant to the LDA of those who lobby for pardons, and to require public disclosure of donations for presidential libraries. Finally, this Comment will provide an analysis and prediction of the jurisprudence that would likely result should S. 645 become law, drawing from prior jurisprudence that resulted from past lobbying regulations and public reaction to the proposed bill.

I. THE LOBBYING DISCLOSURE ACT OF 1995

A. Underlying Case Law

1. Judicial recognition of the First Amendment right to petition the government via lobbying

The registration requirements placed on lobbyists today have precipitated from a history of seemingly slow-moving regulations, statutes, and case law, all of which awkwardly struggle to not intrude on citizens' First Amendment right to petition the government.[17] *United States v. Rumely*[18] served as the Supreme Court's first encounter with resolving this tension between citizens' First Amendment rights and regulation of lobbying activities, wherein the Court suggested that lobbyists are entitled to constitutional protection for their activities.[19] Justice Frankfurter's majority opinion reasoned that Rumely could refuse to comply with the demand of the House Select Committee on Lobbying Activities that he disclose the names of those who had purchased political tracts from his organization, given the First Amendment's application to lobbyists.[20] Therefore, the Court held that lobbyists were entitled to some protection on First Amendment grounds.[21]

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16. 751 A.2d 1241 (2000).

17. U.S. CONST. amend. I. Portions of the First Amendment provide that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

18. 345 U.S. 41 (1953).

19. *Id.* at 44, 46.

20. *Id.* at 44 (suggesting application of the First Amendment in dicta).

21. *Id.* at 41. *See generally* Steven A. Browne, Note, *The Constitutionality of Lobby Reform: Implicating Associational Privacy and the Right to Petition the Government*, 4 WM. & MARY BILL

Such constitutional protection of lobbying was further advanced by the landmark case of *Buckley v. Valeo*,[22] in which the Supreme Court recognized the application of the First Amendment to lobbying communications, but upheld the Federal Election Campaign Act of 1971 to be constitutional.[23] The Court reasoned that states have a compelling interest in deterring corruption, or even the appearance of corruption, via lobbying, so that the 1971 Act establishing a Federal Election Commission was constitutional.[24] Subsequently, a state court strengthened this First Amendment protection of lobbyists by holding that laws that "significantly interfere" with the right to petition the

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RTS. J. 717 (1995) (analyzing courts' interpretations of the First Amendment "Right of Association"). *See also* Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J.L. & PUB. POL'Y 149 (1993) (arguing that the right to lobby may very well be protected by the Constitution and analyzing the *Rumely* holding); Comment, *Public Disclosure of Lobbyists' Activities*, 38 FORDHAM L. REV. 524 (1970) (arguing that burdensome reporting and registration requirements may have the effect of preventing some from employing lobbyists, and briefly discussing First Amendment violations that such requirements may instigate); David E. Landau, *Public Disclosure of Lobbying: Congress and Associational Privacy After* Buckley v. Valeo, 22 HOW. L.J. 27 (1979) (exploring tensions between the right to privacy and lobbying disclosure requirements pursuant to the 1946 Act); Ron Smith, *Compelled Cost Disclosure of Grass Roots Lobbying Expenses: Necessary Government Voyeurism or Chilled Political Speech?*, 6 KAN. J.L. & PUB. POL'Y 115 (1996) (discussing tension between the right to privacy guaranteed under the Constitutional penumbra theory and lobbying disclosure requirements pursuant to the LDA); Amy E. Moody, Comment, *Conditional Federal Grants: Can the Government Undercut Lobbying by Nonprofits Through Conditions Placed on Federal Grants?*, 24 B.C. ENVTL. AFF. L. REV. 113 (1996) (discussing the definition and perception of "lobbying contacts" under the LDA and exploring constitutional questions that arise when lobbying regulations are at issue).

22. 424 U.S. 1 (1976).

23. *Id.* The Court upheld the portions of the Federal Election Campaign Act of 1971 that compel specific record-keeping by candidates of even small campaign contributions, *id.* at 143, and stated that legislatures have a compelling interest in preventing corruption of the political process via the regulation of individual contribution limits, *id.* at 75. The Court approved of the Act's individual and political committee contribution limits, the disclosure and reporting provisions, and the public financing scheme due to the strong interests in restricting influences stemming from the dependence of candidates on large campaign contributions. *Id.* at 21. Conversely, the Court held that the Act's proposed limitations on campaign *expenditures* (contra campaign *contributions*) were unconstitutional because they infringed on the First Amendment right to free speech in political campaigns. *Id.* at 19 58-9. *See also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (upholding the right of anonymous pamphleteering, despite arguments by many commentators who contend that burdensome reporting and registration requirements have the effect of preventing some from employing lobbyists). *But see* Comment, *Public Disclosure of Lobbyists' Activities*, 38 FORDHAM L. REV. 524 (1970) (arguing that the cost involved to meet the stringent requirements, which were later validated in *Buckley v. Valeo*, 424 U.S. 1 (1976), are an issue for parties with fewer financial resources, and stating that many critics have argued that these reporting requirements impinge on the right to associate); Stacie L. Fatka & Jason Miles Levien, Note, *Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution*, 35 HARV. J. ON LEGIS. 559, 574 n.81 (1998) (stating that there is little judicial support for the assertion that lobbyists or their employers have a right to remain anonymous when attempting to influence legislators, but recognizing arguments that the reporting requirements of Federal Election Campaign Act of 1971 validated by *Buckley v. Valeo*, 424 U.S. 1 (1976), may be too demanding on lobbyists to truly be constitutional).

24. 424 U.S. at 75-76, 143 (1976).

government require strict scrutiny, while laws that merely have an "incidental impact" require rational basis review.[25] Moreover, the court established that the constitutionally protected right to lobby also applies to state lobbying legislation.[26] Overall, the right to petition the government remains protected by the First Amendment, despite legislative attempts to closely regulate lobbying activity.

2. Enactment and subsequent judicial interpretation of the Federal Regulation of Lobbying Act of 1946

Attempts to reconcile First Amendment protection of the right to petition the government with regulation of lobbying activity proved to be weak in the promulgation of the Federal Regulation of Lobbying Act of 1946, which defined "lobbyist" especially broadly.[27] The 1946 Act served as the foundation for federal regulation of lobbying activity for almost fifty years, though it was narrowed by *United States v. Harriss,*[28] a Supreme Court decision weakly rejecting a challenge to the Act's constitutionality, only eight years after its enactment.[29] In order to preserve the 1946 Act, the Court narrowly construed the law by finding particular provisions controlling while ignoring conflicting provisions.[30]

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25. Fair Political Practices Comm'n v. Superior Court of L.A. County, 599 P.2d 46, 53-55 (Cal. 1979); *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 350 (1995) (holding that an Ohio law that prohibited distribution of campaign literature that did not contain the name and address of the person issuing the literature was unconstitutional because the regulation, unlike the one at issue in *Buckley v. Valeo*, was not narrowly tailored to achieve the state's interest); Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 491 (D.C. Cir. 1968) (holding that Constitutional protection is granted to lobbyists through the First Amendment right to petition, and stating that "[e]very person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition."); Moffett v. Killian, 360 F. Supp. 228, 231-32 (D. Conn. 1973) (implying that state or federal statutes that seek to restrict lobbying are obligated to demonstrate that such measures pass constitutional muster, and reasoning that just because one earns a living by lobbying or soliciting lobbyists to lobby for him/her does not mean that s/he should not be afforded the same First Amendment protection that booksellers or motion picture distributors enjoy); ACLU v. N.J. Election Law Enforcement Comm'n, 509 F. Supp. 1123, 1128-34 (D. N.J. 1981) (holding that the constitutional right to lobby also applies to state lobbying legislation, and laws that appear to infringe on this right are subject to strict scrutiny, and cautioning that State legislatures must exercise care when implementing the measures that lobbying groups must take in order to register, because the filing of extensive paperwork in order to comply with the regulations should not function to deter groups from lobbying).

26. Fair Political Practices, 599 P.2d at 48 (citing holding in *Citizens for Jobs & Energy v. Fair Political Practices Com*, 547 P.2d 1396 (1976).

27. 2 U.S.C. § 266 (repealed 1995). *See infra* note 31.

28. 347 U.S. 612 (1954).

29. *Id.* at 624.

30. Justice Jackson noted, "I recall few cases in which the Court has gone so far in re-writing an Act." *Id.* at 633 (Jackson, J., dissenting). For instance, the Supreme Court narrowed the Act to cover only "direct communication with members of Congress on pending or proposed federal legislation" despite evidence that Congress was likely not concerned with the exact method of influencing legislation. *Id.* at 620, 631.

The Federal Regulation of Lobbying Act of 1946 ultimately required disclosure, via registration, by those attempting to lobby,[31] but was deemed by many to be a poorly constructed law which was not considered extensively enough by the legislature.[32] The 1946 Act did not seek to regulate payments for lobbying or even to grant eligibility status to those who could lobby, but instead sought to make lobbying activities transparent by providing public information on political pressures that influenced legislation.[33] The Supreme Court, upon this first and most noteworthy interpretation of these novel lobbying regulations in *Harriss*, recognized that "full realization of the American ideal of government by elected representatives depends to no small extent on [Congress's] ability to properly evaluate" the political pressures to which they are subjected.[34] The Court established that without the transparency created by the Act, "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal."[35] As interpreted, the 1946 Act was not intended to prohibit lobbying, but instead simply to provide appropriate transparency to strengthen the credibility of public interest groups in their relationship to the overall legislative process.[36]

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31. Pub. L. No. 79-601, 60 Stat. 839-42 (codified at 2 U.S.C. §§ 261-270 (1994)). Section 308 of the 1946 Act provided:

> (a) Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included . . . .

2 U.S.C. § 267 (1994).

32. Steven A. Browne, *The Constitutionality of Lobby Reform: Implicating Associational Privacy and the Right to Petition the Government*, 4 WM. & MARY BILL RTS. J. 717, 719 (citing Senate Comm. on Governmental Affairs, Lobbying Disclosure Act of 1993, S. REP. NO. 103-37, at 3 (1993), and stating that "[t]he inferior draftsmanship" of the 1946 Act and the "subsequent interpretation [of the Act] by the Supreme Court resulted in an ineffective law").

33. Federal Regulation of Lobbying Act of 1946, 2 U.S.C. § 266 (repealed 1995). The 1946 Act mandated registration by persons and organizations who, directly or indirectly, received money, gifts, or anything of value, to aid in the accomplishment of (1) passing or defeating legislation by Congress; or (2) influencing, directly or indirectly, the passage or defeat of legislation by Congress. *Id.* at §266. Once registered, the lobbyists were required to submit reports on a quarterly basis which include (1) the name and address of a contributor of more than $500 to the lobbyist; (2) the amount of the contributions; and (3) a detailed account of expenditures made on behalf of contributors. *Id.* § 264.

34. United States v. Harriss, 347 U.S. 612, 625 (1954).

35. *Id.*

36. The Court declared that the 1946 Act did not seek to prevent lobbying altogether, but it merely "provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose."

Perhaps the most important development of *United States v. Harriss* was the establishment of the "principal purpose" test for the registration requirement. The Court declared that unless a "principal" or "main" purpose of the activity was the passage or defeat of legislation, the lobbying in question does not trigger registration.[37] Although this test appeared an appropriate interpretation of the Act to the majority, the 1946 Act remained riddled with gaps, caused many administrative problems regarding its enforcement, and was disregarded too easily by many existing lobbyists.[38] The Judiciary Committee of the House of Representatives recognized these problems many years later in its report on the Lobbying Disclosure Act of 1995, stating that "[t]he Court's construction of the Act in *Harriss* has created significant gaps in coverage."[39] The Committee declared that this interpretation of the 1946 Act led to the failure of the majority of those engaged in lobbying to register and comply with the Act's provisions.[40]

B. Enactment of the Lobbying Disclosure Act of 1995

The House Judiciary Committee interpreted the widespread failure to register and disclose lobbying activities pursuant to the 1946 Act[41] as a signal that lobbying reform was necessary and long overdue.[42] As a

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37. *Id.* at 622-23. The Court established the "principal purpose test," which set forth the standard that there are three requirements to warrant coverage under Section 307 of the 1946 Act: "(1) the 'person' must have solicited, collected, or received contributions; (2) one of the main purposes of such 'person,' or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress; (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress." *Id.* at 623.

38. MINOR, *supra* note 13, at A-3 (suggesting that the 1946 Act was generally ignored by most lobbyists, due to rampant loopholes); *see also* William P. Fuller, *Congressional Lobbying Disclosure Laws: Much Needed Reforms on the Horizon,* 17 SETON HALL LEGIS. J. 419, 427 (1993) (citing statistics showing that only 6,000 lobbyists out of 60,000 to 80,000 were legitimately registered under the LDA in 1993).

39. Lobbying Disclosure Act of 1995, H.R. REP. NO. 104-339, at 3 (1995). The Committee stated that the *Harriss* Court interpreted the Act to solely cover:

> [E]fforts to influence the passage or defeat of legislation in Congress . . . exclud[ing] other Congressional activities. Coverage extends to the lobbying of Members of Congress, but not Congressional staffs. The Act is also limited to persons whose 'principal purpose' is lobbying, so that individuals who spend less than half of their time lobbying are not covered.

Id.

40. *Id.* The Committee referred to a study completed in 1991 by the General Accounting Office, *infra* note 41, which found that almost 10,000 of the 13,500 organizations and persons cited in that year's *Washington Representatives* directory were not registered under the 1946 Act. Lobbying Disclosure Act of 1995, H.R. REP. NO. 104-339, at 4 (1995).

41. U.S. GENERAL ACCOUNTING OFFICE, FEDERAL REGULATION OF LOBBYING ACT OF 1946 IS INEFFECTIVE (1991) (GAO/T-GGD-91-56).

42. Lobbying Disclosure Act of 1995, H.R. REP. NO. 104-339, at 3 (1995). The Committee stated in this House LDA report that "[t]he fact that individuals and organizations who have not

result, the initiative to pass what would become the Lobbying Disclosure Act of 1995 commenced in the early 1990s.[43]

Senator Carl Levin (D-MI), serving as chairman of the Subcommittee on Oversight of Government Management of the Senate Governmental Affairs Committee, requested in 1991 that the Government Accounting Office (GAO) evaluate the effectiveness of the 1946 Act.[44] The GAO concluded that the 1946 Act was not nearly inclusive enough because the statute was drafted poorly.[45] Specifically, the GAO stated that the Act's reliance on criminal penalties alone as an enforcement mechanism was ineffective, and that a multitude of other problems with the interpretation of the poorly drafted Act led to minimal compliance.[46]

Armed with such findings, Senator Levin introduced the first version of the LDA on February 27, 1992.[47] Despite the senator's strong advocacy for strengthening lobbying registration requirements and substantially tightening the 1946 Act,[48] as well as the building momentum for lobbying reform during the 1992 Presidential election campaign,[49] the bill was slow in its eventual enactment due to

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registered can hold themselves out as 'Washington Representatives' without violating current lobbying disclosure law underscores the need for this legislation." *Id.*

43. *See* Kenneth P. Doyle, *The BNA Guide to Lobbying Disclosure & Gift Restrictions*, in Daily Rep. for Executives (BNA) at S-1, S-4, to S-8 (Mar. 15, 1996).

44. MINOR, *supra* note 13, at A-3 (stating that Senator Levin had been a proponent of lobbying reform since his involvement in the Wedtech scandal); *see generally* Tom Redburn, *Lobbyist Curbs Urged in Wake of Wedtech*, L.A. TIMES, May 5, 1988, at 4 (reporting that Levin directed his attention to the issue of lobbying reform as chairman of the Subcommittee on Oversight of Government Management).

45. U.S. GENERAL ACCOUNTING OFFICE, supra note 41, (concluding that "significant activity clearly recognized as lobbying" was not covered by the 1946 Act due to the Court's extremely narrow interpretation of the Act in *United States v. Harriss*, 347 U.S. 612, 623 (1954)).

46. *Id.* The GAO found that the forms to be completed by those covered by the 1946 Act were confusing, which resulted in incomplete reports of lobbying activity, and that lack of an enforcement authority for offices that administered the registration requirements led to a substantial lack of compliance. *Id.*

47. Senate Comm. on Governmental Affairs, Lobbying Disclosure Act of 1993, S. REP. NO. 103-37, at 20 (1993). Subsequent to Senator Levin's initial introduction of the bill, it "was revised and re-introduced" in the Senate on May 21, 1992 as Senate Bill 2766. *Id.* at 21. The bill was referred to the Committee on Governmental Affairs following its re-introduction, and the Committee reported on the bill "favorably," proposing the addition of three amendments. *Id.* Despite such activity regarding the bill during the summer of 1993, "the Senate did not consider [it] in the 102nd Congress." *Id.* at 22.

48. *Id.* at 20-21

49. MINOR, *supra* note 13, at A-4 (recognizing Ross Perot's concentration on campaign finance and lobbying regulation reform during his 1992 campaign for President, and pointing out that Perot's focus on lobbying reform proved to be an ironic idiosyncrasy in that "Perot had previously hired Washington lobbyists to act on his behalf . . . [O]ne of Perot's lobbyists [in 1975] drafted an amendment to a tax bill that would have created one of the largest one-time tax breaks in history, providing Perot with $15 million . . . . [the amendment] was later defeated on the House floor"). After Perot's defeat, President Clinton suggested in his 1993 State of the Union Address that

disagreements between the House and the Senate.[50] Moreover, the full Senate never considered the Lobbying Disclosure Act of 1992.[51]

After considerable debate and possibly politically motivated opposition to the bill, Senator Levin negotiated with Senator Mitch McConnell (R-KY), the chairman of the Senate Select Committee on Ethics, to reach a compromise on the reintroduced bill.[52] This reintroduced bill had been divided into two distinct bills, one proposing rules for the acceptance of congressional gifts,[53] and one concerning lobbying provisions.[54] The Levin-McConnell compromise appointed legislative officers to administer the Act's provisions, instead of the previously considered creation of a new executive office to partake in

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lobbying reform warranted attention by Congress, stating that "we should quickly enact legislation to force lobbyists to disclose their activities." President William J. Clinton, State of the Union Address (Feb. 17, 1993), *available at* http://www.pub.direction-address-to-joint-session-of-congress.text.

50. Levin's initial bill was amended and re-introduced as Senate Bill 349 during Congress' following term, the 103rd Congress. Senate Comm. on Governmental Affairs, Lobbying Disclosure Act of 1993, S. REP. NO. 103-37, at 22 (1993). This new bill was passed in the Senate on May 6, 1993, by a vote of 95-2. 139 CONG. REC. S5579 (daily ed. May 6, 1993). The House, after amending the bill, passed the legislation on March 24, 1994 by a vote of 315-110. 140 CONG. REC. H1992 (daily ed. Mar. 24, 1994). The Senate did not agree with the amendments proposed by the House, and subsequently agreed to place the bill in a conference committee. 140 CONG. REC. S5592 (daily ed. May 11, 1994). The House then passed the bill via conference report on September 29, 1994 by a vote of 306-112. 140 CONG. REC. H10, 296 (daily ed. Sept. 29, 1994). Subsequent to passage by the House, the Senate could not terminate a filibuster before the vote on the conference report, and, as a result, the bill failed to pass in the 103rd Congress. *Id. See* Michael Weisskopf, *Senate Republicans Block Lobbyist Reform Measure*, WASH. POST, Oct. 6, 1994, at A1 (illuminating disagreements based on party lines surrounding proposals to reform registration requirements and the like for lobbyists, and recognizing the possible political motives for the legislation); *see also* MINOR, supra note 13, at A-4-A-5 (indicating that Senator Robert Dole (R-KS) and Rep. Newt Gingrich (R-GA) opposed the conference report in spite of their previous support for the legislation because they opposed the bill's provisions for "grass roots" lobbying, and did not succumb to the proposal of creating a new executive agency under the Department of Justice to administer the provisions of the Act); Ann Devroy, *Clinton, Gingrich Play Down Disputes: Air of Civility Marks Historic Meeting*, WASH. POST, June 12, 1995 at A1 (reporting that the Clinton-Gingrich meeting regarding the proposed LDA serves as an important symbol of bipartisan support of general lobby reform, and stating that during the meeting, Clinton and Gingrich agreed to appoint a panel to propose reform of lobbying rules).

51. The bill that was approved by the Senate Governmental Affairs Committee that year, S. 2766, 102d Cong. (1992), was not identical to Levin's original bill, S. 2279. Among the differences in the two bills was the fact that under Levin's initial bill, S. 2766, lobbyists would need to register with the Office of Government Ethics, and thus a new office would need to be created under the Department of Justice, entitled the Office of Lobbying Registration and Public Disclosure. S. 2766, 102d Cong. (1992). The bill, after sustaining amendments by the House, which resulted in Senate opposition, and surviving a conference between the two houses, was eventually reintroduced in the 104th Congress by Senator Levin as Senate Bill 1060. S. 1060, 104th Cong. (1995).

52. *See Senate Clears Major Stumbling Blocks on Lobbying Reform*, NATIONAL JOURNAL CONG. DAILY/A.M., July 25, 1995, at 3.

53. S.1061, 104th Cong. (1995).

54. S.1060, 104th Cong. (1995).

such direction.[55] The compromise also resulted in a notable amendment to the bill that limited its overall coverage.[56] Finally, the bill passed by an overwhelming Senate vote of 98-0,[57] and, after four amendments to the bill were defeated in the House, the bill was approved in the House by an equally overwhelming vote of 421-0.[58] Subsequent to such passage in the House, President Clinton signed the bill into law on December 19, 1995.[59]

C. Compliance with the Lobbying Disclosure Act of 1995

The Lobbying Disclosure Act of 1995 appeared to have an immediate impact.[60] The initial registrations of those who engaged in "lobbying contacts" or "lobbying activities" as lobbyists doubled, presumably enhancing legislators' and the public's confidence that the

55. S. 1060, 104th Cong. § 4 (1995) (providing that lobbyists "shall register with the Secretary of the Senate and the Clerk of the House of Representatives"); debate that resulted in the Levin-McConnell compromise can be found in 141 CONG. REC. S10511-31, S10535-36, and S10538-62 (daily ed. July 24, 1995); *see also* 141 CONG. REC. S10594-603 (daily ed. July 25, 1995).

56. 141 CONG. REC. S10594-603 (daily ed. July 25, 1995); *see also* MINOR, *supra* note 13, at A-5 (indicating that the compromise, in its pertinent portions, limited the number of covered officials to only high-ranking officials and political appointees, included provisions to increase the number of "part time" lobbyists exempted from registration to include grass roots lobbyists from coverage under the Act, and lessened the specificity required in disclosing with whom lobbying contacts are made).

57. 141 CONG. REC. S10599 (daily ed. July 25, 1995).

58. House debate on the LDA, and proposal of the defeated amendments thereto, can be found at 141 CONG. REC. H13682-90 (daily ed. Nov. 28, 1995), and at 141 CONG. REC. H13 738-49 (daily ed. Nov. 29, 1995); *see also* Adam Clymer, *Congress Passes Bill to Disclose Lobbyists' Roles,* N.Y. TIMES, Nov. 30, 1995, at A1 (reviewing legislative history of the bill in both Houses of Congress); Helen Dewar & Michael Weisskopf, *House Gives Final Approval to Lobbyist Disclosure Bill,* WASH. POST, Nov. 30, 1995, at A1 (discussing some of the difficulties of the legislation); Alice A. Love, *Congress Approves First Overhaul of Lobby Disclosure Law Since '40s*, ROLL CALL, Nov. 30, 1995, at 1 (reviewing the bill's exhaustive history in both Houses from the perspective of a Capitol Hill staffer).

59. *See Statement On Signing the Lobbying Disclosure Act*, 21 WKLY. COMP. PRESS. DOC. 2205 (Dec. 25, 1995); *see also Clinton Signs the Lobby Reform Bill Setting New Disclosure Procedures*, 13 INT'L TRADE REP. (BNA) 14 (Jan. 3, 1996) (discussing the LDA generally, and the Clinton administration's support for the LDA).

60. MINOR, *supra* note 13, at A-13-A-14 (stating that once initial registrations were calculated subsequent to the LDA's promulgation, the number of organizations registered under the LDA rose to 3,000, with firms submitting reports for the activities of over 9,000 lobbyists); *see also* Mary Jacoby, *New Lobby Law Doubles Number of Disclosures*, ROLL CALL, Mar. 18, 1996, at 1 (citing statistics and testimony indicating that the LDA produced unprecedented numbers of registrations); Juliet Eilperin, *New Rules Double Tally of Lobbyists*, ROLL CALL, Oct. 28, 1996, at 3 (proposing that the LDA was effective in producing more registrants, and stating that the number of registrants doubled); Ruth Marcus & Guy Gugliotta, *Number of Lobbyists Who Register Doubles*, WASH. POST, Mar. 16, 1996, at A4 (stating that the number of registrants doubled under the LDA); Kenneth P. Doyle, *Levin: New Law Has Doubled Number of Registered Groups and Individuals*, 52 Daily Rep. for Executives (BNA) at A-10 (Mar. 18, 1996) (stating that the LDA had a strong effect on the number of organizations as well as on the number of individual lobbyists in causing them to register).

LDA would prove to be beneficial.[61] Such registrations pursuant to the LDA, and compliance with the Act by filing the requisite forms, have provided for increased transparency and subsequent scrutiny of organizations engaged in lobbying.[62]

Experts profess, however, that even though the Act is quite a few years old, there is no general accord on the LDA's overall success.[63] The lack of judicial interpretation of the Act,[64] coupled with criticism that the law merely asks lobbying organizations to engage in self-policing of their own activities,[65] has produced the opinion that the LDA's effectiveness still remains to be seen.[66] Registrants are, however, subject to perceived disadvantages that may result from the increased transparency.[67] Specifically, those engaged in lobbying must remain sensitive to the fact that the media, as well as the public may scrutinize their activities.[68]

Organizations engaged in the lobbying activities described in the LDA, however, are certainly expected to comply with the regulations

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61. Testimony of Gary Sisco, Secretary of the Senate, Before the Subcomm. on the Legislative Branch of the Senate Comm. on Appropriations, 107th Cong., 1st Sess. (May 24, 2001) (indicating that since the initial filings referred to in note 60, *supra*, were submitted in February of 1996, the number of registered lobbyists grew to more than 16,000 as of September 30, 2000). Sisco indicated that there were 4,774 firms and organizations registered under the LDA, which employed 16,342 lobbyists to represent 13,865 clients. *Id.*

62. MINOR, *supra* note 13, at A-14 (stating that those who register pursuant to the LDA should be prepared to defend their activities and decisions to the media and the public, and stating that registrants should avoid any appearances of non-compliance or impropriety because filings are "scrutinized carefully by the media, government watchdogs, and competitors").

63. *Id.* (stating that "more than five years after its enactment . . . there is no consensus on the LDA's success," and recognizing positive and negative criticism regarding the enactment of the LDA).

64. See *infra*, Part I.D, where this lack of case law regarding the enforcement of the Lobbying Disclosure Act is discussed in detail.

65. *See* T.R. Goldman, *Registering a Win: Lobby Disclosure Law Didn't Take Money Out of Politics, But It Has Shed Light on Who's Working the Lawmakers*, INFLUENCE, July 26, 2000 at 11 (stating that the Act amounts to little more than self-policing by the lobbying industry). *See generally Loopholes for Lobbyists: Some Provisions of New Registration Law Have "Unintended Consequences,"* POL. FIN. & LOBBY REP., Feb. 14, 1996 (suggesting that the enactment and enforcement of the LDA may ease compliance with the regulations on lobbyists by causing more regulatory loopholes); *New Lobby Disclosure Law is Better Suited For "History" Than for "Current Events,"* POL. FIN. & LOBBY REP., Dec. 13, 1995, *available at* LEXIS, Legis Library, Pflrpt File (predicting that the LDA will not fulfill current lobbying needs for reform).

66. *See* Carl Weiser, *Unenforced Lobby Law Fails to Live up to "Toughest in History" Label*, GANNETT NEWS SERVICE, Nov. 8, 1999 (arguing that the LDA, in theory, may have forced compliance by creating tough registration requirements and disclosure standards, but that it has created room for non-compliance via loopholes and a policy of enforcement via self-policing).

67. *See* MINOR, *supra* note 13, at A-14 (stating that "[l]obbyists should recognize that the information they disclose, or the fact that they have failed to disclose the appropriate information, may appear in the next day's newspaper").

68. *Id.* (stating that filings in accordance with the LDA often are the topic of stories in legislation-oriented periodicals such as *BNA's Money & Politics Report, Roll Call, The Hill, Congressional Quarterly, Political Finance, National Journal*, and *Legal Times*).

that the Act appears to have created.[69] Such compliance generally has taken the form of specific strategies that recognize and incorporate the needs of the organization.[70] Experts recommend a variety of approaches to insure compliance with the LDA,[71] and recognize that such strategies may differ depending on many aspects that make the organization unique.[72]

D. Interpretation of the Lobbying Disclosure Act of 1995

Although the Lobbying Disclosure Act of 1995 repealed the Federal Regulation of Lobbying Act of 1946,[73] and forced organizations to

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69. The LDA proposes civil penalties for those who do not comply:

> Sec. 1606. - Penalties.
> Whoever knowingly fails to—
> (1) remedy a defective filing within 60 days after notice of such a defect by the Secretary of the Senate or the Clerk of the House of Representatives; or
> (2) comply with any other provision of this chapter;
> shall, upon proof of such knowing violation by a preponderance of the evidence, be subject to a civil fine of not more than $50,000, depending on the extent and gravity of the violation.

2 U.S.C. § 1606 (2001). In addition to possible civil penalties, the False Statements Accountability Act provides for possible criminal penalties for non-compliance, such as sentencing for up to five years imprisonment for false statements made to Congress. 18 U.S.C. § 1001. This provision applies to persons who knowingly make "any materially false, fictitious, or fraudulent statement or representation," *id.* § 1001(a)(2), and applies to investigations in which Congress participates, as well as any "document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch." *Id.* § 1001(c)(1). The Act applies to those who make false statements under the LDA, according to a Department of Justice spokesperson: "we don't see any bar to using [the False Statements Accountability Act] to seek penalties for violations that may occur when individuals are filing their reports under the Lobbying Disclosure Act." Kenneth P. Doyle, *Justice Department: False Statements Act Could Criminalize Violations of Lobbying Law*, 1 MONEY & POLITICS (BNA), at 85 (Nov. 12, 1997).

70. *See* MINOR, *supra* note 13, at A-14 (stating that a system that forces an organization to comply with the LDA is crucial due to resulting media and public scrutiny, that such a strategy should be focused on avoiding any appearances of impropriety, while reflecting the needs of the registered organization).

71. *Id.* An effective approach to assuring compliance with the Act should at least accomplish the following functions: (1) "[e]xamine all aspects of an organization's activities involving the government" to determine what activities constitute "lobbying" as defined by the LDA and are subsequently subject to the Act's provisions and regulations; (2) "[e]stablish a standard compliance mechanism," which should seek to achieve the goals of (a) identifying issues for lobbying, the names of those engaged in lobbying, and the division(s) of the government subjected to the lobbying efforts, and (b) manage and estimate expenses and costs associated with the organization's lobbying efforts; (3) educate the organization's employees on the relevant portions of the LDA as well as relevant facts; and (4) "[i]dentify a compliance coordinator," who can administer expert advice, monitor applicable legislative developments, and send a message to the organization's employees that compliance with the Act is extremely important. *Id.*

72. *Id.* (stating that compliance strategies will differ with what organization is being represented, depending on a variety of factors: "[s]trategies will differ between organizations that lobby on their own behalf and lobbying firms that represent outside clients, and they will differ among organizations in both categories").

73. Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1603, 1604 (Supp. 1996).

register that had not previously been required to do so[74] (as well as drastically changing the processes for registration for those organizations and individuals that did comply with the regulations),[75] case law providing judicial interpretation of the LDA is surprisingly scarce. The LDA, although passed by overwhelming majorities in both Houses of Congress,[76] was nevertheless greeted with some skepticism and criticism.[77] Consequently, it is somewhat curious that federal courts have not yet considered the Act's provisions.[78]

One resemblance of a case interpreting the LDA is *Gmerek v. State Ethics Commission*,[79] in which a Pennsylvania court struck down the state's version of the Lobbying Disclosure Act of 1995.[80] The state court held that the Act improperly regulated the practice of law, which is a power delegated by the Pennsylvania constitution to the state's supreme court.[81] Thus, Pennsylvania's version of the Act, signed into law by

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74. *Id.* § 1601.

75. *Id.*

76. *See supra* notes 57–58 and accompanying text.

77. *See* Michelle Grant, Note, *Legislative Lawyers and the Model Rules*, 14 GEO. J. LEGAL ETHICS 823, 827 (2001) (stating that a "legislative lawyer . . . has a special responsibility to protect the integrity of the law formation process," and discussing how the American Bar Association's Model Rules of Professional Conduct do not provide adequate guidance to the legislative lawyer who is not covered by the LDA, but who "[has] as great an influence on the legislative process as lobbyists, if not greater"); *New Lobby Disclosure Law*, *supra* note 65 (stating that the LDA will not fulfill current lobbying needs for reform); *Loopholes for Lobbyists*, *supra* note 65 (discussing how the enactment of the LDA may actually ease regulations on lobbyists by causing more loopholes). *But see* Charles Lawson, Note, *Shining the 'Spotlight of Pitiless Publicity' on Foreign Lobbyists? Evaluating the Impact of the Lobbying Disclosure Act of 1995 on the Foreign Agents Registration Act*, 29 VAND. J. TRANSNAT'L L. 1151 (1996) (arguing that the LDA unravels, at least to a degree, the regulatory maze that FARA formed).

78. State courts' parallel lobbying disclosure laws have been seriously questioned in their respective state courts since the LDA's promulgation in 1995. *See generally* Gmerek v. State Ethics Comm'n, 751 A.2d 1241 (Pa. Commw. 2000) (holding Pennsylvania's version of the Lobbying Disclosure Act in violation of separation of powers principles, and thus striking the law for want of constitutionality); North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999) (reversing the trial court's judgment that the state could not regulate the timing of political contributions). *Id.* at 715. The court affirmed the trial court's ruling that the contested statute was unconstitutionally vague and overbroad because it failed to make an exception for committees that engaged in issue advocacy alone, and failed to except nonprofit organizations. *Id.* at 713. The court did mention, however, that the federal legislature had "extensively regulated" the activities of lobbyists via the LDA. *Id.* at 715.

79. 751 A.2d 1241 (Pa. Commw. Ct. 2000).

80. Lobbying Disclosure Act, 65 PA. CONS. STAT. §§ 1303-1311.

81. Article V, Section 10 of the Pennsylvania Constitution "vests all authority over the regulation of the 'practice of law' with the Pennsylvania Supreme Court." *Gmerek*, 751 A.2d at 1246-47. The relevant section of the state's constitution provides that

> The Supreme Court shall have the power to prescribe general rules . . . for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch . . . . All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

PA. CONST. art. V, § 10(c).

Governor Ridge on October 15, 1998,[82] was held unconstitutional less than two years later because it governed lobbying activities too broadly.[83] Moreover, the court addressed the prohibition on contingent compensation for lobbying as a violation of the state's rules of professional conduct for lawyers. In addition, the court also found that Pennsylvania's LDA impermissibly regulated other basic ethical rules for lawyers, because it addressed client confidentiality.[84] The court ultimately conceded, however, that the other provisions of the LDA could be interpreted differently and therefore be held valid.[85] Yet, the court indicated that the legislature's subsequent infringement on the state supreme court's duty of regulating attorney activity was not the evil that the state's lobbying act was designed to prevent,[86] and therefore struck it down.[87]

In contrast, other courts have held that some state lobbying regulations requiring disclosure similar to the requisite LDA disclosure are narrow enough to survive constitutional questions at the federal level.[88] For example, in *Florida League of Professional Lobbyists, Inc. v.*

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82. *Gmerek*, 751 A.2d at 1243; 65 PA. CONS. STAT. §§ 1303-11. "The Act was to take effect on August 1, 1999." *Gmerek*, 751 A.2d at 1243.

83. The *Gmerek* Court refers to Section 1302(b) of the Act, which provides for regulation of lobbying activities, and states that the regulation of such activities "shall prevail over any regulation of professional activity when that activity constitutes lobbying." *Gmerek*, 751 A.2d at 1248.

84. The *Gmerek* Court also refers to section 1307(a) of the Act, which prohibits contingent compensation, and holds that such a provision contravenes Rule 1.5(c) of the state's Rules of Professional Conduct. *Id.* Likewise, the court cites to section 1305(c), which "could require the disclosure of confidential information in violation of Rule 1.6 of the Rules of Professional Conduct," and to section 1309 of the Act, which "authorizes the imposition of sanctions" and thus "directly conflicts with the Supreme Court's exclusive authority to discipline attorneys and regulate the practice of law." *Id.*

85. The Court cites *Kremer v. State Ethics Comm'n*, 469 A.2d 593, 595-96 (Pa. 1983), in which it stated:

> Pursuant to [the Court's] supervisory power, [the Court has] established a Code of Judicial Conduct applicable to judges, which rules contain detailed provisions designed to prevent conflicts of interest, financial and otherwise .... If further refinement is required, it must be accomplished through rules promulgated by this Court and not by legislative enactment.

Gmerek, 751 A.2d at 1264 n.33.

The Court also cites *United States v. Harriss*, 347 U.S. 612, 625 (1954), maintaining that "[u]ndoubtedly, the Pennsylvania General Assembly may properly enact legislation regulating the conduct of individuals . . . when [such] activities do not constitute the 'practice of law.'" *Gmerek*, 751 A.2d at 1264 n.33.

86. Citing *Harriss*, 347 U.S. at 625, and stating that citizens are entitled to assurance of the honesty and reliability of the legislative process and the process by which laws are enforced. *Gmerek*, 751 A.2d at 1264.

87. *Gmerek*, 751 A.2d at 1264.

88. *See generally* Florida League of Professional Lobbyists, Inc. v. Meggs, 87 F.3d 457 (11th Cir. 1996) (holding that Florida's disclosure provisions were not facially unconstitutional under the First Amendment, and that the First Amendment allows states to prohibit lobbyists from receiving contingency fees for their services); Special Programs, Inc. v. Courter, 923 F. Supp. 851, 860-61

Meggs,[89] in which an organization of professional lobbyists challenged the disclosure requirements enforced in Florida regarding contingency fees,[90] the Eleventh Circuit held that the statutes in question[91] were not overbroad and therefore not facially invalid.[92] While recognizing that where a First Amendment challenge is brought, "facial challenges" based on the overbreadth doctrine "may succeed more often,"[93] the court stated that the *Harriss* holding interpreted the Federal Regulation of Lobbying Act of 1946 to be valid in spite of such facial challenges to constitutionality.[94] Therefore, the court declined to validate the professional lobbyists' facial challenge of the statute's constitutionality.[95]

Likewise, in *Special Programs, Inc. v. Courter*,[96] the United States District Court for the Eastern District of Virginia upheld the state's lobbying disclosure requirements against a constitutional challenge based

(holding that disclosure, record-keeping, and other registration requirements enacted by Virginia's legislature did not violate the Equal Protection Clause of the Fourteenth Amendment).

89. 87 F.3d 457 (11th Cir. 1996).

90. *Id.* at 458. The Court stated that the issue for determination was whether the legislation regulating the conduct of those who "lobby" the state's legislative or executive officials was unconstitutional in that it requires exhaustive disclosure by lobbyists and their principals and precludes lobbyists from receiving fees dependent "on their success in affecting legislative or executive outcomes." *Id.*

91. The case examined the constitutionality of Chapter 93-121, Laws of Florida, which amended the provisions of FLA.STAT. ch. 11.045 and 112.3215 to provide that a lobbyist shall disclose all lobbying expenditures, whether made by the lobbyist or by the principal, and the source for all such expenditures. FLA. STAT. ch. 11.045(3)(a). The amended statute also prohibits would-be lobbyists from exchanging their services for an award contingent on legislative or executive outcome. *Id.* ch. 11.047.

92. *Meggs*, 87 F.3d at 460. The Court held that "[a]gainst the standard of *Harriss* and its progeny, we are unpersuaded that a substantial number of the applications of Chapter 93-121 will offend the First Amendment. So, we reject the facial challenge." *Id.*

93. *Id.* at 459 n.2 (citing the Supreme Court's recognition of the potential effect of the overbreadth doctrine in *New York v. Ferber*, 458 U.S. 747, 767 (1982) and in *United States v. Salerno*, 481 U.S. 739, 744 (1987)).

94. *Meggs*, 87 F.3d at 459-60 (stating that some courts have interpreted *Harriss* as granting "broad approval for lobbying restrictions" and disclosure requirements, and recognizing that the Supreme Court in *Harriss* made no exact recommendations regarding the specific level of constitutional scrutiny to be applied, but stated that in that case "the possibility that persons would engage in . . . self-censorship" substantial enough to pose First Amendment questions was "too remote" to strike down the law).

95. *Id.* at 460. The Court explicitly rejected the argument of facial constitutional invalidity and held that the statute was narrowly tailored enough, despite the lobbyists' argument that the statute requires reporting of "indirect expenses when there is no direct contact with governmental officials." *Id.* The Court also held that previous case law rejecting such arguments offered additional persuasion. *Id.* However, the Court was careful to leave some degree of deference for later courts to decide similar issues given differing fact patterns, stating that "[w]e . . . express no opinion on the constitutionality of particular fact-based challenges that may arise in the future. We just conclude that the district court committed no error of law in denying relief to the Plaintiff on its facial challenge to the lobbying disclosure requirements." *Id.* at 461.

96. Special Programs, Inc. v. Courter, 923 F. Supp. 851 (E.D. Va. 1996).

on the Equal Protection Clause.[97] The court applied a standard of strict scrutiny[98] and cited a previous case upholding legislation that imposed disclosure, record-keeping, and registration requirements on professional lobbyists.[99]

The lack of federal judicial interpretation of the LDA has led many to speculate whether it will be effective.[100] However, given holdings in a variety of courts on lobbying regulations similar to the LDA, one may predict that the LDA could survive a challenge of constitutionality.[101] Despite some positive validations of statutes very similar to the LDA, some may determine that the legislature's findings that led to the Lobbying Disclosure Act of 1995 propose overly ambitious changes to the previously well-established room for absence of registration.[102]

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97. *Id.* at 853. This case involved an organization entitled "Smokey Mountain Secrets" that solicited funds on behalf of charities. *Id.* When Smokey Mountain sought to expand its activities to door-to-door marketing, they incorporated a separate organization, "Special Programs, Inc." to engage in the new solicitation technique of selling packages under the "Smokey Mountain" name in door-to-door solicitations. *Id.* Despite this change in marketing and the name under which the products were now being sold, Smokey Mountain still sought to enjoy favor afforded to charitable organizations regarding lobbying disclosure and registration. *See id.* When Virginia's Division of Consumer Affairs investigated Smokey Mountain under allegations that it could not claim charitable status under the lobbying reporting statute, Smokey Mountain responded by asserting that exempting charities from the requirements was a violation of the Equal Protection Clause, and that, as a result, the enabling statute was void. *Id.* The Court decided, after considering the plaintiff's arguments based on equal protection, that strict scrutiny analysis applied to all equal protection challenges asserted; that the exception from the definition of "charitable organization" under the Solicitation of Contribution statute in question which applied to labor unions and trade associations violated the Equal Protection Clause; that the statutorily-imposed $20,000 bond requirement of professional solicitors did not violate the Equal Protection Clause; and that disclosure, record-keeping, and other registration requirements did not violate the Equal Protection Clause. *Id.*

98. *Id.* at 860-61 (applying standard of *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), in which the Supreme Court stated that disclosure requirements that are narrowly construed to serve a compelling governmental interest in the charitable solicitation context are constitutional).

99. *Id.* at 861 (further comparing the instant case to *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), and reasoning that "the . . . record-keeping and registration requirements imposed upon professional solicitors are similar in nature to those imposed upon charitable organizations, showing that their purpose is to regulate otherwise unregulated entities . . . . Thus, they . . . are constitutional").

100. *See New Lobby Disclosure Law*, *supra* note 65 (stating that the LDA will not achieve its ambitious legislative purpose); *Loopholes for Lobbyists*, *supra* note 65 (discussing how the enactment of the LDA may actually ease regulations on certain lobbyists by causing more loopholes).

101. *See Special Programs, Inc.*, 923 F. Supp. at 861 (stating that the lobbying disclosure requirements in question survive a challenge based on the equal protection doctrine); *Meggs*, 87 F.3d at 460 (holding that Florida's disclosure provisions were not facially unconstitutional under the First Amendment).

102. The findings of Congress listed in the Lobbying Disclosure Act of 1995 included:

> (1) [a] responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decision-making process in both the legislative and executive branches of the Federal Government;

Therefore, the Act's judicial interpretation and level of effectiveness in achieving its purpose certainly remains to be seen.

II. SENATE BILL S. 645 AND H.R. 5131

A. Policy Considerations and Legislative Findings of S. 645

1. Controversies involving presidential pardons and undisclosed donations to presidential libraries encouraged introduction of the bills

Even with commentators' criticism of the Lobbying Disclosure Act of 1995[103] and the professed "loopholes" therein,[104] experts likely did not know the extent of the gaps in the LDA until the controversy at the end of President Clinton's last term in office. Such controversy centered on the President granting clemency to fugitive Marc Rich.[105] Rich escaped

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(2) existing lobbying disclosure statutes have been ineffective because of unclear statutory language, weak administrative and enforcement provisions, and an absence of clear guidance as to who is required to register and what they are required to disclose; and

(3) the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government.

Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 (2000); *see also* Grant, *supra* note 77, at 827 (offering similar caution by stating that "[l]egislative lawyers have vast policymaking potential and must act honestly and ethically in order to uphold the integrity of the law formation process").

103. *New Lobby Disclosure Law*, *supra* note 65 (stating that the LDA will not fulfill current lobbying needs for reform); *Loopholes for Lobbyists*, *supra* note 65 (discussing how the enactment of the LDA may actually ease regulations on lobbyists by causing more loopholes); Weiser, *supra* note 66 (arguing that the LDA, in theory, may have forced compliance by creating tough registration requirements and disclosure standards, but that it has created room for non-compliance via loopholes and a policy of enforcement via self-policing).

104. *Loopholes for Lobbyists*, *supra* note 65 (stating that the LDA may actually ease regulations on certain lobbyists); *see also* 148 CONG. REC. S3154 (daily ed. Mar. 29, 2001), in which Senator Specter, the sponsor of S. 645, acknowledged that the thrust of S. 645 admittedly is derived from existing loopholes in the LDA and in the Ethics in Government Act of 1978: "this legislation . . . seeks to reform and correct a couple of major gaps which are present in existing procedures in two respects; stated succinctly, to require that lobbyists . . . be required to register and that contributions to Presidential libraries be subject to public disclosure."

105. The Marc Rich pardon controversy continues to instigate press coverage, over one year later. *Clinton Regrets Rich Pardon*, FOX NEWS CHANNEL (April 1, 2002) (citing an interview in NEWSWEEK magazine in which the former president said he regrets the last-minute pardon he gave to fugitive financier Marc Rich because it has tarnished his reputation, and he probably would not do it again, for political reasons), *at* http://www.foxnews.com/story/0,2933,49195,00.html; *see also Clinton Defends Rich Pardon*, CBS NEWS (Feb. 18, 2001) (presenting President Clinton's first-time explanation of his "controversial, last-minute pardon of fugitive financier Marc Rich"), *at* http://www.cbsnews.com/stories/2001/02/18/politics/main272877.shtml; *Ex-Prosecutor Calls Clinton Pardons Irregular*, CNN.COM (Mar. 14, 2002) (stating that Clinton's grants of executive clemency to more than 100 aroused much suspicion, and listing some of the most controversial pardons), *at* http://www.cnn.com/2002/ALLPOLITICS /03/23/clinton.pardons/; *President Clinton's Eleventh Hour Pardons: Hearing on S. 645 Before the Senate Comm. on the Judiciary*, 107th Cong.

from federal authorities for a period of seventeen years for tax evasion, among other offenses.[106] Subsequent to Rich's flight, his former wife, Denise Rich, and Beth Dozoretz, former finance chair of the Democratic National Committee, lobbied on his behalf for a grant of clemency.[107] Their lobbying efforts were rewarded when President Clinton officially granted Marc Rich a presidential pardon on January 20, 2001.[108]

The team lobbying for Marc Rich's pardon was successful in maintaining a presence close enough to the White House, yet below the radar screens of the press and public.[109] Legislative findings indicate that

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20 (2001) (statement of Roger C. Adams, United States Pardon Attorney, before the Senate Comm. on the Judiciary) (describing the logistics of notifying the U.S. Department of Justice of grants of clemency, and stating that, regarding the Marc Rich pardon, "none of the regular procedures were followed" because the Pardon Attorney's office learned of the White House's consideration of the pardon for the first time in the early morning hours of January 20, 2001. Adams also testified that, when he attempted to complete the requisite investigation of Marc Rich and Pincus Green, he was told by White House Counsel staff that "it was expected there would be little information about the two men because they had been 'living abroad' for several years").

106. See Senator Specter's statements in 148 CONG. REC. S3155 (daily ed. Mar. 29, 2001), indicating that "Rich fled to Switzerland in 1983, shortly before he was indicted on 65 counts of racketeering, tax evasion, mail fraud, wire fraud, violation of Department of Energy regulations, and trading with the enemy." *Id.* Senator Specter elaborated on the methods in which Rich attempted to dodge prosecution from the Justice Department, which include efforts to renounce his citizenship, refusal to return to the United States to plead his case in court, repeated efforts to solicit a favorable deal from the Justice Department, and finally orchestration of a plan in late 2000 to obtain a grant of executive clemency to clear all charges against him, resulting in ultimately never even being required to stand trial based on the multiple charges initially leveled against him. *Id.*

107. See 148 CONG. REC. S3154 (daily ed. Mar. 29, 2001), in which Senator Specter indicated that direct contact between Denise Rich, Beth Dozoretz, and President Clinton took place regarding Clinton's granting of executive clemency to Rich that had been planned. *Id.* Senator Specter, citing and summarizing testimony before the Judiciary Committee of the Senate at a hearing, stated that:

> In granting the pardon, former President Clinton notified Ms. Beth Dozoretz, who was very active in lobbying for the pardon, at 11 o'clock on January 19, some 2 hours in advance of telling the pardon attorney, and there had been extensive lobbying by Ms. Denise Rich, the former wife of Marc Rich.

Id. Senator Specter also stated that President Clinton "spent far more time talking to [Dozoretz] about [the Rich case] than he did talking to the prosecutors in the Southern district of New York." *Id.* at S3156.

108. See *Clinton and the Pardons: The Raging Storm*, N.Y. TIMES, Feb. 20, 2001, at A20 (stating that former President Clinton said that he had decided to grant Rich clemency for a number of legal and foreign policy reasons); see also *Former President Clinton Being Criticized*, *supra* note 105 (reporting on the controversial nature of pardon and Clinton's relations with Rich's "lobbyists"); *Ex-Prosecutor*, *supra* note 105 (reciting suspicious circumstances surrounding pardons granted to two individuals who had paid the former First Lady's brother, Tony Rodham, $245,000 for "consulting services").

109. *See* 148 CONG. REC. S3154 (daily ed. Mar. 29, 2001), in which Senator Specter summarized the Senate Judiciary Committee's investigation of the Marc Rich pardon controversy, which uncovered evidence that those involved in lobbying for the Rich pardon knew that they were successfully dodging public attention, and were proud of it. The Senate's investigation found that in a December 26, 2000, e-mail from Robert Fink, one of Rich's lawyers, to Jack Quinn, Rich's lobbyist, Fink declared, "Frankly, I think we benefit from not having the existence of the petition known, and do not want to contact people who are unlikely to really make a difference but who could create press or other exposure." *Id.* at S3155. Subsequently, the investigation uncovered that a

this team had partaken in much research on executive pardon authority and knew that public disclosure of such lobbying for presidential pardons was not required by statute and would likely not occur.[110]

In addition, a variety of other pardons granted at the end of the Clinton administration[111] indicate that others were aware of such loopholes in lobbying regulations that would allow individuals and "teams" of individuals to lobby for presidential pardons without registering for or disclosing such activity to the public.[112]

Likewise, as the fairly recent trend of supporters donating funds to presidential libraries indicates,[113] the Lobbying Disclosure Act of 1995 does not regulate such donations,[114] but allows donators to dodge public disclosure of their contributions.[115] Given the lack of provision for such donators to register in any way with any government agency under the LDA, such donations may never be uncovered,[116] or forced to abide by government regulation of any sort.[117] In addition to this general lack of

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January 9, 2001, e-mail from Quinn to Fink further solidified this theory; Quinn stated, "I think we've benefited from being under the press radar . . . ." *Id.* Senator Specter maintained that the pardon would never have been granted had "all the details [been] out in the open . . . in early January instead of" subsequent to the granting of the pardon. *Id.*

110. See 148 CONG. REC. at S3155 (daily ed. Mar. 29, 2001), in which Senator Specter stated that the Senate had uncovered a log from the law firm Arnold and Porter which cites a March 12, 1999, memorandum among Rich's lawyers at the firm entitled "Legal Research re: Pardon Power." Clearly, Senator Specter argued, there was consideration of seeking a pardon to warrant such legal research. *Id.*

111. *Id.* (indicating that Hugh Rodham, brother of former First Lady Hillary Rodham Clinton, gained more than $400,000 working to get a grant of clemency for Almon Glenn Braswell, who was being investigated for serious tax evasion offenses, and Carlos Vignali, Jr., who was heavily involved in a drug smuggling organization and had previously shipped more than 800 pounds of cocaine from California to Minnesota). Vignali's pardon, according to Senator Specter, came as a surprise especially to the Pardon Attorney who recommended that his initial request for a pardon be denied. *Id. See also President Clinton's Eleventh Hour Pardons*, *supra* note 105. Similarly, Roger Clinton made several attempts to receive payment for obtaining grants of executive clemency for his friends. *Id.* The matter is currently still under investigation by the U.S. Attorney for the Southern District of New York. *Id.*

112. *See supra* note 109.

113. 148 CONG. REC. at S3155 (daily ed. Mar. 29, 2001) (stating that "Presidential libraries are a relatively new phenomenon, with only ten of them in existence").

114. 2 U.S.C. § 1601 (Supp. 1996); *see also* 148 CONG. REC. at S3155 (daily ed. Mar. 29, 2001) (stating that, under current regulations, presidential libraries are erected with private funds, and then submitted to the National Archivist for operation, at which point the Presidential Libraries Act provides for the establishment of an endowment to cover some costs of the operation of the library).

115. See Senator Specter's statement indicating that large donations do not necessarily equate to wrongdoing, but that "[t]he fact that these donations can be made without public disclosure makes them a matter of even greater concern." 148 CONG. REC. at S3156 (daily ed. Mar. 29, 2001).

116. *See id.*

117. The Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 (Supp. 1996), for example, requires registration as a lobbyist first, once the individual in question has made the requisite lobbying contacts or engaged in the lobbying activity that the Act addresses, and subsequently issues a variety of regulations upon registration that must be complied with, such as the filing of several

oversight of donations to presidential libraries, certain tax implications[118] resulting from these donations may provide for results that are even more adverse to the public interest.[119]

Marc Rich and his personal lobbying team also benefited from this lack of regulation over contributions to presidential libraries.[120] Senator Specter indicates in his statements encouraging support for S. 645, however, that such donations do not suggest evidence of wrongdoing,[121] but merely require regulation,[122] particularly in the form of public disclosure.[123]

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forms to disclose lobbying activity on a periodic basis. *Id.* §§ 1603–1604. Without such an initial requirement of registration, such as the lack thereof with regard to contributions to presidential libraries, there are no resulting regulations mandated by the Act. *Id.*

118. *See* 148 CONG. REC. at S3155 (stating that goals of establishing an endowment to cover some costs of operating a presidential library, pursuant to the Presidential Libraries Act of 1955, 44 U.S.C. § 2111, are usually met through the establishment of a charitable organization which can operate as a § 501(c)(3) corporation, and therefore be generally exempt from the disclosure requirements of I.R.C. § 6033(e) or the proxy tax).

119. Such a tax status as a § 501(c)(3) corporation appears to be somewhat of an oxymoron, however, given that Section 501(c)(3) organizations are *not subject to the disclosure requirements* of I.R.C. § 6033 or the proxy tax because a § 501(c)(3) organization is *prohibited from expending its funds for lobbying or political activities*. *See* MINOR, *supra* note 13, at A-21. This creates an interesting dichotomy with regard to the tax implications of lobbying that legislators would need to address should S. 645 become law.

120. *See* 148 CONG. REC. at S3156 (Senator Specter stating that Denise Rich donated "at least $450,000 to former President Clinton's library foundation," and that Beth Dozoretz "pledged to raise $1 million for the Clinton library"); *see also President Clinton's Eleventh Hour Pardons*, *supra* note 105, at 13 (statement of Sen. Feingold, Member, Senate Comm. on the Judiciary) (describing Denise Rich as a "huge donor" to the Democratic Party, and presenting evidence that she contributed $867,000 to individual Democratic Party committees during the Clinton Presidency in mostly soft money, and donated $66,300 to individual Democratic candidates in hard money, in addition to her contributions to the Presidential library fund).

121. 148 CONG. REC. at S3156. Senator Specter indicates that former Presidents Reagan and Clinton began raising funds for their libraries during their second terms, since they were two-term presidents, and that Reagan library officials have indicated that the library fund received several large contributions from corporate donors while the former President was still in office, and that these big corporate donations rapidly diminished when Reagan left office. *Id.* at S3155-56. Conversely, former Presidents Carter and Bush did not engage in fundraising for their libraries while in office because they were running for reelection, and, after losing their reelection bids, never faced a situation of having to raise money for a library while still in office. *Id.* at S3155. Despite differing circumstances surrounding the termination of certain presidents' terms, Specter stated that:

> It is not necessary to suggest . . . any wrongdoing on the part of former President Reagan or of former President Clinton to realize that a donor could make large donations to a presidential library in the hope of receiving a favorable action from the President in exchange for a donation. The fact that these donations can be made without public disclosure makes them a matter of even greater concern.

Id. at S3156.

122. Senator Specter concluded this discussion by focusing on the need for public disclosure of contributions to presidential libraries, stating that the circumstances of the Marc Rich pardon controversy elucidate the need for public disclosure of donations while a President is still in office. 148 CONG. REC. S3154, S3156 (daily ed. Mar. 29, 2001).

123. *See* 148 CONG. REC. S3154 (daily ed. Mar. 29, 2001), in which Senator Specter states that public disclosure may serve to prevent large donations made with the intent of corruptly

2. Historical weaknesses in lobbying disclosure laws

Despite the seemingly partisan nature of much of the legislation that is proposed on Capitol Hill, support for S. 645 and H.R. 5131 to amend the Lobbying Disclosure Act of 1995 appears to be bipartisan.[124] Both parties appear to support the legislation,[125] while pointing out that the LDA and other lobbying disclosure laws have been weak.[126]

Senate floor debates on S. 645 have indicated that Denise Rich's contributions to President Clinton's presidential library have not been the sole donations to cause public speculation in the past.[127] Democrats in the Senate have pointed out that "President Clinton was also not the first Chief Executive to grant clemency to friends or family members of major contributors."[128] Senator Patrick Leahy (D-VT), following Senator Specter's statements of legislative findings regarding S. 645, stated that nondisclosure of lobbying activities was ripe with need for correction, and that "pardons which have become controversial and appear improper given the confluence of insider lobbying and financial contributions are not unique to the end of President Clinton's term in office."[129] Support

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influencing the President: "[t]he question is raised about whether . . . there is favoritism or influence sought from [contributions to presidential library funds]. By having the public disclosure, then it would be within public view." *Id.*

124. Such bipartisan support for the reform proposed by S. 645 is seen by the list of co-sponsors for the bill: upon Senator Specter's (R-PA) introduction of the bill on March 29, 2001, Senators Leahy (D-VT), Hatch (R-UT), Kohl (D-WI), Biden (D-DE), Feinstein (D-CA), Sessions (R-AL), Grassley (R-IA), and, most notably, Clinton (D-NY) were cited as co-sponsors of the legislation. S. 645, 107th Cong. (2001); *see also* John Dean, *Why Senator Specter's New Bill, Joined by Senator Hillary Clinton, Won't Prevent Another Situation Like the Marc Rich Pardon*, FINDLAW LEGAL COMMENTARY, April 13, 2001, 1, 3 (recognizing Senator Clinton's support as a member of the Democratic party for the legislation in the title of the article).

125. See *supra* note 124.

126. *See* statement of Senator Feingold in *President Clinton's Eleventh Hour Pardons*, *supra* note 105, at 13 (stating that something must be done to address the current suspicions that presidential pardons can be based on improper influence, and urging the passage of campaign finance reform legislation in the 107th Congress to bridge such gaps).

127. 148 CONG. REC. S3154–56 (daily ed. Mar. 29, 2001). *See also id.* at S3156 (statement of Sen. Leahy, Member, Senate Comm. on the Judiciary) (stating that other executive administrations raised significant funds while remaining in office, and referring to the Reagan administration, in which "[t]he Ronald Reagan Presidential Foundation . . . began fundraising in February 1985, nearly four years before President Reagan left office. By November 1991, the Foundation had raised between $45 and $65 million [in large lump sums mostly from big corporations,] . . . and reportedly [ceased] when President Reagan returned to private life"). *See also* Joe Conason, *Pardon the Reminder: What About G.H. Bush?*, N.Y. OBSERVER, Mar. 5, 2001, at 5 (implying that the media coverage of the Clinton pardon controversy was the outcome of a double standard, and stating that "[a]t the time [of the Bush, Sr. administration's pardons], nobody deemed those log-rolling decisions worthy of outraged editorials or snickering columns, let alone federal investigations or Congressional hearings. They weren't even reported in *The New York Times*.").

128. 148 CONG. REC. S3157 (daily ed. Mar. 29, 2001) (statement of Sen. Leahy, Member, Senate Comm. on the Judiciary).

129. *Id.*

for S. 645 across party lines indicates the especially strong need for resolution of presidential pardon controversies.

Such bipartisan support for S. 645 and the bill's components in the House of Representatives,[130] as well as statements by legislators that the LDA and other lobbying laws have not mandated sufficient disclosure for other presidential terms,[131] indicates that the LDA and other lobbying disclosure laws, according to lawmakers, are in need of reform. Experts had criticized the seemingly scattered provisions in the LDA prior to the Marc Rich pardon controversy and Senator Specter's proposal to amend the LDA,[132] indicating that problems and gaps within the LDA and other lobbying laws have long been demanding attention.[133]

B. Regulations and Restrictions That Would Result from the Enactment of S. 645

Senate Bill S. 645 focuses on adding two new provisions to the LDA.[134] Specifically, the bill seeks to: (1) require public disclosure via registration under the LDA of those who lobby the President for pardons, and (2) require public disclosure of donations or pledges of $5,000 or more, or commitments to raise $5,000 or more for presidential libraries while the president is still in office.[135]

While the legislation may appear to simply serve a remedial purpose, given the controversy surrounding the Rich pardon in the Clinton administration,[136] sponsors of S. 645 profess that such amendments to the LDA will have a daunting effect for many years regarding contributions

130. H.R. 577, 107th Cong. (2002), which amends 44 U.S.C. § 2112, would require disclosure of sources and amounts of funds raised for presidential libraries, and make such disclosures available to the public via the Internet. The bill passed the House of Representatives on February 5, 2002 by 392-3, and was sent to the Senate. 148 CONG. REC. H122 (daily ed. Feb. 5, 2002). Similarly, H.R. 5131, 107th Cong. (2002), would amend the LDA to ensure that requests or petitions for executive clemency are treated as lobbying contacts, which corresponds to the first section of S. 645. H.R. 5131 was referred to the House Subcommittee on the Constitution on August 20, 2002, and has been endorsed by 44 cosponsors. 148 CONG. REC. H4766 (daily ed. Jul. 16, 2002).

131. *See supra* notes 103 and 121.

132. *See generally Loopholes for Lobbyists*, *supra* note 65 (stating that lobbying disclosure laws were already filled with gaps prior to the enactment of the LDA); Ross Sandler & Sheila P. Murphy, *City Clerk Opinions: Part II: Are You a Lobbyist?*, 1 City Law 32, 34 (1995) (stating that a more aggressive enforcement strategy to fill in the gaps of the LDA and other lobbying disclosure laws may be in order, given the absence of a single enforcement action in New York during a nine-year period).

133. *See supra* notes 103, 121.

134. S. 645, 107th Cong. §§ 1-2 (2001).

135. *Id.* The bill does not, however, address areas of fundraising other than those funds raised for presidential libraries.

136. *See supra* note 105.

in general that are exchanged for a presidential pardon.[137] Senator Specter predicts that S. 645 will also discourage family members of presidents from lobbying for presidential pardons,[138] thus having even more of an effect on those seeking to transcend the process of requesting clemency from a president.[139]

Senator Specter appears to have focused only on the disclosure requirements placed on those seeking to lobby for presidential pardons.[140] It is certainly noteworthy that the LDA solely addresses disclosure requirements of lobbyists,[141] and does not limit the ability of individuals to engage in lobbying in any respect.[142] Specter's proposed amendment, however, may need to endure criticism that mere public disclosure of lobbying for presidential pardons and making donations to presidential libraries is not sufficient.[143] Some critics have already proposed that the LDA's lack of an official enforcement mechanism, coupled with the fact that public disclosure is quite different from the regulation of the actual methods of lobbying, indicates that S. 645 will not notably enhance the LDA.[144]

Despite such criticism, Senator Specter insists that the passage of his amendment to the LDA would sufficiently regulate the lobbying of presidential pardons and the donations to presidential libraries merely by public disclosure.[145] The senator maintains that not only does the bill require public disclosure, but also registration as lobbyists of those lobbying for presidential pardons and contributing the requisite amount

137. *See* 148 CONG. REC. S3156 (daily ed. Mar. 29, 2001) (statement of Sen. Leahy, Member, Senate Comm. on the Judiciary) (stating that the proposed legislation "is a pragmatic and forward-looking response to customs and practices that long predate the [Clinton] Administration").

138. *Id.* at S3155, wherein Senator Specter stated that Roger Clinton and Hugh Rodham, in attempting to obtain executive grants of clemency in exchange for money, exemplify the principal problem that S. 645 seeks to alleviate.

139. *Id.*

140. S. 645, 107th Cong. (2001).

141. *See* MINOR, *supra* note 13, at A-7 (stating that "[i]t is important to note that the [LDA] is a *disclosure* statute only. The LDA requires that lobbyists disclose information about their activities, but it does not limit in any way the ability of individuals to engage in lobbying").

142. *Id.*

143. Dean, supra note 124, at 1, 3 (stating that self-policed disclosure is not an effective or appropriate method of ensuring compliance with lobbying regulations in general: "[n]o one really polices the disclosed information," which is why such disclosure laws may not be helpful enough); *see also* Sandler & Murphy, supra note 132, at 32, 34 (suggesting that enforcement via reliance on self-disclosure to the public may not be an adequate method of enforcement).

144. *See supra* note 143.

145. 148 CONG. REC. S3154 (daily ed. Mar. 29, 2001). Senator Specter stated that those lobbying for presidential pardons would be greatly affected if they were not allowed to slip below the public and media "radar screen[s]." *Id.*

to presidential libraries.[146] Subjecting would-be lobbyists to the pages of regulations with which they must comply should they register pursuant to the LDA as a result of S. 645, Senator Specter maintains, may deter lobbyists from acting at all, in which case a constitutional question of deprivation of the First Amendment right to lobby may prove to be an issue.[147]

C. Predicted Effectiveness of S. 645

1. Increased transparency of lobbying activity may have advantages and disadvantages

Commentators warn that disclosure laws have "legitimized a form of official corruption—sanitizing activities by publicizing them."[148] Given the lack of an official enforcement mechanism to force compliance with the LDA (which was a result of the McConnell-Levin compromise prior to the Act's passage), such criticism may be valid.[149] However, some may contend that criticism of regulating via forcing public disclosure is overdue, based on the fact that the LDA operates chiefly and solely on public disclosure of lobbying activities.[150] Despite such criticism, Senator Specter maintains that significant advantages would result from forcing public disclosure of lobbying,[151] and his beliefs appear to be shared

146. *Id.* (statement of Sen. Specter) (stating that "[m]y bill requires individuals who urge officials in the White House to grant clemency to register as lobbyists. There is currently no requirement for them to do so").

147. *See id. See also* ACLU v. N.J. Election Law Enforcement Comm'n, 509 F. Supp. 1124, 1128–29 and 1133 (D.N.J. 1981) (stating that statutes that appear to infringe on the right of free speech and on the right to petition the government for the redress of grievances are subject to strict scrutiny, and cautioning that State legislatures must exercise care when implementing the measures that lobbying groups must take in order to disclose, because the filing of extensive paperwork in order to comply with the regulations should not function to deter groups from exercising their First Amendment right to petition the government).

148. Dean, *supra* note 124, at 1, 3.

149. *See id.*

150. *See id.* (stating that public disclosure is counterproductive because "no one really polices the disclosed information" and that "[m]embers of Congress largely ignore the information collected by the Secretary of the Senate and the Clerk of the House," and cautioning that disclosure laws are merely "legitimiz[ing] a form of official corruption"); *see also* MINOR, *supra* note 13, at A-7 (stating that "[i]t is important to note that the [LDA] is a *disclosure* statute only"). *But see* Lobbying Disclosure Act, 2 U.S.C. § 1601 (2000), which, in its findings, noted: "(3) the effective public measure of identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase the public confidence in the integrity of the Government."

151. 148 CONG. REC. S3154 (daily ed. Mar. 29, 2001). Senator Specter, when speaking on the Senate floor, made specific statements in attempt to gain support for the bill, applying the would-be legislation directly to the Marc Rich pardon controversy:

> Without going into the details . . . there were major efforts made to keep this activity under the so-called radar screen so that nobody would know about it. This legislation

across party lines.[152] Immediately following Senator Specter's recitation of the controversies necessitating the bill, Senator Leahy stated that S. 645 would succeed in bringing a heightened "transparency into the clemency process" and would result in a reduction in the "appearance of impropriety that may otherwise attach to a presidential pardon."[153] This desired avoidance of even appearances of impropriety through grants of executive clemency certainly remains an aspiration for everyone involved in legislative and executive functions.[154]

Critics of S. 645 maintain, however, that the findings which motivated the bill's proposal are inadequate, and that more research on lobbying for presidential pardons and donating to presidential libraries should be completed before passing legislation out of frustration that resulted from the Marc Rich pardon controversy.[155] In addition to more research, they indicate that tougher, more intricate legislation may be in order: "We should better understand the activities of pardon lobbying and contributing to presidential libraries themselves, asking if they are infected by quid pro quos and rotten pardons, or whether their salutary purposes are dominant. If there is a true problem, then comprehensive legislation should be drafted."[156]

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would require someone in Jack Quinn's position to register and be known publicly, and then with the kind of public pressure which would be brought, I think it highly likely that a pardon such as that granted to Marc Rich would never have been granted.

Id. Specter also draws attention to the second, subsequent provision of the bill, which would force disclosure of contributions made to Presidential libraries, and states that public disclosure would remedy situations where individuals may make substantial contributions to a President's library foundation with the hope and expectation of subsequently receiving favorable action by the President. *Id.* at S156.

152. *See supra* note 124.

153. 148 CONG. REC. S3157 (daily ed. Mar. 29, 2001).

154. *President Clinton's Eleventh Hour Pardons*, *supra* note 105, at 13 (statement of Sen. Feingold, Member, Senate Comm. on the Judiciary) (stating that allowing a corrupt soft money system that led to the Rich pardon provides "at least an appearance of corruption, and not only of our legislative process, not only at our political conventions, but now in the very heart of our criminal justice system"). *Id.* (opening statement of Sen. Hatch, Chair, Senate Comm. on the Judiciary) (stating that the Senate Judiciary Committee should closely examine the process by which the President may issue a pardon, and stating that "[p]ardons to individuals such as [Marc Rich and Pincus Green], and under these circumstances, raise serious questions in the public's mind about what goes on in the pardon process, how such decisions are made, and who can be held accountable").

155. *See* Dean, *supra* note 124, at 3 (stating that the lobbying activities involved in the scandals that necessitate concern and legislation are far more intricate than Specter's proposed amendment suggests). *See also* Jesse J. Holland, *Enthusiasm Wanes on Capitol Hill for Clinton Pardon Hearings*, ASSOCIATED PRESS, Mar. 6, 2001 (indicating that Republican legislators began to deem congressional hearings as inappropriate: quoting Senator Trent Lott (R-MS) as saying that he is "inclined to move on" after 10-hour hearing in the House Government Reform Committee, and quoting Bush spokesman Ari Fleischer as stating that "[t]he President has spoken and said he is moving forward"), *available at* http://www.nctimes.com/news/2001/20010306/m.html.

156. Dean, *supra* note 124, at 3.

Senators Specter and Leahy, however, maintain that the bill would provide the remedies desired by legislative and executive officials, and continue to shore up support for the admittedly rushed legislation.[157]

2. Changes in jurisprudence that would result from the enactment of S. 645

Although jurisprudence that may result from the passage of S. 645 may be difficult to accurately predict, some indications exist that provide assistance with such a forecast.[158] While the absence of regulation of pardon lobbyists in the LDA is recognized by many,[159] the bill's section that proposes the disclosure of lobbying activities regarding pardons would amend the LDA, and therefore may warrant an inference that this new regulation would be enforced in a way similar to existing provisions of the LDA. Perhaps the task of predicting changes in jurisprudence caused by S. 645, however, remains daunting, despite such an inference, due to the fact that case law interpreting the LDA's existing provisions is quite sparse.[160] Criticism of the LDA's and the proposed legislation's "enforcement" mechanism of public disclosure, therefore, may not be without merit.[161]

Perhaps a more precise parallel for predicting the bill's enforcement in courts was drawn by S. 645's sponsor, Senator Specter, between the second provision of S. 645, which addresses contributions to presidential libraries,[162] and the judicial enforcement of the regulation of campaign

157. *See* 148 CONG. REC. S3154–57 (daily ed. Mar. 29, 2001) (statement of Sen. Leahy, Member, Senate Comm. on the Judiciary) (stating that the bill would implement a satisfactory amount of transparency in the clemency process via public disclosure so as to reduce any appearances of indiscretion that may otherwise arise in executive grants of clemency).

158. *See generally supra* Part I.D, Interpretation of the Lobbying Disclosure Act of 1995.

159. *See generally* 148 CONG. REC. S3154–57 (daily ed. Mar. 29, 2001) (statements of Senators Specter and Leahy); Dean, *supra* note 124, at 3 (recognizing that there are no registration requirements for lobbyists who seek to obtain executive grants of clemency); *Loopholes for Lobbyists*, *supra* note 65 (pointing out general loopholes in the LDA).

160. *See generally supra* Part I.D, Interpretation of the Lobbying Disclosure Act of 1995.

161. *See supra* note 143.

162. S. 645, 107th Cong. (2001). Text of the relevant section indicates that the legislation would add the following to an existing statute:

> (9) If the reporting individual is the President and is currently serving as the President, the identity of the source, a brief description, and the value of all gifts, pledges, or commitments of a gift aggregating $5000 or more for the establishment of a Presidential library for that President after his or her term has expired received from any source other than a relative of the President during the preceding calendar year. Information required to be reported under this paragraph shall be made publicly available in accordance with this Act.

S. 645, 107th Cong. § 2 (2001).

contributions,[163] which have also been the subject of heightened scrutiny and resulting legislative proposals.[164] Such a seemingly strong comparison is useful when seeking to predict resulting jurisprudence, but other provisions within the bill that are centered on the specification involving contributions to presidential libraries may cause increased difficulty in this regard.[165] Although the section appears to have been drafted with much clarity,[166] provisions that allow for the exclusion of family members from the necessary registration for library contributions[167] may cause confusion and perhaps mixed jurisprudence.[168]

Moreover, examples of the exact measures of compliance that the lawmakers seek via submission of a standard set of forms to comply with

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163. 148 CONG. REC. S3154 (daily ed. Mar. 29, 2001). Senator Specter drew a comparison in his initial introduction of S. 645 between contributions to presidential library foundations, which the bill seeks to regulate, and contributions to presidential campaigns:

> A pledge to contribute money to a Presidential library has a great many of the same characteristics as a campaign contribution. The question is raised about whether or not there is favoritism or influence sought from that kind of a monetary contribution. By having the public disclosure, then it would be within public view.

Id.

164. Public outcry calling for increased regulations for campaign contributions resulted in the enactment of the Bipartisan Campaign Reform Act of 2001 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (March 27, 2002), which contains extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* Senator John McCain (R-AZ), a principal sponsor of the legislation, stated in a press release that the legislation, which bans political party, corporate and labor-funded soft money campaign ads, is certainly a necessity, given "the record-breaking pace of soft money spending in the current election cycle." *Campaign Reform Sponsors Condemn Record Breaking Soft Money Spending: Sponsors Demonstrate Positive Affect [sic] New Law Will Have on Soft Money Ads* (Sept. 26, 2002), *available at* http://mccain.senate.gov/cfrissueadspc.htm). According to reports, Republicans had reported raising $181.8 million in soft money during the first 18 months of the 2002 election cycle, which is a 40 percent increase over the $130 million raised by the Republicans during the same period in the 2000 presidential cycle. *Id.* Democrats reported raising $126.4 million in soft money during the same period in the 2002 election cycle, which is an increase of $2 million over the $124.2 million raised during the election period of 2000. *Id.*

165. Section 2 of the bill, entitled "Amendment to the Ethics in Government Act of 1978," provides seemingly loose requirements for disclosing contributions made to Presidential libraries. S. 645, 107th Cong. § 2 (2001). For example, the bill provides that "the identity of the [contributing] source, a brief description, and the value of all gifts, pledges, or commitments of a gift aggregating $5,000 or more" should be disclosed. *Id.* The "brief description" requirement may be lacking in requisite specificity that bills warrant. In addition, the bill makes an exception for relatives of the President who contribute, yet it does not attempt to define "relative," to clarify if the exclusion can apply to only blood relatives, or relatives by marriage or adoption or the like. *Id.* Perhaps the strongest indication that bills must be carefully drafted so as to provide appropriate direction to courts was seen in the response shown by the *Harriss* case to the poor drafting of the 1946 Act. *See supra* note 30 and accompanying text.

166. *See generally supra* note 165.

167. *See supra* note 165.

168. *Id.*

the amendments[169] may be helpful when the amendment requires "the identity of the source, a brief description, and the value of all gifts, pledges or commitments of a gift . . ."[170] to be publicly disclosed to officials.[171] Such prospective allowance for variation with compliance with S. 645 (and House versions of the bill, H.R. 5131 and H.R. 577) may result in variation with courts' enforcement of the bill.[172]

Although methods of compliance may vary due to statutory language, the proposed measures would likely result in the overall effect of forcing public disclosure via registration requirements and disclosures to the government from overall increased paperwork of lobbying for presidential pardons and contributions to presidential libraries.[173] The bills may result in discouraging the pardons of fugitives comparable to Marc Rich, preventing them from enjoying presidential pardons as a result of lobbying efforts,[174] although such a prediction is arguable due to the enforcement mechanism of mere public disclosure.[175]

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169. The Lobbying Disclosure Act of 1995 instigated enforcement via a Lobbying Registration Form (Form LD-1) and Lobbying Report Form (Form LD-2), both of which are accompanied by instructions regarding application, logistics for completing, and review of the forms, as well as penalties for non-compliance with the LDA, which provide for a civil fine of not more than $50,000. *See* MINOR, *supra* note 13, at B-501, B-601 (Worksheets 5 and 6, Forms LD-1 and LD-2). Such forms that ask specific questions as a way of ensuring compliance are perhaps the most unambiguous method of compliance. *See id.* Further interpretation of the statutory requirements for such new legislation can also take the form of memoranda issued by overseeing officials. Specifically, the Lobbying Disclosure Act Guidance Memorandum, which was issued jointly by the Clerk of the House of Representatives and the Secretary of the Senate in July 1998, provides clarifications and overall interpretation of the Lobbying Disclosure Act of 1995, 2 U.S.C. § 1605, as well as the Technical Amendments Act of 1998, via realistic examples and questions and answers that organizations may face when seeking to comply with this legislation. *See* MINOR, *supra* note 13, at B-401 (Worksheet 4, Lobbying Disclosure Act Guidance Memorandum Issued Jointly by the Clerk of the House of Representatives and the Secretary of the Secretary of the Senate).

170. S. 645, 107th Cong. § 2 (2001).

171. *Id.*

172. See generally United States v. Harriss, 347 U.S. 612, 625 (1954), where the Court rewrote the 1946 Act to require certain disclosures, and read other provisions out of the Act, all due to poor legislative drafting. *Id.* at 633 (JACKSON, J., dissenting).

173. Registering as a lobbyist subjects the registrant to the lobbying requirements and provisions in the Lobbying Disclosure Act of 1995, 2 U.S.C. 1601 (2000), and the registrant must then complete official, lengthy forms to verify his or her compliance with such self-disclosure. *See supra* note 169.

174. 148 CONG. REC. S3154 (daily ed. Mar. 29, 2001) (including statements of Senator Specter indicating that executive grants of clemency to fugitives may substantially subside with the enactment of S. 645).

175. *See supra* note 148 and accompanying text.

III. SENATE BILL S. 645 WOULD ENHANCE THE LOBBYING DISCLOSURE ACT OF 1995

In spite of criticism that S. 645 was hastily drafted absent sufficient legislative research and analysis,[176] as well as critics' overall disillusionment with enforcement of the regulations via public disclosure,[177] the proposed legislation would likely achieve the objective of preventing pardons of fugitives like Marc Rich.[178] The legislative history of the proposed amendments recognizes that the power of lawmakers to affect the granting of clemency to individuals is constitutionally limited,[179] and given such limitations, the amendments propose changes that are certainly as strong as possible regarding the prevention of pardon controversies similar to the Marc Rich scandal in the future.[180]

While S. 645 will certainly strengthen the LDA and the Ethics in Government Act of 1978 in the aforementioned two aspects, and therefore will likely achieve its purpose of preventing seemingly undeserved pardons that result from lobbying of the President and handsomely contributing to presidential libraries,[181] the proposed legislation's effectiveness may be limited to such prevention mechanisms.[182] Although compliance with the Lobbying Disclosure Act appeared to be immediately successful following the passage of the Act,[183] it cannot be denied that the LDA's effectiveness relies mostly on

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176. Dean, *supra* note 124, at 3 (stating that Senator Specter's motives for seeking to enact S. 645 are political and merely the result of public outrage, and have been hastily instigated: "Senator Specter is doing what lawmakers typically do. It is standard congressional practice to propose a new law after an untoward event . . . Senator Specter's quick fix efforts, while well-intentioned, do not really do the job").

177. *See supra* note 148.

178. *See supra* note 174.

179. 148 CONG. REC. S3154 (daily ed. Mar. 29, 2001). Senator Specter expressly stated that S. 645 does not address the executive power guaranteed by the Constitution to grant clemency. *Id.* Specter recognized that "any changes in that power would require a constitutional amendment." *Id.* Likewise, Senator Leahy (D-VT) stated in a February 14, 2001 hearing before the Senate Judiciary Committee that executive grants of clemency are absolute, and the absolute nature of this power remains the same across party lines: "[The presidential pardon power] is absolute for Republican Presidents. It is absolute for Democratic Presidents . . . President Carter used the power more than 560 times, President Reagan pardoned more than 400 times, President Bush more than 75 times." *President Clinton's Eleventh Hour Pardons*, *supra* note 105, at 4.

180. *See supra* note 174.

181. *See supra* note 174.

182. 148 CONG. REC. S3154 (daily ed. Mar. 29, 2001), in which Senator Specter carefully uses the word "prevent" in his statements on the Senate floor, and, therefore, warrants an inference that public disclosure will serve as a prevention mechanism for grants of executive clemency. However, the bill does not attempt to require punitive actions against presidential pardons that have been granted as a result of lobbying in retrospect: it would rely solely on public disclosure causing the culmination of prevention of the pardons. *Id.*

183. *See generally supra* Part I.C, Compliance with the Lobbying Disclosure Act of 1995.

self-policing, mostly due to constitutional restraints on substantive restrictions.[184] While such self-policing may prove to be worthy of critics' discomfort regarding lobbying regulations, S. 645, H.R. 5131, and H.R. 577 would, at the very least, strengthen the measures that currently exist in the LDA.

IV. CONCLUSION

While criticism of the proposed amendments may be warranted with regard to some aspects and predictions of the legislation,[185] the amendments would strengthen existing lobbying laws and likely result in fewer pardons similar to the Marc Rich pardon. The Lobbying Disclosure Act, however, remains riddled with gaps in coverage and will likely always face the problem of the Act's degree of effectiveness due to the Act's lack of a method of enforcement. Overall, perhaps the strongest hope for future enforcement of lobbying regulations and the would-be amendments remains in the jurisprudence that may result from the legislation. If S. 645 and the legislative commentary and history surrounding the bill instigates hard-lined jurisprudence with regard to the enforcement of lobbying regulations, the legislation would likely be very successful in achieving its objectives, as would-be violators would be deterred from not complying with S. 645 and lobbying regulations in general if they knew that the stiffest possible penalties would result. Critics should not underestimate the effect of hard-lined jurisprudence, which is certainly the strongest hope in providing prevention of seemingly corrupt executive grants of clemency.

184. *See supra* notes 143 and 147.

185. Public disclosure can never insure against public outrage and resulting compliance. *See supra* note 143. Likewise, prevention, absent retroactive penalties, may not be as effective in eliminating activities altogether. *See supra* note 182.