OLÍVIA RADICS

Lobbying and the First Amendment Right to Petition

Introduction

Lobbying has long been an integral part of American politics, a practice inseparable from and deeply imbedded in the American way of democracy[1]. Despite its firm roots in the Anglo-American political tradition, lobbying has always been the target of severe criticism, not only from the American public but from countless political actors[2] as well and as such it has been in the focus of numerous regulative efforts on the part of the legislature[3], both federal and state. The sole mention of the word lobbying evokes negative connotations and lobbyists are often identified as ruthless influence-peddlers, hired guns who fail to refrain from any method when seeking the favors of elected officials[4]. It doesn't come as a surprise then that from time to time – usually following scandals in the lobbying arena[5] – the need for lobbying reform emerges. This has been so for the entire history of lobbying[6]. This periodically emerging need for reform almost never fails

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[1] ANDREW P. THOMAS: *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby.* 16 Harv. J.L. & Pub. Pol'y 149, p. 149.

[2] As Krishnakumar puts it wonderfully simply: "Lobbying has long been a dirty word in the eyes of the American public". in ANITA S. KRISHNAKUMAR: *Towards a Madisonian, Interest-group-based, Approach to Lobbying Regulation.* 58 Ala. L. Rev. 513, p. 514.

[3] The legislature's efforts at regulating lobbyists are detailed in Part III. of this essay.

[4] In the common thinking these favors from elected officials are usually in exchange for previous meals, gifts, fundraising events, campaign contributions provided by the lobbyists, a way in which lobbyists manage to obtain undue access to the officials in question.

[5] The most publicized lobbying scandal in recent years has been tied to Jack Abramoff, Representative Tom DeLay and other Republican politicians. This case, however, was only one more in the line of many previous ones.

[6] The first of several lobbying restrictions on the federal level came as early as 1876, following the Credit Mobilier railway scandal. The resolution adopted by the House obliged all persons or corporations engaged in lobbying to be registered with the Clerk of the House. This resolution, however, was valid only for the Forty-fourth Congress and its duration was not extended.

to be answered by the legislative branch in the form of regulative efforts, most notably prohibition or disclosure[7]. Even if these efforts often fail to achieve the expected results, they might impose threats to the constitutionally guaranteed right to petition the government[8], a right in close conjunction with other First Amendment rights closely related to lobbying: the freedom of speech and the press and the right of assembly or association[9].

Lobbying regulation seems to be a never-ending task and a necessary one as such, especially in light of recent lobbying scandals[10]. Despite the inevitability of lobbying restrictions and reform, there remains the fundamental question: is there a constitutional right to lobby in the United States? The question has been hanging in the air for the entire 20th century history of lobbying and the most adequate actor to answer the question, the U.S. Supreme Court has failed to do so up to this point. Not that the issue hasn't been raised before the Court yet[11]. Indeed, lobbying has been on the Supreme Court's table several times, both directly and indirectly. Nevertheless the Court has been extremely hesitant in the treatment of the question and this is rather telling about its ambiguous relationship to the issue of lobbying rights. The core of the issue is whether a constitutional right to lobby can be derived from the First Amendment rights of petition, free speech and press and the right of assembly. Of these rights the right of petition concerns us the most, together with the right of assembly as these rights are the most often invoked in cases disputing the constitutionality of lobbying restrictions[12]. If a constitutional right to lobby can be derived from the above mentioned First Amendment rights, it would not make all lobbying restrictions unconstitutional at once but it would

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[7] Prohibition usually means a legal ban on certain lobbying activities, most typically on gifts, meals, entertainments or providing means of travel (such as private jets) for elected officials. The ban can be an overall or a conditional one (one which only bans activities over a certain limit). Disclosure on the other hand does not mean a ban; it means exposure of certain information to the larger public. Outright bans have been very rare up to these days but especially in light of recent lobbying scandals, prohibitions are being reconsidered. Nevertheless disclosure is still the main method for regulating lobbying.

[8] The right of petition is a right guaranteed by the First Amendment of the U.S. Constitution: „Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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". U.S. Const.amend.I.

[9] For full text of the First Amendment, see supra note 8.

[10] See supra note 5.

[11] The U.S. Supreme Court has examined the question of a right to lobby mostly indirectly, that is through examining the right to petition and the right of association most notably in Trist v. Child 88 U.S. (21 Wall.)441 (1874), Rumely v. United States 345 U.S. 41 (1953), United States v. Harriss 347 U.S. 612 (1954), Eastern Railroad Presidents Conference v. Noerr Motor Freight 365 U.S. 127 (1961), Regan v. Taxation with Representation of Washington 461 U.S. 540 (1983), Buckley v. Valeo 424 U.S. 1 (1976).

[12] See Rumely v. United States 345 U.S. 41 (1953), United States v. Harriss 347 U.S. 612 (1954), Eastern Railroad Presidents Conference v. Noerr Motor Freight 365 U.S. 127 (1961), Regan v. Taxation with Representation of Washington 461 U.S. 540 (1983), NAACP v. Alabama 357 U.S. 449 (1958).

definitely pose a burden – and not necessarily a disadvantageous one – on the legislature to take into account the constitutional implications of planned anti-lobby measures.

Naturally lobbying cannot be considered a uniquely Anglo-American phenomenon, despite the fact that the profession has reached its greatest heights in the United States and has grown together with American democracy and government[13]. Although the two seem to be inseparable, this doesn't make lobbying a solely American institution. Lobbying or public policy advocacy has made its appearance on the European stage for quite a while now[14]. Few would argue that lobbying is a profession in the U.S. but there is a growing number of people who think the same about European lobbying and rightly so. European lobbyists have grown enormously in number[15] and their techniques have generally become more sophisticated and diverse. They might have learnt from their American counterparts but European lobbying at large has stayed, well, European in style[16]. Nevertheless it is undeniable that lobbying in Europe should always keep a watchful eye on the development of its American counterpart, especially in light of recent European Union and separate member state efforts to regulate the profession[17]. This necessarily makes the topic of this article all the more current in Hungary as well, where the first lobbying restrictions were enacted in 2006[18].

The first part of this essay will introduce the history of lobbying, whereas the second part of the essay focuses on the history of lobbying regulations in the United States, with special regard to recent lobbying restrictions[19]. In part three I

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[13] „Lobbying has surely been around as long as there has been government" in THOMAS M. SUSMAN: *Lobbying in the 21st Century- Reciprocity and the Need for Reform.* 58 Admin. L. Rev. 737, p. 738.

[14] Lobbying has been on the scene in England from very early on. In the form of petitioning it has been a factor to be taken into consideration since the Magna Carta. Since the 17th century lobbying has become a profession on its own. Although lobbying in continental Europe does not have the same historical traditions as in the Anglo-Saxon world, it has become prominent on the European continent especially in the past 50 years. With the creation of the European Union, lobbying has become prevalent and it has expanded enormously in its dimensions. The numbers themselves are rather telling: In 2000, about 2,600 interest groups had an office in Brussels and by 2003 this number grew to 3,000 according to Lobbying in the European Union: Current rules and practices, EP Directorate-General for Research Constitutional Affairs Series, AFCO 104 EN.

[15] See supra note 14.

[16] Although it might sound like a stereotype, European lobbyists are described as highly efficient and respectful. DAVID COEN: *Lobbying in the European Union, Directorate-General Internal Policies of the Union*, Constitutional Affairs, PE 393.266 EN, p. 10.

[17] The European Union has undertaken the task of introducing lobbying legislation in recent years. The first steps of this process have already been taken. In May 2008 the European Union introduced a code of conduct for lobbyists and in July 2008 the European Commission opened its lobby register, both under the umbrella of the European Transparency Initiative, which was launched in 2005 with its main objective being the strengthening of public trust in the EU institutions. http://ec.europa.eu/commission_barroso/kallas/transparency_en.htm.

[18] Act XLIX. of 2006 on Lobbying.

[19] Lobbying Disclosure Act of 1995.

shall endeavor to draw a small sketch of the development of the right to petition both in England and the United States. Part four will examine the leading constitutional cases in the field of lobbying.

I.

An early history of lobbying

Lobbying[20] or public policy advocacy is the process of petitioning the government to influence public policy[21]. Many believe that the word lobby originates in the United States, that is, it was first used by President Ulysses S. Grant, who during his first term in presidency was a frequent visitor of the lounge of the Willard Hotel in Washington D.C. where he enjoyed the pleasure of good whisky and cigar, an activity he was not allowed to profess in his home. His secret trips to the Hotel's bar soon became well-known around town and those wishing to have a word or two with the president petitioning in their own name[22] or on behalf of someone else would gather in the hotel's lobby to catch the president on his way to and from the lounge. President Grant used to call these people "lobbyists", not without a pejorative hint. The truth is, however, that the term has earlier roots in English parliamentarianism: in 17th century England a large waiting room of the House of Commons was called the "lobby"[23].

Wherever though its roots may have been, lobbying has been around for the entire history of the United States. As Senator Robert C. Byrd said it in his speech about lobbying[24]: "Lobbyists have been at work from the earliest days of the Congress"[25]. Indeed as early as the end of the 18th century[26], lobbying was a known and – obviously under the constraints of the historical backdrop – a widespread practice. Not that lobbying was considered an honorable profession or thing to do at the time. Public distrust surrounding lobbying was fueled by numerous rumors –

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[20] The word lobby comes from the Latin word „labium", which means vestibule or hall.

[21] Public citizen: Origins, evolution and structure of the Lobbying Disclosure Act. Available at: http://www.cleanupwashington.org/documents/LDAorigins.pdf

[22] Self-lobbyists, people who represent themselves.

[23] NICHOLAS W. ALLARD: *Lobbying is an Honorable Profession: the Right to Petition and the Competition to Be Right*, 19 Stan. L. & Pol'y Rev. 23., p.37.

[24] Robert C. Byrd, Senate Majority Leader in 1980, launched a historical project on March 21, 1980. Over a decade, he delivered more than a hundred speeches on the history and operations of the U.S. Senate. These speeches later became the centerpiece of the Senate's 1989 bicentennial commemoration. His speech on lobbyists was delivered on September 28, 1987 and it is available for readers at: http://www.senate.gov/legislative/common/briefing/Byrd_History_Lobbying.htm

[25] See Robert C. Byrd: supra note 24.

[26] In 1792 William Hull was hired by the Virginia veterans of the continental army to lobby for additional compensation for their war services. In the same year Hull wrote to other veterans' groups, recommending that their 'agent or agents' cooperate with him during the next session to pass a compensation bill. See Robert C. Byrd: Lobbyists.

and no point in denying, sometimes more than rumors at the time – such as those relating to the Bank of the United States, "the most distrusted and despised special interest"[27] of its era. There were several senators who also served as the bank's directors. One of them, Senator Daniel Webster of Massachusetts wrote the following to the bank's director in his infamous letter on December 21, 1833: "Since I arrived here, I have had an application to be concerned, professionally, against the Bank, which I have declined, of course, although I believe my retainer has not been renewed, or refreshed, as usual. If it be wished that my relation to the bank should be continued, it may be well to send me the usual retainer."[28] This quote is a perfect example of the era's less sophisticated lobbying methods. The choice of words could even be harsher, of course, as today most people would consider this plain corruption. There are several examples of the same genre, of which only a few are worthy of mentioning and mainly for their anecdotal value. Samuel Colt, for example, the famous gun-maker, gave away free pistols to representatives[29] in 1850 while seeking passage of his patent bills. This was by no means a unique example of Colt's or his counterparts' doings[30]. As Colt himself put it: "To reach the heart or get the vote, the surest way is down the throat"[31]. Indeed it was a common practice to wine and dine elected officials at the time, and provide them with company[32]. Before delivering severe judgment on the character of elected officials of the era, it is worth noting that at the time Washington D.C. was not the bustling capital that it is today. The Washington D.C. of the epoch was suffering heavily from a harsh climate and was severely lacking in cultural and social amenities. Congressmen usually stayed in the nation's capital without their families and lived and dined in comfort-lacking boarding houses. It doesn't come as a surprise that the so-called "social lobby"[33] was live and flourishing at the time.

From the middle of the 19th century railroad and tariff lobby[34] became significant, which naturally lead to an increase in the number of Washington lobbyists[35].The Civil War had a similar effect[36]. Around this time it became customary to hire more than one agent to act on one's behalf, even though no

[27] See Robert C. Byrd: supra note 24.

[28] See Robert C. Byrd: supra note 24.

[29] At one time Samuel Colt gave a pistol to the 12 year old son of a representative. See Robert C. Byrd supra note 24.

[30] See Robert C. Byrd: supra note 24.

[31] See supra note 30.

[32] Colt himself used three ladies to entertain elected officials, who were known as the Spiritualists and there were also ladies of less spiritual nature, known as the Chicks. They were also to be found in the company of elected officials.

[33] See Robert C. Byrd: supra note 24.

[34] JARICA B. NIPPER: *Lobbying the Lobbyists: A Comparative Analysis of the Lobbying Regulatory and Disclosure Models of the United States and European Union.* 14 Tulsa J. Comp. & Int'l L. 339, p. 343.

[35] See Robert C. Byrd: supra note 24.

[36] See Robert C. Byrd: supra note 24.

results could have been guaranteed[37]. This latter aspect, might I add, hasn't changed over time even if it appears otherwise. The growing number of lobbyists and lobby-related affairs came together with scandals erupting from time to time, especially in conjunction with railroad subsidies[38]. Times like these have their own heroes or anti-heroes, such as Sam Ward, self-depicted "King of the Lobby"[39], who made a noteworthy self-confessing testimony in front of a congressional committee: "This business of lobbying, so called, is as precarious as fishing in the Hebrides.(…) I am not ashamed – I do not say that I am proud, but I am not ashamed – of the occupation. It is a very useful one. In England it is a separate branch of the legal profession"[40].

Despite the numerous scandals of the time, lobbying was already a profession by then, employing a lot of the practices that are in use even today[41]. It is also worth noting that more than once the lobbyists of the 19th century provided highly useful services to elected officials[42]. Their amazing growth in number came around the time the United States underwent a significant economic growth and the federal government started to expand its powers[43]. The multitude of issues that elected

[37] See Robert C. Byrd: supra note 24.

[38] The most famous scandal of the time was that in relation to Crédit Mobilier and the construction of the Union Pacific railroad. Union Pacific, the railroad company acquired Crédit Mobilier of America, a construction company in 1864 and Crédit Mobilier won the contract of constructing a large part of the railroad. So basically Union Pacific was paying itself from government funds to pay the railroad instead of paying outside contractors. The Crédit Mobilier charged the railroad millions of dollars more than the actual cost of construction: this surplus naturally went into the pocket of Pacific Union's bosses and the stockholders of Crédit Mobilier. The president of the company was Congressman Oakes Ames from Massachussets. He discouraged congressional investigations of the company by passing out stocks to elected officials. The stocks were sold for less than market value. By the time the railroad was finished, Union Pacific and its stockholders were nearly bankrupt. The scandal broke out in 1872 when the New York Sun published an article about it. The public outcry forced out a congressional investigation but a large number of those involved in the scandal, including future president James A. Garfield, escaped punishment. See: Andrew P. Thomas, supra note 1, p. 151., Edward Winslow Martin: "A Complete and Graphic Account of the Crédit Mobilier Investigation" from "Behind the Scenes in Washington", The Continental Publishing Company and National Publishing Co. 1873, http://cprr.org/Museum/Credit_Mobilier_1873.html.

[39] HAJDÚ NÓRA: *Lobbi és és demokrácia az Egyesült Államokban.* Politikatudományi Szemle 2002. 3–4., p. 141.

[40] See Robert C. Byrd: supra note 24.

[41] Robert C. Byrd: „Some of the lobbying techniques of the Gilded Age were not unlike those of today, with speeches supplied, analyses prepared, opposition arguments suggested, personal contacts with key members, appearances before committees, and grassroots campaigns created by lobbyists.". In Robert C. Byrd: supra note 24.

[42] Lobbyists drafted speeches for Congressmen, prepared analyses, made propositions and presentations to elected officials.

[43] This phase in American history is often called the Gilded Age, which signifies a time of large economic growth in U.S. history (from the second half of the 19th century until the first decades of the 20th century). Parallel to this, the federal government started to face a variety of new issues, which it decided to take on.

officials were obliged to face – without the help of today's sizeable professional staffs – came together with a multitude of interests that all wanted to be heard and wanted access to the members of both houses. These developments lead to a shift in the way lobbying was practiced in Washington D.C.: professional lobbyists took over the place of self-representing lobbyists[44]. This shift naturally caused the sophistication of techniques and we can say that the weaponry of today's lobbying profession was in large part formed in this period[45]. A lot of the techniques that are widespread and accepted today were surrounded by great suspicion at the time, which partly lead to the bad reputation that lobbyists of the 19th century "enjoyed". Despite the public's distrust towards lobbyists, they started to grow in number and experience, which was in no small ways due to the above-mentioned fact, namely that a growing number of interests wanted to find their way to the federal government[46]. Lobbying became an important factor, one to be taken into consideration, in governance[47]. It had always been this way in the United States but no doubt in a different form[48]. Nevertheless we can safely say that public policy advocacy first reached a whole new dimension around the end of the 19th century. Maybe not exactly the dimension that the Founding Fathers[49] imagined for their newborn country[50], but definitely a never before seen phase.

II.

Regulative efforts

As lobbying became a factor to be taken into consideration more than ever before, the need to regulate it emerged for the first time partly in response to the public

[44] Lobbyists who represented their own interests and usually came up to the capitol only to present their case and then went back home. Lobbyists of this kind were necessarily less effective than professional agents. They did not disappear altogether but their number was certainly reduced over the past century.

[45] See Robert C. Byrd supra note 24.

[46] Naturally the situation was similar on state level but it is not the subject of this article to examine lobbying at the state level.

[47] In 1888 lobbying was defined in the American political dictionary. HAJDÚ NÓRA: supra note 36, p. 141.

[48] Namely through the right of petition, which has been in practice since the first days of the young republic. Self-lobby is also a more direct form of public policy advocacy.

[49] According to some, the Founding Fathers were their era's most prominent lobbyists. ANDREW P. THOMAS: p. 185.

[50] One of the best sources of knowing what the Founding Fathers imagined as a future for the United States is The Federalist papers, a series of 85 articles written in order to advocate the ratification of the U.S. Constitution and also give a guideline for its future interpretation. The articles were written under the pseudonym Publius (in honor of Publius Valerius Publicola) by James Madison, Alexander Hamilton and John Jay and they give a unique perspective on how the Founders wished to construe the Constitution.

distrust and suspicion that surrounded the institution. In 1876 the House required all lobbyists to register with the clerk of the House[51]. In 1879 lobbyists pretending to be journalists were denied access to the press galleries in the Senate and the House chambers[52]. These first restrictions did not cease to be in effect up to this day[53]. Partly as a response to the Crédit Mobilier scandal a 1875 Senate Bill proposed registration for lobbyists[54]. Although the bill didn't pass, in only a year's time the House adopted a resolution which required the registering of all lobbyists with the Clerk of the House[55]. However promising this bill was, its effect only extended to the Forty-fourth Congress and was not renewed after that[56].

The beginning of the 20th century brought with itself more determined legislation concerning lobbyists[57], in part as a response to the emergence and starting dominance of large corporations and trusts on the lobbying scene[58]. Part of the process of regulating lobbyists was that committee meetings became open to the public. Open committee meetings seem like a natural thing to be in the age of C-Span but at the time making them open was a huge step in reinforcing public trust in Congress. In 1928 the Senate passed a bill which would have mandated lobbyists to register and file monthly financial statements but the House didn't approve the bill. The first federal disclosure statute, the Public Utility Holding Act[59], was adopted by Congress in 1935, followed by the Merchant Marine Act[60] in 1936. Both acts envisioned disclosure requirements for lobbyists but their scope was naturally limited. The Foreign Agents Registration Act[61] was enacted two years later and it mandated all agents working for a foreign principal to register with the Attorney general and file periodic statements with the State Department[62]. The Foreign Agents Registration Act is still in effect today and requires lobbyists working for a foreign principal to disclose the name, address and ownership of all principals together with detailed financial accounts[63]. Obviously the scope of this

[51] See Robert C. Byrd supra note 24.

[52] ANDREW P. THOMAS: supra note 1., p. 152.

[53] See Robert C Byrd supra note 24.

[54] The bill would have required attorney representing clients before the House and the Senate to be registered by the Congress. ANDREW P. THOMAS: supra note 1., p. 152.

[55] SEE ANDREW P. THOMAS: supra note 1., p. 152.

[56] SEE ANDREW P. THOMAS: supra note 1., p. 152.

[57] Even if regulation didn't always pass, the determination was there. The first U.S. President to call in arms against lobbying was President Woodrow Wilson, who made lobby reform and the fight against corruption a campaign issue in the presidential election of 1911.

[58] The most well-known trusts of the time included Standard Oil, American Tobacco, U.S. Steel. Robert C. Byrd: supra note 24.

[59] 49 Stat. 838 (1935). The statute mandated all persons employed by a registered trading company to file a disclosure statement with the Securities and Exchange Commission.

[60] 49 Stat. 1985, 2014 (1936). The statute prescribed a disclosure requirement for lobbyists representing companies holding construction or operating subsidies.

[61] 52 Stat. 631.

[62] The Act's actual agenda was to discover the workings of Nazi symphatizers.

[63] Andrew P. Thomas: supra note 1., p. 153.

act was limited as well and the need for comprehensive lobbying regulation persisted. Even more so as lobbying went through an amazing development in the beginning of the 20th century[64]. It seems like that the Gilded Age[65] was indeed Gilded[66] for the lobbyists. As I have mentioned earlier, starting from the second half of the 19th century, lobbyists became more prepared, their methods evolved and they generally became more sophisticated and diverse than ever before[67]. From the early 1900's technology's new inventions revolutionized lobbying: with the introduction of new tools like the telephone or the radio lobbyists became able to reach a much larger pool of constituents. This development revolutionized grassroots lobbying[68], a factor usually not taken into account by any legislative measures.

At the same time the legislative branch did not give up the attempts at regulating lobbying. The Federal Regulation of Lobbying Act of 1946 was once again an effort to introduce registration requirements for lobbyists – without significant success. This act was the first comprehensive federal lobbying reform legislation in the U.S. The Federal Regulation of Lobbying Act did not actually "regulate" lobbying[69] in the sense that it only prescribed registration and disclosure rules for those engaged in lobbying but didn't actually limit the activity itself. According to the Act, a lobbyist is "any person ...who by himself, or through any agent or employee or other person in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which is to aid, in the accomplishment" of the "passage or defeat of any legislation by the Congress" or who directly or indirectly influence the passage or defeat of such legislation[70]. Those who qualified lobbyists under this description had a duty to register with the Clerk of the House and the Secretary of the Senate[71]. The lobbyists who fell under

[64] This fascinating development was mainly due to the innovative technologies that became common in this period.

[65] See supra note 42. The expression „the Gilded Age" has connotations in American literature as well. Mark Twain co-wrote a novel with Charles Dudley Warner of the title: The Gilded Age. A Tale of Today, 1873. The novel depicts post-Civil War life in the United States, with special regard to the corruption in Washington D.C. The term "Gilded Age" which came to signify the era so well, originally came from the title of this book.

[66] „Gilded Age" as opposed to „Golden Age", the former being of lesser value than the latter is another common interpretation of both the novel by Mark Twain and the epoch's denomination.

[67] See supra note 24.

[68] Grassroots lobbying is lobbyist-initiated citizen participation in government. Lobbyists enter into contact with the citizens (through the media, telephone, or mail) and try to convince them to participate in large volume telephone or letter campaigns to elected officials. Being able to generate grassroots support can be rather convincing for elected officials and add enormous strength and support to the lobbyist's agenda as "votes are the ultimate currency in politics". KRISHNAKUMAR: supra note 2., p. 549.

[69] ANDREW P. THOMAS: supra note 1., p. 154.

[70] 2 U.S.C.§ 266.

[71] 2 U.S.C. § 267 (a).

this obligation had to provide the following information: "his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or to be paid, how much he is to be paid for his expenses, and what expenses are to be included"[72]. Besides these pieces of information lobbyists had a duty to file quarterly reports with the Clerk of the House and the Secretary of the Senate. These quarterly reports had to contain the following information: "a detailed report under oath of all money received and expended by him... in carrying on his work; to whom paid; for what purposes; and the names of any papers, periodicals, magazines, or other publications in which he has caused to be published any articles or editorials; and the proposed legislation he is employed to support or oppose[73]. Another additional quarterly report was to be filed with the Clerk of the House the contents of which were: the name and address of the contributors of more than $500 to the lobbyist; the exact amount of the contributions and a detailed account of expenditures made on behalf of contributors[74]. The lobbyists also had to identify all those for whom they expended $10 or more[75].

The Federal Regulation of Lobbying Act was at last the piece of legislation long awaited: an act wholly and solely devoted to the regulation of lobbying. Unfortunately it was also an act destined for failure. Indeed, the Act "has been called one of the most poorly drawn laws of all time"[76] and it had been severely criticized by journalists even before it was enacted[77]. The main target of the criticism was the Act's somewhat ambiguous language, especially when defining who a lobbyist is. The question of the Act's constitutionality (due to its ambiguity) was bound to end up before the Supreme Court[78] sooner or later. The first direct challenge arrived with United States v. Harriss[79] eight years after the enactment of the Federal Regulation of Lobbying Act.

Despite the constitutional challenges against the Act, it remained in effect until the mid-90's. There had been attempts at amending it earlier in the 70's but they were destined to fail mainly because the legislature itself was not prepared to face the issue. Following a number of failed bills, the Federal Regulation of Lobbying Act was finally replaced by a new Act, the Lobbying Disclosure of Act of 1995.

[72] 2 U.S.C. § 267.

[73] 2 U.S.C. § 267.

[74] 2 U.S.C. § 264.

[75] 2 U.S.C. § 265(a).

[76] Lester W. Milbrath in. ANDREW P. THOMAS: supra note 1. at p. 154.

[77] ANDREW P. THOMAS: supra note 1., p. 154.

[78] This happened even before the Select Committee on Lobbying Activities, which was created by the House, operated under Congressman Frank Buchanan and was charged with the investigations of the Act's deficiencies, was able to finish its task.

[79] United States v. Harriss 347 U.S. 612 (1954).

The incentive for the Lobbying Disclosure Act (LDA) of 1995 came from Bill Clinton in the 1992 presidential campaign[80]. The objective of the Act was to fight against corruption in the government but once again Congress managed to enact a law that had its share of shortcomings. If it hadn't been so, lobby reform would not be of such utmost importance and urgency even these days. Despite the Act's high-aspiring preamble[81] the LDA failed to achieve its aims. As its title suggests, the Act introduced disclosure requirements for lobbyists. These mandate lobbyists to fill out forms created by the Clerk of the House and the Secretary of the Senate. The forms require lobbyists to list the name, address, and principal place of business of the registering lobbying firm, the client on whose behalf the firm has or will engage in lobbying and of any affiliated organization that has contributed more than $10,000 towards the lobbying firm's lobbying activities and furthermore of any foreign entities that hold at least 20% ownership in the client or one of its affiliated organizations[82]. The Act doesn't require lobbyists to name the government officials they lobby[83], which is one of the main shortcomings of the act: it concentrates solely on the lobbyists and elected officials are left outside the scope of the act despite the fact that those who are lobbied form an equally important part of the lobby process as those whose lobby. This way of approaching the issue disregards the fact that the public is more concerned about the behavior of elected officials than lobbyists[84]. After all lobbyists – contrary to congressmen, who can and are held accountable for their doings during their term in office – do not have any responsibility towards the public, besides adhering to at least a minimum standard of honor[85]. The Act (and its maker, the Congress) fails to take account of the fact that the public distrust around lobbying mainly stems from the fear that lobbyists, professional agents have the kind of access to politicians, elected officials that average citizens might not have[86]. In the multitude of interests and voices, which is naturally a burden on the officials as well and makes it difficult for them to filter the voices or opinions that are indeed worthy of hearing, the voices and interests of average citizens can be and are sometimes lost. The

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[80] ANITA S. KRISHNAKUMAR: supra note 2., p. 518.

[81] According to the Act's preamble the basis of the new law is three congressional findings, namely that "responsible representative government requires public awareness of the efforts of paid lobbyists to influence the public decision-making process of the Federal government", that "existing lobbying disclosure statutes have been ineffective because of unclear statutory language (and) weak administrative and enforcement provisions" and that "effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials (would) increase public confidence in the integrity of the Government". 2 U.S.C. § 1601.

[82] 2 U.S.C. § 1603.

[83] 2 U.S.C. § 1604 (b).

[84] SEE ANITA S. KRISHNAKUMAR: supra note 2., p. 519.

[85] According to Anita S. Krishnakumar „the social contract upon which our government is based is not between lobbyists and the public; it is between the public and its elected officials. KRISHNAKUMAR: supra note 2., p. 525.

[86] KRISHNAKUMAR: supra note 2., p. 525.

Lobbying Disclosure Act would be an incomparably more successful legislative act if it took into consideration the actual fears of the public and acted accordingly. Disclosure of the names of elected officials who are lobbied, with information provided about the time spent with them and the issue discussed with them, would make the Act's attempts at true reform far stronger.

Another feature of the Lobbying Disclosure Act in need of revision is the format in which the disclosures are filed by the lobbying agents. The forms filled out and submitted by the lobbyists are made available to the public only in hard copy format at the Legislative Resource Center at the Senate Office of Public Records in the nation's capitol. Only a small part of the forms can be viewed online[87]. This of course makes it very hard for average citizens to review the files and maybe cross-reference them[88]. Indeed it makes it a hard task for anyone, except for maybe a small number of determined non-profit political organizations.

The Act places only a one-year ban on revolving-door lobbying[89], which means that former members of Congress can start working as lobbyists after a one-year cooling-off period, which is not necessarily enough if the objective is to fight against unequal access to elected officials[90]. On the other hand, former elected officials dispose of special knowledge and expertise, which can nevertheless be used in a beneficial way in the lobbying arena[91].

The Act's enforcement provisions also added to its failure in being an effective tool for regulating lobbyists. The Act prescribes a penalty for violation of the registration provisions but the fine has an upper limit in the amount of $50,000[92]. This amount is of course high for average citizens and may easily have a deterrent effect on them, which is exactly the kind of result that should be avoided by any lobby legislation. On the other hand even the maximum amount of the penalty is certainly well below anything even closely threatening for big lobbying firms. Another problem posed by the enforcement provisions of the Act is that solely the United States District Attorney for the District of Columbia has authority to prosecute violations of the Act[93], who might not be the official best suited for this role. We conclude this from the fact that at present no serious investigations are

[87] KRISHNAKUMAR: supra note 2., p. 539.

[88] KRISHNAKUMAR: supra note 2., p. 520.

[89] Revolving-door lobbying is when former elected officials, congressmen having left office return to the same offices but in a different role: as lobbyists. Revolving door lobbying raises the issue of undue access once again as former members are obviously able to use their connections to promote the causes they lobby for. This is usually one of the main reasons why they are hired. Revolving door lobbying is not always harmful; former members are able to put their much-needed expertise to a hopefully good use. Also, as Thomas Susman mentioned, revolving door lobbying mitigates the "us v. them" feeling among elected officials. THOMAS M. SUSMAN: supra note 13., p. 743.

[90] KRISHNAKUMAR: supra note 2., p. 526.

[91] THOMAS M. SUSMAN: supra note 13, p. 743..

[92] 2 U.S.C. § 1606.

[93] 2 U.S.C. § 1605.

conducted in order to confirm the validity of the reports filed by lobbyists[94]. Disclosure cannot be serious if it is not checked for validity and if cross-references cannot be made. A stricter control system must be introduced in order to ameliorate the already existing disclosure pattern. Obviously there is a need for a federal agency which oversees the disclosure process and this should be a body distant from the legislature itself. That is, previous ideas that the Clerk of the House or the Secretary of the Senate would be the motor of enforcement are bound to lead to failure[95]. There is a strong need to appoint a federal agency, which is largely independent from the legislature and the executive as well and which would be able to check the now rather leniently handled disclosure reports submitted by lobbyists with the necessary scrutiny. This seems to be inevitable if Congress wishes lobbying regulation to be effective at all.

Another important factor that has to be taken into account is grassroots lobbying, i.e. direct citizen participation in public policy. Grassroots lobbying has become a significant factor in politics, one that should not be underestimated[96]. Despite this grassroots lobbying has managed to stay out of the scope of lobby regulations so far.

The Lobbying Disclosure Act despite its shortcomings is still in effect today. It is not, however, the last in the federal legislature's attempts at a comprehensive lobby reform. In 2005 Congress adopted the Special Interest Lobbying and Ethics Accountability Act of 2005 (SILEAA)[97] , which was followed by the Lobbying Transparency and Accountability Act of 2005 (LTAA)[98], and the Legislative Transparency and Accountability Act of 2007[99]. The above-mentioned acts were styled as amendments to the Lobbying Disclosure Act[100]. This also means that none of the above acts show enough bravery to attempt to truly reform the current way in which lobbying works. The core of the problem seems to be that both previous and current legislation only aims to handle the situation on a superficial level by putting on a showcase for the public but failing to introduce long-lasting and effective methods to address the most worrisome concern of lobbying; namely

[94] KRISHNAKUMAR: supra note 2., p. 554.

[95] These bodies are too close to the fire to put it simply.

[96] As grassroots lobbying falls outside the scope of mandatory disclosure, it is very hard to estimate how much is spent on it. A study by the Annenberg Public Policy Center shows that during the 1996 election cycle $135–150 million was spent on grassroots lobbying, in the 1997–98 election cycle this amount went up to $250–341 million and reached and surpassed $500 million in the 1999–2000 election cycle. These amounts and their continuous rise shows that grassroots lobby has become a significant factor. Underestimating it would be a gross mistake. WILLIAM V. LUNEBURG, THOMAS M. SUSMAN: *Lobbying Disclosure: A Recipe for Reform.* 33 J. Legis.32, p. 44.

[97] Special Interest Lobbying and Ethics Accountability Act of 2005, H.R. 2412. (109th Congress).

[98] Lobbying Transparency and accountability Act of 2005, S. 2128 (109th Congress).

[99] Legislative Transparency and Accountability Act of 2007, S. 1 (110th Congress).

[100] ANITA S. KRISHNAKUMAR: supra note 2., p. 515.

unequal access to public officials, quid pro quo or reciprocity arrangements[101] and possibilities for corruption. Besides any thorough lobbying reform should focus on the members of Congress as well, together with their staff members.

The need for comprehensive and effective lobbying reform prevails but any reform attempts should keep in mind that restricting lobbying can limit the right to petition guaranteed by the First Amendment of the U.S. Constitution.

III.

The Right to Petition the Government

England

The right to petition the government for a redress of grievances appears in the First Amendment of the U. S. Constitution[102], together with the freedom of speech and the press and the right of association. Today these rights are treated as being inseparable. "The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression" declared the U.S. Supreme Court in McDonald v. Smith[103]. That is, in the Supreme Court's interpretation the right of petition is not a distinctive right from the other expressive rights but only one aspect of the same issue. Historically, however, the right of petition was very much a separate right from the above mentioned rights and in actual fact enjoyed greater protection than those[104] and may even be characterized as the likely source of all the expressive rights[105]

When we say that lobbying has been around as long as there has been government[106], it is the right of petition that we talk about. The right of petition is

[101] Quid pro quo or reciprocity arrangements or even the appearance of them cause more harm to lobbying than most politicians or lobbyists think as they enormously decrease the public trust in elected officials. The key here is that even if there is nothing actually improper going on, the appearance of impropriety is more than enough as what the public fears the most is that lobbyists somehow get the kind of access to members of Congress that is otherwise not available to average citizens. It is also worth noting that gifts, meals, entertainment, campaign contributions might make elected officials, even if they do not think so, bestowed to lobbyists, which might actually lead these officials to return the favors received and this is definitely improper.

See Vincent R. Johnson: Regulating Lobbyists: Law, Ethics, and Public Policy, 16 Cornell J.L. & Pub. Pol'y 1, p. 22.

[102] See supra note 8.

[103] McDonald v. Smith, 472 U.S. 479 (1985).

[104] JULIE M. SPANBAUER: *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth.* 21 Hastings Const. L. Q. 15, p. 17.

[105] NORMAN B. SMITH: *„Shall Make No Law Abridging...": An Analysis of the Neglected, but Nearly Absolute, Right of Petition.* 54 U. Cin. L. Rev. 1153., p. 1153.

[106] „Lobbying has surely been around as long as there has been government itself" in. THOMAS M. SUSMAN: supra note , p. 738.

one of the most ancient political rights, which in the Anglo-American tradition can be traced back to the Magna Carta (1215), in which the King of England granted the right of petition to the barons in writing for the first time[107]. This early right of petition was by no means a strong right[108] but nevertheless from 1215 it became customary to present petitions to the King. These petitions were either presented by the petitioners themselves or by their representatives and they were usually heard (not necessarily granted) by the King in exchange for financial contributions made to the crown[109]. This custom slowly lead to the development of the English parliament[110]. By the 14th century it was customary that the King listened to petitions presented by the people for themselves or on behalf of others at the beginning of every opening session in the parliament[111]. At this time there was no significant difference between petitions of a more private and of a more political nature[112] and petitions were presented on behalf of both individuals and communities. The petitioning of the era had two aspects: legislative and judicial or quasi-judicial[113]. These aspects did not separate clearly for a lengthy period[114]. It is worth noting that due to this dual function, petitioning played an important part in litigation as well[115]. This comes as no surprise as the three branches of the government did not separate clearly at the time[116]. Naturally for us it is the right of individual petitioning is what matters. In its later history, especially later on in the American colonies, the quasi-judicial function of the right to petition became meaningless.

Although a right of several aspects, the right of petition was not a particularly strong right at first as the decision to hear petitions was still somewhat within the King's discretion. Not even the appearance of the parliament as the other main actor on the political stage brought a significant change in this. The parliament in

[107] „If we, our justiciar, or our bailiffs or any of our officers, shall in anything be at fault toward anyone, or shall have broken any one of the articles of the peace or of this security, and the offences be notified to four barons of the five-and-twenty, the said barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, petition to have the transgression redressed without delay". In http://www.britannia.com/history/docs/magna2.html

[108] JULIE M. SPANBAUER: supra note 104., p. 22.

[109] JULIE M. SPANBAUER: supra note 104., p. 22.

[110] JULIE M. SPANBAUER: supra note 104., p. 22.

[111] NORMAN B. SMITH: supra note 105., p. 1155.

[112] „In this period, laws proposed by parliament, just like individual grievances, were presented in the form of petitions to the king". See NORMAN B. SMITH: supra note 105. p. 1156.

[113] See Julie M. Spanbauer, supra note 104. , p. 23.

[114] Not until the 16th century when legislation stopped being initiated by petitions.

[115] Litigation in the Court of Chancery, the Court of the Exchequer, the Court of the Common Pleas and the Court of the King's Bench was initiated by petition. JULIE M. SPANBAUER: supra note 104., p. 24.

[116] JULIE M. SPANBAUER: supra note 104., p. 24.

no small ways abused the right of petition the same way as the King[117]. Petitioners were sometimes even punished for submitting their requests[118]; fortunately by the beginning of the 18th century, this phenomenon ceased to exist[119]. It is important, however, to make a distinction between punishing the petitioner (by imprisonment) and not granting the favorable reception of the petition. Granting a favorable reception was never a part of the right of petition. Without further detailing the historical lineage of the development of the right of petition in England, let it be enough to conclude that by the 18th century the right of petition was indeed a right, its practice ceased to be punished and it was a recognized form of expressing individual grievances to the government asking for a redress. Most of the times petitioning was not only permitted, but even successful[120] and therefore it was frequently practiced.

The American Colonies

The right of petition, as shown above, was an established right in England by the time the American colonies came into existence. The Body of Liberties adopted by Massachusetts Bay Colony was the first colonial code to establish the right of petition in the overseas colonies[121] and this was only the first in a row of several other colonial codes which all contained similar provisions[122]. This clearly shows that the right of petition in the colonies was present from the earliest days. In actual fact, the right of petition was already engraved in the minds of the first settlers of the new colony, it was an asset they had brought with themselves on the long road across the Atlantic. This background naturally preset the main characteristics of the development of the petitioning right in what was not so much later to become the United States of America. Petitioning was an accepted way for individuals to approach their respective government. Petitioners were able to exercise their right to submit a written request for a redress of grievances without fear of possible

[117] The parliament was able to exercise the same kind of control over petitions as the King was able to. This was mostly due to the fact that the right to hear petitions never included the right to grant their favorable reception by either the king or the parliament.

[118] JULIE M. SPANBAUER: supra note 104., p. 26.

[119] JULIE M. SPANBAUER: supra note 104., p. 27.

[120] NORMAN B. SMITH: supra note 105, p. 1166.

[121] „Every man whether Inhabitant or Foreigner, free or not free, shall have liberty to come to any public Court, Council or Town meeting, and either by speech or writing, to move any lawful, seasonable or material Question, or to present any necessary Motion, Complaint, Petition, Bill or Information, whereof that Meeting hath proper cognizance, for it be done in convenient time, due Order and respective Manner". The Colonial Laws of Massachusetts in NORMAN B. SMITH: supra note 109., p. 1170.

[122] Delaware (1776), New Hampshire (1783), Vermont (1777), North Carolina (1776), Pennsylvania (1776) all adopted codes ensuring protection for those petitioning for a redress of grievances. JULIE M. SPANBAUER: supra note 104. , p. 28.

punishment[123]. Naturally, favorable treatment of petitions was not granted but the right of petition included the right to a response[124].

As the Revolution drew near, the right of petition became an especially treasured and meaningful right, one which gained affirmation in a number of pre-revolutionary documents, such as the Declaration of Rights and Grievances[125] or the Declaration and Resolves of the First Continental Congress[126], which set the tune for the to-be adopted Constitution. The right to petition, similarly to other individual rights, was not included in the original text of the Constitution but formed part of the first of the ten amendments that were drafted in order to amend the Constitution and which are known as the Bill of Rights.

First Amendment

The Bill of Rights, a comprehensive name by which we mean the first ten amendments of the United States Constitution, was proposed to the House of Representatives by James Madison. In the original draft presented by Madison, the right of petition and assembly was separate from the right of speech and religion: "The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of grievances"[127]. The original text was reviewed by both the House of Representatives and the Senate and after a few modifications was adopted in its present form[128]: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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"[129].

It is worth noting that neither in England nor in the American colonies did the right of free speech and press enjoy the same amount of support and recognition as the right of petition. The former two had a much less successful history. Seditious libel[130] and treason[131] rules were the most notable restrictions on the freedom of

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[123] Except for meritless petitions which were to be punished by fines in several of the colonies. These restrictions, however, did not aim to limit petitioning or the content of petitioning.

[124] JULIE M. SPANBAUER: 104., supra note, p. 33.

[125] „It is the right of the British subjects in these colonies to petition the King or either House of Parliament". In http://www.constitution.org/bcp/dor_sac.htm.

[126] That they have a right peaceably to assemble, consider of, their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal". In http://www.yale.edu/lawweb/avalon/resolves.htm.

[127] JULIE M. SPANBAUER: supra note 104., pp. 39.

[128] The records suggest that there was a motion to strike "assemble" from the text of the original text but the motion was dismissed. The right of petition was often conditioned on the right of assembly in those days and the two were viewed as inseparable from each other.

[129] U.S. Const.amend.I.

[130] Seditious libel originated in a 1606 case. Before that libel was a private action for damages. JULIE M. SPANBAUER: supra note 104., pp. 34–35.

speech and press. The reason for the maltreatment of these rights in comparison to the right of petition, was probably that petitioning, if exercised correctly, was much less threatening to the government than free speech. Petitions were addressed to the government and were directly handled or managed by the government, so it was able to exercise control over them by having the right to either dismiss them or receive them favorably. The same was not true for the freedom of speech and press, which – once exercised – were rather hard to be held under control and therefore they were definitely viewed as more dangerous to the status quo that the petitioning right. The right of petition was a right widely accepted and practiced in the former colonies. It was a right "implied by the very idea of government, republican in form"[132].

IV.

The constitutional right to lobby

For the non-Anglo-Saxon educated mind the connection between the right to lobby and the right to petition may seem a bit far-stretched. Nevertheless in the Anglo-American culture the right to lobby – if indeed there is such a constitutionally guaranteed right – stems from the right to petition the government for a redress of grievances, a right that allows every citizen to participate in government. It provides the constituents a right to directly or indirectly enter into contact with their elected officials and try to influence them on a public policy that affects them. The right to petition and the right to lobby are – despite their common origins – not the same[133]. The right of petition can be exercised in a number of ways, of which lobbying is only one[134]. The right to lobby also involves the right to free speech and press, and the right of assembly[135]; in fact generally there is no distinction made among these rights in the case of lobbying[136] and they are usually handled

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[131] Treason was introduced as a crime in a 1352 statute in England and it had to be an overt act showing an intent to murder the king or to levy war or to adhere to the king's enemies. Also, any writing which showed evidence of these intents was enough to call it an act of treason. JULIE M. SPANBAUER: supra note 104., pp. 34–35.

[132] U.S. v. Cruikshank, 92 U.S. 542, 552.

[133] The right to lobby does not appear in the First Amendment, which is no surprise considering the term lobbying did not exist at the time the Bill of Rights was framed. But it is without doubt that several of the activities that the Founding Fathers themselves exercised would now be considered lobbying activities. ANDREW P. THOMAS: supra note 1., p. 185.

[134] ANDREW P. THOMAS: supra note 1., p. 184.

[135] The right of assembly is also called the right of association. It is usually referred to in two contexts: intimate relationships, protected by the right of privacy and the freedom of individuals to gather in small groups or to unite in large organizations in order to engage in protected First Amendment activities. ALLAN IDES AND CHRISTOPHER N. MAY: *Constitutional Law, Individual Rights, Aspen Law & Business*. 2001. p. 363.

[136] In the framework of lobbying, freedom of speech and press are usually used only as techniques and their core meaning is not affected.

under the same umbrella. It is also worth noting that in the framework of lobbying legislation, the freedom of speech and press are usually not affected: lobbyists are not limited in the contents of their communication with elected officials and they are free to publish whatever they want. They are, however, limited in the amount of time they are allowed to communicate with members of the Congress[137]. That's of course a long step from pre-revolutionary times when even the Founding Fathers chose to wrote under pseudonyms[138].

The right to lobby involves something more as well. Lobbyists, especially since the second half of the 19th century have been more often than not acting as agents on other people's behalf; they fulfill (paid or unpaid) surrogate roles for individuals[139]. The idea that all lobbyists are evil influence-peddlers, simply does not stand. First of all it is a mistake to think that only large corporate interests lobby. Nowadays there are more and more interests (and behind these interests groups: individuals) who express their views to elected officials through lobbyists. Fortunately, the tendency is that more minorities, women and young people become engaged in lobbying, either directly or through an agent[140]. Lobbying is a way, a manner in which individuals and interest groups of all kinds can actually participate in government. In fact the main task for lobbyists should be to act as an active representation of the constituents towards the government[141]. But despite the fact that lobbying is part of the democratic process of citizen participation in government, it also has inherent threats of corruption and that's why restrictions of some kind seem to be necessary. Any restriction, however, needs to take into account the fact that it may have implications on the expressive rights of the First Amendment[142]. Of course, the real question is whether a constitutional right to lobby can actually be derived from these rights and the best suited actor to decide this question is the Supreme Court.

The Supreme Court has been, however, somewhat hesitant in the treatment of this issue; not that it has had no opportunities yet to examine it[143]. The Supreme Court first faced the question of lobbying in Trist v Child[144], a case from the Gilded Age, in which the Supreme Court declared a lobbying contract with an attorney

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[137] For some reason lobbying regulations fail to regulate lobbyists' contact with members of the executive branch and instead they tend to focus on lobbying in the legislative branch.

[138] The Federalist Papers were written under a pseudonym as well. Because of the restraints on the freedom of speech and the press anonymous speech was much treasured in revolutionary America.

[139] VINCENT R. JOHNSON: supra note 101., p. 4.

[140] THOMAS M. SUSMAN: supra note 13., p. 742.

[141] JAMES M. DEMARCO: *Lobbying the Legislature in the Republic: Why Lobby Reform is Unimportant.* 8 Notre Dame J. L. Ethics & Pub. Pol'y 599, p. 613.

[142] Congress does seem to take into account the constitutional implications of lobbying and usually cites the possible implications on the constitutional right to lobby as a reason for the limited scope of lobbying restrictions.

[143] Although it is worth noting that despite the fact that lobbying seems to be present at every level of government, so far relatively few cases involving lobbying has reached the Supreme Court.

[144] Trist v. Child, 88 U.S. 21 Wall. 441 (1874)

unenforceable. In the Court's reasoning an "agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered (...) contrary to the plainest principles of public policy"[145]. The Supreme Court did little to conceal its view on lobbying: ""if any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employee as steeped in corruption and the employment as infamous"[146]. This early indication of the Supreme Court's view on lobbying made it clear for quite a while that lobbying will not enjoy any sort of protection from the federal judiciary.

Trist v. Child was an early opinion but it nevertheless preset the tone for what was to come. Following the first lobbying restrictions, it was inevitable that the question of their constitutionality would be raised. The first occasion for this was created by the notoriously badly drafted Federal Regulation of Lobbying Act[147] in Rumely v. United States[148][149]. The Court examined the scope of the Act, namely what constituted a lobbying activity under the Act[150]. According to the Supreme Court's reasoning, if lobbying activities were to be construed broadly, the Federal Regulation of Lobbying Act would have to face a serious constitutional challenge and therefore "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided"[151]. Following this principle the Court decided to construe the language of the Federal Regulation of Lobbying Act narrowly so as to avoid a constitutional issue and decided to use "lobbying in its commonly accepted sense" as "representations made directly to the Congress, its members, or its committees"[152]. The Supreme Court, in opting for the more limited definition of lobbying activities, limited the scope of the Act as well. Even though the Court did not explicitly treat the question of a right to lobby, it eventually ended up – although hesitantly – providing some form of constitutional protection for it, namely through the First Amendment expressive rights.

Rumely was not a direct challenge on the constitutionality of the Act and neither was the question of lobbying examined in depth by the Court. Nevertheless

[145] Trist v. Child, 88 U.S. 21 Wall. 441, p. 451.

[146] Trist v. Child, 88 U.S. 21 Wall. 441, p. 451.

[147] See supra note 81.

[148] Rumely v.United States 345 U.S 41 (1953).

[149] In Rumely v. United States Mr. Rumely refused to disclose to a Congressional committee (the Buchanan committee) the names of those who made bulk purchases of books of a political nature from his organization. The organization engaged in activities which under the Federal Regulation of Lobbying Act constituted lobbying.

[150] The Federal Regulation of Lobbying Act did not use the term lobbying activity.

[151] Crowell v. Benson, 285 U.S. 22.

[152] 90 U.S. App. D.C. 382, 197 F. 2d 166, 175.

it became clear that further challenges would arrive. The next attack on the Federal Regulation of Lobbying Act's constitutionality came with United States v. Harriss[153]. The question focused on the statute's definition of "lobbying" and who was considered a lobbyist under the Act. The Court held that the main question was whether the Act "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute"[154] or whether the statute was unconstitutionally vague and unclear[155]. The Court turned to Rumely and basically applied the same concept that was applied there, namely that the language of the act "should be construed to refer only to 'lobbying in its commonly accepted sense' – to direct communication with members of Congress on pending or proposed federal legislation"[156]. Thus the Court decided to make "constitutionally definite the class of offenses by a reasonable construction of the language"[157], which is also a duty of the court[158]. According to this interpretation only those had to comply with the disclosure requirements who fulfilled the following three criteria: the person must have solicited, collected, or received contributions; one of the main (principal) purposes of such person or contributions must have been to influence the passage or defeat of legislation by Congress and this must have been done through direct communication with members of the Congress on pending or proposed legislation[159]. By construing the act's definition of lobbyist narrowly, the Court managed to avoid more serious constitutional implications but at the same time excluded a number of activities from the scope of the act, such as grassroots lobbying, or lobbying members of the executive branch or self-lobbying[160].

In Harriss the Court also dealt with the issue of lobbying in general (although its treatment of the subject was far from exhaustive). In the Court's opinion the Federal Regulation of Lobbying Act's mandatory disclosure requirements do not infringe lobbyists' First Amendment rights as Congress "is not constitutionally forbidden to require the disclosure of lobbying activities"[161] as these disclosure requirements effectively serve Congress' self-protection[162]. The Court also touched the issue of mandatory disclosure requirements having a deterrent effect on those wishing to engage in activities falling under the scope of the First Amendment and concluded that such danger does not exist although "hypothetical borderline situations are conjured up in which such persons choose to remain silent because of

[153] United States v. Harriss 347 U.S. 612 (1954)

[154] United States v. Harriss 347 U.S., 625.

[155] The Court applied "the underlying principle (...) that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed". United States v. Harriss 345 U.S., 617.

[156] United States v. Harriss 347 U.S., 620.

[157] United States v. Harriss 347 U.S. 612.

[158] United States v. Harriss 347 U.S. 612.

[159] United States v. Harriss 347, U.S. 612.

[160] ANDREW P. THOMAS: supra note 1., p. 163.

[161] United States v. Harriss 347 U.S., 625.

[162] United States v. Harriss 347 U.S., 625.

fear of possible prosecution for failure to comply with the act (...) the restraint is, at most, an indirect one resulting from self-censorship"[163]. Thus in Harriss the Court found that lobbying restrictions, if constitutionally precise and clear, do not infringe upon First Amendment rights. If we reverse this conclusion it is clear, however, that despite the Court's overly hesitant admission, lobbying is entitled to some form of constitutional protection under the First Amendment, although the scope of this protection was not clarified in Harriss and the decision failed to give a solid basis for lobbyists to apply for protection under the Constitution. The latter was clearly not an intention of the Court anyway.

Later cases decided by the Supreme Court involving the right to lobby also failed to declare the existence of a constitutional right to lobby. In Eastern Railroad Presidents Conference v. Noerr Motor Freight[164] the Court concluded that in a representative government such as the United States the executive and the legislative branch of government "act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives"[165]. The Court also acknowledged that "the right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms"[166]. With this latter statement the Supreme Court identified the right of petition as the operative right in the lobbying issue and once again guaranteed some form of constitutional protection for lobbying.

In Regan v. Taxation with Representation of Washington[167] the Supreme Court was of the opinion that "Congress did not violate Taxation with Representation of Washington's First Amendment rights by declining to subsidize its First Amendments activities"[168]. In his concurring opinion Justice Blackmun, joined by Justices Brennan and Marshall, declared that "Because lobbying is protected by the First Amendment, (...) §501(c)(3) therefore denies a significant benefit to organizations choosing to exercise their constitutional rights"[169], which, of course, violates the principle "that the government may not deny a benefit to a person because he exercises a constitutional right"[170]. Although this seems to be an affirmative recognition of a constitutional right to lobby, Regan v. Taxation with

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[163] United States v. Harriss 347 U.S., 626.

[164] Eastern R. Conf. v. Noerr Motors, 365 U.S. 127 (1961). A group of trucking companies and their trade associations sued for treble damages and injunctive relief against a group of railroads charging that the defendants had conspired to restrain trade in, and monopolize, the long-distance freight business, in violation of the Sherman Antitrust Act.

[165] Eastern R. Conf. v. Noerr Motors, 365 U.S., 137.

[166] Eastern R. Conf. v. Noerr Motors, 365 U.S., 138.

[167] Regan v. Taxation with Representation of Washington, 461 U.S. 540. (1983). Taxation with Representation of Washington, a non profit organization filed suit challenging the Internal Revenue Code's denial of tax-exempt status to them because of its lobbying activities.

[168] Regan v.Taxation with Representation of Washington, 461 U.S. 548.

[169] Regan v. Taxation with Representation of Washington, 461 U.S. 552.

[170] Regan v. Taxation with Representation of Washington, 461 U.S 545.

Representation of Washington did not alter the constitutional scene for lobbying, mainly as Justice Blackmun failed to detail his declaration and also, because his opinion was not part of the majority decision.

The above cases represent the most important milestones in the treatment of the right to lobby in the Supreme Court's practice. Milestones they are, nevertheless none of the above cases recognized a right to lobby affirmatively. We can only gather fragments of some form of constitutional protection for lobbying from these decisions. The situation is somewhat different in associational privacy cases which have enjoyed greater support from the Supreme Court. The most important associational privacy cases do no involve lobbyists' rights specifically, but nevertheless they have proved to be important in drafting a three-pronged test which can be applied to statutes limiting constitutional rights (such as the right of assembly or the right of petition) and therefore form an important part of lobbying caselaw[171]. In NAACP v. Alabama ex rel. Patterson[172] the Court concluded that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.(...) State action which may have the effect of curtailing the freedom to associate is subject to closest scrutiny"[173]. The Court actually cites Rumely and Harriss in supporting its argument[174]. In NAACP the Court arrived at the conclusion that a state must show a controlling interest in the disclosure requirements and it also must prove that there is a substantial relationship between the state's interest and the information provided by disclosure[175]. The same two-pronged test was reinforced in Bates v. Little Rock[176] and was added a third prong in Shelton v. Tucker[177], that being the "less drastic means doctrine": "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose"[178]. In yet another associational privacy case, Buckley v. Valeo[179] the Supreme Court found that the right of association was not

[171] It is also worth noting that associational privacy cases and right to petition cases tend to cite and cross-reference each other. It seems like the Supreme Court itself handles the two issues as facets of essentially the same topic.

[172] NAACP v. Alabama ex. Rel. Patterson, 357 U.S. 449 (1958). NAACP (National Association for the Advancement of Colored People), a non-profit organization working for the advancement of the interests of African-Americans, refused to comply with an Alabama court order requiring disclosure of the organization's membership lists.

[173] NAACP v. Alabama ex. Rel. Patterson, 357 U.S., 460.

[174] NAACP v. Alabama ex. Rel. Patterson, 357 U.S., 461.

[175] NAACP v. Alabama ex. Rel. Patterson, 357 U.S., 463–464.

[176] Bates v. Little Rock, 361 U.S. 516 (1960)

[177] Shelton v. Tucker 364 U.S. 479. (1960)

[178] Shelton v. Tucker 364 U.S. 479.488.

[179] Buckley v. Valeo 424 U.S. 1 (1976)

an absolute right and that the three-pronged test previously applied was a balancing test and it allowed for even a "significant interference with protected rights of political associations"[180] in case the state can actually show a sufficiently important interest.

Although none of the above cases dealt expressly with lobbying rights, its implications on the right of petition, another fundamental right guaranteed by the First Amendment, are undeniable. If the Supreme Court were to remain consistent with its opinions in associational privacy cases, the same three-pronged test is to be applied to lobbying statutes as well. But then again, it is worth noting that the difference in the Court's treatment of the right of association and the right to lobby might not be incidental, especially since both case law was formed in the same era. It seems that the Court found it more important to develop the boundaries and protections for associational privacy then it did for the right to lobby, the existence of which was never affirmatively recognized by the Supreme Court.

V.

Lobbying Today: A Conclusion

Since the beginning of the 20th century lobbyists have continuously grown in their numbers[181] and lobbying today is a widespread practice at all levels of government, both federal and state. Especially at the federal level, lobbying has reached a never before seen phase as the result of a process which started in the second half of the 19th century and was a direct result of Congress' expanding powers[182]. The issues that are lobbied for are as diverse as the people themselves, the ways in which lobbying is done is similarly varied and the amounts spent on lobbying are simply vast[183]. By becoming more diverse, we mean that more people are represented through lobbyists than ever before. It is not an overstatement to say that basically everybody is lobbying these days, either by herself or through an agent acting on her behalf. Naturally this is not a bad thing, but it does raise the number of people wanting access to elected officials, who simply have limited time at their disposal. Nevertheless these days more young people participate in lobbying than ever before[184] and the same goes for women and minorities[185].These developments show that lobbying has gone through a positive change in the past century. Lobbying is

[180] Buckley v. Valeo 424 U.S. 1, 25.

[181] In 2008 the number of lobbyists in Washington D.C. surpassed 17.000 and total lobbying spending reached 1.59 billion USD. Center for Responsive Politics, http://www.opensecrets.org/lobby/index.php.

[182] See supra note 43.

[183] See supra note 181.

[184] THOMAS M. SUSMAN: supra note 13., p. 742.

[185] THOMAS M. SUSMAN: supra note 13., p.742.

no longer reserved for the favored few; it has opened its doors and at the same time it has become a true profession[186]. Besides this, it would be a mistake and indeed an unforgivable generalization to say that lobbying is all about quid pro quo arrangements bordering on corruption or trading of votes for campaign contributions. Lobbying is important because it is the main form in which individuals and communities, interest groups of all sorts can express their views on public policy. Lobbying would not be viable today, much less an important factor in government, if it hadn't be for the support that a lobbying group enjoys for its objectives[187]. It is crucial to see the citizens, the constituents behind each lobby group. It's an undisputed fact that everyone in Washington D.C. wants reelection and therefore each lobby group is worth as much as the support it enjoys from constituents. This is what makes lobbying a truly significant factor in governance. It is also important to see the variety of tasks and functions of lobbyists in their full scope. Lobbying involves a wide range of activities, of which meeting with elected officials or their members of staff is only one and not even the most significant aspect. Lobbyists' duties' involve – among others – research, making presentations, drafting model legislation and speeches, generating grassroots lobbying activity[188]. Naturally the main objective of lobbying remains the same: trying to influence public policy by encouraging the passage or defeat of legislation[189]. The multitude of tasks that lobbyists have to perform shows that lobbyists – besides voicing opinions of the citizens to the government – also contribute to the legislative process and this contribution is not the least insignificant[190][191]. As the Supreme Court declared in United States v. Harriss: "Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends on no small extent on their ability to properly evaluate such pressures"[192]. Lobbyists are generally experts in their field, and can add invaluably useful insight to the decision-making process by providing valid and reliable information to members of Congress. Indeed, these days a lobbyist who fails to do so, does not look forward to a long-lasting career in Washington D.C. and rightly so, as the main purpose of lobbing has been – and should be – acting as a surrogate for the constituents[193].

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[186] THOMAS M. SUSMAN: supra note 13., p. 742.

[187] JAMES DEMARCO: supra note 141. p. 617.

[188] JOSEPH I. HOCHMAN: *Post-Employment Lobbying Restrictions on the Legislative Branch of Government: A Minimalist Approach to Regulating Ethics in Government.* 65 Wash. L.Rev. 883, p. 885.

[189] JOSEPH I. HOCHMAN: supra note 188., p. 885.

[190] JOSEPH I. HOCHMAN: supra note 188., p. 902.

[191] VINCENT R. JOHNSON: supra note 188., p. 5.

[192] UNITED STATES V. HARRISS: 347 U.S., p. 625.

[193] VINCENT R. JOHNSON: supra note 101, p. 8.

This process has become at times distorted, especially when one looks at large corporate interests governing the scene of lobbying[194], which makes one wonder what has happened to small interest groups and individuals. Large and powerful interest groups have an inherent danger: they may make members of Congress forget who their real constituents are and what interests they dispose of. Despite the fact that the lobbying scene has been tempered with scandals, partly as a result of the above-mentioned process, lobbying in general is still much more ethical than was in the 19th century[195], for example, and this in my opinion is largely due to the "sunshine" that has been shed on lobbying. This sunshine, however, is not simply the result of lobbying restrictions that have been put into effect since the beginning of the 20th century. Although their role is undeniable in shedding "some" light on the way lobbying actually works, they are far from being truly effective or much less perfect. On the other hand political journalists and political watch groups have done a lot to shed real light on the way in which politics work.

This is not enough, of course. Lobbying restrictions have been put into effect but without as much use as was expected of them, which is partly due to Congress' hesitance to enact truly meaningful lobbying legislation. Maybe one of the reasons for this is that any lobbying legislation that aims to be indeed effective should not leave the elected officials themselves out of the scope; otherwise lobbying legislation simply remains "much ado about nothing"[196]. It is also important to remember that lobbyists more often than not represent other people, so they are acting as an agent for someone else. This is especially significant when campaign contributions by lobbyists are limited, even though usually it is the client who donates, not the lobbyist himself[197]. Therefore more focus on the client and the issue that he or she represents should be in place, especially in the disclosure files. This would be helpful for voters and all interests groups in general. It would help the former become a more competent voter[198], by knowing what interests try to reach his or her elected official and it would help the latter as well by identifying their competitors[199] and it would enable the interest groups to act as "factions" and battle each other in a "true Madisonian fashion"[200]. Besides the above, any meaningful lobby legislation should extend its reach to grassroots lobby[201]; it

[194] It is worth mentioning that the biggest lobbyist spender in the U.S. is the American Chamber of Commerce. See supra note 182.

[195] THOMAS SUSMAN: supra note 13., p.

[196] WILLIAM SHAKESPEARE: Much ado about nothing.

[197] This is true in most lobbyists' case and it is worth noting that in the period between 1998 and 2005 only 6% of all lobbyists are responsible for more than 83% of all campaign contributions made by lobbyists. RICHARD BRIFFAULT: *Lobbying and Campaign Finance: Separate and Together*. 19 Stan. L. & Pol'y Rev. 105, p. 111.

[198] It would make it possible for constituents to base their acts in the voting boxes based on accurate information. All in all, it would add to voter's competence.

[199] THOMAS M. SUSMAN: supra note 13., p. 750.

[200] KRISHNAKUMAR: supra note 2., pp. 571–573.

[201] See supra note 68.

should try and deal with revolving-door lobbying effectively without losing the experience of former members of Congress[202] and enforcement provisions should definitely be stricter[203]. In some cases (meals, entertainment, gifts and other services) prohibition seems to be necessary and inevitable to avoid even the appearance of corruption, which is just as bad as actual corruption[204].

Overall, true lobby reform is inevitable to restore or if not lost yet, preserve public trust in the political institutions. Any reform, however, must take into consideration First Amendment concerns and must not restrict an individual's possibility to access public officials to influence the decision-making process. Nevertheless it's important to mention that lobbying laws so far have not limited lobbying in its essence at all; they might have erected certain boundaries to avoid improprieties but overall lobbying legislation has not limited the right to lobbying in a substantial way.

RADICS OLÍVIA

LOBBIZÁS ÉS AZ ELSŐ ALKOTMÁNYKIEGÉSZÍTÉS ÁLTAL MEGHATÁROZOTT PETÍCIÓS JOG

(Összefoglalás)

A lobbizás mind az Egyesült Államokban, mind az Európai Unióban tagadhatatlanul szignifikáns helyet foglal el a politikai döntéshozatalban. A tanulmány középpontjában a lobbizás egyesült államokbeli szerepe és története áll. Noha a lobbizás – objektíve nézve – sohasem tartozott a tiszteletet érdemlő szakmák közé, az Egyesült Államokban igazi szakmává nemesedett a 19. század második felétől kezdődően, szoros összefüggésben a szövetségi kormány hatalmának növekedésével.

A 20. század elejétől kezdődően a lobbizást számos szövetségi törvény próbálta szabályozni, főleg az azt övező bizalmatlanság és az időről időre felbukkanó botrányok nyomán, ugyanakkor ezek a törekvések (tiltás vagy információszolgáltatás) a legtöbb esetben eredménytelenek voltak vagy legalábbis kevéssé sikeresek. A lobbizás törvényi szabályozása ugyanakkor korlátozhatja a személyek petíciós jogát, valamint a gyülekezési szabadságot, amely jogokat az Egyesült Államok Alkotmányának első alkotmány-kiegészítése biztosít minden

[202] See supra note 89.

[203] Disclosure should be done in an electronic format; preferably reports by lobbyists should be filed online. An independent federal agency with the necessary means available should be appointed to handle and cross-reference these reports and enforce the penalties if necessary.

[204] RICHARD BRIFFAULT: supra note 197., p. 108.

állampolgár számára. Éppen ezért a tanulmány célja az Egyesült Államok Legfelsőbb Bíróságának a petíciós jog és a gyülekezési szabadság megsértésével kapcsolatos döntéseinek bemutatása, azzal együtt, hogy a lobbizás átfogó reformja, természetesen a vonatkozó jogok tiszteletben tartása mellett, elengedhetetlenül szükséges napjainkban.