ESSAY

WHAT ARE LOBBYISTS SAYING ON CAPITOL HILL? CLIMATE CHANGE LEGISLATION AS A CASE STUDY FOR REFORM

BY

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The Lobbying Disclosure Act (LDA) fails to create a forum for honest debate on Capitol Hill. This Essay presents an empirical study of the lobbying positions taken by ten large companies with a direct stake in climate change legislation by Congress. The author finds tremendous variability in the amount that each company voluntarily chooses to reveal about its positions on nine key issues under active debate. Since the LDA does not require firms to report their positions on pending legislation, the result is a serious gap in public accountability. To close this gap, there is a need to reform the LDA to require "truth in lobbying."

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I. INTRODUCTION

"The public has a right to know, and the public should know, who is being paid to lobby, how much they are being paid, on what issue."[1] Senator Levin (D.-Mich.) was speaking in support of the Lobby Disclosure Act (LDA), a bill that passed through Congress without opposition on December 19, 1995.[2] But he was exaggerating. The LDA fails to require lobbyists to report the positions they are taking on bills considered by Congress. You cannot find out what lobbyists are saying about an issue by consulting LDA reports. Instead, one must engage in extensive independent work analyzing a host of outside sources to find out where a company stands. This Essay makes that effort and shows the positions of key industry lobbyists on a single issue: climate change. After a great deal of sleuthing, some interesting patterns were uncovered—but these only reveal the tip of the iceberg. There can be no substitute for a reform of the LDA that requires lobbyists to reveal the public policy positions of the firms employing them. Congress is presently considering LDA reform, but lobbyist positioning is not in the mix.[3] This Essay argues that it ought to be. We should not allow the Jack Abramoff scandals to cloud our vision, and instead we should use this window to make a significant move in the direction of a more democratic and transparent lobbying process.

Why are lobbyist positions important when so many other factors influence policymaking on Capitol Hill? There are two reasons. First, shining a light on the positions of lobbyists will permit responsible and intelligent policymaking. Lobby disclosure reforms will withstand the test of time only if the law reflects an in-depth understanding of the behavior of industries and interest groups. Relying on voluntary disclosure is not enough. This Essay argues that one can craft a suitable reporting requirement that will make a real difference. Second, the public will become distrustful if a firm's public pronouncements on an issue appear to diverge sharply from its lobbyists' positions on Capitol Hill. Lobbyist positions are therefore important in order to further effective discourse and increased trust in American democracy.

This Essay's argument proceeds in two stages. First, it will show that the current system of voluntary disclosure fails to fulfill either the goal of informed legislation on Capitol Hill or the need to inform the general public about the real-world policy positions of leading industries. The case study involves the public positions on climate change policy taken by major greenhouse gas emitters in the United States.[4] The author systematically

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1 141 CONG. REC. S105102, S105103 (1995) (statement of Sen. Levin (D-Mich.)).

2 Pub. L. No. 104-05, § 2, 109 Stat. 691 (1995) (codified at 2 U.S.C. § 1601 (2000)).

3 Lobbying Transparency and Accountability Act of 2006, S. 2349, 109th Cong. (2d Sess. 2006); Lobbying Accountability and Transparency Act of 2006, H.R. 4975, 109th Cong. (2d Sess. 2006).

4 The companies are similar to those used by the Investor Responsibility Research Center (IRRC) for the nonprofit group Ceres on corporate governance and climate change (the exception is Progress Energy instead of TXU Corp). The IRRC/Ceres report analyzed the top greenhouse gas emitters in the United States. *See* Douglas Cogan, CORPORATE GOVERNANCE AND

investigated publicly available literature published by each firm, sent out questionnaires, and personally met with lobbyists. This multi-pronged approach permitted a much better understanding of most firms' political positions, but some companies were more secretive than others. Because the LDA does not require political positions to be reported, the companies and their lobbyists were within their rights to disclose information selectively, or not at all.

The second part of this Essay makes the case for reform. The proposal builds on the existing structure of the LDA. The statute already requires lobbyists to list the bills and issue areas that concern each of their clients.[5] This Essay proposes that lobbyists also be required to report their position on each bill. All lobbyist positioning could be recorded in real time through the worldwide web, allowing others to engage in a running commentary on the quality of the information provided by the lobbyists (who can, of course, revise their reports as their positions change).

II. THE POLITICAL SAGA

To begin, consider the political saga surrounding climate change legislation proposed over the past few years. Act One begins with a Senate floor discussion of the Climate Stewardship Act of 2003[6] sponsored by Senators John McCain (R-Ariz.) and Joseph Lieberman (D-Conn.). A debate ensued between Lieberman and Senator George Voinovich (R-Ohio) over the position of an electric utility company named Cinergy.[7] Voinovich, who opposed the bill, asserted that Lieberman had gone over the line in suggesting that Cinergy supported the Climate Stewardship Act. Lieberman quickly backtracked, giving Voinovich an edge in the debate. In reality, Cinergy had not actively opposed the proposal, taking a neutral stance, neither supporting nor rejecting the initiative. But, after the confusion on the floor, Cinergy issued a statement opposing the bill.[8] McCain-Lieberman

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CLIMATE CHANGE: MAKING THE CONNECTION, A CERES SUSTAINABLE GOVERNANCE PROJECT REPORT 1 (June 2003), *available at* http://www.ceres.org/pub/docs/Ceres_corp_gov_and_climate_change_0703.pdf (reporting on how 20 of the world's largest corporate emitters factor climate change into their business).

5 2 U.S.C. § 1603 (2000).

6 Climate Stewardship Act of 2003, S. 319, 108th Cong. (1st Sess. 2003).

7 149 CONG. REC. S13484, S13487 (2003) (statement of Sen. Lieberman (D.-Conn.)). After Voinovich said Cinergy did not support the bill, Senator Lieberman had to backtrack a little:

> Secondly, there has been some reference to Cinergy and American Electric Power. I want to make clear, I did not say—I certainly did not intend to say; I do not believe I did say—that those companies endorsed our proposal. But the fact is, Cinergy did testify that they could live by the amendment without additional cost. And that is the relevant part of it.

Id. at S13496. Senator Voinovich replied: "I make it clear for the record that ADP and [Ci]nergy . . . are both opposed to S.139." *Id.* at S13491.

8 Letter from Chris Hessler, Lobbyist for Cinergy, AJW Group, to the U.S. Senate (Oct. 29, 2003) (on file with author). The letter says, "While Cinergy has adopted an internal voluntary greenhouse gas reduction program, it does not support passage of S. 139, the McCain-Lieberman Climate Stewardship Act of 2003. Cinergy opposes the imposition of mandatory

failed by a vote of fifty-five to forty-three on October 30, 2003, the day after Cinergy issued its statement.[9] Cinergy was hardly the only factor in accounting for this defeat, but the company's timing made Lieberman look unreliable at a moment when he wanted to show command over the situation.

Act Two involves the oil giant British Petroleum (BP) and its position on Senator Jeff Bingaman's (D-N.M.) Climate and Economy Insurance Act of 2005, which would have imposed mandatory emission reductions on greenhouse gases.[10] The Bingaman bill started to gain traction when Senator Pete Domenici (R-N.M.) showed interest in supporting it. Bingaman was ready to offer his proposal as an amendment to Energy Bill H.R. 6, and it may have moved forward with the support of Senator Domenici.[11] At the same time, Senator Chuck Hagel (R-Neb.) proposed an amendment emphasizing technological solutions without mandatory emissions reductions.[12] At this critical moment BP intervened. BP was previously silent but now supported Hagel over Bingaman. Soon thereafter Senator Domenici withdrew his support, and Bingaman retreated, offering instead the "Sense of the Senate" Resolution on climate change, which does not have the force of law.[13] Lobbyists supporting the Bingaman bill felt blindsided by BP, which usually gains a great deal of publicity as a "green" company, proudly waving its "Beyond Petroleum" logo.[14] But when push came to shove, BP rejected mandatory cutbacks on emissions. Without a mandatory disclosure system, BP lobbyists had reason to suppose that this momentary strategic maneuver would soon be forgotten amidst its continued publicity campaign on behalf of green issues.

These two cases show how the legislative process can be affected and distorted when lobbyists do not proactively outline their firms' positions. Cinergy's silence permitted Lieberman to assume its support—blindsiding him at the eleventh hour when the company came out with a position that suggested that the Senator had been guilty of negligent misrepresentation.

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greenhouse gas emission limits and opposes passage of this bill." *Id.*

9 U.S. Sen. Roll Call Votes 108th Cong.—1st Session, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00420 (last visited Jan. 28, 2007).

10 Climate and Economy Insurance Act of 2005, S. Amendment 868 to H.R. 6, 109th Cong. (1st Sess. 2005); *see also* THE NAT'L COMM'N ON ENERGY POLICY, ENDING THE ENERGY STALEMATE: A BIPARTISAN STRATEGY TO MEET AMERICA'S ENERGY CHALLENGES at iv–v (2004) (listing the key recommendations on which the Bingaman legislation is based).

11 Chris Baltimore, *No Climate Change in Energy Bill – Domenici*, REUTERS, June 21, 2005, http://www.commondreams.org/headlines05/0621-04.htm (last visited Jan. 28, 2007); Jim Snyder, *Business Groups Target Climate Measure*, THE HILL, June 21, 2005, http://thehill.com/thehill/export/TheHill/Business/062105_climate.html (last visited Jan. 29, 2007).

12 S. Amendment 817 to H.R. 6, 109th Cong. (1st Sess. 2005). This was passed into law through the Energy Policy Act of 2005, Pub. L. No. 109-58 §§ 1610 (b),(c),(e),(f), (1), 1611(a), 119 Stat. 594 (codified in scattered sections of 42 U.S.C.).

13 S. Amendment 866 to H.R. 6, 109th Cong. § 1612 (1st Sess. 2005).

14 Seb Beloe, Jules Peck & Jodie Thorpe, *Influencing Power: Reviewing the Conduct and Content of Corporate Lobbying* (2005), *available at* http://www.sustainability.com/insight/scalingup-article.asp?id=317.

Similarly, BP's generally pro-green position allowed others to assume that it would support strong measures, once again leading the company to blindside the people campaigning for mandatory emissions reductions. Cinergy apparently has learned the costs of these last minute maneuverings. Cinergy now stands out as a company that specifically references its position on climate change legislation proposed in Congress, suggesting that the firm itself did not enjoy finding itself in the middle of a politically sensitive muddle in 2003.[15] BP representatives also explain that supporting Hagel does not limit its support for additional measures in the future.[16] If both of these companies had been clearer about their positions earlier in the process, such political misunderstandings may not have occurred at all.

These stories also illustrate how the general public can sometimes be misinformed about companies' lobbying positions on critical bills. Both Cinergy and BP have public projects aimed at voluntarily curbing emissions in their own plants—they discuss these projects publicly as a way of showing the company's green credentials.[17] Despite this, both companies were part of political maneuverings against mandatory greenhouse gas controls on a federal level. Right now it takes open debate on the floor, as in Cinergy's case, or drastic political maneuverings, as in BP's case, to have such issues become public. Asking a person with a busy life to go through the tremendous amount of sleuthing needed to find out the detailed and nuanced positions of other more secretive stakeholders is unrealistic—a standard reporting mechanism is therefore needed.

III. AVAILABLE INFORMATION

Senators Bingaman, Lieberman, and Voinovich should not be blamed for their lack of information about lobbyists' positions. It is quite difficult to uncover the relevant information, and even more difficult to learn the positions held by all firms in a single industry, let alone survey patterns of support and opposition of all relevant stakeholders. But without such

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15 Cinergy was recently taken over by Duke Energy. *See* Cinergy Is Now Duke Energy, http://www.cinergy.com/ (last visited Jan. 28, 2007) (linking directly to Duke Energy's home page and explaining that Cinergy is now Duke Energy). Duke Energy, however, continues to display the key document that reveals its political position, showing its continued support for transparency. *See* Duke Energy, Duke Energy Position on U.S. Climate Change Policy, http://www. duke-energy.com/environment/climate_change/position/ (last visited Jan. 28, 2007) (describing type of policy favored by Duke Energy).

16 Interview with Ralph Moran, BP Environment, in Washington, D.C. (Nov. 8, 2005).

17 A look at the companies' websites illustrates their determination to be sensitive to global warming. For example, BP's website has many references to global warming. Its advertisement focused on global warming is an example of these efforts. It's Time to Turn up the Heat on Global Warming, http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/A/Advertising_Global_turn_up_the_heat.pdf (2005) (last visited Jan. 28, 2007) (advertising the company's efforts to address global warming). Before it became Duke Energy in 2006, Cinergy's website linked to its 2004 Annual Report which focused on climate change issues. CINERGY CORP., GLOBAL WARMING: CAN WE FIND COMMON GROUND? 3–31 (2004), *available at* http://www.duke-energy.com/investors/publications/annual/ar_2004/downloads/04AR01_Complete.pdf (including forward by CEO James Rogers).

information, decision makers are dependent on meetings with lobbyists, which may in fact be unrepresentative of the positions taken by the larger group of stakeholders. As a result, politicians do not get the full flavor of the positions of all lobbyists and stakeholders. The public is also left in the dark about whether a stakeholder's public statements on an issue translate directly to what the firm's lobbyist talks about in Washington, D.C..

The author attempted to find out what critical players in the climate change debate were saying about proposed legislation. The author performed the review between June and November of 2005 in which she reviewed public documents from 2001 to 2005. Because very few lobbyists directly revealed their clients' position on legislation, she created an "information matrix" based on public documents produced by each company and its leading officers. The author selected nine issue areas and reported company positions in the appropriate box in the matrix. If the company said nothing about an issue the corresponding box was left blank. Key issues included the method of measuring emissions reductions, whether emissions reductions should be mandatory, and how to allocate pollution credits among companies. Following is a full list of issue areas:

1. Does your firm favor mandatory controls on greenhouse gas (GHG) emissions?
2. Does your firm favor mandatory reporting?
3. What type of implementation program does your firm favor—a cap and trade system, a carbon tax, or a technology-based solution?
4. Should GHG targets be set in absolute terms or relative to output?
5. What specific gases should be regulated?
6. Should a law focus mainly on the electric power industry?
7. How should pollution credits be allocated?
8. Are offsets important? (Offsets give firms credit for promoting GHG reductions by other means, for example, by planting trees).
9. Should credit be given for voluntary actions taken before a law is passed?

This review allowed the author to learn a good deal about company positions as well as to detect larger patterns.[18] As Table 1 shows, Cinergy was the most transparent of the firms in the ten company sample—clearly defining positions on five out of the nine issues.[19] Progress Energy,

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[18] Every mark in the "information matrix" contained in Table 1 corresponds directly to a specific quote and citation. Citations and quotations are on file with author and available upon request.

[19] Cinergy's AIR ISSUES REPORT TO STAKEHOLDERS included an entire chapter on legislative issues, including climate change. KEVIN LEAHY ET AL., AIR ISSUES REPORT TO STAKEHOLDERS 15 (2004), *available at* http://www.cinergy.com/pdfs/AIRS_12012004_final.pdf (outlining corporate history of advocacy and lobbying for corporate position). James Rogers, CEO of Cinergy, also made a number of statements to Congress on these issues. *E.g.*, *Clean Air Act Oversight Issues: Hearing Before the Subcomm. on Clean Air, Wetlands, Private Property, and Nuclear Safety of the S. Comm. on Environment and Public Works*, 107th Cong. 344–46 (2001) (statement of James Rogers, CEO and President, Cinergy Corp.) (suggesting that policymakers view climate issue as risk mitigation); *Clean Air Act: Incentive-Based Utility Emissions Reductions: Hearing Before the Subcomm. on Clean Air, Wetlands, Private Property, and Nuclear Safety of the S.*

ConocoPhillips, and ExxonMobil were the least transparent, with clear positions on only two out of the nine issues.[20]

Table 1. Publicly available information about the nine issue areas

Company Name	1	2	3	4	5	6	7	8	9	Topics Discussed	Total Clarity	Clarity Rank
Cinergy +	↔		√	√		√	√	√		6	5	1
BP Plc ~	↔		√	√				√	√	5	4	2 (tie)
Southern Company +	√		√	√				√		4	4	2 (tie)
American Elec. Power +	↔			↔		√		√		5	3	3 (tie)
Chevron +	↔		√	√				√		4	3	3 (tie)
Royal Dutch Shell -			√	√				√		3	3	3 (tie)
Xcel Energy ~	↔		↔	√				√	√	5	3	3 (tie)
ConocoPhillips -			√					√		2	2	4 (tie)
ExxonMobil -	↔		√	↔		√				4	2	4 (tie)
Progress Energy ~				√				√		2	2	4 (tie)

√ clear opinion discussed in publicly available literature
↔ discussed the topic in publicly available literature but not a clear opinion
\+ filled out questionnaire and met with author
\- did not answer questionnaire or meet with author
~ met with author and did not answer the questionnaire

When the author traveled to Washington D.C. in November 2005, eight of the company lobbyists agreed to meet with her. These representatives were generous with their time and quite forthcoming on company positions. Four of the lobbyists also answered a questionnaire that probed further. Of importance, however, was the fact that some interview information was provided on a promise of confidentiality. There were a variety of reasons expressed for secrecy. Most significantly, the lobbyists wanted to maintain leverage in future congressional negotiations. Some were also concerned that the firm would look bad if the lobbyist's legislative positions contradicted the company's public persona.

Despite the many issues that remain unknown, Table 1 does show that a person can find out general trends by asking the right political questions. The matrix shows that all ten companies believe a key to the climate change debate is the availability of cost-effective ways to reduce emissions through new technologies, such as sequestering carbon underground, creating zero

Comm. on Environment and Public Works, 106th Cong. 17–21 (2000) (statement of James Rogers, CEO and President, Cinergy Corp.) (stating that Congress should adopt a simpler program setting emission reduction targets). The most important public statements by Cinergy were issued after the 2003 debacle on the Senate floor. *See supra*, notes 6–9 and accompanying text.

[20] Progress Energy released a full scale environmental assessment in March of 2006. These disclosures have not been incorporated into this matrix to maintain a level playing field with other companies who also may have issued statements about climate change after research was complete.

emission automobiles, or moving to low emission power production. They are all concerned about how legislation that might require emissions reductions will affect their business. They worry that low-cost technologies will not be available in time to meet emissions targets without substantial cost.[21] Beyond these points of agreement, the companies' positions diverge in consequential ways.

Broadly speaking, the firms fall into two different camps. The "voluntarist" group includes Chevron, ConocoPhillips, ExxonMobil, Progress Energy, and Southern Company. All focus on voluntary mechanisms to reduce emissions and on subsidies for cost effective low emission technologies. Southern Company and ExxonMobil also imply that the developing world must accept part of the pollution reduction burden before any action by Congress to order domestic polluters to cut back[22] and is not likely to support legislation that includes mandatory emissions reductions.

This is not true of companies in the second camp, which includes American Electric Power (AEP), Xcel Energy, Cinergy, Royal Dutch Shell, and BP. This "regulatory group" leaves open the possibility of supporting a program that includes emissions reductions with cap-and-trade style mandates.[23] Although some are concerned about regulating emissions in other parts of the world, Cinergy and BP show a willingness to support U.S. legislation, regardless of what happens elsewhere.[24] Xcel Energy would

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[21] All companies surveyed, except one, said something about the need for low emissions technologies. *See also* Dan Vergano, *The Debate's Over: Globe Is Warming*, USA TODAY, June 13, 2005, *available at* http://www.usatoday.com/news/world/2005-06-12-global-warming-cover_x.htm (while most agree global warming is happening, disagreement exists about what to do about it); Margaret Kriz, *Heating up*, NAT'L J. 2504–08 (2005) (discussing growing political and corporate recognition of the need for clean energy development).

[22] *Cf.* Information available at Southern Company's web site, http://www.southerncompany.com/planetpower/ (Jan. 28, 2007); Lee Raymond, Chairman & Chief Executive Officer, Exxon Mobile Corp., Facing Some Hard Truths About Energy (June 7, 2004) (transcript available on ExxonMobil web site), http://www.exxonmobil.com/Corporate/Newsroom/SpchsIntvws/Corp_NR_SpchIntrvw_LRR_070604.asp (last visited Jan. 28, 2007) (contrasting developed countries' market risk under Kyoto with the lack of reductions obligations for developing countries).

[23] AEP actually straddles both camps. It is similar to those in the first camp by hinging its support of legislation on whether other countries, like China and India, are also decreasing emissions. AEP's answers to the questionnaire suggest an interest in negotiating a climate change package now, which could include some type of emission reduction strategy. AEP also wrote an analysis which directly referenced legislation, although it focused on the economic and not political issues connected with the proposals. *See* DONALD CARLTON ET AL., AM. ELEC. POWER, AN ASSESSMENT OF AEP'S ACTIONS TO MITIGATE THE ECONOMIC IMPACTS OF EMISSIONS POLICIES 4 (2004), *available at* http://www.aep.com/environmental/reports/shareholderreport/docs/FullReport.pdf.

[24] *See* Lord Browne, Group Chief Executive, British Petroleum, Speech at Windsor: Business and the Environment (Feb. 10, 2005) (transcript available on BP web site), http://www.bp.com/genericarticle.do?categoryId=98&contentId=7004472 (last visited Jan. 28, 2007) (asserting BP's commitment towards environment improvements and environment problems); *Business Actions Reducing Greenhouse Gas Emissions: Hearing Before the H. Comm. on Science*, 109th Cong. 17 (2005) (written statement of James Rogers, Chairman, Chief Executive Officer and President, Cinergy Corp.) (urging the United States legislature to find a way to reduce emissions and provide the investment to ensure that the technology is available

support legislation if it gives flexibility to the states to implement emissions reduction goals.[25] The firms in the regulatory group want to be active participants in the negotiations as long as a program treats their own industry fairly—they are willing to think about climate change packages that include mandatory emissions reductions.

With the exception of AEP, firms in the regulatory group have voluntary internal emissions reductions goals. BP, Royal Dutch Shell, and Cinergy aim for an absolute reduction in their emissions over time. Cinergy has a "commitment to reduce our GHG [greenhouse gas] emissions during the period from 2010 through 2012 by five percent below [their] 2000 level, maintaining those levels through 2012."[26] Xcel Energy has an emission intensity reduction goal. This means that depending on voluntary general statements about issues will not always directly translate into a clear political position decipherable by policymakers and the public at large.

To make the next big step, it is not enough to follow up on the author's study by attempting a broader, ongoing investigation of the public positions announced voluntarily by the major players. Rather, reform of the LDA is necessary.

IV. THE SHAPE OF REFORM

Recent reform efforts by Congress focus exclusively on the abuses of Jack Abramoff and his coconspirators.[27] Abramoff extravagantly funded electoral campaigns, trips, and extra perks to buy votes, [28] and a variety of steps have been proposed to control these practices. None of them, however, gets at what lobbyists are actually saying to elected officials on Capitol Hill.

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to meet the necessary reductions); *To Receive Testimony to Consider the Science of Global Climate Change and Issues Related to Reducing Net Greenhouse Gas Emissions, 2001: Hearing Before the S. Comm. on Environment and Public Works*, 107th Cong. 461 (2001) (statement of James Rogers, Chairman, President, and Chief Executive Officer, Cinergy Corp.) ("Congress has a unique opportunity to make a difference in our nation's long-term air quality and to take affirmative action toward establishing a workable global climate policy. Cinergy stands ready to do what we can to help.").

25 *To Receive Testimony on Harmonizing the Clean Air Act With Our Nation's Energy Policy: Hearing Before the Subcomm. on Clean Air, Wetlands, Private Property, and Nuclear Safety of the S. Comm. on Environment and Public Works*, 107th Cong. 85 (2001) (statement of Olon Plunk, Vice President for Environmental Services, Excel Energy); *see also Power Generation Resource Incentives & Diversity Standards: Hearing Before the S. Comm. on Energy and Natural Resources*, 109th Cong. 11 (2005) (statement of Wayne Brunetti, Chairman, Chief Executive Officer, Xcel Energy) ("[W]e strongly believe that any federal program should defer to existing state programs.).

26 CINERGY CORP., *supra* note 17, at 52.

27 *See* Legislative Transparency and Accountability Act of 2006, S. 2349, 109th Cong. (2006) (prohibiting or regulating, along with other reforms, travel and gifts paid for by lobbyists and lobbying by former congressional members); Lobbying Accountability and Transparency Act of 2006, H.R. 4975, 109th Cong. (2006) (same).

28 Susan Schmidt & James V. Grimaldi, *Abramoff Pleads Guilty to 3 Counts*, WASH. POST, Jan. 4, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/01/03/AR2006010300474.html.

The voluntary report provided by Cinergy is a model for the kind of reporting that can and should be required by a reformed LDA. Cinergy is an electric utility company located in Ohio and it merged with Duke Energy in 2006.[29] Like many companies that emit greenhouse gases, it has a public campaign aimed at reducing those emissions over the next century.[30] It is also typical of many companies because it has a lobbying presence in Washington, D.C. to promote its interests.[31] In its *Air Issues Report to Stakeholders*, Cinergy includes explanations of its lobbying position on climate change bills proposed in Congress.[32] Cinergy's method could be required of all stakeholders. Through a reformed LDA, modeled on Cinergy-style transparency, public reporting of political positions could become commonplace.

Although Cinergy provides lengthy descriptions of its positions on pending legislation, a specific description length should not be mandatory. The LDA should give each company discretion to decide how much detail it wants to provide. For example, because Southern Company opposes all climate change proposals that include mandatory emissions reductions, its report would not need to be very nuanced or detailed. The main issue is clarity. The average person should be able to read the description and gain a clear sense of the position taken by each firm's lobbyist on each pending bill. The LDA already recognizes this point. In listing their activities, lobbyists must explicitly report the issue and bill number that are the focus of their efforts.[33] The author's proposal simply builds on this requirement.

Many of the lobbyists interviewed in Washington, D.C., emphasized the need for selective secrecy about their positions if they hoped to be able to bargain effectively. It is obviously sometimes advantageous for a lobbyist to withhold an endorsement of a bill while working behind the scenes to

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[29] Press Release, Duke Energy, Duke Energy, Cinergy Complete Merger (Apr. 3, 2006), *available at* http://www.duke-energy.com/news/releases/2006/apr/2006040301.asp.

[30] *See* CINERGY CORP., *supra* note 17, at 1–13 (describing steps Cinergy is taking to reduce its greenhouse gas emissions).

[31] For example, between January 1, 2001, and December 31, 2004, Cinergy reported, as required by the LDA, approximately 4 million dollars in lobbying expenses. *See* Office of Public Records, Lobby Filing Disclosure Program, http://sopr.senate.gov/cgi-win/m_opr_viewer.exe ?DoFn=3&iREG=CINERGY%20CORP&iREGQUAL== (last visited Jan. 28, 2007). The average spent between 2000 and 2004 by the largest firms in the United States was $10.2 million. Manuel Samoza, Masters Candidate at the Yale School of Forestry and Environmental Studies, reviewed all data for the top 100 firms listed by Fortune Magazine and cross referenced those companies against the amount of money they spent as reported through the LDA. The LDA information is available at sopr.senate.gov (last visited Jan. 28, 2007). Manuel Samoza, Grayson Walker, and Kaitlin Gregg, masters students at Yale School of Forestry and Environmental Studies, also reviewed lobby data for the 10 firms reviewed as part of this paper. Information was crosschecked with the lobby information available at the Center for Public Integrity web site. Center for Public Integrity, http://www.publicintegrity.org/lobby/ (last visited Dec. 15, 2005). The top 100 firms are from Fortune Magazine's top 500. *See Largest U.S. Corporations*, FORTUNE, Apr. 18, 2005, at F-1.

[32] LEAHY ET AL., *supra* note 19, at 16–17.

[33] 2 U.S.C. § 1604(b)(2)(A) (2000); *see also* U.S. SENATE, LOBBYING DISCLOSURE ACT GUIDANCE, http://www.senate.gov/legislative/common/briefing/lobby_disc_briefing.htm#6 (last visited Jan. 28, 2007) (describing the function of LDA reports).

influence its content. To accommodate this point, the LDA should offer the lobbyist a chance to report a "neutral" stance on a bill. This allows lobbyists flexibility to negotiate agreements without revealing their position too early in the process. Once the ambiguities and timing issues are rectified, however, the lobbyist should then change his or her position to "support" or "oppose," thereby informing the general public, stakeholders, and politicians when the time is right.

Timing of reports is also important. The LDA presently requires reports only twice a year,[34] but such time lags are plainly unacceptable for these purposes. Instead, the lobbyist should be required to report his or her position on the internet in real time. Any changes can also be updated within a relatively short time—such as seven days.

The result will be a new type of "information matrix" that gives both insiders and outsiders a chance to monitor Capitol Hill positioning on any bill of interest. If reported promptly, this allows others to write and comment on the lobbyist's positions. An accompanying blog can allow for ongoing commentary about the positions reported through the LDA. This will allow for up-to-the-minute discussions about critical pieces of legislation. This information, and associated commentary, will be available for every person, Congress member, and stakeholder to see and evaluate. There will continue to be one-on-one meetings between lobbyists and members of Congress, but the debate itself and particular positions on individual bills will be understood more broadly by Congress and the public at large.

The reporting requirement will only be meaningful, however, if the LDA imposes sanctions on any lobbyist who ignores the provisions.[35] The sanctions will encourage each lobbyist to report truthfully. Currently, the LDA penalizes violators only through a civil fine.[36] For the purposes of publicizing lobbyists' positions, more should be done to discourage noncompliance. The Secretary of the Senate and the Clerk of the House of Representatives, who are in charge of the reporting process, should publicly list the names of lobbyists who fail to report their positions on bills. This information can then easily be reviewed.

All this may seem desirable, but is it constitutional under the First Amendment? *United States v. Harriss*[37] is on point. The Supreme Court upheld the constitutionality of the Lobbying Regulation Act (LRA) of 1946,[38] a predecessor of the current LDA.[39] In contrast to the present statute, the

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34 2 U.S.C. § 1604(a) (2000).

35 *See Senate Overwhelmingly Approves Lobby Reform; House to Take up 527s*, THE WATCHER (OMB Watch), Apr. 4, 2006, at 9, *available at* http://www.ombwatch.org/article/articleview/3357/1/436 (reporting criticism of the current LDA's enforcement measures).

36 2 U.S.C. § 1606 (2000).

37 347 U.S. 612 (1954).

38 Regulation of Lobbying Act, ch. 753, 60 Stat. 839, 839–42 (1946) (current version at 2 U.S.C. §§ 1601–12 (2000)).

39 *Harriss*, 347 U.S. at 624–25; Regulation of Lobbying Act, ch. 753, 60 Stat. 839, 839–42 (1946) (current version at 2 U.S.C. §§ 1601–12 (2000)).

LRA contained an explicit statement about lobbyist positioning on bills.[40] Chief Justice Warren upheld the LRA against First Amendment attack:

> [T]he 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. This is the evil which the Lobbying Act was designed to help prevent . . . it, is not constitutionally forbidden to require the disclosure of lobbying activities.[41]

The principle of stare decisis thus places a heavy burden of persuasion on critics who would contest the constitutionality of my proposed reform.

To be sure, there have been First Amendment decisions since *Harriss* that protect the right to anonymity when disclosure threatened to chill the freedoms of especially vulnerable groups. In *McIntyre v. Ohio Elections Commission*,[42] the Court struck down a fine levied upon the publication of an anonymous leaflet protesting a tax.[43] But the Court emphasized that there was reason to believe that the pamphleteer would speak *only* if she were anonymous.[44] This is not true of a typical Capitol Hill lobbyist.

To lobbyists, *Buckley v. Valeo*[45] seems to be a more proximate precedent. The case famously upheld the Federal Election Campaign Act[46] despite its requirement that campaign contributors reveal their identity.[47] The contributors in *Buckley* were not considered a vulnerable class of people, and the Court showed no interest in protecting their anonymity.

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> 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 . . . shall . . . file with the Clerk and Secretary a detailed report under oath of . . . what purposes . . . and the proposed legislation he is employed to support or oppose.

Regulation of Lobbying Act, ch. 753, § 308, 60 Stat. 841–42 (1946) (current version at 2 U.S.C. §§ 1601–12 (2000)); *see also* H.R. REP. NO. 104-339, at 2 (1995) ("Lobbyists covered under the 1946 Act are required to disclose . . . the particular legislation they have been hired to support or oppose.").

41 *Harriss*, 347 U.S. at 625.

42 514 U.S. 334 (1995).

43 *Id.* at 357.

44 *Id.* at 342.

45 424 U.S. 1 (1976).

46 Rederal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2 U.S.C. and 26 U.S.C.).

47 *Id.* at 143–44. *Buckley* is interesting because it lays out a three prong test and finds that campaign contributions meet the test:

> First, disclosure provides the electorate with information about where the campaign money comes from. . . . Second, disclosure . . . deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions to the light of publicity . . . . Third . . . recordkeeping, reporting and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

Id. at 66–68.

Rather than violating fundamental rights, the author's proposed reform affirmatively protects basic constitutional interests. The First Amendment gives the general public a right to know,[48] this right is most important when the subject matter of that knowledge is politics. The pivotal concern is whether a citizen has enough information to understand the true nature of the law—to ensure that lawmaking is not done in a dictatorial fashion but rather through a public discourse.[49] The Court emphasized this point in *Red Lion Broadcasting Co. v. Federal Communications Commission*,[50] upholding the constitutionality of the fairness doctrine by requiring broadcasters to provide coverage of opposing political views. The key value was not the broadcaster's right to speak, but the audience's right to information.[51] The Supreme Court made a similar point in *Lamont v. Postmaster General of the United States*.[52] *Lamont* dealt with the Post Office policy of filtering foreign mail and withholding subversive materials.[53] The Court held that this imposed an unconstitutional burden on the addressees' right to know.[54] The author's proposed reform vindicates a similar First Amendment interest. No longer would a member of the general public be required to engage in months of work to gain a partial glimpse of the truth about lobbying in Washington. Instead, he or she could gain a relatively accurate sense of the situation simply by consulting the LDA information on the internet.

V. CONCLUSION

The benefits of disclosure far outweigh the costs of keeping lobbying positions out of the public's eye. Research suggests that the current system of voluntary reporting of a lobbyist's actual position on a bill fails to provide politicians and citizens with the facts they need to make sense of the real world of politics. Statutory reform is necessary to achieve a more open, transparent, and accountable democracy.

None of the LDA reform proposals currently in Congress includes a requirement that lobbyists offer their positions on bills.[55] Because lobbying can be abused and access is sometimes unequal, as the Abramoff scandal shows, it is very important to include such a provision. If Congress chooses not to include positioning in this wave of reforms, hopefully it will consider the idea for the future. If a commission charged with thinking about future lobbying disclosure improvements is created by Congress, it could consider

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48 *See* U.S. CONST. amend. I (establishing freedom of press, speech, and right to assemble and petition).

49 ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 10–11, 24–26 (1948).

50 395 U.S. 367, 391 (1969).

51 *Id.* at 390.

52 381 U.S. 301, 305–07 (1965) (concluding that withholding mail unless actively requested by the addressee was an abridgment of the right to free speech).

53 *Id.* at 302.

54 *Id.* at 305–07.

55 Lobbying Transparency and Accountability Act of 2006, S. 2349, 109th Cong. (2006); Lobbying Accountability and Transparency Act of 2006, H.R. 4975, 109th Cong. (2006).

proposals to more fully disclose lobbying positions.[56] Only by knowing what lobbyists are actually saying will the public and decision makers truly understand how laws are made in this country—and as such the people will be able to effectively influence their outcome accordingly.

[56] Lobbying Transparency and Accountability Act of 2006, S. 2349, 109th Cong. § 263 (2006).