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Special Orders

Lobbying and Lobby Reform: A Practitioner's Viewpoint

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The Constitutional Basis of Lobbying

When discussing lobbying and lobby reform, it is important to remember that our freedom to advocate, or to lobby, has been construed as among our most basic constitutional right of free expression. The First Amendment to the United States Constitution specifically states: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." Such "redress" has evolved over time and through federal court interpretation to encompass nearly any request for government action. Indeed, this form of free expression has informed most, if not all, of current U.S. law. Moreover, the parameters of this free expression — along with the right to free speech — are tested and validated in court interpretations of our nation's lobbying and campaign finance laws.

The term "lobbyist" encompasses the activities of a broad array of individuals involved with many institutions in both the public and private sectors. Members of the House of Representatives and the Senate, the president and his cabinet, governors and mayors all, at times, "lobby" — and are often, in fact, the most effective lobbyists. The more "traditional" notion of lobbyists, sometimes referred to as advocates for "special interests," includes individuals who represent companies, trade associations, chambers of commerce and other business groups, unions, a broad array of so-called non-governmental organizations such as consumer or environmental groups, law firms, grassroots organizations, public relations and public affairs firms, polling firms, marketing organizations, accounting firms, and direct mail firms. These advocates represent issues and points of view unique to their organizations or constituencies and, in many cases, are essential to ensuring that government officials are presented with all the basic information and competing viewpoints of a given issue.¹

Lobbying As Part of a Law Firm

As a lawyer lobbyist I have chosen to practice law as an advocate on behalf of clients before Congress and the executive branch. It is within these forums that the rules for our entire society are debated and formed. I find it exciting and professionally rewarding to be involved in important policy decisions that are the basis of our system of law. I practice in Washington because, perhaps more than anywhere else, it is where government, politics, and policy intersect.

I take great pride in being part of a first-class, first-generation law firm. I have been with my firm almost 30 years, and our Public Law and Policy practice has continually been ranked in the top tier of lobbying firms. Quality is the main ingredient in a lobbying practice that wants to differentiate itself from similar practices at other firms. Constant adherence to excellence always sets people apart favorably. At our firm we have trained, encouraged, and supported many policy advocates through the years. A great number of these professionals have had successful careers outside of the firm, in senior positions in both the public and private sectors, based on principles they developed at our firm.

To put lobbyists and special interests in context, remember the words of President Truman. When asked how he felt about lobbyists who favored his programs he responded: “If they supported my programs they wouldn’t be lobbyists, they’d be citizens appearing in the public interest.”

Qualities of a Good Lobbyist

I have the pleasure of serving on the board of directors of the Bryce Harlow Foundation. Bryce Harlow came to Washington in 1938 after graduating from the University of Oklahoma to begin his career as assistant librarian of the House of Representatives. He served as a congressional aide on the staff of General George Marshall and as a staff member of the House Armed Services Committee. He also served on the White House staff — first for President Eisenhower and then for President Nixon. He was the first formal assistant to the president for congressional affairs. And he started the Washington government affairs office of the Procter & Gamble Company. He was a remarkable man with a distinguished career in government service and corporate representation.

Accordingly, in his honor, the Bryce Harlow Foundation was formed to advance the high ethical standards for business-government relations begun by this pioneer of our profession. The Foundation is dedicated to promoting and enhancing the quality of professional advocacy and increasing the understanding of its essential role in the development of sound public policy.

Bryce Harlow believed there were five fundamental characteristics of being a good lobbyist in Washington and they apply to being a good advocate in any policy arena. I think they help set the framework for any discussion about public policymaking and lobby reform.

The first characteristic is **integrity**. Bryce Harlow put it this way: “The coin of lobbying, as of politics, is trust. One’s word is one’s bond. Truth-telling and square-dealing are of paramount importance in this profession. If one lies, misrepresents, or even lets a misapprehension stand uncorrected — or if someone cuts corners too slyly — he/she is dead and gone, never to be resurrected, or even mourned.” This applies to individuals and to groups. It applies across the board, without exception. Once a lobbyist loses credibility, it most likely cannot be regained. This principle is exceedingly important as a basis for any discussion of lobby reform.

The second characteristic is a **willingness to work hard**. Lobbying is a very competitive system. There often are advocates on the other side of the issue who are trying to have their position accepted, or to stop your position from being adopted, by the relevant decision maker. In such circumstances, the first challenge may be to convince someone in a position of authority to enter the fray and act on your issue. Accordingly, since most policy issues tend to be very complex, it takes an enormous amount of work to convince someone in authority to **listen** to your case, much less understand it and work toward its adoption. As Bryce Harlow said, in this business, there is simply “no rest for the weary.”

The third characteristic is **adaptability to change**. Bryce Harlow said, “The formal and informal rules of the game undergo frequent and sometimes subtle modifications And, lest we forget, key participants in the policy process turn over with alarming frequency. No sooner does a ranking official profess to see merit in a company’s position than that official resigns, dies, gets transferred or fired, or is beaten in an election. The whole painstaking process of education and persuasion then has to be started from scratch with the official’s successor.” Suffice it to say that this phenomenon is even truer today than

it was when Mr. Harlow wrote those words, due to factors such as increasingly competitive elections and self-imposed term limits, as well as term limits for certain leadership positions and committee and subcommittee chairmanships.

The fourth characteristic is **humility and perspective**. According to Bryce Harlow: “A Washington representative needs to recognize and accept the fact that whatever it is that he/she represents is more important than his/her own personality and atmospherics.” A member’s schedule, and that of his/her staff, is extremely demanding. Most people outside Washington do not have an appreciation of just how hard members and staff work. A good lobbyist, therefore, must respect these hard-working people. He/she needs to learn to be patient and to check his/her ego at the door. It is not about *you*, it is about your case. As Harlow said, “Never confuse yourself with your job. It may be important. You are not.”

The fifth characteristic is **an understanding of the processes of government**. Bryce Harlow described this fundamental as follows: “Representatives need to have a clear fix on how the government actually works, how the pieces fit together, how things get done.” A good lobbyist simply must take the time to read and comprehend the rules under which governmental bodies operate and to understand the process of how decisions actually get made. Understanding the so-called “decision tree,” as well as the rules of how the various institutions work, internally and with each other, is essential to success. These rules define the “realm of the possible” for each lobbying project and enable a lobbyist to focus his/her efforts on the appropriate decision maker at the right time in the policymaking process.²

Checks and Balances

To the untrained eye the formulation of public policy can be a confusing and daunting process. Indeed, the Founding Fathers of our nation were determined to create a system that was responsive to the will of the people, but that would not allow the laws of the nation to be changed easily. In addition to the formal policymaking processes, it must be remembered that there are a great number of personal relationships in politics that can create seemingly unusual alliances or unexpected outcomes. While these relationships are often not apparent to the casual observer of government and politics, they are at the core of the making of law and public policy. This is particularly so with regard to relationships among members of Congress and, in some cases, between members of Congress and officials in the executive branch. These intra-governmental relationships are much more influential in policymaking than any relationship between a member of Congress and the so-called lobbying community. And, in any case, with regard to the relative value of relationships versus good advocacy, I’ll take good advocacy every time. But remember, good advocacy is based on integrity and credibility.

It is also important to remember that policymaking is based on a process of “give and take” or checks and balances. In every session of Congress, many ideas are introduced as bills, hundreds of hearings are held, and numerous bills are considered in subcommittees and committees, and by the full House and Senate. Some of these bills make it to a joint conference committee involving members from both bodies, and some bills get to the White House and are either signed into law or vetoed by the president. At each stage of the legislative process the system of checks and balances applies. It applies among entities within the institutions and between them. It also applies to the relationships among the various policy makers themselves. Then, of course, if the legislation becomes law, it is also subject to review by the judicial branch. This system of checks and balances is complicated but it ensures a fair process for policymaking. Historically, this checks and balances mechanism has generally protected the integrity of the policymaking process. However, recently, this historical protection broke down with the increased use of so-called “earmarks.” Earmarks are provisions contained in appropriations bills directing the funding of a specific project, usually at the request of a single member of Congress. In many instances, appropriated funds were included in a conference report directed for a specific purpose without

the benefit of knowing the identity of the supporting member, and often without the benefit of hearings, or even consideration, in either House of Congress. This practice leads to abuses like those of Congressman Cunningham and others. As set forth below, the House, although not the Senate, has now moved to address this issue.³

Regulation of Lobbying

Lobbying has become a much more professional and regulated practice than it was when I began in this field in the late 1970s. The public may not understand that as well as they should. As discussed above, lobbying is based on the constitutional right to petition the government but is governed by a comprehensive set of rules and regulations affecting the activities of lobbyists. These rules focus on public disclosure of lobbying activities on the one hand and limits on political contributions and gifts on the other.

The regulation of lobbyists began as early as 1946 with the adoption of the Federal Regulation of Lobbying Act which required registered lobbyists to publicly disclose how much they were paid and how much they spent on lobbying activities. While the Supreme Court upheld the Act and its public disclosure requirements, the actual wording of the Act was somewhat vague, and rarely enforced. Furthermore, it applied only to lobbying members of Congress, not to executive branch officials. While Congress enacted significant reforms in the regulation of ethical conduct of public officials during the 1970s and 1980s, it was not until 1995 that Congress revisited the lobbyist reporting and disclosure issue. After researching and holding hearings on lobbyist activities, Congress enacted the Lobbying Disclosure Act of 1995 (LDA). The LDA is a comprehensive law that applies to both the Legislative and Executive Branches of the government. It requires lobbyists to register and regularly disclose on whose behalf they are lobbying and the amounts they are spending and being paid to lobby. The LDA is a great improvement over prior law and practice and allows the public easy access to information about lobbyists and their activities.

Other federal laws regulating lobbying activities include the Foreign Agents Registration Act, which extends similar disclosure requirements to representatives of foreign governments engaged in political activities in the United States. The Byrd Rule, named after its Senate sponsor, Senator Robert C. Byrd, regulates the use of appropriated funds to lobby for certain government contracts. Laws regulating federal elections also provide relevant restrictions on campaign contributions from lobbyists and the general public. The Federal Election Campaign Finance Act of 1971, as amended in 1974, as well as the most recent amendments adopted as part of the Bipartisan Campaign Reform Act of 2002, more commonly known as McCain-Feingold, places limits on the amount of campaign contributions federal officeholders may accept from individuals and political action committees (PACs). Finally, both the House and Senate have separate internal rules governing the receipt of gifts or other things of value by Members or staff.

In addition, there are post-employment rules that limit the lobbying that former members of Congress and their staffs or members of the executive branch can perform for specified periods of time after they terminate their government employment. In certain areas, such as foreign affairs, there are lifetime limitations. Other limitations are for shorter periods, usually a year. For example, a former staff member of a member of Congress cannot lobby that member's office for one year.

Time for Changes to Restore Public Confidence

With the revelations of inappropriate, and sometimes criminal, behavior exemplified by the actions of lobbyist Jack Abramoff and former Representatives Duke Cunningham and Bob Ney, and others, there has developed a 'crisis of confidence' in our political system, especially with regard to lobbyists and their real or perceived influence on policy makers. Post-election polls show that the issue of

“corruption” in the system was a major factor in the 2006 election. A national exit poll taken on November 7 showed “41 percent of voters said that corruption and scandals in government were extremely important in their House vote, with an additional 33 percent saying the issues were very important. Those citing corruption and scandals as very important favored Democratic House candidates by 8 points, and those who said they were extremely important favored Democrats by 24 points.”⁴

But the public’s unhappiness has been building for some time. For example, in a CBS News/New York Times poll (January 2006), when respondents were asked the question, “Do you think recent reports that lobbyists may have bribed Members of Congress are isolated incidents, or do you think this kind of behavior is the way things work in Congress?”, a whopping 77% said that they thought that this is “the way things work.”

Similarly, in a Time/SRBI poll (March 2006), when respondents were asked, “In your view, do more Members of Congress vote based on the best interests of their constituents or based on what lobbyists and special interests want?”, 67% responded “based on what lobbyists and special interests want.”

The trend continued in a New York Times/CBS News poll (September 15-19, 2006) when respondents were presented the question, “Do you think most Members of Congress are more interested in serving the people they represent, or more interested in serving special interest groups?”, 73% said “special interest groups.”

Prior to the election, responding to recent scandals and the public response to them, the House of Representatives and Senate moved with great fanfare to address the ways in which both lobbyists and members of Congress and their staffs conduct themselves.

In early 2006, the Senate passed the Legislative Transparency and Accountability Act⁵ and the House approved the Lobbying Accountability and Transparency Act.⁶ Both measures made extensive changes to the internal rules and procedures governing the activities of the respective chambers as well as to current law regulating the practices of registered lobbyists. In order to be implemented, however, that legislative package must be reconciled by the House and Senate in a conference committee and then signed by the president.

The legislative package proposed similar changes for both House and Senate rules. Both measures address the gift rule, travel rules, so-called “earmark” reform and post-employment decisions. Two areas where the House goes further than the Senate are the requirement that new and current staff complete periodic courses in ethics and the forfeiture of member pensions if representatives are found guilty of crimes of bribery or fraud.

In terms of proposed changes to current law regulating lobbying, both bills propose greater disclosure and increase the dollar amount for civil fines levied against lobbyists for violating LDA provisions. The House proposal goes so far as to include criminal liability for lobbyists found to have conducted themselves in violation of the Act.⁷

Although there seemed to be great initial enthusiasm for lobby reform in the wake of the Abramoff and Cunningham scandals, efforts to push the legislation to final passage stalled. Lawmakers instead had to settle for tackling portions of the bills separately in changes to internal rules in their respective chambers.⁸

On February 1, 2006, the House passed an independent resolution revoking the floor privileges of any former members, including delegates and resident commissioners, former House parliamentarians, and former elected officers of the House if they are currently registered lobbyists, agents of a foreign principal, or if they have any personal or pecuniary interest in any pending measure before the House. In the same resolution, the House also voted to prohibit former members and former officers, and their spouses, who are registered lobbyists or agents of foreign principals from accessing the House gymnasium.⁹

In September 2006, the House passed a resolution changing its internal rules to require greater disclosure with respect to earmarks. By a vote of 245 to 171, and in the face of strong opposition from members of the Committee on Appropriations, the House ensured greater transparency by requiring members to disclose to the public the projects for which they request earmarks.¹⁰ Because the changes were adopted as part of a single year appropriations bill, this rule change will expire at the end of this fiscal year. However, similar language will likely be readopted, along with a number of other House rules changes, at the beginning of the next Congress in January 2007. As of this writing, the Senate has not passed a similar earmark provision.

Both the House and the Senate have also passed legislation creating on the Internet a searchable database of federal contracts and grants.¹¹ The Office of Management and Budget (OMB) will be tasked with administering the database, and the agency is in full support of additional tools to make government more accountable to taxpayers. The database has a congressionally mandated operational date of January 1, 2008.

Whether or not the current House and Senate leadership will feel inclined to revisit lobby reform during the post-election “lame duck” session is hard to predict. It is important to note, however, that since the Democrats gained control of both chambers of Congress in the November mid-term election, it is highly probable that they will pursue “comprehensive” lobby reform proposals in the 110th Congress. In fact, Speaker-to-be Nancy Pelosi has indicated that “comprehensive” lobby reform¹² will be one of the first measures considered in the 110th Congress. As indicated earlier, the Senate can be expected also to address “comprehensive” reform.

Conclusion

Establishing integrity in the system on both an individual and institutional basis is the essential ingredient of continued legitimacy, real or perceived, of policymaking. I believe that whatever changes it takes, however extensive, to restore the public’s confidence in our system of policymaking should be adopted. The lobbying industry will comply with those rules and it will be incumbent on those of us actively participating in that process to do so with integrity.

Notes

1. For a similar discussion by the author regarding lobbying generally, see *Inside the Minds, Political Powerhouses – Beltway Insiders on the Way Washington Works* (Aspatore Books, 2003).
2. See Bob Burke and Ralph G. Thompson, *Bryce Harlow: Mr. Integrity* (Oklahoma Heritage Association, 2000).
3. Anticipated that the Senate, in control of the Democrats, will move to reform in the 110th Congress.
4. See <http://www.cbsnews.com/stories/2006/11/08/politics/main2161309.shtml>;
see <http://www.cnn.com/ELECTION/2006/pages/results/states/US/H/00/epolls.0.html>.
5. See Senate Lobby Reform Bill (S. 2349): http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s2349es.txt.pdf.
6. See House Lobby Reform Bill (H.R. 4975): http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h4975rh.txt.pdf.
7. See Congressional Research Service Report, Side-by-Side Comparison of House and Senate Bills: <http://www.fas.org/sgp/crs/misc/RL33326.pdf>.
8. It is important to note that, in their consideration of “comprehensive” lobby reform, neither the House nor the Senate adopted changes to the campaign finance law. I believe this is a major omission. People on either side of the equation, both members and donors, are spending too much time on, and giving too much attention to, fundraising. And, it adversely impacts policymaking. The limitations of this

article prevent me from addressing this subject fully, but no real lobby reform will be complete without changes to our campaign finance law.

9. See House Floor and Gymnasium Resolution (H. Res. 648): http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:hr648rh.txt.pdf.

10. See House Earmark Resolution (H. Res. 1000): http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:hr1000eh.txt.pdf.

11. See Senate Database of Federal Contracts and Grants (S. 2590) which was sponsored by Senator Tom Coburn (R-Okla.): http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s2590is.txt.pdf. House passed Senate bill on September 13, 2006, PL No. 109-282.

12. Even more comprehensive than the measure (HR 4975) that passed in the House on May 3, 2006, the Democratic reform package (HR 4682) addresses additional issues such as a ban on gifts from lobbyists (same as Senate version), prohibition on privately-funded travel (versus suspension of such travel in current bill), establishment of Office of Public Integrity, mandatory annual ethics training for House staff, rule change seeking to end 2-day work week, minimum requirements for political appointees holding public safety positions, Title VII addressing “Zero Tolerance for Contract Cheaters.” See http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h4682ih.txt.pdf



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