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# Tweets, Lobbying, and Loopholes: A Pragmatic Approach to Lobbying Reform

## What Comes Next?

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by Jackson Rubinowitz

On May 30, 2019, an unlikely agreement between Rep. Alexandria Ocasio-Cortez and Sen. Ted Cruz appeared to take place on Twitter. Ocasio-Cortez tweeted that members of Congress should be banned from becoming corporate lobbyists or should at least be subjected to a waiting period following their congressional service. Ocasio-Cortez cited a statistic from Public Citizen, in which the advocacy group reported that among former Congress members who move to jobs outside of politics, nearly 60% start lobbying or otherwise influencing federal policy. After Cruz weighed in expressing his agreement with Ocasio-Cortez's proposal, Ocasio-Cortez proposed a deal to co-lead a bill with Cruz. Cruz's response? "You're on."

### *Why is lobbying regulation necessary?*

The issue that caused this unlikely Twitter alliance, in a nutshell, is Washington's revolving door, where former members of Congress leave office and accept jobs lobbying the federal government on behalf of corporations. The potential conflict is that lawmakers' future employment prospects could influence policy decisions. Whether or not Ocasio-Cortez or Cruz will actually follow up with actual legislation remains to be seen, but even if they do, it is not entirely clear that a lifetime ban on lobbying would solve the problem. Moreover, such a ban could even exacerbate existing issues. If Ocasio-Cortez and Cruz truly want to address the problematic and corrupt role that lobbying can play in the federal government, they should propose legislation that focuses on transparency and public disclosure.

### *What are the current laws that regulate lobbying?*

This would not be the first time Republicans and Democrats cooperated to pass lobbying reforms. In 2007, Democratic Majority Leader Harry Reid introduced a bill to reform lobbying disclosures and restrictions. A surprising cosponsor of the bill was then Senate Minority Leader Mitch McConnell. The bill was largely a response to a 2005 corruption scandal involving Jack Abramoff, a high-powered lobbyist who spoiled government officials with golf trips and sushi dinners in order to influence policy. The proposed bill attempted to strengthen the Lobbying Disclosure Act of 1995 (LDA), but by the time President Bush signed it, it had been reduced to a half-hearted attempt to follow through on a promise to voters and left gaping holes in the regulations.

### *What are the loopholes that make the current laws ineffective?*

A key issue with the 2007 law, titled the Honest Leadership and Open Government Act (HLOGA), is that it combines more stringent reporting standards than the LDA with a looser definition of who is subject to the regulations. The HLOGA requires more frequent reporting of lobbying activity (quarterly as opposed to semiannual), more financial disclosures, more disclosure requirements about specific clients and projects, and online publication of disclosures in an accessible and comprehensible form. However, a major loophole still exists that allows those engaging in lobbying work to avoid registering as "lobbyists," thereby evading disclosure requirements. The loophole has been dubbed the "Daschle Loophole" after former Senator Tom Daschle's efforts to avoid registering as a lobbyist despite performing extensive "strategic advisory" work for clients in order to influence lawmaking.<sup>1</sup> Daschle worked for high profile lobbying firms for the better part of a decade before opening his own shop, The Daschle Group, and finally registering as a lobbyist in 2016.<sup>2</sup> Daschle was able to avoid registration because the definition of "lobbying" under the 1995 LDA requires direct contact with more than one public official and because registration is only required when one spends more than 20% of work for an individual client on lobbying activities. It is incredibly easy for "advisors" to pass off lobbying work to colleagues once they approach the 20% mark, and direct contact with officials is far from necessary in order to influence policy through personal relationships. Such efforts to influence policy without formal lobbying have been dubbed "shadow lobbying." Another common strategy aside from passing

<sup>1</sup> Isaac Arnsdorf, *The Lobbying Reform that Enriched Congress*, Politico, July 3, 2016, <https://www.politico.com/story/2016/06/the-lobbying-reform-that-enriched-congress-224849>

<sup>2</sup> Louis Serino, *After Years of Lobbying, Tom Daschle Finally Registers as a Lobbyist*, Sunlight Found. (Mar. 30, 2016), <https://sunlightfoundation.com/2016/03/30/after-years-of-lobbying-tom-daschle-finally-registers-as-a-lobbyist/>

around work to avoid the 20% threshold is to simply run a lobbying firm without performing lobbying work personally. For example, former Secretary of Energy Spencer Abraham runs a global energy consulting firm that occasionally performs lobbying work for individual clients. While the firm does register that work, Abraham himself has never registered as a lobbyist. This means the precise nature of the lobbying work his firm performs, as well as which clients may have relied on Abraham's connections, is unclear.<sup>3</sup> These are just two high profile examples among many. Statistics on lobbying disclosures, although open to interpretation, indicate a high probability that the HLOGA resulted in a trend of lobbyists moving into the shadows. [The Center for Responsive Politics](#) reported a steady increase in the number of registered lobbyists from 10,418 in 1998 to a peak of 14,824 in 2007, followed by a consistent year-over-year decline thereafter, reaching a low of 10,331 in 2019.<sup>4</sup> Closing the Daschle Loophole was a key initiative for proponents of the 2007 HLOGA, but it was swiftly eliminated from the bill during drafting negotiations. After all, lawmakers hardly have an incentive to close a loophole which predominately benefits their future-selves.

### *What is the practical effect of these loopholes?*

With such massive loopholes, any proposed legislation by Ocasio-Cortez and Cruz to impose a lobbying ban on former legislators has the potential to incentivize more shadow lobbying. As it stands, former senators and congressional representatives are prohibited from lobbying after leaving office for two years and one year respectively. Former Rep. Steve Southerland (R- Fla.), in an [interview](#) with Politico, explained that he took a job at a lobbying firm just five months after leaving office in 2014. Prompted to comment on the one-year ban on lobbying, he explained, "I never went away, I just went invisible, and probably became more effective."<sup>5</sup> A permanent lobbying ban would likely incentivize former officials to "go invisible" on a permanent basis. Thus, for any ban to actually work, a prerequisite reform is to close these loopholes and broaden the scope of disclosure and registration to encompass a wider range of policy influencing activity.

### *How are lobbying disclosures enforced?*

Yet another hurdle to overcome in reforming lobbying is that, as it stands, there is no effective enforcement mechanism to ensure honest and accurate reporting. In negotiations for both the LDA and HLOGA, proposals to create an independent enforcement office were vehemently rejected. This means that disclosure of lobbying work is largely self-regulated, relying on lobbyists' own evaluation of their work.<sup>6</sup> Combine this with the narrow definition of work that qualifies as "lobbying," and it is nearly impossible to find violations for failing to disclose lobbying work. No one has ever been charged with lobbying without registering as of December 2018.<sup>7</sup> If an "advisor" claims that 19%, as opposed to 20%, of work was lobbying based, how can that be verified without an impartial investigation? While the Comptroller General of the United States must audit registered lobbyists through random sampling, no one is monitoring those individuals and firms who have not registered.<sup>8</sup> As a result, there have been successful charges against lobbyists for failing to file reports in a timely and accurate manner, but not against unregistered political influencers for performing lobbying activities without registering as lobbyists.<sup>9</sup>

### *What has to happen for a lobbying "ban" to work? Is a lobbying ban even necessary?*

For any extension of the lobbying ban for former members of Congress to be effective, these loopholes must first be closed so as to prevent "shadow lobbying," an independent enforcement office must be established in order to ensure truthful and complete disclosure of lobbying work, and the definitional scope of lobbying work should be expanded to include all lobbying activities, even those that do not involve direct contact with government officials. These reforms would tremendously increase the transparency and public visibility of the lobbying industry, thereby limiting the extent to which government officials can be influenced by future employment prospects. An extension of the period during which former public officials are barred from lobbying, currently two years for Senators and one year for Representatives, is unlikely to carry many benefits, and a lifetime

<sup>3</sup> Paul Blumenthal, *Lobbying Disclosure Threshold Helps the Most Wealthy, Most Powerful Dodge and Deal*, Sunlight Found. (Jan. 18, 2011), <https://sunlightfoundation.com/2011/01/18/lobbying-disclosure-threshold-helps-the-most-wealthy-most-powerful-dodge-and-deal/>

<sup>4</sup> Center for Responsive Politics (June 17, 2019), <https://www.opensecrets.org/lobby/>

<sup>5</sup> Isaac Arnsdorf, *The Lobbying Reform that Enriched Congress*, Politico, July 3, 2016, <https://www.politico.com/story/2016/06/the-lobbying-reform-that-enriched-congress-224849>

<sup>6</sup> *Id.*

<sup>7</sup> William H. Minor, *Political Activity, Lobbying Laws and Gift Rules Guide* §1:15 (3d ed. 2018)

<sup>8</sup> 2 U.S.C.A §1614

<sup>9</sup> *Id.*

ban is almost certainly superfluous. Moreover, such strict bans are incredibly unlikely to survive congressional scrutiny. Former members of Congress, especially former House representatives, rely on private sector employment for financial stability after leaving moderately paid government jobs. One can imagine that they will not be eager to pass a law that would have the potential to take money out of their own pockets. A proposal to extend the lobbying ban for ex-House members from one year to two was vehemently rejected during house negotiations for the HLOGA. A permanent ban is even less likely. These challenges notwithstanding, an Ocasio-Cortez-Cruz coalition could use the threat of a lifetime lobbying ban as leverage to pass the aforementioned reforms, which could be a positive step towards a reduction in financially motivated policy making.

### *What comes next?*

In sum, the prospect of a bipartisan agreement to reform lobbying regulations is quite encouraging. Yet the focus must remain on solving the most pervasive issue with the lobbying industry – a lack of transparency regarding who is lobbying for whom. A lifetime ban on lobbying work would be an effort to entirely eradicate the risk of government officials being motivated by future employment prospects. While this is a laudable goal, it is also a quixotic one. The paramount objective of lobbying reform should instead be to close existing loopholes and to establish a legitimate enforcement mechanism.