CHAPTER 1

Constitutional and Legal Protections of Lobbying

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1-1 Introduction
1-2 Lobbying: The Constitutional Framework
   1-2.1 Constitutional Foundations
   1-2.2 Modern Jurisprudence
1-3 Lobbying: An Evolving but Ever-Present Force

1-1 Introduction

Lobbying has been a tradition in the United States government from the beginning of the Republic. The tradition was so valued that it became entrenched in the fabric of American society as part of the First Amendment’s protection. Despite this hallowed position, the public has almost as traditionally been skeptical of those “special interests” that petition the government—especially when money plays a role—and a number of scandals over the years have understandably contributed to that skepticism.

Those with experience in government or lobbying, however, understand that lobbying and lobbyists play a vital role in our government, representing and advancing the interests of millions of individuals and providing valuable information and perspective to legislators and executive branch officials concerning those who will be affected by legislation or regulation. As Senator Robert Byrd put it in his essay commemorating the bicentennial of the U.S. Senate:

Although we often hear a hue and cry about “special interests,” everyone, in a sense, belongs to a multitude of these interests: we are defined by our gender, race, age, ethnicity, religion, economic status, educational background, and ideological bent. Some groups are better funded or better organized than others: corporate interests, organized labor, New Right

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political action committees. Some groups, especially the very young, the very old, the very poor, are the least organized and the least able to make their needs heard. Nevertheless, they all have a “special interest” in congressional actions. Members of Congress, of course, attempt to represent all of the various interests within their constituencies, but they must establish some priorities. Lobbyists attempt to shape those priorities by reminding them of the needs of specific groups.  

Today’s lobbyists operate in an increasingly high-stakes, highly competitive, and highly scrutinized environment—one that requires in-depth policy knowledge, hard work, and no small amount of savvy. The industry is now populated by tens of thousands of lobbying professionals, attorneys, policy analysts and experts, and countless others who operate in a strictly regulated environment. Lobbying professionals, and those attorneys and compliance officers who advise them, must have a sophisticated understanding of the myriad local, state, and federal laws that govern their activity, as well as the ethics rules that govern the governmental entities with which they interact.

The following chapters present a brief history of lobbying regulation, an explanation of the legislative and rulemaking process, and in-depth information and insight regarding various regulations of lobbying activities. But first, this chapter examines the importance of lobbying, as well as the constitutional and legal protections it enjoys, by first discussing the origins and constitutional basis for lobbying, early lobbying practices, and landmark cases that have shaped the bounds of its constitutional protections. This chapter concludes by discussing the important role lobbying and lobbyists continue to play in the government today.

1-2 Lobbying: The Constitutional Framework  
Lobbying may have “surely been around as long as there has been government itself,” but its place in the constitutional firmament is of slightly more recent vintage. In his famous Federalist No. 10, James Madison considered the dangers and potential benefits of “factions.” Balancing the good with the bad, the constitutional system Madison established allowed those factions to compete in the political marketplace for ideas while being simultaneously checked by each other and the three branches of both the federal and state governments. The Supreme Court has similarly sought to strike a balance between the rights of competing factions and the desire on the part of the public at large for honest and open government. Five key cases—all from the 20th century—trace the Supreme Court’s modern acceptance of lobbying as a protected and beneficial activity under the First Amendment.

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1-2.1 Constitutional Foundations

Perhaps more than any other Founding Father, Madison understood that it was imperative for the Framers “to design a form of republican government that would provide a positive role for, but also a system of balances against, the work of organized interests.” Madison sought to establish “an extraordinary theory of effective governance in which the principal legislative task of government is to regulate competing interests by involving the spirit of those interests in the ordinary operations of government.” The separation of powers between the three branches of government—executive, legislative, and judicial—combined with the further separation of power between the federal government and competing state governments would provide multiple opportunities for factions to influence the work of government while also having their “ambition . . . to counteract ambition.”

Here is one of the main indictments of King George III found in the Declaration of Independence:

In every stage of these Oppressions, We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

The colonists’ complaint gave birth to the Bill of Rights in 1791, whose First Amendment provided, “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

1-2.2 Modern Jurisprudence

In the modern era of constitutional jurisprudence, the Supreme Court has seemingly walked a similar tightrope, seeking to balance the needs of citizens and their chosen advocates to communicate their interests to Congress while also protecting the rights of the public and members of Congress to “self-protection” in the form of greater information about who is engaged in such advocacy. Finally forced to confront the issue directly, the Justices acknowledged the First Amendment concerns at stake.

United States v. Rumely presented the Supreme Court with a challenge to a congressional subpoena to the Committee for Constitutional Government (CCG) issued by the House Select Committee on Lobbying Activities. The committee was investigating whether the Federal Regulation of Lobbying Act of 1946, the first comprehensive codification of lobbying regulations in American history, was

5. Allard, supra note 2 at 37.
6. The Federalist No. 10 (James Madison), supra note 3.
7. Id.; see also Allard, supra note 2 at 37.
8. The Declaration of Independence para. 30 (U.S. 1776).
11. 345 U.S. 41, 42 (1953).