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# Toward an Ethics of Being Lobbied: Affirmative Obligations to Listen

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## I. INTRODUCTION

In this essay, I argue for a simple claim: In the U.S. today, those in political office have affirmative obligations to seek out and listen to the widest and most diverse possible range of people affected by government action, policy, law, and regulation. This obligation arises most proximately from the unequal distribution of lobbying power among the populace in combination with the legal, ethical, and practical problems with the state imposing constraints on lobbying. Ultimately, the affirmative obligation to listen, and listen widely, is rooted in the goal of wise and just democratic governance.

Three features characterize the practice of lobbying in the United States today. Professional lobbying is commonplace, constitutionally protected from robust regulation, and wildly unequally distributed across the population. Due to these features, lobbying can impinge on successful democratic governance in at least three ways. By narrowing the factual and informational basis for governmental action, lobbying promotes stupidity. By impeding fair service to the entire populace, lobbying contributes to injustice. By diminishing popular

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contributions to representative governance, lobbying delegitimizes putatively democratic governments.

This essay assumes that lobbying is here to stay and that its Constitutional protections are proper as a matter of law, politics, and ethics. Furthermore, this paper assumes that there is nothing unethical about professional lobbyists or individuals or associations robustly seeking to influence, educate, or assist legislative, executive or administrative officials by providing these officials with arguments, information, and draft language for statutes or regulations. Likewise, there is nothing unethical about professional lobbyists or anybody else contacting political officials in person or by other means. While this paper assumes that any given position advanced by a particular lobby or the style in which it is conveyed may well be unethical, this paper also assumes that it is neither legally nor practically feasible to regulate the content of the positions taken by lobbyists. Nor is it legally or practically feasible to impose too many rules on the various methods used by lobbyists as they communicate with political officials.

But, neither the ubiquity and staying power of lobbying and organized lobbies nor the justified protection of lobbying from legal regulation should make us complacent about the potentially corrosive effects of lobbying on American politics. Lobbying can lead to unfair or poorly informed legislation or executive action. Lobbying can thereby make elected officials bad at their jobs. This essay proceeds on two more assumptions. First, it is bad, ethically and otherwise, for elected officials to be bad at their jobs, particularly for them to act unjustly or stupidly. Second, officeholders have an ethical obligation to do their jobs as well as possible.

From a more systemic point of view, the state of lobbying today exacerbates the difficulty of maintaining a meaningful communicative connection between most of the governed and their government. In modern large-scale postindustrial democracies this connection is fragile. It is too easy for popular participation in politics and lawmaking to amount to nothing more than a formalistic or ritualized trip to the ballot box, if that. Indeed, permitting the collective action represented by professional lobbyists is one antidote to this. But professional lobbying requires financial resources and other prerequisites not available to all persons whose participation is necessary to legitimate the actions taken by a democratic state.

How can individual officeholders prevent lobbying from making them bad at their jobs? How can today's office-holders address systemic erosion of the communicative connection between the governed and the government? What measures may they ethically take? What measures, if any, must they? At the conclusion of this essay, I provide some preliminary answers to these questions. In the interim, I turn to the historical practice from which today's lobbying emerged, petitioning the government for redress of grievances. A close look at the specifics of that practice shows that petitioning helped government officials fulfill affirmative obligations to listen widely and responsively. It may well be

impossible to reproduce exactly the historical practices of petitioning the government, although I will suggest some modern tools that might be used to enable modern variants. By seeing how officials in the past have met, at least to some extent, their affirmative obligations to listen, we gain a point of departure for considering how today's officials might do likewise. By appreciating how widespread petitioning was and how seriously it inflected Anglo-American government as it evolved into representative democracy, we can better gauge what is lost when government officials do not make sure they listen widely and actively. While today's Constitutional protections for lobbying originate in an older right to petition the government for redress of grievances, the actual practice codified in the right grounds a much richer conception of how assertively officials should seek out and listen to the governed, particularly those not already speaking through lobbyists.

## II. PETITIONING VERSUS LOBBYING

Today's lobbying has its roots in a very old, somewhat different Anglo-American political practice: petitioning. Petitioning emerged in England in the 14th century and developed into its heyday there in the 17th and 18th centuries.<sup>1</sup> Transplanted to the British American colonies, petitioning developed a distinctively American democratic character, dating from colonial times up until the mid-1800s, when petitioning as a democratic communicative practice foundered under the conditions that precipitated the U.S. Civil War.<sup>2</sup> An examination of petitioning demonstrates how today's government officials could correct for the problems created by professional lobbying by undertaking affirmative efforts to listen to more of the population more systematically.

Because of the long history of petitioning and its practice across time and place, its cultural, political, and legal meanings admit of varying interpretations. Fine-grained examinations of particular instances, periods, or locales will show different dimensions of the practice in particular moments and settings. Nevertheless, some broad features can be grasped from a historical overview of the practice. The development of petitioning in England from the fourteenth to the seventeenth centuries illustrates the emergence of a communicative practice, as petitioners insisted on their right to speak to and be heeded by the government and the government insisted that it be spoken to nonviolently and without menace.<sup>3</sup> In colonial America, the simultaneous creation of local legislative bodies and the practice of petitioning them indicate how petitioning fostered democratic governance in the colonies prior to the Revolutionary War and before the later expansion of suffrage to men of color and then to women.<sup>4</sup> Petitioning was not transcendently democratic in the more monarchical

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1. *Infra* Part II.A.

2. *Infra* Part II.B & II.C.

3. *Infra* Part II.A.

4. *Infra* Part II.B.

periods of English history, but it did in a very practical way show petitioners, kings, and parliaments alike the significance of meaningful voice for the governed. Likewise, petitioning was not a substitute for enfranchisement in colonial America or the newly minted United States, but its availability and use by nonvoting members of the community made it practically evident that elected officials had obligations to hear and act on behalf of people who could not have voted for them. Democratic representation was not accomplished simply through the ballot box, but by government being accessible and responsive to those who were not legally permitted to cast a ballot and available to all between elections.

#### A. *Petitioning in England Before the American Revolution*

In England, the practice of petitioning predates its famous codification in Magna Carta, which was signed in 1215. Petitioning was part of feudal English life, particularly after the Norman Conquest, when English feudalism became administratively organized.<sup>5</sup> By the time Magna Carta identified petitioning as a right, the practice had been underway in England, in various forms, for at least two centuries.<sup>6</sup>

In the feudal context, petitioning both empowered and restrained the king vis-à-vis other feudal lords. The king had the authority to hear petitions from the findings of his subordinate lords but did not have direct authority over original petitions from those lower down the feudal hierarchy.<sup>7</sup> For present purposes, this two-facetedness—legitimator of authority and constraint on authority—is central. While petitioning may not have been designed for or experienced as a mechanism of personal autonomy for petitioners,<sup>8</sup> the practice mediated the relationship between two loci of power in feudal England: the king and the lords. Giving the king the authority to hear petitions based on findings made by lords legitimated the king's authority over those lords. Limiting the king's reach to petitions already reviewed by lords constrained the king's power. Likewise, the lords' power was legitimated as they were the first authority over petitions, but it was constrained by the authority of the king to review their determinations.

Magna Carta made clear both facets of petitioning. As codified, petitioning was a procedural device barons could use to ensure that the sovereign complied with the substantive provisions of the charter.<sup>9</sup> At the same time, Magna Carta assured the king that so long as he complied, the barons would finance his

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5. THEODORE F. T. PLUCKNETT, *Feudalism in England*, in A CONCISE HISTORY OF THE COMMON LAW 516–520 (Little, Brown & Co., 5th ed. 1956) (1929).

6. Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2163 (1998); see Gary Lawson & Guy Seidman, *Downsizing the Right To Petition*, 93 NW. U. L. REV. 739, 745 (1999).

7. Guy I. Seidman, *The Origins of Accountability: Everything I Learned About the Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 421 (2005).

8. Mark, *supra* note 6, at 2163–64.

9. Gary, *supra* note 6, at 746.

undertakings.<sup>10</sup> Petitioning providing a nonviolent channel for constraining an overreaching king, while at the same time recognizing his power to collect revenues from the nobility.<sup>11</sup>

As the crown's need for funds grew, so did the practice of petitioning. Knights and burgesses gained the opportunity to petition the king and kings gave them audiences at which to be heard.<sup>12</sup> As feudalism broke down, petitioning expanded further, simultaneously extending the reach and depth of the crown's administrative authority and making it somewhat accountable to more of the crown's subjects.<sup>13</sup> Petitions became conduits of information about situations throughout the realm and opportunities for input into royal policy and decisions.<sup>14</sup>

After Magna Carta, petitions came to dominate and even set the agenda of the English Parliament.<sup>15</sup> While petitioners themselves chose their audience—the King, the House of Commons, or the courts—Parliament became a popular pick, partly because Parliament, seeking to expand its own authority vis-à-vis the Crown, undertook to hear and ensure response to as many petitions as possible.<sup>16</sup> Furthermore, because the King's access to funding depended on his hearing petitions referred to him from Parliament, it amplified popular petitions when they were presented to the King via Parliament.<sup>17</sup>

By the sixteenth century, “[p]etitioning came to be regarded as part of the Constitution, that fabric of political customs which defined English rights.”<sup>18</sup> The right and practice of petition was set within a hierarchical society, to be sure, but the existence of petitioning established, enacted, and entrenched the reciprocity of obligations between those higher and lower in the social and political order.<sup>19</sup>

Petitioning played an important role in the fractious political events of seventeenth century England, including the Civil War and English Revolution.<sup>20</sup> Amidst the power struggles, petitioning did not disappear. Even rejections of petitions served to strengthen the practice, particularly when the rejections were based on formal rather than substantive considerations. In these situations, the authority petitioned did not deny the right to address it nor its obligation to take heed. Rather it specified the acceptable form a petition had to take: it had to

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10. *Id.* at 746.

11. See Mark, *supra* note 6, at 2165–66.

12. Gary, *supra* note 6, at 746; Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 23 (1993).

13. Gary, *supra* note 6, at 746; Norman B. Smith, ‘*Shall Make No Law Abridging . . .*’: *An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1155 (1986).

14. Mark, *supra* note 6, at 2165–2166.

15. *Id.* at 2167.

16. *Id.* at 2168.

17. *Id.* at 2168.

18. *Id.* at 2169.

19. *Id.* at 2169.

20. *Id.* at 2170–71.

address a recognized authority, state a defined grievance, and pray for relief.<sup>21</sup> A petition was a discrete political and legal instrument for seeking justice.<sup>22</sup>

This understanding and operation of petitioning in England flowered at the same time the British colonies in North America did. Colonial petitioning grew up informed by the English practice. What really distinguished American petitioning from its English counterpart, though, was the creation of a new kind of audience for petitions, an audience that was eager to establish itself as a political and legal authority: colonial assemblies, the forerunners of today's state legislatures and the prototype for today's federal legislative branch.

### *B. Petitioning in the American Colonies*

The American colonies came into being via different mechanisms and with different governance structures. The British saw the original colonies more as proprietary corporate enterprises rather than as new political units. Thus, colonies were founded with a delineated executive but no local representative body. Nevertheless, within a decade or two of their formation in the 1600s, each colony ended up with an assembly.<sup>23</sup> Eventually, each assembly became a representative legislature. All the assemblies came to be lawmaking bodies distinct from the executive. The assemblies were composed of a subset of a colony's inhabitants.<sup>24</sup> During the eighteenth century, assemblies developed into institutions organized to address the concerns of the populations they represented.<sup>25</sup> To accomplish this mission, much of the colonial assemblies' time was spent dealing with petitions. The typical response to a petition was the passage of a bill addressing the concern it raised.<sup>26</sup> As the assemblies became more sophisticated and organized, they created standing committees, some dedicated exclusively to the business of hearing and addressing petitions.<sup>27</sup> Petitions flowed to the colonial assemblies throughout the seventeenth century, increasing in most colonies during the eighteenth.<sup>28</sup> The proportion of statutes based on petitions increased as well. During the eighteenth century, petitions were the basis for about half the bills passed by colonial assemblies.<sup>29</sup> Note the very direct connection, therefore, between legislation and popular concerns, a connection forged by the mechanism of petition.

By hearing and addressing a wide variety of grievances, colonial assemblies

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21. *Id.* at 2173.

22. *Id.* at 2174.

23. PEVERILL SQUIRE, *THE EVOLUTION OF AMERICAN LEGISLATURES: COLONIES, TERRITORIES, AND STATES*, 1619–2009, at 11 (2012).

24. *Id.* at 12–15.

25. *Id.* at 27.

26. *Id.* at 28.

27. *Id.* at 40–46; Gary, *supra* note 6, at 751.

28. SQUIRE, *supra* note 23, at 68.

29. *Id.* at 68; see also Stephen A. Higginson, *A Short History of the Right to Petition*, 96 *YALE L. J.* 142, 144 (1986).

gained information<sup>30</sup> and legitimized their lawmaking authority.<sup>31</sup> Through petitions, colonial legislatures learned about topics ranging from local welfare needs (such as care for orphans and the ill) to local abuse of official power (such as excessive taxation or corruption).<sup>32</sup> The richness of information contained in petitions was enhanced by the fact that petitions were submitted from a wide cross-section of the population, including women, native Americans, felons, and slaves.<sup>33</sup> This expansive base for petition-based legislation extended representation beyond the population who selected or were from the same background as the assembly members. Laws had a more popular base than they would if they stemmed only from communication among the representatives themselves or between representatives and established political elites.

Dating from 1680 in Massachusetts, a number of colonial charters expressly included the right to petition.<sup>34</sup> By the time of the Revolutionary War, so did the charters of Delaware, New Hampshire, North Carolina and Vermont.<sup>35</sup> In all the colonies, petitioning was used and recognized as way for individuals to participate in government. Colonial assemblies, rather than royally appointed governors or judges, became the focus of colonists' petitions.<sup>36</sup>

### *C. Petitioning in the United States of America*

After Independence, petitioning continued at the new national level. During the first fifty years of the Union, Congress acted much like colonial legislatures did, handling petitions on a wide range of subjects and using committees to manage their volume and variety. Petitioning continued to serve as a mechanism that simultaneously informed political officeholders about concerns of the populace and made government responsive to the people.

As the nineteenth century progressed, the issue of slavery came to dominate petitions to Congress.<sup>37</sup> Congress was flooded with petitions calling for abolition. Eventually, Southern politicians, frustrated by constant anti-slavery petitions, made the issue into one of states' rights, with John C. Calhoun arguing that petitions about slavery to the federal Congress intruded, in principle, into matters reserved to individual states to decide.<sup>38</sup> Calhoun fervently objected to the Senate hearing petitions from Northerners on the subject of slavery in the South.<sup>39</sup> Abolitionists avoided this sectarian maneuver by focusing their peti-

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30. Higginson, *supra* note 29, at 147, 153–155.

31. *Id.* at 145; Gary, *supra* note 6, at 749.

32. Higginson, *supra* note 29, at 154.

33. *Id.* at 153.

34. Gary, *supra* note 6, at 749.

35. *Id.* at 749.

36. *Id.*; Higginson, *supra* note 29, at 150–51.

37. Higginson, *supra* note 29, at 143–44, 157–58.

38. *Id.* at 159–60.

39. See John C. Calhoun, Speech on the Reception of Abolition Petitions (Feb. 6, 1837), reprinted in *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* 461, 463–64 (Ross M. Lence ed. 1992). In response to introduction of anti-slavery petitions by senators from Indiana, Ohio, Vermont,

tions on Washington, D.C., a polity governed directly at the federal level and one where slavery was legal.<sup>40</sup> Meanwhile John Quincy Adams rejected the contention that only local inhabitants could petition on local or regional matters. Regardless of Constitutional limitations on the remedies the federal government could put into place, people had independent rights to communicate their grievances and have them considered.<sup>41</sup> Nevertheless, in 1840, the House of Representatives adopted internal procedures to stop the inflow of abolitionist petitions.

Thus, the same tensions that undid peaceful preservation of the Union ended a political and legal practice that had been a feature of Anglo-American governance for centuries, a practice that both reflected and fostered democratic, representative popular sovereignty. Up until Congress gagged petitions related to slavery, the Anglo-American history of petitioning models a two-way channel of communication, a way of connecting the governed and the governors. Petitions and responses forged a shared understanding of the needs, desires, and interests between parties on either side of the process. The demise of petitioning the federal legislature presaged resort to all out war between the States.

#### *D. Lobbying*

After the Civil War, the prior practice of petitioning the federal legislature died out completely. The U.S. Supreme Court construed the right narrowly, basically treating it as coextensive with rights of free speech and association<sup>42</sup> and therefore as not giving rise to a Constitutional obligation on the part of government to actually listen or respond to petitions. This has preserved the constitutional right of people to speak to the government but has eliminated the double faceted nature of such speech. Absent the right to be heeded, speech stops serving as two-way channel for mutual edification. The government may be prohibited from interfering with anybody's effort to send it a bulletin

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Rhode Island, Pennsylvania, and Massachusetts, Calhoun characterized the petitions as denunciations of the South, which depended on slavery for its economic well-being. *Id.* at 463–64, 466, 472, 475 (“We of the South will not, cannot, surrender our institutions . . . I look not for aid to this [federal] Government, or to the other States . . . If we [Southern states] do not defend ourselves none shall defend us . . .”).

40. *Id.* at 161.

41. *Id.* at 162–64.

42. *See, e.g.,* McDonald v. Smith, 472 U.S. 479, 485 (1985) (holding that the right to petition, like other First Amendment rights, does not confer an absolute immunity from prosecution on those who exercise the right); *see also* CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1351–52 (S. Doc. No. 112-9, 2013), available at <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2013/pdf/GPO-CONAN-2013.pdf> (“Later cases tend to merge the rights of assembly and petition into the speech and press clauses, and, indeed, all four rights may well be considered as elements of an inclusive right to freedom of expression. While certain conduct may still be denominated as either petition or assembly rather than speech, there seems little question that similar standard will be applied in most cases.” (footnotes omitted)).

but it has no legal obligation to respond or even attend to any or every bulletin sent its way.

While some scholars dispute the Supreme Court's interpretation of the Petitions Clause, the Court's narrow judicial treatment of petitioning has opened a gap between our judicially determined Constitutional law of lobbying and a communicative ethics of lobbying. The judicial treatment could and perhaps may eventually be changed to accord with the ethical approach I advocate here, but regardless of judicial understanding of the constitutional protections and responsibilities around petitioning the government, the ethics of lobbying, and particularly the ethical obligations of those subject to lobbying, is an independent matter.

### III. THE ETHICAL PRACTICE OF BEING LOBBIED

The foregoing overview of petitioning in England, colonial America, and the young United States is not meant to demand a reintroduction of particular historical practices into the United States today. Rather, the historical review of the practices highlights important features missing from today's politics, particularly the availability of a widespread, popular mechanism to communicate information and concerns to those in government and an inbuilt dynamic of responsiveness to communications from all quarters of the population. How might government officials today incorporate these features into day-to-day governance? By appreciating, acknowledging, and actively fulfilling an affirmative obligation to listen widely and responsively.

With the decline of a robust and populist system of petitioning the government for redress of grievances, it falls in the first instance to individual representatives to make sure that they get wide-ranging and meaningful opportunities to listen constructively to those they govern. There are some simple steps a representative could take. He might block out periods of time for appointments with those who are not represented by paid or professional lobbyists. He could advertise the weeks or months during which he or his staff are only available to associations and individuals speaking on their own behalf. A single official could go further. He could have one staff person dedicated not just to the usual "constituent services" but to acquiring information from those affected by the official's decisions and from outside experts knowledgeable in relevant areas.

In the absence of institutionalized mechanisms for hearing from and attending to sources other than those already speaking, and especially other than those who have the resources and skills to get heard relatively easily, individual representatives have obligations to do what they can to widen their circle of communicative action. Such individual efforts may be limited in their overall effect, however. Depending on the part of government in which they serve or other political associations available to them, officials could create more systematic devices for ensuring wide-ranging and diverse listening. Whatever the Supreme Court may say is constitutionally required with regard to hearing and

responding to petitions to redress grievances, Congress can act to go beyond any judicially described minimum. Congress could use its power to hold fact-finding inquiries more responsibly and differently than it has tended to in recent times, with committees operating to seek out and absorb information and viewpoints not necessarily represented by professional lobbyists.<sup>43</sup>

One reason often given for officials' tendency not to take the initiative to expand the circle of those to whom they listen is a limitation on resources. The creation of legislative law clerkships, a concrete proposal currently before Congress, could help remedy this problem.<sup>44</sup> Advocated by a coalition of legal academics, law school deans, law students, lawyers, policy makers, and legislative staff members, the Congressional clerkship program would operate similarly to judicial clerkships and executive branch fellowships offered to outstanding recent law school graduates.<sup>45</sup> Professor Robin West, former associate dean of Georgetown University Law Center, called for such a program in an article published in 2006.<sup>46</sup> Another early backer of such a program was Dean Larry Kramer of Stanford Law School.<sup>47</sup> Clerks with legal educations could also improve the political quality of legislation by ensuring that it rests on better, more complete background knowledge of the issues and the impact on all those affected by proposed bills.<sup>48</sup> Advocates of a legislative clerkship program

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43. Some political scientists see even recent Congressional hearings as broadening the sources from which Congress obtains information. Kay Lehman Schlozman, Sidney Verba & Henry E. Brady, *Who Speaks Loudly in Washington? And Who Isn't Heard at All?*, BOSTON GLOBE, Aug. 26, 2012, at K1 ("Congressional hearings can also play a corrective role. Though they sometimes seem like political theater, hearings, on average, bring in a broader range of voices and interests than does lobbying. Financial resources are less central to participation, and the initiative rests more with policy makers in Congress than with the organizations. Business interests, which account for nearly three-quarters of the dollars expended on lobbying, are a much smaller share of the testimonies at hearings—less than one-third. Congressional policy makers could make even greater efforts to ensure that hearings include all voices.")

44. For general information see the website for the Congressional Clerkship Coalition, About the Initiative, <http://www.congressionalclerkship.com/p/learn-more.html> (last visited Feb. 14, 2014); see also Daniel Webster Congressional Clerkship Act of 2013, S. 1458, 113th Cong. (as introduced in the Senate, Aug. 1, 2013), available at <https://www.govtrack.us/congress/bills/113/s1458/text>.

45. Dakota S. Rudesill, *Keepers of the U.S. Code: The Case for a Congressional Clerkship Program*, WASH. U. L. REV. SLIP OPINIONS, Nov. 5, 2008, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1273943](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273943).

46. Robin West, *A Response to Goodwin Liu*, 116 YALE L.J. POCKET PART 157, 161 (2006) (West argued for the benefits of having clerks focused on aiding lawmakers' efforts to enact Constitutionally required and Constitutionally permitted laws).

47. See *The Daniel Webster Congressional Clerkship Initiative*, STAN. L. SCHOOL BLOG (April 7, 2011), <http://blogs.law.stanford.edu/newsfeed/2011/04/07/the-daniel-webster-congressional-clerkship-initiative/>.

48. Dakota S. Rudesill describes how law clerks could enhance the operations of Congress. Rudesill, *supra* note 45 ("Even where expert Members and staff are involved, unforgiving time pressures and varied responsibilities mean that too often basic legislative work gets short shrift. During my years on the Hill, I often saw amendments filed (and even passed) that were decidedly unclear about what was being amended or the net effect of the new law. A law clerk or two at key committees and Member offices dedicated to legislative research, analysis, and drafting—a keeper of the U.S. Code, if you will—would be valuable indeed.")

emphasize that these clerkships should not be duplicative of current legislative staff positions. As Professor Dakota Rudesill puts it, a legislative clerkship should consist of at least one “year of intensive legal work on bills, hearings, or chamber procedure.”<sup>49</sup> The Congressional Clerkship initiative illustrates how one part of government whose members are regularly professionally lobbied could institute a systemic program with a work force—law clerks—far more insulated from direct lobbying than members or their staffs. Similar clerkship programs might make sense for administrative agencies.

Whether conducted individually or by a corps of clerks, affirmative listening can take advantage of simple, comparatively low cost tools for soliciting input and feedback online. Small businesses seeking more authentic communication with customers turn to simple online polls and surveys.<sup>50</sup> Local, state, and federal officeholders could do the same, taking advantage of freely available advice about how to use email, online surveys, user forums, widgets and off-the-shelf data analytics tools to gather meaningful, useful ideas and reactions from individuals.<sup>51</sup> While some tools directed toward consumers might well have to be adapted to facilitate valuable communication between citizens and officials, these resources specifically demonstrate how the Internet enables willing, eager listeners to create opportunities for people who want to speak to them to make themselves heard. Politicians increasingly rely on the Internet to raise money and rally support for themselves: they could turn that expertise to encouraging people to tell them about their concerns and their views.

The foregoing operational suggestions are preliminary ideas for how today’s legislators and other government officials might fulfill their affirmative obligations to listen. They illustrate how listening widely and actively could be institutionalized under current circumstances. Officeholders and their staffs might well devise different, and better, mechanisms were they focused on meeting the obligation. Or they might find contemporary vehicles by which people could return to petitioning the government.

#### IV. CONCLUSION

In the twenty-first century, lobbyists in the United States continue to root their profession in the Constitutionally guaranteed right to petition the government for redress of grievances.<sup>52</sup> The history of the practice underlying

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49. Rudesill, *supra* note 45.

50. See Elizabeth Cotner, *Online Tools To Solicit Feedback From Customers*, NFIB (Mar. 3, 2011), <http://www.nfib.com/article/online-tools-to-solicit-feedback-from-customers-56093/>.

51. See, e.g., Josh Catone, *9 Web Apps for Gathering Customer Feedback*, MASHABLE (Mar. 6, 2011), <http://mashable.com/2011/03/06/user-feedback-apps/>; Gregory Ciotti, *The 7 Best Ways To Gather Customer Feedback*, HELPSCOUT (June 19, 2013), <https://www.helpscout.net/blog/customer-feedback/>.

52. See, for example, the mission statement of the Association of Government Relations Professionals (AGRP). Association of Government Relations Professionals, *AGRP Mission and Strategic Plan*, <http://grprofessionals.org/about-association-government-relations-professionals/agrp-mission-and-strategic-plan/> (last visited Feb. 14, 2014) (“We believe in the Constitutionally-protected right of

this right evidences the downsides of today's lobbying. When professional lobbyists dominate communication with the government, lobbying does not afford officials the wide range of input historically achieved through the petitioning process. Correlatively, the narrowed bases for today's lobbying means that official responsiveness to lobbies creates concerns about capture and unfairness, in contrast to the way in which petitioning made government accountable even to groups and persons deprived of the ballot.

A legitimate democracy requires a meaningful communicative connection between the governed and the government. By ensuring that government officials hear from, acknowledge, and respond to the populace, such a connection safeguards the distinctively democratic relationship between the governed and their government, to wit, that government is of, by, and for the people. In the United States today, governmental size, scale, and complexity—at all levels of government—make it difficult for the people to engage meaningfully and authoritatively with government officials, elected or appointed.

On its face, lobbying might seem to remedy this problem because lobbying is a vehicle for members of the populace to access officials. But if lobbying is a vehicle practically available only to limited segments of the population, lobbying cannot rectify the anti-democratic tendencies of large modern governments, even those with genuinely democratic aspirations. Rather than making government more democratic, contemporary lobbying in the U.S. further diminishes the representativeness of governments that have become disconnected from input from most of the populace.

In the U.S. today, the unequal distribution of lobbying leads to an unequal distribution of voice. But it also leads to an unequal distribution of listening. If elected officials allow it, all of their time would be filled by hearing from those who are motivated, organized, and well positioned to communicate with them. For both legal and practical reasons it makes no sense to legislate against people speaking with or otherwise communicating with officials. But there is nothing legally objectionable about an office holder rationing her time for receiving communications from different speakers. Indeed a responsible democratic official should do even more to ensure that she listens to those who may not be able to get her attention as easily as more established, more powerful or more wealthy voices. She should be actively facilitating the speech of those from whom she otherwise would not hear.

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freedom of speech, the public's right to petition government, and the right of all Americans to be represented before government."'). Until October 2013, the AGRP was known as the American League of Lobbyists. See Press Release, American League of Lobbyists, The Board of the American League of Lobbyists (ALL) Votes To Recommend Its New Brand: "Association of Government Relations Professionals" (AGRP) (Oct. 15, 2013), <http://grprofessionals.org/wp-content/uploads/2013/11/Rebrand-PR-10-14-2013v2.pdf>.