

February 2019

Behind the Times: A Comparative Argument That the State of Idaho Should Combat the Revolving Door Effect with Waiting Period Legislation

F M Cody D. Earl

Follow this and additional works at: <https://digitalcommons.law.uidaho.edu/idaho-law-review>

Recommended Citation

F M Cody D. Earl, *Behind the Times: A Comparative Argument That the State of Idaho Should Combat the Revolving Door Effect with Waiting Period Legislation*, 52 IDAHO L. REV. 639 (2019).

Available at: <https://digitalcommons.law.uidaho.edu/idaho-law-review/vol52/iss2/7>

This Article is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Law Review by an authorized editor of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

BEHIND THE TIMES: A COMPARATIVE ARGUMENT THAT THE STATE OF IDAHO SHOULD COMBAT THE REVOLVING DOOR EFFECT WITH WAITING PERIOD LEGISLATION

TABLE OF CONTENTS

INTRODUCTION	639
PART I: THEORY OF REVOLVING DOOR PROHIBITIONS	640
A. General Impacts of the Revolving Door.....	640
B. Lobbyists and the Revolving Door	643
PART II: FEDERAL RESPONSES TO THE LOBBYIST	
REVOLVING DOOR	646
A. Historical Perspective.....	646
B. Transparency Measures	647
C. Prohibitions on Quid Pro Quo Arrangements	649
D. Waiting Periods	650
PART III: IDAHO’S RESPONSES TO THE LOBBYIST	
REVOLVING DOOR	653
A. Historical Perspective for Idaho	653
B. Idaho’s Transparency Measures	654
C. Idaho’s Prohibitions on Quid Pro Quo Arrangements	656
D. Absence of Waiting Period Legislation in Idaho.....	657
PART IV: COMPARATIVE ANALYSIS OF STATES.....	658
A. Methodology	658
B. Findings.....	662
PART V: RECOMMENDATIONS FOR IDAHO	665
A. Need for Waiting Period Legislation in Idaho	665
B. Proposal Waiting Period Legislation for Idaho.....	666
PART VI: CONCLUSION.....	668

INTRODUCTION

At the heart of American government and politics is a fascinating phenomenon known as the “Revolving Door Effect.” In short, the metaphorical revolving door describes the free transfer of employment from the public sector to the private sector and has been credited for numerous political downfalls, regulatory oversights, and government scandals. One of the most egregious examples of the revolving door effect occurs when public officials leave office and immediately accept employment as private sector lobbyists. The two basic concerns of this practice are: (1) the fear that a public official’s decision-making and actions might be compromised or altered by the promise of future employment from a

corporation or industry; and (2) the notion that a past public official might have an unfair advantage when lobbying for the support of current public officials, with whom he or she previously worked. The goal of this article is to enlighten the public about the prevalence of these employment transfers and argue that Idaho's measures against the lobbyist revolving door are insufficient. Furthermore, after a comparative analysis, the article concludes that Idaho should enact waiting period legislation.

Part I provides an overview of the scholarship on the revolving door effect, its impacts on society as a whole, and the unique dangers associated with the lobbyist revolving door. Part II narrows the emphasis to the measures taken by lawmakers at the federal level to mitigate the effects of the lobbyist revolving door. These measures fall into three general categories: (1) transparency measures; (2) prohibitions on quid pro quo arrangements; and (3) implementation of waiting periods. Part III analyzes Idaho's responses to the revolving door, demonstrating that, although Idaho has adopted transparency measures and prohibitions on quid pro quo arrangements, Idaho is among the minority of states that have not enacted waiting period legislation. Then, Part IV engages in a comparative analysis of the states within the jurisdiction of the Ninth Circuit Court of Appeals. The analysis looks for meaningful distinctions between states that have enacted waiting period legislation and those that have not. Drawing from the previous Parts, Part V argues that Idaho should adopt waiting period legislation for lobbyists and proposes draft legislation. Finally, Part VI contains some ending thoughts and further highlights the notion that Idaho is behind the times and should enact waiting period legislation sooner rather than later.

PART I: THEORY OF REVOLVING DOOR PROHIBITIONS

A. General Impacts of the Revolving Door

The revolving door effect has impacted the governance and politics of the United States in numerous ways over the last several decades. Scholars blame the metaphorical revolving door between jobs in the public and private sector for impacting the manner in which government officials regulate.¹ The main assumption and cause for concern regarding the revolving door is the idea that public officials, while in their capacity as a government employee, make decisions and act in ways that will benefit the private corporation or industry for which they plan to become employed at the conclusion of their public sector employment.² In recent years the revolving door effect has been credited for

1. David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 508 (2013).

2. *See id.*

the Bernie Madoff scandal³ and the Gulf Coast oil spill.⁴ Although the impacts of the revolving door are highly publicized and scrutinized following scandals of this magnitude, the revolving door affects other aspects of politics and government on a daily basis.

This article aims to focus on the effects of public officials becoming private lobbyists via the revolving door, at both the federal and state levels of government. Nonetheless, it is critical to have a general foundation and understanding of the possible conflicts of interest present when individuals are permitted to freely transition in and out of public employment. Along with the general concerns about fraud and public deceit are the risks of numerous corrupt practices such as: (1) actual quid pro quo arrangements in which public officials are bribed or incentivized by their future private sector employers; (2) undue access by private sector employees into the public sector; and (3) regulatory capture.

The first major concern of the revolving door is that it is “essentially a bribe, paid through the prospect of lucrative future employment. The quid pro quo for the bribe is the promise to regulate lightly, or not at all.”⁵ The banking sector provides an example of the prevalence of this concern, and some argue that publicly employed regulators neglect their regulatory duties in an effort to aid large banks—in hope of future employment and a more lucrative salary with said banks.⁶ The exchange of loose regulatory oversight for future employment is by no means limited to the private banking sector, and some theorists contend that the conduct is prevalent in numerous government agencies, such as the Departments of Commerce, Defense, Agriculture, and Energy.⁷ In re-

3. David Smyth, *Breaking: Study Confirms What I Think*, CADY BAR THE DOOR: INSIGHT & COMMENTARY ON SEC ENFORCEMENT ACTIONS AND WHITE COLLAR CRIME, (Aug. 6, 2012), <http://www.secmiscellany.com/2012/08/06/breaking-study-confirms-what-i-think/>. In 2009, Bernie Madoff was sentenced to 150 years in prison after conducting a “Ponzi scheme” in which he defrauded thousands of investors out of an estimated \$65 billion. Many scholars blame the revolving door and Mr. Madoff’s involvement with the U.S. Securities and Exchange Commission for the magnitude of his fraudulent scheme. Stephanie Yang, *5 Years Ago Bernie Madoff Was Sentenced to 150 Years in Prison – Here’s How His Scheme Worked*, BUSINESS INSIDER (July 1, 2014, 6:54 PM), <http://www.businessinsider.com/how-bernie-madoffs-ponzi-scheme-worked-2014-7>.

4. *The Revolving Door: Drilling Regulators Move to Big Oil Jobs and Back*, ASSOCIATED PRESS (May 27, 2010, 4:21 AM), http://www.cleveland.com/nation/index.ssf/2010/05/the_revolving_door_drilling_re.html (detailing Jim Grant’s transfer of employment to British Petroleum prior to the major oil spill in April 2010).

5. Zaring, *supra* note 1 at 512.

6. See Matt Levine, *Strict Regulation Makes the Revolving Door Spin Faster*, BLOOMBERG VIEW (June 26, 2014, 5:31 PM), <http://www.bloombergvew.com/articles/2014-06-26/strict-regulation-makes-the-revolving-door-spin-faster>.

7. See *Top Agencies*, OPEN SECRETS, <https://www.opensecrets.org/revolving/top.php?display=G> (last visited Feb. 16, 2016) (listing the current number of revolving door people profiled in each government agency).

sponse, the federal government, as well as a majority of states, has adopted various forms of legislation prohibiting quid pro quo arrangements.⁸

A second, and equally concerning, impact of the revolving door is the amount of undue access that private sector corporations obtain by hiring former public officials. The main concern regarding undue access is the idea that large corporations gain “inside-knowledge, vital contacts, and . . . powerful influence” when they employ an individual who formerly was responsible for regulating the industry in which the corporation is engaged.⁹ The basic argument is that the revolving door benefits large corporations who are able to hire former public officials and use the new hire’s knowledge, expertise, experience, and contacts to the benefit of their corporate interests.¹⁰ Over the last several decades, the rate at which ex-regulators have been employed by private corporations has drastically increased.¹¹ For example, public financial firms report they have expanded the hiring of past public officials in the United States between eighteen to fifty-five percent over the last ten years.¹² Furthermore, the flow of ex-regulators between the six major regulatory agencies and financial institutions within the United States has more than doubled following the most recent financial crisis.¹³

A third concern of the revolving door effect is regulatory capture. One common definition of regulatory capture is “[a] process through which regulated monopolies end up manipulating . . . state agencies that are supposed to control them.”¹⁴ On a more basic level, regulatory capture occurs when regulation of an industry is directed away from public interest and instead focuses on the interest of the individual actors within the industry itself.¹⁵ The revolving door has been blamed for the

8. See *infra* Part II.C.

9. Tamás Novák, *Business, Politics and the Revolving Door in the European Union*, GLOBAL VOICES (Nov. 16, 2013, 12:32 GMT), <http://globalvoicesonline.org/2013/11/16/business-politics-and-the-revolving-door-in-the-european-union/> (explaining the general concern of the revolving door and knowledge acquired by corporations in the context of the European Union).

10. Kevin T. McGuire, *Lobbyists, Revolving Doors and the U.S. Supreme Court*, 16 J. L. & POLITICS 113, 113 (2000).

11. See Dieter Zinnbauer, *The Pros and Cons of the Revolving Door Practice – The Main Argument*, ANTI-CORRUPTION RESEARCH NETWORK (Oct. 24, 2014), <http://corruptionresearchnetwork.org/acrn-news/blog/the-pros-and-cons-of-the-revolving-door-practice-2013-the-main-arguments>.

12. *Id.* (citing Sophie Shive & Margaret Forster, *The Revolving Door for Financial Regulators*, SOCIAL SCIENCE RESEARCH NETWORK, 1 (Nov. 18, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2348968.)

13. Zinnbauer, *supra* note 11, at n. 9 (citing D. Lucca et al., *The Revolving Door and Worker Flows in Banking Regulation*, NBER (2014)).

14. Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REVIEW OF ECONOMIC POLICY no. 2, 203, 203 (2006).

15. Daniel Carpenter & David A. Moss, *Preventing Regulatory Capture: Special Interests Influences and How to Limit It*, THE TOBIN PROJECT, 1–3 (2014), <http://www.tobinproject.org/sites/tobinproject.org/files/assets/Introduction%20from%20Preventing%20Regulatory%20Capture.pdf>.

occurrence of regulatory capture, most notably regarding the Securities and Exchange Commission (SEC).¹⁶ Some argue that the revolving door effect has allowed the SEC to become inundated with individuals regulating in favor of certain industries, such as investment banks and hedge funds, to the degree that the line between the regulatory agency and the industries that it is charged with regulating has become blurred.¹⁷ These arguments are supported by the fact that several former SEC employees are now employed with private sector corporations for the sole purpose of helping the corporation influence SEC rulemaking, counter investigations, and promote more lenient regulations from the regulatory agency.¹⁸

Although it is difficult to quantify how much of a detriment these three effects of the revolving door have on governance and regulation within the United States, it is apparent that the transition of employment between the public and private sector is now a common practice. This raises questions, not only about the integrity of the individual(s) who traverse from the public to the private sector, but also about the honesty and integrity of the entire regulatory system. The concerns of quid pro quo arrangements, undue access, and regulatory capture are by no means the only effects caused by the revolving door; however, they are the effects that most directly correlate to the revolving door used by lobbyists at both the state and federal level.

B. Lobbyists and the Revolving Door

One key ingredient to the functionality of democracy in the United States is the ability of citizens to voice their opinions and be heard. Although citizens have several methods to voice their opinions, lobbying is arguably the most direct method for a citizen to relay his or her sentiments. The term “lobby” is defined: “[t]o talk with or curry favor with a legislator . . . repeatedly or frequently, in an attempt to influence the legislator’s vote.”¹⁹ Further definitions include: “[t]o support or oppose (a measure) by working to influence the legislator’s vote” and “[t]o try to influence (a decision-maker).”²⁰ In sum, a lobbyist is charged with the task of communicating to, working with, and influencing lawmakers at the various levels of government to initiate or vote for legislation in fa-

16. See *Dangerous Liaisons: Revolving Door at SEC Creates Risk of Regulatory Capture*, PROJECT ON GOVERNMENT OVERSIGHT 2–8 (Feb. 11, 2013), <https://s3.amazonaws.com/s3.documentcloud.org/documents/602191/20130211-dangerous-liaisons-sec-revolving-door.pdf>.

17. *Id.*

18. *Id.* at 8–10.

19. *Lobby*, BLACK’S LAW DICTIONARY (9th ed. 2009).

20. *Id.*

vor of the individual lobbyist or the industry that the lobbyist represents.

The number of individuals employed as lobbyists varies from year to year as the desires and needs of corporations, industries, and public interest groups fluctuate. A database compiled by the Center for Responsive Politics shows that the number of registered federal lobbyists in Washington, D.C. has exceeded 10,000 individuals since the year 1998.²¹ On a state level, in 2015 there were 449 registered lobbyists in the state of Idaho alone.²² The number of lobbyists at the state level can also vary depending on numerous factors, such as the state's population, demographics, number of corporations, and laws that impact or reduce the political reach of lobbyists.

The profession of lobbying—at both the state and federal level—is continually changing as new laws are passed and “loopholes” in said laws are exploited. The three main concerns addressed above²³ correlate directly with the individuals and corporations who spend an exorbitant amount of resources annually in an attempt to influence lawmakers. First, the concern of actual quid pro quo arrangements is justified based on the fear of elected officials accepting bribes in exchange for their vote or support for a lobbyist's proposed initiative.²⁴ Second, with a large number of past public officials accepting employment as lobbyists for various corporations and industries with specified interests, there is a concern of those entities obtaining undue access to regulatory agencies.²⁵ Finally, the risk of regulatory capture is heightened as more and more ex-regulators obtain employment as lobbyists for the corporations and industries that they previously regulated.²⁶

As noted above, the first main concern regarding the association of lobbyists and the revolving door effect is the fear of lawmakers engaging in quid pro quo arrangements. With the inherent nature of lobbying requiring a lobbyist and lawmaker to spend large amounts of time together—whether at dinners, receptions, sporting events, or elsewhere—the opportunities for the parties to engage in a quid pro quo arrangement are abundant.²⁷ Furthermore, it is not uncommon for a lobbyist, or the

21. Lobbying Database, OPEN SECRETS, <https://www.opensecrets.org/lobby/> (last visited Mar. 1, 2016) (representing data obtained from the Senate Office of Public Records based on geographic location).

22. *Lobbyists with Employers for 2015*, OFFICE OF THE ID. SEC'Y OF STATE, <http://www.sos.idaho.gov/elect/lobbyist/2015/lobemp.pdf> (last visited Mar. 1, 2016).

23. See *supra* Part I.A.

24. See, e.g., Peter Overby, *Beyond Quid Pro Quo: What Counts As Political Corruption?*, NPR (May 6, 2015 2:35 PM), <http://www.npr.org/sections/itsallpolitics/2015/05/04/404052618/beyond-quid-pro-quo-what-counts-as-political-corruption>.

25. See, e.g., OPEN SECRETS, *supra* note 7.

26. See generally Tim Devaney, *Senator: Regulatory capture a 'threat' to government*, THE HILL (Jan. 30, 2014, 3:03 PM), <http://thehill.com/regulation/lobbying/197002-senator-regulatory-capture-a-threat-to-government> (highlighting Senator Sheldon Whitehouse's warning about the power of interest groups and lobbyists).

27. ROGER H. DAVIDSON ET AL., CONGRESS AND ITS MEMBERS 377 (14th ed. 2013).

corporation a lobbyist represents, to dedicate funds and resources to an event or gathering in the hope of obtaining even more one-on-one time with certain lawmakers.²⁸ In sum, with the very nature of a lobbyist's job being to obtain the support or vote of a lawmaker, there are justifiable concerns for potential quid pro quo arrangements.

The second concern regarding the intersection of lobbyists and the revolving door effect is the fear of a corporation obtaining undue access to the agencies charged with regulating said corporation. Today, more than half of the members of Congress who left office in 2012 are registered as lobbyists.²⁹ As more and more members of Congress accept employment as lobbyists upon completion of their time in office, the concern of corporations having undue access to the inside governance and regulation of the United States continually increases.

A final concern that exists as a result of the juncture of the revolving door and lobbying is the occurrence of regulatory capture. For evidence of the risk of regulatory capture—the blurred line between the regulatory agency and the industries it is charged with regulating³⁰—one has to look no further than the leadership change of the Federal Communications Commission (FCC) in 2014. Currently, CTIA Wireless, a nationwide cable and wireless lobbyist association, is led by a former FCC commissioner and chairman, and the FCC itself is chaired by an individual who was a former CTIA lobbyist.³¹ This exchange of leadership between the FCC and one of the entities it is charged with regulating highlights the notion that, as corporations and industries continue to grow and expand, they are infiltrating the agencies that are charged with regulating them.

With the nature of lobbying being to influence and persuade decision-making government officials, the possibilities for corruption are endless. With the fear and perception of corruption already prevalent as lobbyists and lawmakers interact, there is no question that the effects and detriments caused by the revolving door should be limited to whatever degree possible. As more and more public officials transition into the role of a lobbyist, the risks of quid pro quo arrangements, undue access, and regulatory capture become increasingly present in the United States.

28. *Id.* at 377–78.

29. Zinnbauer, *supra* note 11.

30. DANGEROUS LIAISONS, *supra* note 16, at 1.

31. Jon Brodtkin, *Washington's Revolving Door: Cellular Lobby and FCC Have Traded Leaders*, ARSTECHNICA (Apr. 23, 2014, 12:50 PM), <http://arstechnica.com/tech-policy/2014/04/washingtons-revolving-door-cellular-lobby-and-fcc-have-traded-leaders/>.

PART II: FEDERAL RESPONSES TO THE LOBBYIST REVOLVING DOOR

The federal government has been active in addressing the problems and concerns resulting from the lobbyist revolving door. Congress has enacted three primary measures to combat the problems associated with the revolving door effect: (1) transparency measures; (2) direct prohibitions on quid pro quo arrangements; and (3) mandatory waiting periods.³² After presenting a historical evaluation, this Part discusses each measure in turn and explains how each seeks to address the revolving door concerns of actual quid pro quo arrangements, undue access, and regulatory capture.

A. Historical Perspective

Nearly every newly elected President of the United States in modern history has made some form of disclaimer or political promise that he is going to resolve the problems derived from the revolving door at the federal level.³³ For instance, both Bill Clinton and Barack Obama issued executive orders shortly after entering office aimed at closing the revolving door in Washington, D.C.³⁴ Furthermore, Presidents on both sides of the political aisle have made promises and expressions of concern regarding the revolving door, which shows the revolving door effect is neither developed nor argued about based on partisan ideologies.³⁵ With the revolving door receiving so much attention from Presidents early in their terms, it is not surprising that a long line of legislation has aimed at closing the revolving door.

When looking at the variety of revolving door legislation enacted throughout the years from a macro perspective, there are three main pieces of legislation that directly address the profession of lobbying. Most present-day scholars point to the Ethics in Government Act of 1978, The Lobbying Disclosure Act of 1995, and the Honest Leadership and Open Government Act of 2007 as the three pivotal pieces of legislation concerning the intersection of lobbyist and the revolving door effect.³⁶ Collectively, these three pieces of legislation, supplemented throughout the years by other legislation, aim to combat the effects of the revolving door by demanding transparency measures, prohibiting

32. See *infra* Part II.(B)–(D).

33. Zaring, *supra* note 1, at 523–24.

34. *Id.* at 524. Both Presidents made statements about the negative perceptions associated with the revolving door effect. Clinton infamously stated, “on streets where statesmen once strolled, a never-ending stream of money now changes hands – tying the hands of those elected to lead.” *Id.*

35. See *generally id.* (highlighting the notion that both Republican and Democratic Presidents have acknowledged the need for anti-revolving door legislation).

36. See Rebecca L. Anderson, *The Rules in the Owners’ Box: Lobbying Regulations in State Legislature*, 40 URB. LAW. 375, 380–87 (2008); see also Zaring, *supra* note 1, at 524–26.

quid pro quo arrangements, and implementing waiting periods. Along with those three main themes, these pieces of legislation also focus on the encouragement of ethical practices among individuals in both the public and private sectors of employment.³⁷

In addition, various professions have sought to limit the revolving door effect. In the legal profession for example, the Model Rule of Professional Conduct 1.11, titled “Special Conflicts of Interest for Former and Current Government Officers and Employees,” evidences a concern for the effects of the revolving door.³⁸ In short, this rule prohibits a former government lawyer from representing a private client in a matter in which the lawyer participated personally as a public officer or official.³⁹ The rule also contains a provision with detailed instruction for what a law firm must do in order to avoid the imputation of the former public lawyer’s conflicts of interest.⁴⁰ Although these rules are simply “suggested” rules of professional conduct, a majority of states have implemented some rule of this nature into their Rules of Professional Conduct for lawyers.⁴¹ Along with these ethical provisions, various other ethical provisions and codes of conduct have been adopted within the medical field, financial advisement field, and other general fields in which an individual owes a fiduciary duty to somebody else.⁴²

Collectively the legislation and conduct rules that have been adopted provide for: (1) transparency measures; (2) prohibitions on quid pro quo arrangement; and (3) implemented waiting periods.

B. Transparency Measures

Out of concern for the various effects of the revolving door, the federal government has implemented measures to increase the transparency of the dealings between lobbyists and lawmakers.⁴³ Some of these measures include: (1) requiring lobbyists to register and account for money spent; (2) limiting the amount of money a lobbyist can spend entertaining a public official; and (3) requiring corporations and other in-

37. *Id.* at 387–93 (comparing Hawaii’s Code of Ethics to the intentions of lawmakers at the federal level).

38. MODEL RULES OF PROF’L CONDUCT r. 1.11 (2014).

39. *Id.*

40. *Id.*

41. *See, e.g.,* IDAHO RULES OF PROF’L CONDUCT r. 1.11 (2014), <http://isb.idaho.gov/pdf/rules/irpc.pdf>.

42. *See, e.g.,* AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS; *see also* CERTIFIED FINANCIAL PLANNER BOARD CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY.

43. *See* Valts Kalniņš, *Transparency in Lobbying: Comparative Review of Existing and Emerging Regulatory Regimes*, CENTRE FOR PUB. POLICY PROVIDUS 1, 5 (2011).

dustries to provide detailed reporting of the amount of money annually spent on lobbying acts.⁴⁴

One of the earliest attempts to increase transparency measures came via the Ethics in Government Act (EGA) of 1978.⁴⁵ This legislation was enacted as a response to the Watergate scandals, which ultimately led to President Richard Nixon's resignation.⁴⁶ As referenced in the act's title, this legislation utilized the fear and societal unrest of the time period to promote ideas of ethical government practices.⁴⁷ The main accomplishment of this legislation was the creation of positions granted with the jurisdictional power necessary to bring enforcement actions against specific members of the executive branch.⁴⁸ Although the act has been amended a few times since its original enactment,⁴⁹ it still serves the purpose of providing government transparency and requiring the reporting of certain government expenditures.⁵⁰

Following a timeline approach, the next main piece of legislation to implement transparency measures was the Lobbyist Disclosure Act (LDA) of 1995.⁵¹ The enactment of the LDA resulted from the Congressional acknowledgement that: (1) public awareness of the efforts put forth by lobbyists to influence policymaking was a necessity of a representative government; (2) the former regime of lobbyist legislation was ineffective and unclear; and finally (3) an effective accounting of how much money was contributed by lobbyists to policy makers would increase the integrity of the government as a whole.⁵²

LDA remained one of the only means for regulating lobbyists and the revolving door overall until 2007, when Congress enacted the Honest Leadership and Open Government Act (HLOGA).⁵³ The HLOGA was enacted for a variety of purposes; however, of pertinence to this article is the legislation's requirement that lobbyists disclose any past employment within the legislative or executive branches.⁵⁴ The HLOGA was

44. See Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 200–03 (2012); see also Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (2007).

45. Anderson, *supra* note 36, at 5. (noting the legislation's main purpose was to create internal structures necessary for monitoring and exacting compliance with existing ethical regulations).

46. *Id.*

47. *Id.*; Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978).

48. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978).

49. Government Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (1989); Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (2007).

50. Anderson, *supra* note 36, at 6.

51. Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (1995) (codified as amended at 2 U.S.C. §§1601–1614).

52. William V. Luneburg, *The Evolution of Federal Lobbying Regulation: Where We are Now and Where We Should Be Going*, 41 MCGEORGE L. REV. 85, 89–90 (2009).

53. *Id.*; Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (2007).

54. Anderson, *supra* note 36, at 7 n.95 (citing Section 208 of The Honest Leadership and Open Government Act).

also responsible for ramping up the number of annual disclosures lobbyists were required to make, and it provided several more rules and regulations aimed at increasing the transparency of a lobbyist's actions.⁵⁵ Although the HLOGA is credited with drastically improving the transparency of the daily occurrences at the federal level, it is important to note that this legislation is approaching ten years of age and loopholes have been, and are continuing to be, exploited.

In sum, each of the three main pieces of legislation enacted in the past several decades to combat the effects of the revolving door have had some inherent transparency component.

C. Prohibitions on Quid Pro Quo Arrangements

Along with enacting transparency measures, the federal government has implemented legislation that negates the effects of the revolving door by prohibiting quid pro quo arrangements. The benefits of enacting legislation to prohibit quid pro quo arrangements are two-fold: it encourages ethical dealings between the members of the democratic process, and it limits the appearance of impropriety.⁵⁶ The argument to support prohibitions on quid pro quo arrangements is that if both government officials and citizens know of the potential criminal liability for engaging in a "this-for-that" exchange, public officials will be deterred from engaging in such exchanges. The three main categories of enacted laws which the federal government utilizes to deter quid pro quo arrangements are: (1) anti-bribery statutes, (2) statutes addressing mail and wire fraud, and (3) various sections of the three main pieces of legislation discussed *supra* in Part II.A.

The first type of legislation enacted to combat quid pro quo arrangements concerns the prohibition on bribery. Among the most notable federal anti-bribery statutes is 18 U.S.C. Section 203, "Compensation of Members of Congress, officers, and others in matters affecting the Government."⁵⁷ In short, this statute subjects any individual who "demands, seeks, receives, or agrees to receive or accept any compensation for any representational services . . ." to penalties and injunctions.⁵⁸ To supplement anti-bribery statutes, and further dissuade quid pro quo arrangements, other federal statutes criminalize money laun-

55. *Id.* at 8.

56. Michael H. Chang, *Protecting the Appearance of Propriety: The Policies Underlying the One-Year Ban on Post-Congressional Lobbying Employment*, 5 KAN. J.L. & PUB. POL'Y 121, 122 (1996).

57. 18 U.S.C. § 203 (2012).

58. 18 U.S.C. § 216 (2012) (outlining punishment(s) as: (1) imprisonment for not more than one year and a fine for any individual engaging in conduct; and (2) imprisonment not in excess of five years and a fine if an individual *willfully* engages in conduct) (emphasis added).

dering and racketeering.⁵⁹ The federal government's stance on criminalizing bribery helps prohibit quid pro quo arrangements and thus deters a major effect of the revolving door.

The federal government also implemented prohibitions on quid pro quo arrangements with the enactment of statutes combating mail and wire fraud.⁶⁰ These antifraud provisions prohibit government officials from defrauding the citizenry of "the intangible right to honest services,"⁶¹ which the Supreme Court has interpreted as prohibiting bribery and kickback schemes.⁶² Much like the anti-bribery statutes, this collection of legislation against various forms of fraud (§§ 1341, 1343 & 1346) prohibits quid pro quo arrangements.

The third source of federal prohibitions on quid pro quo arrangements comes from the EGA, LDA, and HLOGA collectively. Although the EGA and LDA do not directly address quid pro quo arrangements, they both encourage ethical and open government practices; therefore, both inherently prohibit any form of illegal quid pro quo arrangement.⁶³ The HLOGA specifically addresses and prohibits quid pro quo arrangements.⁶⁴ Section 102 of the HLOGA is titled "[w]rongfully influencing a private entity's employment decisions or practices."⁶⁵ Much like its transparency measures, the HLOGA takes a step in the right direction with regard to prescribing prohibitions against quid pro quo arrangements; however, the age of the statute and prevalence of loopholes are causes for concern.

D. Waiting Periods

The third measure taken by the federal government in its attempt to curb the effects of the revolving door is the implementation of waiting periods. The federal government—as well as a majority of states—has enacted waiting periods to both deter and disable former public officials from quickly transferring to private sector employment. Along with acting as a deterrent, waiting periods allow for a turnover of time, personnel, and legislation between an individual's employment in the public

59. See, e.g., 18 U.S.C. § 1956 (2012) (addressing laundering of money instruments).

60. 18 U.S.C. §§ 1341, 1343, 1346 (2012).

61. *Id.* at § 1346.

62. *Skilling v. United States*, 561 U.S. 358, 408–09 (2010) (concerning the prosecution of longtime Enron Corporation executive Jeffrey Skilling. Specifically, the case concerned Mr. Skilling's involvement with the 2001 collapse of Enron Corporation, which in prior years had been the seventh highest revenue grossing company in America).

63. See generally *Ethics in Government Act supra*, note 48; see also *Lobbyist Disclosure Act supra*, note 51 (both acts presumably would discourage any illegal or unethical quid pro quo arrangement).

64. *Honest Leadership and Open Government Act supra*, note 49.

65. *Id.* at § 102. Outlining potential fines and imprisonment for any "Member of Congress [who] . . . with the intent to influence, solely on the basis of partisan political affiliation, an employment decision or employment practice of any private entity."

and private sectors.⁶⁶ Several pieces of legislation, including the HLOGA,⁶⁷ address the implementation of waiting periods at the federal level. Among these pieces of legislation, the most notable is 18 U.S.C. Section 207, “Restrictions on former officers, employees, and elected officials of the executive and legislative branches.”⁶⁸ Congress enacted Section 207 in 1995 as a means to both limit the effects of the revolving door and combat the societal appearance of impropriety.⁶⁹

On a general level, Section 207 applies to all former officers or employees of either the executive or legislative branches of government.⁷⁰ The two sections of most relevance to the general topic of the revolving door are Sections 207 (a) and (c), although some argument could be made that the other sections of the legislation are equally important. Section 207(a) imposes permanent restrictions on representation of particular matters and Section 207(c) applies a one-year restriction on certain former members of the executive branch and independent agencies.⁷¹ On a macro level, these two provisions reduce conflicts of interest in the federal government; however, a more microanalysis is necessary to see the benefits and pitfalls of each section.

Section 207(a)(1) contains language that is critical to ensure that former government officers and employees are prohibited from using the connections and knowledge they acquired while employed by the government to benefit them in the private sector.⁷² Specifically, the provision authorizes any former officer or public employee to be punished under 18 U.S.C. Section 216⁷³ if, after the termination of employment with the government, he or she communicates or appears before the United States on behalf of someone else, with the intention to influence particular United States employees regarding a matter in which the former officer or public employee participated personally and substantially while employed by the government.⁷⁴ In order for this lifetime ban to be implemented, however, “the United States must be a party to, or have a

66. See, e.g., Jeni L. Lassell, *The Revolving Door: Should Oregon Restrict Former Legislators from Becoming Lobbyists?*, 82 OR. L. REV. 979, 990 (2003).

67. Honest Leadership and Open Government Act, *supra* note 49, at §101 (increasing the period of ineligibility from one year to two for Senators and senior Congressional staff who desire to lobby).

68. 18 U.S.C. §§ 207(a)(1)–(2), (c) (1995).

69. Chang, *supra* note 56, at 122.

70. Major Kathryn Stone, *The Twilight Zone: Postgovernment Employment Restrictions Affecting Retired and Former Department of Defense Personnel*, 142 MIL. L. REV. 67, 70 (1994).

71. 18 U.S.C. § 207(a), (b) (2012).

72. *Id.* § 207(a)(1).

73. *Id.* § 216 (prescribing the penalties and injunctions for an offense under section 207).

74. See *id.* § 207(a)(1).

direct and substantial interest in, that same particular matter.”⁷⁵ Subsection 207(a)(2) imposes similar representational limitations as subsection 207(a)(1); however, the time period of prohibited contact lasts for only two years rather than life.⁷⁶ The only substantial difference between subsections (a)(1) and (a)(2) is that the latter applies to particular matters that were actually pending under the former officer’s or employee’s responsibility during the last year of government service, whereas the former subsection only requires the employee’s personal and substantial participation.⁷⁷ The first two subsections of Section 207(a) are specifically intended to reduce the negative impacts of the revolving door created when individuals transfer their employment from the public sector to the private sector.⁷⁸ The legislation ensures that a former officer or government employee cannot use the knowledge and contacts acquired while employed with the federal government in litigation or representation occurring immediately after the conclusion of employment with the government.

The second relevant provision of 18 U.S.C. Section 207 is Section 207(c). This provision implements a one-year period of time that must expire before a former government officer or employee is permitted to communicate with, or appear before, the agency that employed him or her.⁷⁹ This Section ensures that upon the expiration of a government worker’s employment, the former government worker is not permitted to immediately advocate in front of the agency for which he or she was employed, on behalf of another.⁸⁰ Since enactment, this Section has become the subject of debate concerning whether the one-year requirement is too short, too long, or simply unnecessary.⁸¹

In sum, the federal level has implemented three approaches—transparency measures, direct prohibitions on quid pro quo arrangements, and waiting periods—which work together to combat the problems associated with the revolving door. At the state level, however, not every state has adopted all three measures, which potentially allows the problems posed by the revolving door to flourish. It is this lack of legislation, particularly in Idaho, which will be the focus of the remainder of this article.

75. Stone, *supra* note 70, at 71.

76. *Id.*

77. *Id.*

78. *See id.* at 83.

79. 18 U.S.C. § 207(c) (2012).

80. Stone, *supra* note 70, at 72.

81. This debate is evidenced by the different lengths of time each state chooses to codify when enacting their own waiting period legislation. *See infra* Part IV.

PART III: IDAHO'S RESPONSES TO THE LOBBYIST REVOLVING
DOOR

Idaho, like the federal government, has developed and implemented methods to mitigate the effects of the lobbyist revolving door. Unlike the federal government, however, Idaho has only implemented transparency measure and prohibitions on quid pro quo arrangements and has chosen not to enact waiting period legislation. After presenting a historical perspective of Idaho, this Part explains the contours of Idaho's current responses to the lobbyist revolving door and seeks to identify an explanation or rationale for the absence of waiting period legislation in Idaho.

A. Historical Perspective for Idaho

Idaho became the 43rd state on July 3, 1890 and is currently the 13th largest state in the United States.⁸² With a vast amount of land and a population of roughly 1.6 million persons, most of Idaho can be described as rural.⁸³ With the layout of Idaho consisting of two or three medium sized metropolitan areas surrounded by intermingled rural towns, the state's government has always been known for its generally clean, small-town, reputation.⁸⁴ Some individuals credit this small town mentality for the absence of waiting period legislation in Idaho; however, those same individuals are beginning to see the small town mentality dwindle as long-tenured government officials are replaced by members of the younger generation.⁸⁵

The idea of enacting legislation to mitigate the effects of the revolving door is not new to the state of Idaho. Several variations of legislation that would limit the effects of the revolving door have been proposed, and discussed, in Idaho's political history; however, none of said legislation has ever been approved by both houses of Idaho legislature, let alone enacted.⁸⁶

82. IDAHO DEP'T OF COMMERCE, *About Idaho*, VISIT IDAHO, <http://www.visitidaho.org/facts-about-idaho/> (last visited Mar. 1, 2016).

83. *State and Country Quickfacts: Idaho*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/16000.html> (last visited Mar. 1, 2016) (Idaho's estimated population for 2014 was 1,634,464 persons) [hereinafter IDAHO – U.S. CENSUS BUREAU].

84. See Betsey Russell, *Idaho gets D- in 2012 State Integrity Investigation*, CTR. FOR PUB. INTEGRITY, <http://www.publicintegrity.org/2012/03/19/18170/idaho-gets-d-grade-2012-state-integrity-investigation> (updated Nov. 2, 2015) (discussing Idaho's early government).

85. *Id.*

86. *Id.*

B. Idaho's Transparency Measures

Idaho's Secretary of State is the individual charged with informing lobbyists, and the public at large, about what requirements must be satisfied before and during an individual's term as a lobbyist.⁸⁷ Idaho Code Section 67-6602 defines the terms "lobby" and "lobbying" as, "attempting through contact with, or causing others to make contact with, members of the legislature or legislative committees or an executive official, to influence the approval, modification or rejection of any legislation . . . or to develop or maintain relationships with, promote goodwill with, or entertain members of the legislature or executive officials."⁸⁸ Furthermore, the Secretary of State's website provides that "[a]ll persons doing lobbying must register with the Secretary of State unless they fall under of the criteria to be exempt from registration."⁸⁹ Along with establishing the general parameters and guidelines for lobbyists, the Secretary of State's webpage provides information about: lobbyist registration requirements, currently registered lobbyists, and various forms necessary for registering and working as a lobbyist.⁹⁰

Generally, for an individual to be a lobbyist in the state of Idaho he or she must complete and file a Lobbyist Registration Statement with the Secretary of State.⁹¹ An individual must satisfy this requirement either prior to engaging in any act of lobbying or within thirty days after becoming employed as a lobbyist.⁹² Furthermore, if an individual is employed as a lobbyist for more than one company or interest, he or she must file a separate Lobbyist Registration Statement for each position.⁹³ Finally, with regard to registering as a lobbyist, a ten-dollar filing fee must accompany each Lobbyist Registration Statement, and an individual is required to re-register on an annual basis.⁹⁴ The basic guidelines for registering as a lobbyist in the state of Idaho tend to follow the standard guidelines of jurisdictions across the United States.⁹⁵

Each registered lobbyist is required by the State of Idaho to furnish periodic spending reports depending on whether they lobby to the legis-

87. *Welcome from the Idaho Secretary of State*, OFFICE OF THE SECRETARY OF STATE OF IDAHO, <http://www.sos.idaho.gov/> (last visited Mar. 1, 2016) (discussing the variety of tasks the Idaho Secretary of State is charged with completing).

88. IDAHO CODE § 67-6602(j) (2014); *see also Lobbyist Registration Requirements*, IDAHO SECRETARY OF STATE, <http://www.sos.idaho.gov/elect/lobbyist/lobbyist.htm> (last visited Mar. 1, 2016) [hereinafter *Idaho Lobbyist Registration Requirements*].

89. *Idaho Lobbyist Registration Requirements*, *supra* note 8888.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Idaho Lobbyist Registration Requirements*, *supra* note 88.

95. *See generally Lobbyist Registration Requirements*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 31, 2014), <http://www.ncsl.org/research/ethics/50-state-chart-lobbyist-registration-requirements.aspx> (providing a general overview of the lobbyist registration requirements in all fifty states).

lative or executive branches.⁹⁶ Legislative lobbyists are expected to file monthly reports for each month the legislature is in session as well as file an annual report; however, executive lobbyists only need to file reports on a semi-annual and annual basis.⁹⁷ The Idaho Reporting Manual for Registered Lobbyists further explains that a lobbyist must report, “[e]xpenditures made or incurred directly or indirectly for any lobbying purpose.”⁹⁸ The necessary expenditures to be reported include but are not limited to: (A) Entertainment, Food and Refreshments, (B) Living Accommodations, (C) Advertising, Travel, Telephone, and (D) Other.⁹⁹ The Reporting Manual further describes the details each lobbyist must provide and lists the potential civil penalties and fines associated with a failure to comply with the lobbyist reporting requirements.¹⁰⁰ Although the Idaho Reporting Manual for Registered Lobbyists lays out several requirements and obligations necessary to become a lobbyist, not all lobbyist expenditures are recorded due to various exemptions.¹⁰¹

Idaho Code Sections 67-6618(a)-(f) provide a list of persons and scenarios that are exempt from having to register as a lobbyist in the state of Idaho.¹⁰² Among the individuals who are exempt are: lobbyists who do not receive compensation for lobbying; lobbyists who are compensated less than \$250 in any calendar quarter;¹⁰³ and lobbyists who are employees of a corporation, if said corporation has registered as a corporation and designated one or more of its employees as a lobbyist.¹⁰⁴ In sum, certain lobbyist expenditures are not documented, which limits the overall transparency of lobbyist activity in Idaho.

In 2015, there were 449 lobbyists registered in the state of Idaho alone.¹⁰⁵ The same registry reports that there were 427 registered lobby-

96. *Frequently Asked Questions Regarding Lobbying Activity*, IDAHO SECRETARY OF STATE, <http://www.sos.idaho.gov/elect/lobbyist/lobbyfaq.htm> (last visited Feb. 4, 2016).

97. *Id.*

98. IDAHO SECRETARY OF STATE, REPORTING MANUAL FOR REGISTERED LOBBYISTS 4–5, (2015) http://www.sos.idaho.gov/elect/lobbyist/2015/2015_Lobbyist_Reporting_Manual.pdf [hereinafter REPORTING MANUAL].

99. *Id.* at 5.

100. *Id.* at 6, 8.

101. *Frequently Asked Questions Regarding Lobbyist Activity*, *supra* note 96.

102. IDAHO CODE § 67-6618 (2014) (exempting the following categories of persons from registration: individuals who only lobby before public sessions; persons employed at entities engaged in the business of publishing or broadcasting; persons who receive little to no compensation; elected state officers and executive officers; persons representing a bona fide church; and employees of a corporation).

103. *Id.* § 67-6618(c).

104. *Id.* § 67-6618(f)(1)(i)-(ii).

105. Lobbyists with Employers for 2015, *supra* note 22.

ists in the state of Idaho in 2014.¹⁰⁶ Of the lobbyists registered in Idaho, some are employed by a single entity, corporation, or interest group; whereas, other lobbyists are employed by multiple industries with various interests.¹⁰⁷ Most lobbyists in the Treasure Valley area charge a flat rate for their services, which can vary depending on the goals and interests of their employer.¹⁰⁸ Although the rates tend to vary, a “typical” rate in the Treasure Valley can range anywhere from \$15,000 to \$75,000.¹⁰⁹ There are currently no laws in Idaho’s code to limit the amount of compensation a lobbyist is entitled to receive; however, there are rules and prohibitions against any lobbyist receiving extra compensation for successfully pushing a bill through Idaho’s Legislature.¹¹⁰

In conclusion, Idaho’s Secretary of State is charged with the regulation and oversight of lobbyists within the state. An individual who desires to become a lobbyist, and influence lawmakers, may do so after simply filing a form accompanied with ten dollars.¹¹¹ Although the state of Idaho has installed some procedural safeguards to control lobbyists, the state could improve the transparency of the interactions between its lawmakers and private lobbyists.

C. Idaho’s Prohibitions on Quid Pro Quo Arrangements

Similar to the steps taken at the federal level, the state of Idaho has enacted legislation aimed at implementing prohibitions on quid pro quo arrangements.¹¹² Chapter 13 of the Idaho Code addresses various forms of Bribery and Corruption.¹¹³ More specifically, Idaho Code Section 18-1352 prohibits “[b]ribery in official and political matters.”¹¹⁴ This Section states that an individual is guilty of a felony “if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another . . . as a public servant, party official or voter”¹¹⁵ Along the same lines, Idaho Code Section 18-1353 prohibits an individual from “[threatening] harm to any public servant or party official with purpose to influence him to violate his known legal duty”¹¹⁶ Analyzed together, these statutes look very similar to the anti-bribery and

106. *Id.* (The correct PDF for the lobbyist registration in year 2014 can be found at <http://www.sos.idaho.gov/elect/lobbyist/2014lobemp.pdf>).

107. *Id.*

108. Audrey Dutton, *The Lawyers Behind the Legislature: Idaho Attorneys Who Lobby and Draft Bills Say The Capitol Has Changed*, IDAHO STATESMAN 22, 22 http://issuu.com/idahostatesman/docs/1119_bizinsider (Nov. 2014).

109. *Id.*

110. *Id.*

111. REPORTING MANUAL, *supra* note 98, at 1–2.

112. *See, e.g.*, IDAHO CODE § 18-7802 (2004) (prohibiting racketeering practices); *see also* IDAHO CODE § 18-8201 (2004) (prohibiting money laundering and illegal investment).

113. *See* IDAHO CODE §§ 18-1301 through 18-1362 (2004).

114. *Id.* § 18-1352.

115. *Id.*

116. *Id.* § 18-1353(1)(c).

anti-fraud statutes enacted by the federal government to combat quid pro quo arrangements.

The Idaho Code as it pertains to bribery and various types of fraud is comparable to the legislation enacted at the federal level as a means to prohibit quid pro quo arrangements. Although Idaho's statutory structure and conduct coverage is very limited compared to the federal statutes, the state has made some efforts to limit quid pro quo arrangements within its government.

D. Absence of Waiting Period Legislation in Idaho

The third measure taken by the federal government to limit the effects of the revolving door, as it pertains to lobbyists, is the implementation of waiting periods.¹¹⁷ As noted above, the federal government has enacted, and is currently in the process of enhancing, a required expiration of time before an individual can accept employment as a lobbyist upon the completion of his or her time in public office.¹¹⁸ Idaho, on the other hand, does not have any form of waiting period legislation. Therefore, an individual may accept employment as a lobbyist immediately upon the completion of his or her term(s) in office.

When analyzing the enactment of waiting periods from a national standpoint, Idaho is among the minority of states without any waiting period legislation.¹¹⁹ Currently, at least thirty-three states have enacted and implemented some type of waiting period before former public officials are permitted to accept jobs in the private sector as a lobbyist.¹²⁰ Of the remaining states, nine have not adopted any form of waiting period legislation.¹²¹ Within the thirty-three states that have adopted some form of waiting period legislation, the prescribed periods of time that a former public official must wait before obtaining private sector employment ranges anywhere from two years¹²² to the end of the next legislative term.¹²³ Even though the period of time a former government employee is required to wait varies across the states who have implement-

117. *See supra* Part II.D.

118. *Id.*

119. National Conference of State Legislatures, *Rules Against Legislators Lobbying State Government After They Leave Office*, NCSL.ORG (Oct. 15, 2015), <http://www.ncsl.org/research/ethics/50-state-table-revolving-door-prohibitions.aspx> [hereinafter *Revolving Door Prohibitions*].

120. *Id.*

121. *Id.* (identifying states without waiting period legislation as: Idaho, Illinois, Missouri, Nebraska, New Hampshire, North Dakota, Texas, Vermont, and Wyoming).

122. *Id.* (listing states with two-year bans as: Alabama, Colorado, Florida, Iowa, Kentucky, Louisiana, Montana, New York, and Oklahoma).

123. *Id.* (listing states with a variation of waiting period determinate on the expiration of a specific legislative term as: Maryland, Michigan, and Oregon).

ed such legislation, a vast majority of states at least have some form of waiting period legislation on the books.¹²⁴

In sum, the state of Idaho has acted similarly to the federal government with regard to implementing transparency measures and enacting prohibitions on quid pro quo arrangements; however, Idaho is among a minority of states without waiting period legislation. The remaining sections of this article focus on attempting to decipher a reason or explanation as to why the state of Idaho does not have such waiting period legislation.

PART IV: COMPARATIVE ANALYSIS OF STATES

This Part seeks to determine if there is something unique about Idaho, such that waiting period legislation is not necessary to combat the problems associated with the lobbyist revolving door. Specifically, this inquiry is conducted by comparing Idaho to the eight other states within the jurisdiction of the Ninth Circuit Court of Appeals—Alaska, Hawaii, Washington, Oregon, California, Nevada, Montana and Arizona.¹²⁵ Although Idaho is the state of most importance for purposes of this article, the other eight states within the Ninth Circuit's jurisdiction provide various reference points for comparisons. The main reason(s) and purpose for comparing the nine states within the Ninth Circuit's jurisdiction is to try to identify a factor, or set of factors, that help explain why Idaho is the only state in the Ninth Circuit's jurisdiction that has not enacted waiting period legislation.¹²⁶

The nine states within the Ninth Circuit's jurisdiction were chosen due to their relative similarities in geography, demographics, and political culture. Although the nine states are by no means identical with regard to these three main categories, the variety of states provide a well-rounded look at the different degrees of waiting period legislation within the western United States. This part compares these nine states in four areas: (1) political ideology; (2) population; (3) prevalence of waiting period legislation; and (4) each state's base ratio.

A. Methodology

The nine states subject to the jurisdiction of the Ninth Circuit Court of Appeals are Alaska, Hawaii, Washington, Oregon, California, Idaho, Nevada, Montana, and Arizona.¹²⁷ Generally speaking, the nine states chosen are geographically located in the western portion of the

124. *Id.*

125. United States Courts for the Ninth Circuit, *Map of the Ninth Circuit*, USCOURTS.GOV, http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000135 (last visited Jan. 23, 2016).

126. *Revolving Door Prohibitions*, *supra* note 119.

127. *Map of the Ninth Circuit*, *supra* note 125. While it is acknowledged that some smaller islands and United States territories are also subject to Ninth Circuit's jurisdiction, the main focus for our purpose are the states within the jurisdiction. *Id.*

United States¹²⁸ and make up a population of roughly 63 million people.¹²⁹

The first two categories of comparison are the political ideology and population of each state. Of the nine states, three of them—Hawaii, Oregon, and California—have a political ideology of Democratic, five of them—Alaska, Idaho, Nevada, Montana, and Arizona—declare their political ideology as Republican, and one state—Washington—is currently split.¹³⁰ For purposes of this methodology, the overall political ideology of each state was determined in reference to the political party holding a majority of seats in both the state’s Senate and House of Representatives.¹³¹ The ideology of each independent state helps to provide some background into the political culture of said states, as well as highlights the willingness of each state to adopt new legislation.¹³²

Along with political affiliation providing a fairly even split between the nine selected comparative states, the actual population of each state also creates an equal split. When using a population of two million persons per state as a baseline, there are four states - Alaska, Hawaii, Idaho, and Montana - with populations below the line, while five of the states - Washington, Oregon, California, Nevada, and Arizona - have a population above the 2 million persons threshold.¹³³

The third category of comparison is the prevalence, or absence, of waiting period legislation enacted in the state. Within this category, Idaho is the only state that has not enacted some form of waiting period legislation.¹³⁴ Figure 1 provides information in a graphical format based on each state’s political ideology,¹³⁵ waiting period legislation,¹³⁶ population,¹³⁷ number of establishments,¹³⁸ and base ratio.¹³⁹

128. *See id.*

129. United States Census Bureau, *Quickfacts United States*, CENSUS.GOV, <http://quickfacts.census.gov/qfd/index.html> (last visited Feb. 4, 2016) (it is important to note that the most recent census data was gathered in 2012, and the numbers used in this calculation represent the “estimated 2014 population” of each respected state).

130. *2015 State and Legislative Partisan Composition*, NAT’L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2015_Feb4_11am.pdf (Feb. 4, 2015, 11:00 AM) (calculating numbers based on total number of seats controlled by either Democratic or Republican members of the state legislature).

131. *See id.*

132. The argument supporting the latter assertion in this sentence is that generally states with a Republican-controlled legislature are in session for shorter amounts of time and are less likely to disrupt the overall status quo. It can be inferred from this shorter duration of time in session, less legislation and changes will be implemented. *See, e.g.*, National Conference of State Legislatures, *Legislative Session Length*, NCSL.ORG <http://www.ncsl.org/research/about-state-legislatures/legislative-session-length.aspx> (last visited Feb. 4, 2016).

133. *See infra* Figure 1.

134. *Revolving Door Prohibitions*, *supra* note 119.

135. *2015 State and Legislative Partisan Composition*, *supra* note 130.

Figure 1. Waiting Period Legislation Within the Ninth Circuit's Jurisdictional States					
<u>State</u>	<u>Political Ideology</u>	<u>Waiting Period Legislation</u>	<u>Popula-tion</u>	<u>Establish-ments</u>	<u>Base Ratio</u>
Alaska	Republi-can	1 Year	736,732	20,519	35.90
Hawaii	Democrat-ic	1 Year	1,419,561	31,622	44.89
Washington	Split	1 Year	7,061,530	176,815	39.94
Oregon	Democrat-ic	Session Limit	3,970,239	108,527	36.58
California	Democrat-ic	1 Year	38,802,500	874,243	44.38
Idaho	Republi-can	None	1,634,464	43,124	37.90
Nevada	Republi-can	Session Limit (Pend-ing)	2,839,099	60,306	47.08
Montana	Republi-can	2 Years	1,023,579	36,529	28.02
Arizona	Republi-can	1 Year	6,731,484	132,762	50.70

Figure 1 provides a graphical representation of the similarities and differences between the nine states within the Ninth Circuit's jurisdiction. The chart also develops a ratio for comparison, which will be re-

136. *Revolving Door Prohibitions*, *supra* note 119.

137. *Quickfacts United States*, *supra* note 129.

138. *State and Country Quickfacts: Idaho*, *supra* note 83. It is important to note that in order to obtain the number of each states' establishments the U.S. Census Bureau site was navigated accordingly. For purposes of this comparison, the statistic referred to as "Private nonfarm Establishments, 2013" was utilized. The U.S. Census Bureau defines this term as "a single physical location at which business is conducted or where services or industrial operations are performed." Furthermore, the U.S. Census Bureau states, when two or more activities are conducted at a single location under a single ownership, said activities are grouped together as one "Establishment." It was important to compare the nine states based on number of establishments the increased prevalence of businesses would result in more lobbyists, lobbying for said entities interests, which of course is the focus of this article. The importance of utilizing such measure will be discussed further below.

139. The base ratio is determined by dividing the number of persons per state by the total number of establishments in that state. This number gives a balanced variable to compare each state within the Ninth Circuit's jurisdiction.

ferred to as the “Base Ratio.” Each state’s base ratio is determined by dividing the number of persons per state by the total number of establishments within said state. Take for example, the state of Alaska—with a population of 736,732¹⁴⁰ persons and a total number of 20,519 establishments reported¹⁴¹—its base ratio is 35.90. The base ratio of Alaska is determined by dividing the population (736,732) by the total number of establishments (20,519), thus yielding a base ratio of 35.90. The base ratio eliminates any disparity among the population of each state, while providing a number that is a fair and accurate representation of each state.

Using the base ratio as a beginning point for further analysis it is important to note that the mean base ratio of all nine states within the Ninth Circuit’s jurisdiction is 40.59.¹⁴² Much like political ideology and population, the base ratio of each state provides a fairly equal split between the nine states. Five of the states—Alaska, Washington, Oregon, Idaho and Montana—have a base ratio below the mean ratio; whereas, the other four states—Hawaii, California, Nevada and Arizona—have base ratios above the mean ratio.¹⁴³ The mean base ratio can show several things and a further explanation of the number might prove beneficial.

With the base ratio being the result of the state’s population divided by the number of establishments within that state, the ratio directly reflects the number of persons per establishment in each state. As defined by the United States Census, an establishment is “a single physical location at which business is conducted or where services or industrial operations are performed.”¹⁴⁴ Therefore, the base ratio provides insight to the prevalence of business type operations in each of the nine states within the Ninth Circuit’s jurisdiction. The prevalence of business operations in each state is an important statistic to consider based on the fact that businesses, both large and small, tend to devote a large amount of resources to lobbying.¹⁴⁵ In sum, the base ratio is a statistical number that provides a snapshot of the number of persons per business operations in each of the nine states.

140. *Quickfacts United States*, *supra* note 129.

141. *State & County Quickfacts: Alaska*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/02000.html> (last visited Feb. 11, 2016).

142. The sum of all nine states’ basis ratio divided by the total number of states.

143. Figure 1, *supra* Part IV.A.

144. See *State and Country Quickfacts: Idaho*, *supra* note 83 (defining “Establishment”).

145. See, e.g., Jesse Solomon, *Top 10 Companies Lobbying Washington*, CNNMONEY (Oct. 1, 2014, 11:36 AM), <http://money.cnn.com/2014/10/01/investing/companies-lobbying-10-biggest-spenders/>.

In conclusion, the methodology in this comparative analysis focuses on four main factors: (1) political ideology; (2) population; (3) prevalence of waiting period legislation; and (4) each state's base ratio. Collectively, these four factors allow for an analytical comparison based on geographic location, political culture, and demographic makeup.

B. Findings

A comparison of the nine states within the Ninth Circuit's jurisdiction using the multitude of factors discussed *supra* yields some interesting findings. This section aims to break down each of the four main comparative factors and highlight why none of the four factors provide an explanation as to why the state of Idaho is different in a way that it does not need waiting period legislation to combat the effects of the revolving door.

As noted above, the political makeup of the nine states within the Ninth Circuit's jurisdiction is fairly evenly split with three Democratic, five Republican, and one Split state (the split state of Washington has predominately been Democratic in the past).¹⁴⁶ Although it would be improper to conclude that Idaho's political ideology alone explains its lack of waiting door legislation, it is interesting to note the degree to which Idaho is conservatively governed. Currently, Idaho's Governor, Lieutenant Governor, eighty (80) percent of the State Senate seats, and eighty (80) percent of the State House of Representatives seats are affiliated with the Republican Party.¹⁴⁷ Furthermore, all four members of Idaho's Congressional Delegation, two Senators and two Congressmen, are also members of the Republican Party.¹⁴⁸

Figure 2 compares the political ideology of Idaho's legislature with that of the other Republican states within the Ninth Circuit's jurisdiction. The graphic highlights the fact that eighty percent of the seats in Idaho's House and Senate are Republican; whereas Alaska, the next most conservative state, only has seventy percent of the seats in the Senate and fifty-eight percent of the seats in the House filled by Republican members.¹⁴⁹

146. *2015 State and Legislative Partisan Composition*, *supra* note 130.

147. *Id.*

148. *Idaho*, GOVTRACK.US, <https://www.govtrack.us/congress/members/ID> (last visited Feb. 11, 2016) (noting Idaho's senators are Michael Crapo and Jim Risch and Idaho's congressmen are Raul Labrador and Michael Simpson).

149. *2015 State and Legislative Partisan Composition*, *supra* note 130 (each percentage was determined by dividing the number of Republican seats by the total number of seats in both the Senate and House of Representatives).

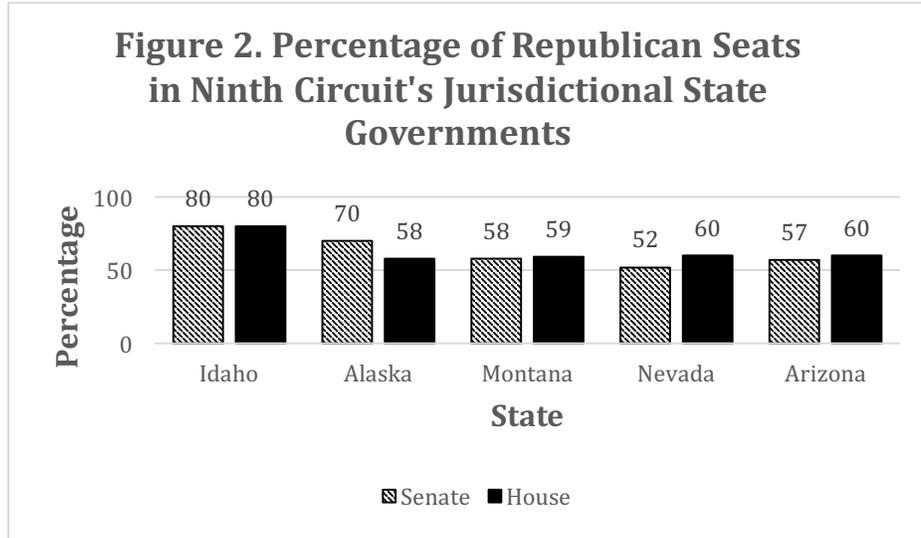


Figure 2 demonstrates the fact that when analyzing the political ideology of each state within the Ninth Circuit's jurisdiction, Idaho is definitely an outlier on the Conservative end of the spectrum. Although Idaho is considerably more conservative than the other states, the difference in political ideology alone does not explain the absence of waiting period legislation in Idaho. It would require too much of an inferential step, concerning the "tendencies" of conservative governments, to conclude that political ideology is the sole reason for the absence of the legislation in Idaho. Furthermore, the political ideology argument is disputed by the fact that each one of the three other Republican states within the Ninth Circuit's jurisdiction have, or are in the process of enacting,¹⁵⁰ waiting period legislation. In conclusion, although Idaho is an outlier on the conservative end of the political spectrum, that alone does not explain the lack of waiting period legislation in the state.

The second factor considered in the comparative analysis is the population of each state. The vast discrepancy in population between the nine states causes this factor to be less relevant in the comparison. With the population of California being more than fifty times that of Alaska, using population as a means of comparison is simply not relia-

150. Sandra Chereb, *Legislative 'cooling off' lobbying law passes Nevada Senate*, LAS VEGAS REVIEW-JOURNAL (May 20, 2015, 6:58 PM), <http://www.reviewjournal.com/news/nevada-legislature/legislative-cooling-lobbying-law-passes-nevada-senate>. Nevada's Senate gave legislative approval for the state's new waiting period legislation that will take effect November 8, 2016.

ble. Although the raw population of each state is less helpful in this comparative analysis, the population of each state is a key factor in each state's base ratio. In conclusion, although the nine states can be evenly split when using two million persons as a baseline (four states with populations below, and five states with populations above),¹⁵¹ this factor also does not explain Idaho's lack of waiting period legislation.

The prevalence or absence of waiting period legislation is the third factor considered in this comparative analysis. Of the nine states within the Ninth Circuit's jurisdiction, Idaho is the only state without some form of waiting period legislation.¹⁵² Of the remaining eight states, five have implemented a one-year waiting period, one has adopted a two-year waiting period, and two have a session-limit waiting period.¹⁵³ When analyzed at a national level using all fifty states, Idaho is one of only nine states that does not have waiting period legislation.¹⁵⁴ Although this factor highlights the fact that Idaho is among the extreme minority of states without waiting period legislation, the factor is very similar to political ideology and population in that it provides little explanation as to why.

The final factor of comparison is the base ratio, which was determined by dividing each state's population by the number of establishments in that state. With businesses arguably being the main contributors to the act of lobbying,¹⁵⁵ it is important to quantify the amount of business in each state and see if that impacts the state's enactment of waiting period legislation. As noted above, the mean base ratio of the nine states within the Ninth Circuit's jurisdiction is 40.59.¹⁵⁶ The base ratio illustrates the amount of business operations in each state and allows a more balanced comparison between states with drastic population differences. Idaho, with a base ratio of 37.90, does not have any form of waiting period legislation, while Washington and Oregon both have such legislation, and they have similar base ratios of 39.94 and 36.58 respectively.¹⁵⁷ Therefore, base ratio alone does not explain why the other eight states have waiting period legislation and Idaho does not.

In conclusion, the comparison of the nine states based on: (1) political ideology, (2) population, (3) prevalence of revolving door legislation, and (4) base ratio, is not outcome-determinative. Although factors such as political ideology and prevalence of waiting period legislation place Idaho as an outlier in comparison to the other eight states, nothing in the comparison explains the reason for the absence of any legislation in

151. Figure 1, *supra* Part IV.A.

152. *Revolving Door Prohibitions*, *supra* note 119119.

153. *Id.*

154. *Id.*

155. See, e.g., Dorie Apollonio et al., *Access and Lobbying: Looking Beyond the Corruption Paradigm*, 36 HASTINGS CONST. L.Q. 13, 14 (2008).

156. Figure 1, *supra* Part IV.A.

157. *Id.*

Idaho. Therefore, this analysis undercuts the suggestion that there might be something unique about Idaho such that it does not need waiting period legislation to combat the effects of the revolving door on lobbying activity within the state.

PART V: RECOMMENDATIONS FOR IDAHO

A. Need for Waiting Period Legislation in Idaho

The analysis in the preceding Part failed to identify a reason why Idaho does not need waiting period legislation to combat the problems associated with the lobbyist revolving door. Indeed, it is no secret that former Idaho public officials make up a large population of individuals currently employed as lobbyists in the state where they used to hold office.¹⁵⁸ In 2011, there were at least one dozen former state legislators registered and employed with private entities and industries within the state of Idaho.¹⁵⁹ One of the more notable transfers that caught the eye of Idaho media in 2012 was when the former chief of staff for Idaho's Governor accepted employment as a lobbyist for Idaho Power—only three months after ceasing to be a Governor's aide.¹⁶⁰ The revolving door effect was further evident in early 2015 when Idaho's former Secretary of State accepted employment with a large local lobbying firm only a few months after ending his twelve-year stint as Secretary of State.¹⁶¹ These few examples of individuals immediately becoming lobbyists upon the cessation of their public term(s) highlight the notion that Idaho currently does not have any waiting period legislation enacted.

Although this is a very abbreviated history of the revolving door in Idaho, it is evidence enough to conclude that the revolving door effect is not a foreign concept to the state of Idaho. While no blame is placed on any individual who has utilized the revolving door between the public and private sector, the appearance of impropriety becomes stronger as more individuals traverse between the two realms of employment. As prior sections have highlighted, the state of Idaho has already taken the initiative to implement two out of three revolving door mitigation

158. Russell, *supra* note 84.

159. *Id.*

160. Betsy Russell, *Second Former Top State Official Becomes Idaho Power Lobbyist*, SPOKESMAN-REVIEW (Jan. 6, 2012), <http://www.spokesman.com/blogs/boise/2012/jan/06/second-former-top-state-official-becomes-idaho-power-lobbyist/>.

161. *Team*, GALLATIN PUBLIC AFFAIRS, <http://gallatinpa.com/team.php> (last visited Feb. 11, 2016); Scott Graf, *Ysursa Worries About Idaho's Low Voter Turnout, Not Denney's Partisanship*, BOISE STATE PUBLIC RADIO (Jan. 5, 2015), <http://boisestatepublicradio.org/post/ysursa-worries-about-idahos-low-voter-turnout-not-denneys-partisanship>.

measures,¹⁶² so why not take the next step and adopt waiting period legislation?

B. Proposal Waiting Period Legislation for Idaho

The focus of the remainder of this article is to analyze and propose specific legislation that Idaho should enact, drawing guidance from the legislation in the other Republican states within the Ninth Circuit's Jurisdiction—Alaska, Arizona, and Montana.¹⁶³ Not only do all three of these states have some form of waiting period legislation enacted, the different legislation adopted by each state also provides a spectrum of the possible levels of waiting period legislation.

First, the state of Alaska has enacted waiting period legislation that would be on the low end of the spectrum due to the statute's vagueness and availability of loopholes. Alaska Statute Section 24.45.121 generally addresses the prohibitions of a lobbyist in the state of Alaska.¹⁶⁴ Section 24.45.121(c) states: "A former member of the legislature may not engage . . . as a lobbyist before the legislature for a period of one-year after the former member has left the legislature."¹⁶⁵ Although the statute implements a one-year waiting period, the same section also permits former members to act as "volunteer lobbyist," which provides a large loophole to the enacted waiting period.¹⁶⁶ Although Alaska's legislation places it at the bottom of this comparative spectrum, some waiting period is better than no waiting period.

Continuing along the spectrum, the state of Arizona's waiting period legislation places the state between Alaska and Montana. Arizona Revised Statutes Section 38-504 addresses "Prohibited acts" with regard to public officers and employees.¹⁶⁷ Specifically, this code provision states: "A public officer or employee shall not represent another person for compensation before a public agency by which the officer or employee is or was employed within the preceding twelve months."¹⁶⁸ The statute further prohibits a public officer or employee from disclosing any information obtained in his or her course of duty for two years after the expiration of his or her term.¹⁶⁹ Much like the state of Alaska, Arizona's legislation enacts a one-year waiting period; however, it does not provide for any voluntary lobbying as the Alaska statute does.¹⁷⁰

At the furthest end of the spectrum, the state of Montana has enacted more stringent waiting period legislation.¹⁷¹ Montana has a two-

162. See *supra* Part III.(B)-(C).

163. 2015 *State and Legislative Partisan Composition*, *supra* note 130.

164. ALASKA STAT. ANN. § 24.45.121 (West 2015).

165. *Id.* at § 24.45.121(c) (West 2015).

166. *Id.*

167. ARIZ. REV. STAT. ANN. § 38-504 (2015).

168. *Id.* §38-504(a) (2015).

169. *Id.* §38-504(b) (2015).

170. See *generally id.*

171. See MONT. CODE ANN. § 2-2-105 (West 2015).

fold approach to limiting the effects of the revolving door. First, Section 2-2-105(3) broadly states: “A public officer or public employee may not, within 12 months following the voluntary termination of officer or employment . . . take direct advantage, unavailable to others, of matters which [he or she] was directly involved.”¹⁷² Second, Section 5-7-310 directly prohibits an individual from being licensed as a lobbyist if during the 2 years prior to applying for the license that person “served as a state legislator, elected state official, department director . . . or member of a certain personal staff.”¹⁷³

With this spectrum of legislation enacted among the Republican states within the Ninth Circuit’s jurisdiction in mind, Idaho should follow Montana’s lead and enact robust waiting period legislation. In following Montana’s lead, Idaho’s goal should be two-fold and combat the revolving door effect with both a macro and micro level approach. The first, macro approach, should be to hold all of Idaho’s public officials to a heightened ethical standard, prohibiting them from using their governmental position in a manner that will provide them an advantage unattainable to others. The second, micro approach, should be to implement a waiting period of at least one, but preferably two, years before a former public official can accept employment as a lobbyist. In line with this second goal, Idaho should strive to eliminate any potential loopholes for “voluntary lobbying.” Therefore, the state of Idaho should enact the following waiting period statute:

Any public officer or employee may not, within one year of termination of public employment, obtain employment in which he or she will take any direct advantage, unavailable to others, of matters in which he or she was involved during his or her term of office or governmental employment. Furthermore, an individual may not register or act as a lobbyist if during the two years prior to registering or acting as a lobbyist that individual: (1) served as a state legislator, public official, or certain official personnel, or (2) was employed in any other governmental capacity. The prohibition on registering or acting as a lobbyist does not apply to an individual who is required to lobby as part of the individual’s responsibilities as an employee of state or local government.

Idaho’s Secretary of State shall issue regulations that define the terms of this statute, implement an enforcement regime, and prescribe the punishments for violating this statute.

172. *Id.* at § 2-2-105(3).

173. *Id.* at § 5-7-310.

The above statute would not only provide Idaho with much needed waiting period legislation, it would also place Idaho leaps and bounds ahead of several other states within the Ninth Circuit's jurisdiction and the United States as a whole.

PART VI: CONCLUSION

The main focus of this article has been to inform the public at large about the reoccurring negative effects associated with the revolving door of employment transfers between the public and private sectors. More specifically, the article highlights the notion that, although the federal government and the majority of states utilize three primary approaches—transparency measures, prohibitions on quid pro quo arrangements, and implementation of waiting periods—to combat the effects of the revolving door, Idaho has only enacted two of those approaches. In an effort to find an explanation for the absence of waiting period legislation in Idaho, Idaho was compared to the eight other states within the jurisdiction of the Ninth Circuit Court of Appeals. The comparative analysis yielded no reason or explanation as to why Idaho is different from the majority of states such that it does not need legislation of this nature. In conclusion, Idaho should enact the waiting period legislation proposed in this article so that it is no longer *Behind the Times*.

*F M Cody D. Earl**

* J.D. Candidate, University of Idaho College of Law, May 2016. A special thank you to Professor Wendy G. Couture for her guidance on this article and to my wife and family for their ongoing support and encouragement.