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## THE REGULATION OF GRASSROOTS LOBBYING

By William R. Maurer\*

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President Obama's domestic policies have generated opposition among many in the general public and mobilized previously uninvolved citizens. This opposition has manifested itself in public rallies, "tea party" protests, and spirited feedback at town hall meetings. Supporters of the president's policies have accused those participating of being part of a larger, organized conspiracy or, at the very least, pawns of the healthcare industry, insurance companies, the Republican and Libertarian parties, and K Street lobbyists.<sup>1</sup> Even White House Press Secretary Robert Gibbs alleged that the protests were the result of "groups . . . that have bragged about organizing and manufacturing that anger" who have been "busing people in and planting people at these rallies."<sup>2</sup>

In a bit of irony, these protests against an expanding and unrestrained federal government have resulted in calls for the federal government to regulate and restrict that political activity. The fact that these protests were not regulated by the government disturbed many, particularly those seeking ever-greater restrictions on the participation in and financing of political campaigns. Those seeking increased regulation and restriction of political speech pointed out that organizing efforts to have citizens contact their elected officials is an area where citizens may participate in the political process without having to register and report to the government (at least at the federal level). One prominent leader of the pro-regulation movement noted, "We're hearing about it with the health care debate. We're going to see it with the climate warming debate. We're going to see it with the financial services reform debate. The problem is, we don't know what's going on because there's no mandatory disclosure."<sup>3</sup> As a result, many are calling for federal regulation of what is sometimes called "grassroots lobbying," or more derisively, "Astroturf lobbying."<sup>4</sup>

The effort to regulate and restrict citizen-to-citizen political communication is not new, but the tea party activities have revived calls for an expansion of the federal regulatory apparatus into political activity at the very heart of the First Amendment. In 2007, the U.S. Senate considered adding grassroots lobbying registration to existing federal lobbyist disclosure requirements.<sup>5</sup> The provision was heavily promoted by organizations traditionally backing campaign finance restrictions, who urged its passage as a means to "increase transparency and provide a more accurate record of paid lobbying actions in Congress."<sup>6</sup> Conservative groups and the American Civil Liberties Union successfully persuaded Congress that such a measure would be unconstitutional, and the Senate dropped the provision from the final bill. With the rise in citizen opposition to the President's agenda, it is likely that some version of the 2007 regulation will be introduced in the near future. This effort, critics say, represents a direct challenge to the ability of ordinary citizens to participate in the governmental process and will leave the political process in the

hands of only those organizations with the resources to comply with the complicated and sweeping regulatory requirements some seek to impose.

### What Do Grassroots Lobbying Laws Look Like?

Although the federal government does not regulate grassroots lobbying, numerous states do, with varying levels of intrusiveness. For instance, Washington, a state with one of the most expansive laws, regulates the "grassroots lobbying" activities of any person who has spent more than \$1,000 in the aggregate in any three months or \$500 in any one month "in presenting a program addressed to the public, a substantial portion of which is intended, designed, or calculated primarily to influence legislation."<sup>7</sup> "Legislation" is defined in the law to cover "bills, resolutions, motions, amendments, nominations, and other matters pending or proposed in either house of the state legislature," and the term "includes any other matter that may be the subject of action by either house or any committee of the legislature and all bills and resolutions that . . . are pending approval by the governor."<sup>8</sup> Within 30 days of becoming a sponsor of a so-called grassroots lobbying campaign—what many Americans would consider a fundamental aspect of citizenship in a representative form of government—the sponsor of the effort must register with the government.<sup>9</sup> The registration statement must include the sponsor's name, address, business, and occupation, or, if the sponsor is an organization, the names, addresses, and titles of the "controlling persons" of the organization.<sup>10</sup> The registration statement also must include the names, addresses, and businesses or occupations of all persons organizing or managing the "grassroots lobbying" effort, along with the names and addresses of each person contributing \$25 or more to the effort and the aggregate amount of their contributions.<sup>11</sup>

In addition, a person or group classified as a grassroots lobbying sponsor has to reveal the purpose of their efforts, including the specific policy about which they are concerned, and the totals of all expenditures made by the campaign, divided into advertising (segregated by media and sometimes by outlet), contributions, entertainment, office expenses (including rent), salaries and wages, consultants, and printing and mailing services.<sup>12</sup> Once the government has collected this mass of information, the citizen activist is still not done; the government also requires the person who has engaged in such activities to file monthly reports of activities and update the information contained in the registration statement.<sup>13</sup>

States such as West Virginia,<sup>14</sup> Oregon,<sup>15</sup> and California<sup>16</sup> have laws similar to Washington's and directly regulate "grassroots lobbying" or the solicitation of others to contact state officials. Other states, such as Florida<sup>17</sup> and New York,<sup>18</sup> regulate attempts to "influence legislation," a more amorphous term that provides even less guidance than explicit grassroots lobbying laws but nonetheless appears to encompass grassroots activism within the scope of the regulations. In all, over thirty states regulate, in one form or another, citizen-to-citizen contact to urge political change.

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\* William R. Maurer is an attorney with the Institute for Justice.



Internet made accessing databases of political activity easily available to anyone with access to a computer. In 1954, the cost of accessing information on political activity was relatively high. Now, the Internet has allowed the government to create government-run databases of political activity that can be accessed with just a few keystrokes. Twenty-first century technology has made *Harris* a vestigial organ of a pre-digital age when accessing the information in the government's possession was difficult, time-consuming, and expensive, and any current grassroots lobbying law must be considered in light of the ease with which public information can be used to harass, coerce, and threaten. In that regard, the United States Supreme Court will soon consider the constitutionality of releasing the names of individuals who signed a petition to place a referendum on the ballot to repeal Washington's "everything but marriage" domestic partnership law in light of evidence that release would result in coercion or a backlash.<sup>31</sup>

### Conclusion

Congress has concluded that it cannot constitutionally reach and regulate citizen-to-citizen communications urging political change, and there is no reason for Congress to heed pro-regulation calls to revisit this question. Federal courts now have the opportunity to recognize that the law, technology, and the ability of political opponents and government officials to access information about the political activity of ordinary citizens has changed dramatically since 1954, and to hold that, under current interpretations and any plain meaning of the First Amendment, the regulation of citizen-to-citizen political advocacy is unconstitutional.

### Endnotes

- 1 See, e.g., Glenn Thrush, *Doggett Calls Protestors a 'Mob,'* POLITICO, Aug. 3, 2009, [http://www.politico.com/blogs/glenthrush/0809/Doggett\\_calls\\_protestors\\_a\\_mob.html](http://www.politico.com/blogs/glenthrush/0809/Doggett_calls_protestors_a_mob.html) (Representative Lloyd Doggett, a former Texas Supreme Court justice, stated: "This mob, sent by local Republican and Libertarian parties, did not just come to be heard, but to deny others the right to be heard. And this appears to be part of a coordinated, nationwide effort."); Lee Fang, *Durbin Responds To Lobbyist-Run Efforts To Harass Town Halls: We 'Won't Fall For A Sucker-Punch Like This,'* THINK PROGRESS, Aug. 3, 2009, <http://thinkprogress.org/2009/08/03/durbin-townhalls-gone-wild/> (Democratic Senator Richard Durbin stated: "These health insurance companies and people like them are trying to load these town halls for visual impact on television.").
- 2 David Jackson, *Obama White House Decries 'Astro-Turf' Lobbying Against Health Care,* USA TODAY, Aug. 4, 2009, <http://content.usatoday.com/communities/theoval/post/2009/08/68496154/1>.
- 3 Eliza Newlin Carney, *A Grassroots Cautionary Tale: Bonner & Assoc.,* NAT'L JOURNAL'S UNDER INFLUENCE, Oct. 19, 2009, <http://undertheinfluence.nationaljournal.com/2009/10/a-grassroots-cautionary-tale-b.php> (quoting Craig Holman, legislative representative for Public Citizen).
- 4 Jim Snyder, *Town Halls Underscore Grassroots Secrecy, Critics Say,* THE HILL, August 10, 2009, available at <http://thehill.com/business--lobby/town-halls-underscore-secrecy-of-grassroots-critics-say-2009-08-10.html> (quoting Public Citizen's Craig Holman, regarding the town hall meetings: "We don't know who is behind it or who pays for it. We don't know how much of it is happening.").
- 5 S. 1, 110th Cong. § 220 (2007).
- 6 Campaign Legal Center, *Legal Center Sends Senators Memo on Astroturf Lobbying,* <http://www.campaignlegalcenter.org/press-2342.html> (posted

- Jan. 10, 2007). Other organizations supporting the measure were Common Cause, Democracy 21, League of Women Voters, Public Citizen, and OMB Watch.
- 7 WASH. REV. CODE § 42.17.200(1). The triggers for reporting were initially \$500 in any three month period or \$200 in one month period. However, the legislature has since required the PDC to modify these amounts based on inflation. WASH. REV. CODE § 42.17.370(11).
- 8 WASH. REV. CODE § 42.17.020(30) (emphasis added).
- 9 WASH. REV. CODE § 42.17.200(2).
- 10 WASH. REV. CODE § 42.17.200(2)(a).
- 11 WASH. REV. CODE § 42.17.200(2)(b) & (c).
- 12 WASH. REV. CODE § 42.17.200(d) & (e).
- 13 WASH. REV. CODE § 42.17.200(3).
- 14 W. VA. CODE § 6B-3-5(1).
- 15 ORS § 171.725(8).
- 16 MD. STATE GOV'T CODE § 15-701(a)(5).
- 17 FLA. STAT. § 11.045(2).
- 18 NY CLS LEGIS § 1-c(c).
- 19 U.S. v. Cruikshank, 92 U.S. 542, 553 (1875); see also *United Mine Workers v. Ill. St. Bar Ass'n*, 389 U.S. 217, 222 (1967) ("We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of liberties safeguarded by the Bill of Rights.").
- 20 *United Mine Workers*, 389 U.S. at 222.
- 21 U.S. v. *Harris*, 347 U.S. 612, 615 (1954).
- 22 *Id.* at 626.
- 23 *Id.* at 620.
- 24 *Id.* (emphasis added). The Court referenced at this point the Senate's Report on the Lobbying Act, which stated that it intended to cover "[t]hose who do not visit the Capitol but initiate propaganda from all over the country in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts." *Harris*, 347 U.S. at 621 n.10. It is remarkable how similar this language is to members of the current Congress's discussions of the Tea Party protesters.
- 25 See, e.g., *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 6 (D.C. Cir. 2009) (upholding a lobbying law because "nothing has transpired in the last half century to suggest that the national interest in public disclosure of lobbying information is any less vital than it was when the Supreme Court first considered the issue").
- 26 See *Fla. Ass'n of Prof'l Lobbyists, Inc. v. Div. of Legislative Info. Servs.*, 525 F.3d 1073, 1080 (11th Cir. 2008) (relying on *Harris* and holding that Florida's grassroots lobbying law was constitutional because of the legislature's compelling interest in "self-protection" from the people it purports to represent); *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 461 (11th Cir. 1996) (relying on *Harris* and noting that "the government interest in providing the means to evaluate these pressures may in some ways be stronger when the pressures are indirect, because then they are harder to identify without the aid of disclosure requirements"); *Minn. State Ethical Practice Bd. v. Nat'l Rifle Ass'n*, 761 F.2d 509, 513 (8th Cir. 1985) (relying on *Harris* and upholding Minnesota's grassroots lobbying law, which required disclosure of association communications, because "[w]hen persons engage in an extensive letter-writing campaign for the purpose of influencing specific legislation, the State's interest is the same whether or not those persons are members of an association"); *Comm'n on Ind. Colls. & Univs. v. N.Y. Temp. State Comm'n on Regulation of Lobbying*, 534 F. Supp. 489, 498 (N.D.N.Y. 1982) (applying *Harris*'s "self-censorship" rationale); *Kimball v. Hooper*, 665 A.2d 44, 48 (Vt. 1995) (applying *Harris* and concluding that "[p]roperly evaluating the governmental process . . . implicates indirect as well as direct communication and activities needed to get the message across"); *Advisory Opinion on the Constitutionality of 1975 PA 227, 242 N.W.2d 3, 23 (Mich. 1976)* (applying *Harris* and noting that "[b]oth the electorate and public officials have a right to be informed of those interests represented by lobbyists").

27 See, e.g., *Smith v. California*, 361 U.S. 147, 154 (1959) (striking down a state law making booksellers strictly liable for the sale of obscene material in their store; the Court stated that booksellers’ “self-censorship” would affect the whole public and impede the distribution of all books). See also *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (holding that a truth defense for libel actions against public officials did not save the constitutionality of such actions because a rule requiring a critic to guarantee the factual accuracy of all his statements would lead to “self-censorship”).

28 *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

29 See DICK CARPENTER, INSTITUTE FOR JUSTICE, *DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM* (2007), available at [http://www.ij.org/index.php?option=com\\_content&task=view&id=1624&Itemid=165](http://www.ij.org/index.php?option=com_content&task=view&id=1624&Itemid=165); JEFFREY MILYO, INSTITUTE FOR JUSTICE, *CAMPAIGN FINANCE RED TAPE: STRANGLING FREE SPEECH & POLITICAL DEBATE* (2007), available at [www.ij.org/index.php?option=com\\_content&task=view&id=1527&Itemid=194](http://www.ij.org/index.php?option=com_content&task=view&id=1527&Itemid=194). Dick Carpenter is also the Director of Strategic Research at the Institute for Justice, the firm at which the author works.

30 See *Protect Marriage Wash. v. Reed*, No. 09-5456BHS (W.D. Wash. July 29, 2009) (granting temporary restraining order against disclosure of individuals’ identities who support ban on gay marriage); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009) (documenting the retaliation faced by supporters of California’s recent Proposition 8: one donor had a window broken; another had a flier distributed around his hometown calling him a bigot; and others received envelopes containing suspicious white powder); John R. Lott, Jr. & Bradley Smith, *Donor Disclosure Has Its Downsides: Supporters of California’s Prop. 8 Have Faced a Backlash*, *WALL ST. J.*, Dec. 26, 2008; Amy Bounds, *Gay Rights Advocates Picket Boulder Cineplex*, *ROCKY MOUNTAIN NEWS*, Nov. 30, 2008 (business picketed and boycotted based on CEO’s personal donation); Associated Press, *John Kerry Grills Belgium Ambassador Nominee over Swift Boat Donation*, Feb. 28, 2007 (“A Senate hearing that began with glowing tributes to a St. Louis businessman and his qualifications to become ambassador to Belgium turned bitterly divisive Tuesday after he was criticized for supporting a controversial conservative group.”).

31 *John Doe #1 v. Reed*, 2010 U.S. LEXIS 536 (U.S., Jan. 15, 2010); see also *Citizens United v. FEC*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 876, 175 L. Ed. 2d 753, 801 (2010) (upholding disclosure provisions applying to independent expenditures made by corporations because the plaintiffs “offered no evidence that its members may face . . . threats or reprisals”).

