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Grassroots Lobbying: Constitutionality of Disclosure Requirements

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Summary

Certain legislative proposals, such as S. 1, 110th Congress, and H.R. 4682, 109th Congress, seek to extend public reporting requirements for some activities intended to stimulate "grassroots" lobbying. The activities involved in "lobbying," including the stimulation of "grassroots" lobbying, clearly implicate and involve freedoms protected by the First Amendment, including speech, associational rights, and the right to petition the government. The courts have long found, however, that certain burdens on these fundamental rights may be tolerated in a statute when the statute seeks to promote significant governmental and societal interests, when the burdens on such activities are, at the most, indirect (such as in disclosure laws), and when the statute is drawn with enough precision so that a correlation exists between the information required to be disclosed and the achievement of the interests asserted as the law's justification. Under such standards, the courts have upheld against facial First Amendment challenges required *disclosures* and detailed reporting in the areas of lobbying activities and campaign finance regulation to promote the interests of preventing corruption and limiting the undue influences of monied and powerful interests, as well as preventing merely the appearance of such corruption or influence, in basic governmental and democratic processes. The apparent trend in more recent judicial decisions seems to allow the legislatures some leeway in determining which activities are relevant to the goals of preserving the integrity of, for example, their own legislative process, and so to include also in required disclosures some activities that are more on the periphery and not necessarily themselves directly involved in such process, but are intended to result in direct contacts and to significantly influence a legislator.

In both state and federal courts, state provisions that reach "indirect" or "grassroots" lobbying have been upheld against facial constitutional challenges. The courts have noted that the Supreme Court in 1954 expressly upheld required lobbying disclosures relating to "direct" pressures on legislators by lobbying groups themselves, by their hirelings or through their "artificially stimulated letter campaigns." In addition, the courts have seemed to recognize the growth of importance of such "grassroots" lobbying efforts in the legislative process, and the increased need for legislators and others to be able to identify and assess the pressures on legislators being stimulated (and financed) by interest groups by such methods. Under the analysis applied in these cases, it would appear that a federal statute that requires only disclosure and reporting, and does not prohibit any activity, and that reaches only those who are compensated to engage in a certain amount of the covered activity, would appear to fit within those types of provisions that have been upheld in judicial decisions when the statute is drafted in such a manner so as not to include groups, organizations, and other citizens who do no more than advocate, analyze, and discuss public policy issues and legislation. Even with the probability of such a crafted disclosure statute withstanding a facial challenge, the law could still at some point be subject to an "as applied" challenge if a particular group or organization could show a reasonable probability that the disclosures required would result in harassment or reprisals against it or its members or contributors.

Contents

Grassroots Lobbying: Constitutionality of Disclosure Requirements

This report discusses the constitutional issues that may arise with respect to a federal law that would require disclosures of efforts to stimulate so-called "grassroots" lobbying activities by those entities and persons who are compensated to engage in such activities.

Background

Activities which are generally described as efforts to stimulate "grassroots" lobbying (depending on the context of the term and/or the particular bill in question) are communications which are directed at members of the general public, or at more selected persons on mailing lists of organizations or other entities, which take specific positions on legislative matters pending before or public policy issues to be considered by the legislature, and which contain a so-called "call to action," that is, for example, urging the recipients of the communications to contact members of the legislature to favor or oppose legislative action on the issue.[1]

Currently, under federal law (the Lobbying Disclosure Act of 1995 [LDA]), registrations and disclosures by professional lobbyists are triggered and related only to so-called "direct" lobbying contacts with covered Government officials, and those activities which support those direct contacts.[2] The current law's registration and reporting requirements are not separately triggered by "grassroots" lobbying activities. That is, an organization which engages *only* in "grassroots" lobbying, regardless of the extent of such "grassroots" lobbying activities, is not required to register its members, officers or employees who engage in those activities, and a lobbying firm or other outside lobbyist which conducts only "grassroots" lobbying campaigns on behalf of a client, regardless of the amount of compensation from the

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[1] For purposes of the Internal Revenue Code, for example, not all public "advocacy" activities are considered "grassroots lobbying." As noted expressly by the IRS: "... clear advocacy of specific legislation is not grassroots lobbying at all unless it contains an encouragement to action." 26 C.F.R. § 56.4911-2(b)(2). A communication "encourages a recipient to take action" if it (1) states that the recipient should contact legislators; (2) provides a legislator's phone number, address, etc; (3) provides a petition, tear-off postcard, or similar material to send to a legislator; or (4) specifically identifies a legislator who is opposed, in favor, or undecided on the specific legislation, or is on the committee considering the legislation, if the communication itself is "partisan" in nature and can not be characterized as a full and fair exposition of the issue.

[2] 2 U.S.C. § 1603(a), see definitions of terms "lobbying activity" and "lobbying contact" in § 1602(7) and (8) and "lobbyist" in § 1602(10).

client or the amount of grassroots activities engaged in, does not need to register and report such activities or relationships under the LDA.[3]

In current legislative proposals, there are generally two ways in which efforts to stimulate "grassroots" lobbying would come within some coverage of the Lobbying Disclosure Act. In the first instance, only those professional "lobbyists" — who are *now* required to register under the LDA by virtue of their "direct" lobbying contacts — would additionally be made to report and disclose efforts to stimulate "grassroots" lobbying for clients or employers over a certain amount.[4] Secondly, in certain proposals, entities which are compensated over a threshold amount ($25,000 or $50,000 in a calendar quarter, depending on the proposal) to engage in activities to stimulate "grassroots" lobbying to a particular extent on behalf of a client would *separately* "trigger" registration and disclosure of such activities under the amended LDA.[5]

Under either method of coverage, however, an organization which itself engages *only* in efforts to stimulate "grassroots" lobbying on behalf of itself, through its own employees, members, or volunteers, would need *not* register and file disclosure reports if they do not meet the threshold trigger for "direct" lobbying contacts with covered officials. Neither the current Senate bill under consideration, S. 1, 110th Congress, nor the similar House version from the 109th Congress, H.R. 4682, 109th Congress, would change the definition of a "lobbyist" who must register (that is, a "lobbyist" to be covered must still make more than one direct "lobbying contact," which expressly does *not* include solicitations to stimulate grassroots lobbying[6]). The only additional registrants under these types of provisions would be for "grassroots lobbying firms" which, as noted, would cover only those entities compensated by clients to stimulate grassroots lobbying efforts on the client's behalf.

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[3] Once an organization has met the threshold requirements for "direct" lobbying and is registered, certain background activities and efforts "in support of" its direct "lobbying contacts," which may include activities which also support other activities or communications which are *not* lobbying contacts such as, in theory, "grassroots" lobbying efforts, may need to be disclosed generally as "lobbying activities." 2 U.S.C. § 1602(7). *Note* H.R. Rpt. No. 104-339, 104th Cong.,1st Sess., "Lobbying Disclosure Act of 1995," 13-14 (1995). The instructions of the Clerk of the House and Secretary of the Senate also note that "Communications excepted by Section 3(8)(B) will constitute 'lobbying activities' if they are in support of other communications which constitute 'lobbying contacts.'"

[4] See, for example, S. 1, 110th Congress, Section 220(a)(1) and (2), and H.R. 4682, 109th Congress, Section 204(a)(1).

[5] These entities are generally called "grassroots lobbying firms." See, for example, S. 1, 110th Congress, Section 220(b) and (a)(2); and H.R. 4682, 109th Congress, Section 204(b)(4).

[6] 2 U.S.C. § 16012(10), "lobbyist"; 2 U.S.C. § 1602(8), "lobbying contact".

Constitutional Protection of Lobbying and Advocacy Activities

The activities involved in "lobbying," that is, persons individually or in association with one another engaging in, initiating and/or directing advocacy communications to public officials on political, social and economic issues of interest to those individuals and groups, have been found to be intertwined with and implicate several fundamental rights protected by the First Amendment to the United States Constitution.[7] In *Eastern Railroads President Conference v. Noerr Motor Freight, Inc.*, the Supreme Court ruled that because of First Amendment considerations the prohibitions of the Sherman Anti-Trust Act could *not* reach the activities of rival businesses to prohibit them acting in concert to lobby legislatures for favorable transportation legislation. The Court noted that lobbying activities involve the "right of petition [which] is one of the freedoms protected by the Bill of Rights," and could not be restricted by statute without serious First Amendment implications.[8] The Court explained the importance of lobbying activities in our representative form of government:

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.[9]

The activities involved in lobbying, public advocacy and political expression about public policy issues, government and legislation, have been found by the Supreme Court to be among the most important freedoms in preserving an open democracy.[10] The Court has thus noted the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open,"[11] and has in the past explained that "expression on public issues 'has always

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[7] *United States v. Harriss*, 347 U.S. 612 (1954); *United States v. Rumely*, 345 U.S. 41 (1953); *Eastern Railroads President Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961). *See*, generally, discussion in Eastman, *Lobbying: A Constitutionally Protected Right*, American Enterprise Institute for Public Policy Research (1977). The rights asserted have included the freedom of speech, freedom of association and the right to petition the Government. *Note* discussion in Browne, "The Constitutionality of Lobby Reform: Implicating Associational Privacy and the Right to Petition the Government," 4:2 *William & Mary Bill of Rights Journal* 717(1995).

[8] 365 U.S. at 138.

[9] 365 U.S. at 137.

[10] "Discussion of public issues and debate ... are integral to the operation of the system of government established by our constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). As early as 1938 Chief Justice Stone postulated on the possible stricter scrutiny under the First Amendment for "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4.

[11] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964); *Garrison v. State of Louisiana*, (continued...)

rested on the highest rung of the hierarchy of First Amendment values.'"[12] The Supreme Court has therefore found that any regulations imposed by Congress on such lobbying and advocacy activities may not unduly burden the exercise of participants' First Amendment rights.[13]

Even when a federal regulation on public policy advocacy involved merely a *disclosure* and reporting requirement, and not a restriction which directly limits or prohibits advocacy activities, such a regulation underwent a rigorous constitutional scrutiny[14] since, as characterized by the Supreme Court in *Buckley v. Valeo*, the Court has recognized the "deterrent effects on the exercise of First Amendment rights" which may arise "as an unintended but inevitable result of the government's conduct in requiring disclosure."[15] The Supreme Court in *NAACP v. Alabama*[16] overturned a State court contempt citation against the NAACP for that organization's failure to disclose its local membership list. Recognizing that "(e)ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association" and that, based upon the First Amendment rights of freedom of speech, petition and assembly, the Constitution guarantees the "freedom to engage in association for the advancement of beliefs and ideas," the Court noted the "chilling effect" that certain state actions, such as requiring the disclosure of membership lists, may have upon the exercise of those rights.[17]

There has additionally been recognized a constitutional protection for, as well as a longstanding tradition in our country of, *anonymous* political speech and

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[11] (...continued)
379 U.S. 69 (1964).

[12] *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980); *FCC v. League of Women Voters of California*, 468 U.S. 364, 381 (1984).

[13] *United States v. Harriss*, 347 U.S. 612 (1954); *United States v. Rumely*, 345 U.S. 41 (1953); *Eastern Railroads President Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961).

[14] *United States v. Harriss*, 347 U.S. 612 (1954).

[15] 424 U.S. at 65; *United States v. Harriss, supra*; *NAACP v. Button*, 371 U.S. 415 (1963).

[16] 357 U.S. 449 (1958).

[17] The Supreme Court stated:

> Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, any State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. The fact that [the State]...has taken no direct action, (citations omitted) to restrict the right of petitioner's members to associate freely, does not end the inquiry into the effect of the production order. (citations omitted) In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action. 357 U.S. at 460 -461; *see* also *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 544 (1963); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960).

pamphleteering. In *McIntyre v. Ohio Elections Commission*,[18] the Supreme Court overturned a State statute requiring that the author of a pamphlet or political document place his or her name and home address on the document when the material was distributed in relation to an upcoming election/referendum on taxes. The Court found that the purpose of the identification law in Ohio was to prevent "fraud and libel" in campaign literature, and to provide information to the voter, but that requiring the author to put his or her name and address on the literature was inherently chilling, did not provide for most voters generally useful information, and did not sufficiently promote the governmental interests asserted as its justification.[19]

Governmental Interest in Lobbying Disclosures

The Supreme Court has thus recognized the potential threat of the "chilling" of First Amendment rights in disclosure statutes which require identifications of those responsible for issue-oriented advocacy and persuasion concerning public policy and political issues. However, it has been noted as a general principle that although First Amendment rights "are fundamental, they are not in their nature absolute";[20] and the federal courts have increasingly upheld statutory regulation in the area of lobbying and campaign disclosures against facial challenges when, on balance, the governmental interest asserted in the regulation is significant, when possible limitations on First Amendment rights are only indirect (as in disclosure statutes), and where the statute in question is drawn with sufficient precision so as to promote and be relevant to the interests asserted as the statute's justification.

The Government's asserted interests in preserving the integrity of fundamental governmental processes, such as the legislative process, and protecting such proceedings from corruption and undue influences from those who are paid specifically to influence them has been long recognized as a significant, important and compelling governmental interest.[21] These interests of promoting and protecting

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[18] 514 U.S. 334 (1995).

[19] "The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented." 514 U.S. at 357.

[20] *Whitney v. California*, 274 U.S. 357, 373 (1927) [Justice Brandeis concurring]; *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), Justice Douglas delivering opinion of the Court.

[21] As early as 1853 the Supreme Court noted, for example, the problem of rich contingency contracts to lobbyists and refused to enforce any such agreement —

> which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. ... Legislators should act from high consideration of public duty. Public policy and sound morality do therefore imperatively require that courts should put the stamp of disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided.
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> ... Bribes in the shape of high contingent compensation, must necessarily lead to

(continued...)

the integrity of governmental processes from corruption and undue influences, of shedding light on the workings of Government, and in preserving the confidence of the public in the integrity and basic fairness of our democratic institutions are the interests that have informed the decisions permitting, in the field of lobbying regulation (as well as in some areas of campaign finance regulation), required disclosures, reporting, and identifications which, out of the context of professional "lobbying" or campaign finance, might otherwise be problematic from a First Amendment prospective. Thus, the Supreme Court has upheld the constitutionality of contribution limitations and disclosure requirements concerning contributors to and expenditures by political parties, political committees and candidates in *Buckley v. Valeo*, the disclosure requirements of the Federal Regulation of Lobbying Act of 1946 in *United States v. Harriss*, and a range of disclosures, reporting, as well as certain limitations and prohibitions in a broad range of campaign finance activities and issue advocacy in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

In 1954 the Supreme Court upheld the reporting and registration requirements of the Federal Regulation of Lobbying Act of 1946. The Court in *Harriss*, construing narrowly the provisions of the Federal Regulation of Lobbying Act (2 U.S.C. §§261 et seq., 1994 Code ed.) upheld the constitutionality of that Act. As to the governmental interest involved in requiring the reports and disclosure from those who engage in "lobbying," as that term was defined by the Court, the Court stated:

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise 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. This is the evil which the Lobbying Act was designed to help prevent.
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> Toward that end, Congress has not sought to prohibit these pressures. It has 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. It wants only to know who is being hired, who is putting up the money, and how much. It acted in the same spirit and for a similar purpose in passing the Federal Corrupt Practices Act — to maintain the integrity of a basic governmental process. See *Burroughs and Cannon v. United States*, 290 U.S. 534, 545.
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> Under these circumstances, we believe that Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to

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[21] (...continued)

> the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are "proper means"; and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or "careless" members in favor of his bill.

Marshall v. Baltimore & Ohio R.R., 57 U.S. (16 How.) 314, 333-334 (1853).

> require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection. And here Congress has used that power in a manner restricted to its appropriate end. We conclude that [the registration and reporting sections of the Act], as applied to persons defined in §307 [those covered by the Act], do not offend the First Amendment.[22]

The Supreme Court in *Buckley* and in *McConnell*, looking at "campaign finance" regulations, recognized not only the significant governmental interest of assuring purity in elections, but also ultimately, the interest in mitigating the potential affect and undue influence of monied interests on the legislative process. The Court in *Buckley*, finding that disclosure requirements generally "appear to be the least restrictive means of curbing the evils" of unwarranted influence and corruption concerning basic governmental processes,[23] noted that governmental interests such as these may "outweigh" the possible chilling effect of disclosure statutes on First Amendment rights:

> The strict test established by *Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. But we have acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the "free functioning of our national institutions" is involved.[24]

The prevention of both *actual* undue influence, and the *appearance* of the undue influence of large, monied interests on the legislative process was sufficient for the Supreme Court in *McConnell v. FEC* to justify not only "disclosures," but also contribution limitations and prohibitions, as well as certain expenditure regulations in the context of campaigns to federal office and the relationship between a candidate/officeholder and those persons who are involved in the election process by spending or contributing large sums of money:

> Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing "undue influence on an officeholder's judgment, and the appearances of such influences.[25]

With respect to contribution limitations, the Court reiterated its position: "Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits."[26]

In addition to the general federal lobbying disclosure laws, there is currently a federal law in force that is commonly known as "FARA," the Foreign Agents Registration Act. Similar to the general federal lobbying law, this law, rather than

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[22] 347 U.S. at 625-626.

[23] 424 U.S. at 68.

[24] 424 U.S. at 66, citing *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961).

[25] 540 U.S. at 150, citing *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 441 (2001).

[26] 540 U.S. at 143.

prohibiting lobbying, or information or propaganda campaigns for or on behalf of foreign interests, instead requires registrations and disclosures by agents of foreign interests who engage in political or propaganda activities in the United States on behalf of such foreign interests, and also requires labeling of certain material distributed in the United States on behalf of those foreign principals.[27] FARA has been upheld against constitutional challenges based on First Amendment freedoms because the courts found that the law does not *prohibit* speech or expression, but rather merely requires *information* from those engaging in such activities on behalf of foreign interests. In *United States v. Peace Information Center*,[28] the federal district court noted specifically that the law "neither limits nor interferes with freedom of speech," nor does it "regulate expression of ideas" or "preclude the making of any utterances"; rather, the court found that the Act "merely requires persons carrying on certain activities to identify themselves by filing a registration statement."[29]

Similarly, the "labeling" and identifying of publicly distributed material under FARA was challenged on First Amendment grounds in a case concerning the distribution of films about acid rain produced by the Canadian Film Board and distributed in the United States. In *Meese v. Keene*,[30] the labeling and public disclosure requirement was upheld by the Supreme Court against the constitutional challenges of distributors of the material in the United States. The Court noted that the act places "no burden on protected expression," and that the law was not intended to "prohibit, edit, or restrain the distribution of advocacy materials."[31] Rather, the Court believed that the labeling requirement added to the information that the public receives, rather than suppressing any information or expression:

> To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda. The statute does not prohibit appellee from advising his audience that the films have not been officially censured in any way.... By compelling some disclosure of information and permitting more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within material subject to the Act is fair, truthful, and accurate speech.[32]

Finally, as to governmental interests generally in required disclosures for activities in this subject area, it is informative to note that the governmental interest asserted in the 1995 political leafleting "labeling" case in Ohio (*McIntyre v. Ohio*

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[27] *See* 22 U.S.C. §§ 611 *et. seq.*

[28] 97 F. Supp. 255 (D.D.C. 1951).

[29] 97 F. Supp. at 262. *See* also discussion in *Viereck v. United States,* 318 U.S. 236, 251 (1943)(Black, J. dissenting); *Attorney General v. Irish Northern Aid Committee*, 346 F. Supp. 1384 (S.D.N.Y. 1972), *aff'd without opinion,* 465 F.2d 1405 (2d Cir.), *cert. denied,* 409 U.S. 1080 (1972).

[30] 481 U.S. 465 (1987).

[31] 481 U.S. at 480.

[32] 481 U.S. at 480-481.

Elections Commission), was to prevent "fraud and libel," and *not* the deterrence of corruption or the appearance of corruption or undue influence upon governmental processes. In *McIntyre*, while overturning Ohio's labeling provision on leaflets which were intended to prevent "fraud and libel," the Court distinguished the lobbying and campaign disclosure cases and expressly indicated that, contrary to the fraud and libel interest, the interests of deterring corruption or the appearance of corruption of governmental processes was a compelling enough interest to justify disclosure of, for example, lobbying activities.[33]

Disclosure of Direct vs. Indirect Lobbying

It has been argued that in both the *Harriss* and the *Buckley* cases the Supreme Court made a specific distinction that, on the one hand, provided significant leeway to the government to require reporting and disclosures from those "directly" involved in or impacting the governmental processes being protected, as opposed to regulating those who are more on the periphery of the targeted activities and so do not directly impact, influence or communicate with candidates, lawmakers or public officials.[34] In *Harriss*, the Supreme Court found that the lobbying statute, as the Court interpreted it, "sought the disclosure of ... *direct pressures* [upon Congress] ...,"[35] implying that the statute would not entail "a broader application to organizations seeking to propagandize the general public."[36] Similarly, in *Buckley v. Valeo*, the Court had upheld disclosure provisions on independent expenditures by narrowing their application to groups that engage in express advocacy in relation to candidates, and who are thus more directly and intimately involved in the electoral process, rather than merely applying to independent "groups engaged purely in issue discussion,"[37] and who thus have only a tangential or peripheral impact or connection to the electoral process, candidates and public officials. In the lower court case in *Buckley v. Valeo*,[38] the United States Court of Appeals overturned former 2 U.S.C. § 437a, a disclosure provision concerning independent expenditures, and that part of the decision was *not* appealed to Supreme Court.[39] The Court of Appeals stated there:

> The Supreme Court has indicated quite plainly that groups seeking only to advance discussion of public issues or to influence public opinion cannot be equated to groups whose relation to political processes is direct and intimate. In

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[33] 514 U.S. 334, 356, n. 20 (1995).

[34] See, for example, discussion by the United States District Court in narrowing the reach and application of a New Jersey elections and lobbying provision, in *ACLU of New Jersey v. New Jersey Election Law Enforcement Commission*, 509 F. Supp. 1123, 1129, 1131-1134 (D.N.J. 1981).

[35] 347 U.S. at 620. Emphasis added.

[36] 347 U.S. at 621.

[37] *Buckley v. Valeo*, 424 U.S. at 79.

[38] 519 F. 2d 821 (D.C. Cir. 1975).

[39] *See Buckley v. Valeo*, 424 U.S. 1, 10, n.7.

> *United States v. Rumely*, 345 U.S. 41 (1953), the Court upheld a resolution authorizing a House committee to inquire into lobbying activities after construing it narrowly to apply only to representations made directly to Congress, and not to indirect efforts to influence legislation by changing the climate of public opinion.[40]

In the context of lobbying disclosure provisions (as in the case of the campaign disclosure provisions reviewed in the *Buckley* case), the overbreadth doctrine[41] may arguably counsel that the activities which are subject to disclosure requirements be carefully defined to exclude required disclosures relating to activities of individuals or groups that "do no more than discuss issues of public interest," or activities by "groups engaged purely in issue discussion." Disclosure and reporting requirements which sweep within their scope the activities by issue oriented or advocacy groups who do no more than publicly discuss, analyze or advocate positions on public issues, might arguably be too remote and not have a "substantial connection" to the governmental interest in lobbying regulation recognized in the *Harriss* case, that is, the revelation of "direct pressures" and influences upon Congress in order to "maintain the integrity of a basic governmental process."[42] For example, in *United States v. Rumely, supra*, the Supreme Court, in upholding a resolution authorizing a House committee to investigate into "lobbying activities" which the Court narrowly defined, stated the following:

> Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment.[43]

It does not appear that these standards would, however, necessarily bar Congress from requiring the disclosure of information from groups or persons compensated to influence the legislative process, and who attempt to do so through either "direct" or indirect "grassroots" lobbying activities and communications. In the first instance, it should be emphasized that while the Supreme Court case of *United States v. Harriss* was ostensibly a decision that found permissible required disclosures of "direct" lobbying activities, the Supreme Court, in narrowly interpreting the provisions of the 1946 Lobbying Act, expressly explained that the lobbying statute "sought the disclosure of ... *direct pressures* [upon Congress] exerted by the lobbyists

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[40] 519 F. 2d at 873.

[41] Disclosure provisions may not be so broad as to "invade the area of protected freedoms" (*NAACP v. Alabama, supra* at 307), and must be fashioned so that the required information to be disclosed under the law bears "a reasonable relationship to the achievement of the governmental purpose asserted as [the statute's] justification" (*Bates v. Little Rock*, 361 U.S. 516, 525 (1960)), that is, there must "be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

[42] *Harriss, supra* at 625.

[43] 345 U.S. at 46.

themselves or through their hirelings *or through an artificially stimulated letter campaign*." The Supreme Court in *Harriss* stated:

> As in *United States v. Rumely*, 345 U.S. 41, 47, which involved the interpretation of similar language, we believe this language should be construed to refer only to "lobbying in its commonly accepted sense" — to direct communication with Members of Congress on pending or proposed federal legislation. The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings or *through an artificially stimulated letter campaign*.[44]

It is thus significant that the Supreme Court in *Harriss* included "artificially stimulated letter campaigns" as among the "direct" pressures on Congress that the lobbying law of 1946 could regulate by way of disclosures. The kinds of "grassroots" activities which the various proposed bills seek to include in disclosures would appear to be within this range of activity when they are sufficiently directed at conduct that involves such artificially stimulated letter campaigns (which are now often called "astroturf" lobbying), and as such, would arguably be activity which has *already* been considered by the Supreme Court to be of the type which may properly be subject to disclosure requirements. Grassroots activities by those compensated to influence legislation, when such activities involve a "call to action," as opposed to pure issue discussion or mere advocacy of a particular point of view, would generally be considered to be those communications that provide arguments and information in a manner and in a particular context intended and designed to stimulate a letter writing campaign and direct contacts and communications by members of the public with covered officials that may not have spontaneously occurred.[45]

Secondly, it should be noted that the distinction between what has been characterized as "express advocacy," as opposed to "issue advocacy," as far as the permissibility of requiring disclosures of such activities within a campaign context, while certainly valid in the past, has become less relevant in more recent case law. The Supreme Court in *McConnell v. FEC*, allowed certain limitations on, as well as disclosures about "issue advocacy" advertisements in what were defined as "electioneering communications" when such communications, regardless of any "express advocacy" (of the election or defeat of a clearly identified candidate), occur within a particular time frame near an election.[46] The Court in *McConnell* expressly denied that, in the context of campaigns, a distinction between such communications is constitutionally based, but rather was mandated in the past only by statutory construction: "[A] plain reading of *Buckley* makes clear that the expenditure advocacy limitation, in both the expenditure and the disclosure contexts, was the

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[44] 347 U.S. 620 (emphasis added).

[45] See, for example, IRS definition of "grassroots" lobbying, in this memorandum, footnote #1.

[46] The question of the coverage in the law of "real" issue ads (that are not necessarily intended as electioneering, even if run in proximity to an election) could still be raised on a case-by-case basis, that is, on an "as-applied" basis. *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006).

product of statutory interpretation rather than a constitutional command."[47] Furthermore, the Court found: "Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy."[48]

The Court in *McConnell* thus upheld the disclosure requirement, even for so-called issue advocacy (as opposed to the "express advocacy" of the election or defeat of an identified candidate), when those issue ads ran in a certain time frame before an election for federal office, thus finding, in effect, that such groups do have enough of a "direct and intimate" relation to the political process to justify disclosing the required information regarding their activities. The Supreme Court in *McConnell* cited with approval the portion of the District Court's *per curium* decision dealing with the required disclosures under "BCRA," (the Bipartisan Campaign Reform Act) of "issues ads":

> ... Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from scrutiny from the voting public. ... Plaintiff's argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interest of individual citizens seeking to make informed choices in the political marketplace.[49]

The Supreme Court decisions thus far with respect to preserving the integrity of the electoral and legislative processes appear to attempt to balance competing interests in such a way as to promote a societal value of increasing the opportunity, effectiveness, and thus the encouragement for participation in the democratic process by ordinary citizens vis-a-vis the more wealthy or organized "special" interests. The decisions have thus, in effect, sought to reduce the perceived "monopoly" that wealthy individuals and monied interests might have in gaining the ear or access to public officials, thus leaving room for and encouraging ordinary citizens to participate and have an impact on public policy. In *Harriss*, for example, the Supreme Court expressly upheld the disclosure and sunlight provisions of the 1946 lobbying law because "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."[50] The Supreme Court in *McConnell*, quoting specifically from its ruling in *Shrink Missouri Government PAC*, allowed certain restrictions and disclosure of particular advocacy activities so as not to discourage others' participation in government: "Take away Congress' authority to regulate the appearance of undue influence and the 'cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in the democratic

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[47] 540 U.S. at 191-192.

[48] 540 U.S. at 193.

[49] 540 U.S. at 197, citing the District Court's *per curium* decision, at 251 F. Supp. 2d 176, 237 (D.D.C. 2003).

[50] 347 U.S. at 625.

process.'"[51] In the Ohio case dealing with identification labeling on political leaflets and pamphlets, *McIntyre v. Ohio Elections Commission*, the Supreme Court invalidated a state law requiring the placing of the author's name and address on political pamphlets where it expressly noted that the plaintiff's activity was not "coordinated" with any public official, candidate or their "organized supporters" in an election, but rather was "independent activity pursued by Mrs. McIntyre,"[52] similar in nature and analogous to the activities of "volunteers" in a campaign which need not be disclosed or counted as campaign contributions under campaign finance law.[53] These interests and values of citizen participation may arguably be consonant with the "grassroots" lobbying proposals under consideration, since such proposals would not encompass and thus not require disclosure of any activity by an individual for himself or herself, nor would it reach any activity by those who are merely volunteers of an organization and who are not compensated for their duties, as the grassroots provisions cover only "professional" lobbyists who are compensated above a certain amount to engage in a particular amount of indirect lobbying activities.

As-Applied Analysis

Although the Supreme Court has explained that disclosure provisions generally "appear to be the least restrictive means of curbing the evils" of unwarranted influence and corruption concerning governmental processes,[54] the Court did note that the "balance" might be tipped in favor of non-disclosure where an organization may show that disclosure would result in harassment or threats of reprisal to contributors or members such that First Amendment rights of association and expression would seriously be infringed by the disclosures. The Court in *Buckley* stated:

> There could well be a case, similar to those before the Court in *Alabama* and *Bates*, where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's

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[51] *McConnell*, supra at 144, quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 390 (2000). *See,* generally, Justice Stephen Breyer, *Active Liberty*, 43-50, on the interest of the encouragement of participatory democracy in First Amendment adjudications.

[52] 514 U.S. at 354.

[53] 514 U.S. at 351, n.14. The Court also distinguished the requirement of individuals to place their names and addresses on handbills and leaflets relating to elections, from the requirement of groups to report on expenditures made in support or opposition to candidates in elections: "[I]dentification of the author against her will is particularly intrusive; it reveals unmistakably the contents of her thoughts on a controversial issue. Disclosure of an expenditure and its use, without more, reveals far less information. It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender's political views. Nonetheless, even though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill — and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation." 514 U.S. at 355.

[54] *Buckley v. Valeo*, 424 U.S. 1, 68 (1976).

> requirements cannot be constitutionally applied. But no appellant in this case has tendered record evidence of the sort proffered in Alabama.[55]

As to the evidence which may be necessary to be shown by a minor political party to exclude such a group from the disclosure requirements of the campaign Act, the Court in *Buckley* stated:

> The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment or reprisals from either government officials or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient.[56]

Thus although broad facial attacks on provisions of law dealing with such things as lobbying and political campaigns, where the law merely requires disclosures and reporting of activities and the amount of expenditures concerning such activities, would face a significant hurdle because of the recognized important and "vital" interest of the Government in assuring the integrity of these processes,[57] such provisions may be examined under an "as-applied" challenge by particular groups, entities or individuals. The Supreme Court in *McConnell*, after quoting the standard to be used in an as-applied challenge, that is, if the parties can show a "reasonable probability"of "economic reprisals or physical threats" or other such similar "harassments," noted that "our rejection of plaintiffs' facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement."[58]

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[55] 424 U.S. at 71.

[56] 424 U.S. at 74.

[57] The Supreme Court in *McConnell* indicated that facial challenges to the disclosure provisions in the campaign act dealing with prevention of undue influence, potential corruption, and the appearance of such activities, in the realm of federal elections and electioneering communications, would not be entertained: "The District Court was also correct that *Buckley* forecloses a facial attack on the new provision ... that requires disclosure of the names of persons contributing $1,000 or more to segregated funds or individuals that spend more than $1,000 in a calendar year on electioneering communications." 540 U.S. at 170. The Court also noted with approval the scrutiny applied to such disclosure provisions in this context: "As the District Court observed, amended FECA § 304's disclosure requirements are constitutional because they "d[o] not prevent anyone from speaking." 540 U.S. at 201.

[58] 540 U.S. at 198, 199. *See* specifically, *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 100 (1982).

Judicial Decisions and State Grassroots Lobbying Disclosure

The clear trend in federal case law concerning constitutional challenges to lobbying statutes in the states has been to uphold against facial challenges provisions of state law which require the disclosure of "indirect" lobbying campaigns which involve "grassroots" lobbying of the nature generally covered in the legislative proposals discussed.

While at least one state court has found disclosures of "indirect" grassroots lobbying to be beyond the permissible regulatory arm of the government (concerning disclosures required by the wording of a voter-adopted referendum),[59] the indication from more recent state court cases is that the courts will uphold statutory requirements for "grassroots" lobbying activities, that is, those activities that urge or direct others to make direct communications or contacts with public officials, that are part of a general regulatory scheme to identify pressures and influences on the government and its officials, and to increase citizen confidence in the integrity of governmental institutions and processes. The Supreme Court of the State of Washington in 1974, for example, upheld very detailed lobbying disclosure provisions of State law concerning "grassroots" lobbying activities in *Young Americans for Freedom, Inc. v. Gorton.*[60] Although the court there narrowly construed the Act so that an organization engaged in such a "lobbying" campaign need not disclose its member/contributor list,[61] the court found that some disclosures regarding "grass root" lobbying campaigns, such as amounts expended, were necessary to fill possible loopholes in lobbying regulation:

> To strike down this portion of the initiative would leave a loophole for indirect lobbying without allowing or providing the public with information and knowledge re the sponsorship of the lobbying and its financial magnitude....
>
> Thus, it seems abundantly clear, and we are convinced, that the right of the public to be informed is paramount to any inconvenience that reporting under section 20 [RCW §42.17.200] may cause respondent.[62]

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[59] *Montana Auto Association v. Greely*, 632 P.2d 300, at 307 (Mont. 1981).

[60] 522 P.2d 189 (Wash. 1974).

[61] "We can agree with the contention of YAF that a required disclosure of its membership would be an impermissible and unconstitutional intrusion upon its members' associational freedoms and the right to privacy. *N.A.A.C.P. v. Alabama*, 357 U.S. 449 ... (1958)." 522 P.2d at 191.

[62] 522 P.2d at 192. The section of the Revised Code of Washington was §42.17.200, entitled "Grass roots lobbying campaigns" and concerned, as characterized by the court, "indirect" lobbying, that is, "a program addressed to the public, a substantial portion of which is intended, designed or calculated primarily to influence legislation...." The sponsor of such a "program," if such person has expended over the threshold amounts designated, must register and report certain items including "[t]he names and addresses of all persons contributing to the campaign, and the amount contributed by each contributor." R.C.W. §42.17.200(2)(c)). To avoid the constitutional infirmities noted, the Supreme Court of

(continued...)

The Supreme Court of Vermont in 1995, in *Kimbell v. Hooper*, upheld the provisions of a Vermont statute which required, among other items, reporting of "indirect contacts to influence legislators."[63] The court there found that this scheme of disclosures and reporting was within the legislature's power to require as a measure to increase the information available about, the confidence in, and to assure the integrity of the basic legislative and governmental processes, and that the Supreme Court precedents had *not* ruled out required disclosures in lobbying laws of indirect pressures on public officials:

> Provisions that reach "indirect" lobbying activities beyond the parameters found in *Rumely* and *Harriss* are not, as plaintiffs would urge, necessarily unconstitutional; in fact, the Court intimated in these cases that Congress could require more stringent reporting.
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> * * *
>
> Properly evaluating the governmental process, and the influence lobbyists bring to bear upon it, implicates indirect as well as direct communications and activities needed to get the message across.[64]

A similar state statutory provision requiring indirect, grassroots disclosures was, in an advisory opinion by a Michigan court, found to be permissible as long as the reach of the law went to specific solicitations of others to make direct communications.[65] This part of the advisory opinion was affirmed in a case in controversy in Michigan in 1983.[66]

As to federal court cases, a United States District Court in 1982 upheld against a constitutional challenge a New York statute which required registration and reporting from anyone who is employed by a person or entity and, in such employment, "attempts to influence the passage or defeat of legislation by either house of the legislature, approval or disapproval of any legislation by the Governor, or the adoption or rejection of any rule having the force or effect of law, or the outcome of any rate-making proceeding by a state agency."[67] The plaintiffs' principal contention was that the statute was an over-broad intrusion into protected First

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[62] (...continued)
Washington narrowly construed the section in question to apply only to funds expended by the organization concerning a *specific* campaign directed at a *specific* piece of pending or proposed legislation, and to require the disclosure only of those persons who had either contributed directly to that *specific* campaign or who had "earmarked" funds for that specific campaign. Such an interpretation would eliminate the necessity for disclosure of an organization's general membership list when that organization engages in indirect, grassroots lobbying

[63] 665 A.2d 44, 46 (Vt. 1995).

[64] 665 A.2d at 47, 48

[65] *Advisory Opinion on Constitutionality of 1975 PA 227*, 242 N.W. 2d 3 (Mich. 1976).

[66] *Pletz v. Secretary of State*, 336 N.W.2d 789, 795 (Mich. 1983).

[67] *Commission on Independent Colleges and Universities v. New York Temporary State Commission on Regulation of Lobbying*, 534 F. Supp. 489, 491 (N.D. N.Y. 1982), citing N.Y. Leg. Law §§ 3(a) and (b).

Amendment conduct because it swept within its scope not only "direct contact with government officials in order to influence legislation," but also could be interpreted to cover "any action which could conceivably impact upon governmental action ..." such as "*any* discussion of the merits of any governmental action that may ultimately affect or influence such action," and as such chills "public discussions or communications in order to avoid the disclosure provisions of the lobby law."[68] The court found, however, that the law may permissibly cover both "direct" lobbying and "indirect" grassroots lobbying activities, and construed the language of the law narrowly to that end so as to exclude coverage of a broader range of pure issue discussion or public advocacy activities:

> If the foregoing [plaintiff's argument of the law's coverage] constituted a realistic appraisal of the scope of the New York lobby law, this Court would agree with plaintiffs that it should be struck down as overbroad. However, since this court believes that the legislation, when put in its proper context, was never meant to, and in practice, never will reach such activities, the Court declines to invalidate the law for overbreadth in that regard.
>
> At the outset, the Court notes that *Harriss* did not hold that *only* direct contact with government officials could be regulated by a disclosure law. The Court held that indirect lobbying, in the forms of campaigns to exhort the public to send letters and telegrams to public officials, could be included within the definition of lobbying activities. *United States v. Harriss, supra* at 621 n.10.[69]

In 1985 the United States Court of Appeals for the 8th Circuit, in *Minnesota State Ethical Practices Board v. National Rifle Association*,[70] upheld against First Amendment challenges the provisions of a Minnesota ethics and lobbying law that required registration and reporting from certain "lobbyists" who are compensated and who expend a particular threshold amount of time and money "for the purpose of attempting to influence legislative or administrative action by communicating or *urging others to communicate* with public officials."[71] The appellant National Rifle Association sent mailgrams and letters to all of its own members in Minnesota (approximately 54,000 persons) urging them to contact their legislators to support particular state legislation. The court found that the disclosure of the sources of pressures on legislators through such grassroots lobbying campaigns (an artificially stimulated letter campaign) to be, in a similar manner as the Supreme Court in *Harriss*, a "compelling interest," and that the potential and incidental burden on First Amendment rights in a statute that prohibits no activity but requires only disclosure is, similarly to the case in *Buckley v. Valeo*, subordinate to the public's "interest in disclosure."[72] The fact that the original letters were only written to and between

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[68] 534 F. Supp. at 496.

[69] 534 F. Supp. at 496.

[70] 761 F.2d 509 (8th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986)

[71] 761 F.2d at 510, citing Minn. Stat. § 10A.01 subd. 11 (emphasis added).

[72] 761 F.2d at 512. The court noted that if an appellant can show a particular or specific burden, reprisal, loss of employment or threat that these required disclosures cause, then the statute on an "as applied" basis would exempt such disclosure. *Id*. at 512.

members within a voluntary association did not in the court's opinion change the outcome:

> When persons engage in an extensive letterwriting 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. The appellants have articulated no reason why their membership in the NRA should give then any greater constitutional protection with respect to lobbying activity than is enjoyed by other citizens.

In *Florida League of Professional Lobbyists v. Meggs*,[73] the United States Court of Appeals for the 11th Circuit in 1996 similarly upheld against first amendment challenges a Florida lobbying disclosure statute which required reporting not only of direct face-to-face lobbying, but also included "indirect" lobbying activities, such as "media campaigns," within its scope. The court there, citing the interests of the government in providing information to the public and to officeholders about the various pressures and influences on the legislative performances of public officials recognized by the Supreme Court in both *Harriss* and *Buckley v. Valeo*, said:

> The League concedes, as it must, that the state has articulated legitimate interests.... And, these interests continue to apply when the pressures to be evaluated by voters and government officials are "indirect" rather than "direct." ... In fact, the government interest in providing the means to evaluate these pressures may in some ways be stronger when the pressures are indirect, because they are harder to identify without the aid of disclosure requirements. *Harriss* appears to have acknowledged as much when, even reading the statute narrowly to apply only to "direct communication," it nonetheless defined direct communication to include "artificially stimulated letter campaign[s]."[74]

In both state and federal courts, provisions which reach "indirect" or "grassroots" lobbying, that is, efforts to persuade, urge or convince members of the public, or members of one's organization, to make direct communications and contacts with public officials on a particular issue, have been upheld against facial constitutional challenges. The courts have noted that the Supreme Court in 1954 expressly upheld required lobbying disclosures relating to "direct" pressures on legislators by lobbying groups themselves, by their hirelings or through their "artificially stimulated letter campaigns." Additionally, the courts have seemed to recognize the growth of importance of such "grassroots" lobbying efforts in the legislative process, and the increased need for legislators and others to be able to identify and assess the pressures on legislators being stimulated (and financed) by interest groups by such methods. Under the analysis applied in these cases, it would appear that a federal statute which requires only disclosure and reporting, and does not prohibit any activity, and which reaches only those who are compensated to engage in a certain amount of the covered activity (leaving volunteer organizations, volunteers, and individuals who engage in such activities on their own accord out of the coverage and sweep of the provisions), would appear to fit within those types of provisions which have been upheld in judicial decisions when the statute is drafted

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[73] 87 F.3d 457 (11th Cir. 1996), *cert. denied*, 519 U.S. 1010 (1996).

[74] 87 F.3d at 460-461.

in such a manner so as not to be susceptible to an overly broad sweep bringing in groups, organizations and other citizens who do no more than advocate, analyze and discuss public policy issues and/or legislation. Even with the probability of such a crafted disclosure statute withstanding a facial challenge, the law could still at some point be subject to an "as applied" challenge if a particular group or organization could show a reasonable probability that the disclosures required would result in harassment or reprisals against it or its member or contributors.