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# A New Gag Rule: How the Executive Branch Reform Act Violates Civil Liberty

*Brian W. Walsh, Matthew Spalding, and Andrew M. Grossman*

If some Members of Congress have their way, detailed information on every contact that individual Americans have with thousands of federal officials regarding any federal government policy will wind up in a centralized government database. While currently removed from the House's pending lobbying reform package, the Executive Branch Reform Act of 2007 (H.R. 984), co-sponsored by House Oversight and Government Reform Committee Chairman Henry Waxman (D–CA) and Ranking Member Tom Davis (R–VA), will likely be introduced as an amendment to that bill. The bill would impose tremendously burdensome reporting requirements on the executive branch and is fraught with unlimited possibilities for oppressive and abusive government conduct. Passage and full implementation of its provisions would pose grave threats to individual Americans' rights to free speech and to petition the government, would threaten the constitutional separation of powers, and would prove unconstitutional in many applications.

Members of Congress should categorically oppose this measure. If such legislation ever reaches his desk, the President should issue a swift and unqualified veto.

**Executive Branch Reform Act of 2007.** Under the Executive Branch Reform Act (EBRA), executive branch officials would be required to record and report personal and confidential data on any "significant" attempt by "any person or entity" (apart from other government officials or their representatives) to contact or communicate with the U.S. government regarding official government business or policy. Five broad categories of government officials are covered under the reporting requirements, including all positions of a "confidential, policy-determining, policy-making or policy-advocating character." Federal officials estimate that over 8,000 executive branch employees (not counting military officers above the one-star or admiral rank) would be enlisted into this effort to collect data on Americans' attempts to communicate with government officials.

The proposed legislation defines a "significant contact" as any "oral or written communication (including electronic communication)…in which [a] private party seeks to influence official action by any officer or employee of the executive branch of the United States." Each federal official's regular reports of "significant contacts" must include the name of all persons who contact the official, the date of each communication or significant contact, and the subject matter and selected portions of the contents of any communications. Four times per year, the reports would be submitted to and compiled by the Office of Government Ethics, an agency created by Congress in 1985 to oversee the Executive Branch.

The EBRA would require the Office of Government Ethics to develop a computerized system for "filing, coding, and cross-indexing" all data on con-

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tacts with covered federal officials. Estimates suggest that a minimum of between 10 million and 20 million reports on Americans' contacts with the federal government would be created and stored in this centralized government database each year.

**We Are All Lobbyists Now.** Proponents of the EBRA tout it as an effort to promote openness and accountability by ending "secret contacts" between lobbyists and executive branch officials. They characterize it as a landmark ethics reform measure that would further the cause of good government.

The legislation is ostensibly targeted at lobbyists. For example, one EBRA provision states that if an individual American communicates with or contacts a covered federal official on behalf of a third person, the data collected and reported must include the name of that third person as well. The bill's sponsors apparently assume that every time an American contacts the executive branch (but not Congress) on behalf of a third party, he is "lobbying." Accordingly, the EBRA calls every third party "the client." But the terms and language of the bill are so broad that its Orwellian reporting requirements are by no means limited to lobbying activities: If the bill is enacted into law, any individual's communications with a federal official concerning government policy will be treated as suspicious.

EBRA Section 604(2)(A) defines the exceptions to "significant contact" to be almost identical to the exceptions to the definition of "lobbying contact" in Section 3 of the Lobbying Disclosure Act of 1995.[1] But unless an individual's communications with the government have been granted express protection by a previous act of Congress, such as by the Whistleblower Protection Act of 1989, the EBRA's list of exceptions provides no safe harbor for a private citizen who seeks to influence government action confidentially.

A separate title of the EBRA requires a two-year "cooling-off period" during which covered officials who leave the executive branch, but not those who leave Congress, may not engage in lobbying, which is loosely defined. This title purports to "stop the revolving door" between the executive branch and the lobbying industry but would do absolutely nothing to stop or even slow the revolving door between the lobbying industry and Congress. When it comes to making sure Congress's own shop runs efficiently, the EBRA's sponsors tacitly acknowledge that the federal government pays too little to attract top talent for congressional staff positions if staffers must find an unrelated career for two years each time they leave government service. The bill's sponsors apparently also acknowledge that lobbying Congress is a valid and constitutional activity within the American system of government—as well they should, because lobbying is protected by the First Amendment rights to free speech and to petition the government.[2]

**An Assault on Fundamental Rights.** In the past, when Members of Congress have chosen to regulate actual paid lobbying—an activity that is at least arguably more susceptible to regulation than private citizens' exercise of their rights to engage in "significant contacts" with government officials—Congress has been wary that it might infringe vital First Amendment rights. Section 8 of the Lobbying Disclosure Act of 1995, for example, states that nothing in the Act "shall be construed to prohibit or interfere with (1) the right to petition the Government for the redress of grievances; (2) the right to express a personal opinion; or (3) the right of association, protected by the first amendment to the Constitution."[3]

In the EBRA, Congress dispenses with any such scruples and *assumes* that it is free to compel the Executive Branch to record and catalog citizen contact reports. Further, the legislation's onerous reporting requirements exclude communications with Members of Congress or their staffs and communications by any individual affiliated with a media organization, foreign government, or foreign political party. Under EBRA, the interests of foreign officials in communicating with and influencing the U.S. government are treated with more deference

1. *See* 2 U.S.C. § 1602(8)(B).
2. In pertinent part, the First Amendment states, "Congress shall make no law…abridging the freedom of speech…or the right of the people…to petition the Government for a redress of grievances." U.S. CONST. amend. I.
3. 2 U.S.C. § 1607(a).

and afforded more respect than the First Amendment rights of Americans to petition their own government. The EBRA's disrespect for the protections the U.S. Constitution affords the rights of citizens to communicate with and petition their own government is disturbingly consistent with the position taken by various international bodies, such as the United Nations.[4]

The existence of the law itself would chill the exercise of Americans' free speech and government petitioning rights. It will be a rare executive branch official who is receptive to the idea of having "significant contacts" with Americans whose ideas are unpopular or who are members of unpopular groups. Executive branch officials required to operate under the burdens of the EBRA would be far less likely than they are today to welcome communications from individuals outside of government. The federal government is so enormous and complex that it is far too frequently insulated from the views of average Americans. The EBRA would insulate the executive branch even further.

Moreover, how many Americans will simply engage in self-censorship and choose to forego communicating with or petitioning the federal government out of a reasonable fear that someone, whether inside or outside of government, might retaliate against them? How many will curtail their public expression or association with certain "undesirable" individuals or groups so as not to compromise their ability to petition the executive branch effectively?

For these reasons, in certain circumstances EBRA's application could seriously infringe First Amendment rights.[5] The Supreme Court has held that government disclosure requirements that encroach on First Amendment rights, such as the right to assemble and to petition government, are subject to "exacting scrutiny," demanding more justification than merely "some legitimate government interest."[6] Exacting scrutiny of disclosure requirements "is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights."[7] The Court has explained that cases similar to *NAACP v. Alabama*[8] (in which rank-and-file members of the NAACP were subject to various injuries when their identities were revealed by the state) would give rise to serious constitutional questions.[9] Especially as concerns grassroots groups, the EBRA would require exacting judicial scrutiny and be unlikely to survive it.

This, of course, should not be surprising, for the EBRA is an engraved invitation to Orwellian government. For example, state officials would enjoy the ability to search for the names of every American who tries to dissuade the Justice Department from seeking increased federal funding for state law enforcement. Congressional offices that are friendly with the gun lobby could search to see who has been contacting executive branch officials about tighter gun controls. Scenarios such as these are not mere possibilities; they are certainties given that the government would be able to run electronic searches on the database and that the data would be made available to the public.[10] Thus, Congress's propensity to issue subpoenas in the supposed exercise of its oversight capacity is clear evidence that it would be impossible for Congress to resist the temptation to subpoena executive branch officials' full and detailed records of "any significant con-

4. For example, the United Nations' Universal Declaration of Human Rights (UDHR) purports to be a statement of all essential rights that governments should protect on behalf of their citizens. The UDHR lists an extensive array of protections but conspicuously omits any protection for—or even recognition of—a right to petition one's own government. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess. 1st plen. Mtg., U.N. Doc A/810 (Dec. 10, 1948).
5. *See* Buckley v. Valeo, 424 U.S. 1, 64 (1976).
6. *Id.*
7. *Id*. at 66; *see also* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 100 (1982).
8. 357 U.S. 449 (1958).
9. *Id.* at 462–63.
10. This database would be a prime candidate for the use of data mining technologies that identify correlations and patterns within large sets of disparate data.

tacts" that powerful Members of Congress characterize as suspicious.

A logical next step would be to use the database to track individuals and groups that contact government officials regularly. This tracking could be performed by federal, state, and local government officials and, because the data would be available to the public, by private advocacy and counter-advocacy groups as well. Because the EBRA would authorize the Office of Government Ethics to promulgate rules to implement the Act's reporting requirements, some enterprising bureaucrat is likely to decide that, in order to ease and simplify the burden of executive branch reporting, each individual and group that engages in "significant contacts" will be assigned a unique numerical identifier.

The right to petition the government has been established in Anglo-American law for so many centuries[11] that Americans take it for granted. Complaints about its infringement are rarely raised, because infringements have been rare. Government officials know that Americans rightly expect unfettered freedom to petition any government leader—at any level and at any time—without fear of reprisal or any other adverse consequence.[12] The EBRA is a frontal attack on these rights.

**An Assault on the Executive Branch.** The EBRA's data recording and reporting requirements are sweeping, indiscriminate, and burdensome to the point of interfering with the constitutional responsibility of the President and executive branch officials to enforce the law. If these requirements were enacted into law and implemented, executive branch officials would have to keep extensive logs of information on every conversation, meeting, letter, delivery, phone call, email, fax, and voicemail received during working hours—as well as those received during private time if they potentially deal with government policies. The bill's recording and reporting requirements could easily overwhelm federal officials, rendering it difficult or impossible to carry out their normal duties, any time a broad grassroots campaign or influential advocacy group targets a specific federal policy or practice.

Congressional power, including the power to engage in information gathering in aid of its legislative duties, is broad. But this power is not without limits. The Constitution created the three branches of the federal government to be co-equal and independent, and the President alone has ultimate control over executive branch officials in the performance of their executive duties. Presidential authority includes the power to oversee and review subordinate officials' work. This supervisory power is, in turn, supported by constitutional protections for the confidentiality of deliberative processes, *including information gathering*, that take place wholly within the executive branch.

The Supreme Court has described the privilege protecting the confidentiality of executive branch communications in several cases, explaining that it "can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties."[13] While the privilege is not absolute, the "President's need for complete candor and objectivity from advisers calls for great deference," even from the federal courts.[14]

> A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the consider-

11. The Magna Carta (1215) formally recognized a right to petition the king almost 800 years ago. See, e.g., Edwin Meese III et al., THE HERITAGE GUIDE TO THE CONSTITUTION 316 (2005). The landmark English Bill of Rights "explicitly and sweepingly" affirmed that same right in 1689. Akhil Reed Amar, THE BILL OF RIGHTS 31 (1998).
12. An American's expectation that he or she will suffer no adverse consequence for exercising the right to petition flows directly from the express language of the protections that citizens within the jurisdiction of the Anglo-American legal tradition have long enjoyed. The 1689 English Bill of Rights, for example, recognized that "it is the right of the subjects to petition the king, and *all commitments and prosecutions for such petitioning are illegal*." An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M. (Eng.) (emphasis added). The Executive Branch Reform Act, by making reporting violations punishable by criminal prosecution, would constitute a substantial step in the direction of rolling back this centuries-old right.
13. U.S. v. Nixon, 418 U.S. 683, 705 (1974).

> ations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of the Government and inextricably rooted in the separation of powers under the Constitution.[15]

Presumptively privileged executive branch communications include even "idle conversations with associates in which casual reference might be made" to political matters.[16] While laws passed by Congress may overcome this presumption, the burden is weighty, and the courts may still find such laws unconstitutional as applied to specific privileged communications. The Court has held that the constitutional questions that must be answered are whether the legislation "disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions"[17] and, if so, whether the communications are maintained within the executive branch and kept confidential.[18]

Only in extreme cases has the Court found the presumption favoring privilege protections for executive branch materials to have been overcome. One of the few instances is when specific disclosures are needed by the judicial branch in the context of a criminal prosecution,[19] but, even then, only where there is "demonstrated, specific need" for communications that are "essential to the justice of the (pending criminal) case."[20]

In even narrower circumstances, the Court rejected former President Nixon's facial challenge, on executive privilege and separation-of-powers grounds, to the constitutionality of the Presidential Recordings and Materials Preservation Act. Congress passed the act a few weeks after Nixon resigned in order to abrogate an agreement that he had entered into with the General Services Administration (GSA) over the disposition of 42 million pages of documents and 880 tape recordings from his administration. This one-of-a-kind act did not require automatic disclosure of executive branch materials to the public or to Congress. Rather, it merely included a grant of authority to the GSA—an executive branch agency—to promulgate regulations for eventual public disclosure of only those materials that were of "general historical significance" and those that documented abuses of government power in the Watergate scandal. The Court deemed it "highly relevant that the Act provides for custody of the materials in officials of the Executive Branch and that employees of that branch have access to the materials only 'for lawful Government use, subject to the [GSA's] regulations.'"[21] Further, the act expressly preserved any affected party's rights to object to public disclosure on the basis of any privilege or privacy interest.[22]

The Court noted that the law would keep the records confidential and within the executive branch and would not burden the executive branch to the extent that it would interfere with its duties.[23] Some of the materials would eventually make their way to the public but only after the executive branch (1) made the decision to release them and (2) provided notice to President Nixon that materials over which he might assert his privilege or personal privacy interests were slated to be released.

14. *Id.* at 706. The quoted language concerns the judicial subpoenas on the executive branch. The Court's opinion suggests that the legislative branch (i.e., Congress) may face an even higher bar when it demands information from the executive. *See id.* at 707–08.
15. *Id.* at 708.
16. *Id.* at 715; *see*, *e.g.*, In re Sealed Case, 121 F.3d 729, 736–40, 751–52 (D.C. Cir. 1997) (holding that the relatively narrow "presidential communications privilege" extends to "presidential advisors in the course of preparing advice for the President").
17. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977).
18. *See id. at* 443–46.
19. *See* 418 U.S. at 713 (affirming in a criminal prosecution of alleged Watergate conspirators the district court's denial of President Nixon's motion to quash a subpoena that sought tape recordings and documents involving presidential communications with aides and advisors).
20. *Id.* at 713.
21. 433 U.S. at 443–44 (quoting the language of the Presidential Recordings and Materials Preservation Act of 1974).

The EBRA is not even close to being a targeted, remedial measure carefully crafted to redress some existing need for public disclosure of specific, executive branch wrongdoing. It is a preventative, heavily burdensome, and deeply intrusive law that would reveal the details of executive branch communications to the public and to Congress. Because it falls far short of the Court's high standard for disclosure requirements, it would be unconstitutional in its application against many or possibly all executive branch officials.

The contempt the Executive Branch Reform Act demonstrates for the internal operations and prerogatives of the executive branch is compounded by its language requiring the Office of Government Ethics to refer any reporting inadequacies to Justice Department prosecutors for possible criminal investigation and prosecution. If the Ethics Office decides that records have been in "noncompliance" for over 60 days, it would be required under the Act to inform federal prosecutors for the District of Columbia. The Act clothes the Ethics Office with both the authority to define "noncompliance" and the sole, unreviewable discretion to set criminal inquiries in motion.

As with all contemporary record-keeping requirements that the federal government imposes, officials compiling and reporting records on all "significant contacts" would be subject to prosecution for making false statements if the records were incorrect, even if the mistakes were inadvertent. If an executive branch official is convicted on this basis, the individual American with whom he had "significant contact" could even be subject to criminal conspiracy charges if government officials suspect that the individual had some involvement in the creation of the erroneous records.

The EBRA would create an information pipeline from the internal deliberative and information gathering processes of the executive branch directly to any third party, Congress included. This pipeline would severely undermine the respect and protection that the Constitution affords to the internal workings and deliberations of the executive branch, led by the President, from encroachment by a coordinate branch.[24] Congress would not tolerate a similar encroachment upon its own deliberative processes.[25] Likewise, the President should not tolerate the reporting provisions of the EBRA.

22. *See id.* at 444 ("The Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch."); *see also id.* at 455 ("[T]here is no basis for appellant's claim that the act 'reverses' the presumption in favor of confidentiality of Presidential papers recognized in *United States v. Nixon*. Appellant's right to assert the privilege is specifically preserved by the Act. The guideline provisions [directing GSA's rule-making authority] on their face are as broad as the privilege itself.") Relying on *U.S. v. Nixon,* the Court also placed substantial weight on the fact that the law would impose no more burden or intrusion on the executive branch than would a district court's confidential (*in camera*) inspection of the same materials. *Id.* at 455.
23. The Court observed that executive branch records do not lose their privilege protections merely because the presidential administration that created those records has left office: "Unless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends…. Therefore the privilege survives the individual President's tenure." *Id.* at 448–49 (quoting and adopting the view of the Solicitor General).
24. For a helpful description of the "deliberative privilege" (as contrasted with the "presidential communications privilege"), see In re: Sealed Case 121 F.3d 729, 736–40 (D.C. Cir. 1997). According to the federal court of appeals for the District of Columbia, which hears a disproportionately large share of federal executive-privilege cases, "Two requirements are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative." *Id.* at 737. The EBRA would require many disclosures of information that falls within this definition of executive privilege and thus, according to the court, would exceed Congress's authority. Overcoming the privilege requires "a sufficient showing of need" that exceeds the executive's interests in maintaining the privilege. This determination is to be made on a case-by-case basis. *Id.* No general, preventative disclosure requirement is likely to satisfy the District of Columbia Circuit's formulation. Further, while the court went to great lengths to delineate the contours of and distinguish the two privileges named above (as opposed to recognizing an all-encompassing "executive privilege"), the distinction is not relevant here in that various applications of the EBRA would violate one, the other, or both privileges.

**Conclusion.** Once before, Congress sought to suppress American citizens' efforts to contact the government in order to influence federal policy. In 1836, a House of Representatives dominated by pro-slavery Members passed a "gag rule" that automatically tabled without consideration anti-slavery petitions presented in Congress, effectively neutralizing the constitutional rights of American citizens to petition the government to address their grievances. Now, 170 years later, some Members of Congress want to create a new gag rule that, using modern technology and bureaucratic efficiency, covers everyone and every issue that comes before the federal government.

No clever crafting of language that retains the requirement that government officials report on private citizens who communicate with them or contact them could make this legislation less repugnant. This kind of proposal is so offensive to American principles of government and to the Constitution that it does not merit serious consideration by Congress. But if Congress ignores its constitutional duty to and sends such legislation to the President, he should veto it, pursuant to his own oath to preserve, defend, and uphold the Constitution.

*—Brian W. Walsh is Senior Legal Research Fellow in the Center for Legal and Judicial Studies, Matthew Spalding, Ph.D., is Director of the B. Kenneth Simon Center for American Studies, and Andrew M. Grossman is Senior Writer at The Heritage Foundation.*

25. Evidence that this is so includes the indignation expressed by leaders in the 109th Congress, who were of the same political party as the President, when federal law enforcement officials searched the offices of a congressman who was the subject of a criminal investigation. *See, e.g.*, Press Release, J. Dennis Hastert, Speaker, U.S. House of Representatives, Speaker Statement Regarding the Federal Bureau of Investigation Search of Congressional Office (May 22, 2006) (on file with author) ("[I]t is not at all clear to me that it would even be possible to create special procedures that would overcome the [c]onstitutional problems that the execution of this warrant has created.").