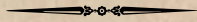
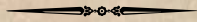


Lobbying -  
The Exercise of Politics and Power  
in New York State



by Tom Shanahan



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## INTRODUCTION

**T**he right to petition government for redress of grievances was established in the Magna Charta, and guaranteed to all the King's subjects by the English Declaration of Rights of 1689. Its infringement by the crown is part of the list of grievances in the Declaration of Independence, and cited as a justification in the first paragraph of New York's first Constitution in 1777. The likelihood that "no answers whatever to the humble petition of the colonies for redress of grievances and reconciliation with Great Britain has been, or is likely to be, given," was cited in that Constitution as a reason for separation of New York from British rule a few paragraphs later. The right to petition for redress of grievances is guaranteed in the First Amendment to the U.S. Constitution, and in Article 1 § 9 of the New York State Constitution of 1938.

Lobbying is the exercise of two fundamental rights, freedom of speech, and an even longer standing right, to petition for redress of grievances, first established in 1215. This paper will examine specific incidents in the history of lobbying in New York, within the context of increasingly stringent regulation which carries the potential to infringe on the right to petition.



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## THE MANHATTAN COMPANY<sup>1</sup>

**T**hey dueled over legislation in the halls of the Capitol in Albany, long before they rowed across the river to do it for keeps on the Weehawken heights one July morning in 1804.

In the late 1790s, Aaron Burr wanted to open a bank. He also wanted it to be state chartered. At a time when regulatory controls over banks were almost non-existent and financial panics were a recurring economic hazard, a state charter offered credibility.

State charters were as hard to get as they were valuable. Alexander Hamilton had helped found the Bank of New York, the nation's first private bank, and wrote its Constitution in 1784.<sup>2</sup> Although a successful financial institution, the bank did not receive a state charter until 1791.<sup>3</sup> The next year it became the first corporate stock traded on the New York Stock Exchange.<sup>4</sup> By the late 1790s, the Bank of New York provided the capital for most of the shipping moving in and out of the port of New York. No other bank had been chartered in New York since then.

For Burr, a bank was a particularly desirable enterprise. Not only did it hold the promise of wealth, for a man who was chronically in debt, but it also had the ability to assist him in his political activities. At a time when property ownership was a requirement for being granted the franchise,<sup>5</sup> the ability to provide political supporters with the capital that could lead to wealth creation and thus satisfy the property requirements, could prove to be a valuable political tool.

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1 The most exhaustive review of the creation of The Manhattan Company can be found in Beatrice G. Reubens: Burr, Hamilton and the Manhattan Company, Part I: Gaining the Charter, *Political Science Quarterly*, 72 [1957]. Even when only used as a roadmap for finding original sources, much of the research presented here was enabled by Beatrice Reubens' work.

2 <http://www.bnymellon.com/about/history/pioneer.html>

3 Chapter 37 of the Laws of 1791.

4 <http://www.bnymellon.com/about/history/index.html>

5 First Constitution of New York 1777, Article VII. [Qualifications of Voters] - "That every male person of full age, who shall have personally resided within one of the counties of this state for six months immediately preceding the day of election, shall, at such election, be entitled to vote for representatives of the said county in assembly; if, during the time aforesaid, he shall have been a freeholder, possessing a freehold of the value of twenty pounds, within the said county, or have rented a tenement therein of the value of forty shillings, and been rated and actually paid taxes to this state:"



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Burr was aligned with Jefferson and Madison's growing Republican<sup>6</sup> faction in national politics, and was looking to build the party's strength in New York.

The problem for Burr, who at the time was a state Assemblyman, was that Hamilton's Federalists controlled the state Legislature. And Hamilton was that party's most powerful leader. It went without saying, that a charter for a bank that would compete with Hamilton's Bank of New York, would not be forthcoming from the state Legislature. In fact, Hamilton's influence with the Legislature two years earlier, had helped return his Father-in-law, Philip Schuyler, to the Senate, ending Burr's U.S. Senate career.<sup>7</sup> At the time of the founding of the Bank of New York, Hamilton had played a role in arousing the opposition to deny a charter to a proposed land bank in which Chancellor Robert R. Livingston was a principal.<sup>8</sup>

Burr recognized that to achieve his goal he would have to approach it in a roundabout way. He found one.

A serious yellow fever epidemic had swept across the East Coast the previous Summer. It forced Congress, at the time embroiled in the critical issues attending the quasi-war with France, to abandon the national Capitol at Philadelphia. The disease also took a heavy toll in New York, with a contemporary estimate of deaths in that city of between 2,400 and 2,500.<sup>9</sup>

A New York city physician, one Dr. Joseph Browne, who just happened to be the brother-in-law of Burr's first wife, had observed an association between the stagnant pools of water in various places around the city, and the recurring yellow fever epidemics. He concluded that yellow fever was contracted by people drinking from these stagnant pools of water,<sup>10</sup> and proposed

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<sup>6</sup> "Republican" does not refer to the current Republican party, which was born in the 1850s and gained ascendancy under Lincoln, but to the Republican faction which developed under Jefferson in opposition to the dominant Federalists.

<sup>7</sup> Prior to adoption of the 17th Amendment in 1913, Senators were chosen by the Legislatures of their respective states.

<sup>8</sup> Hamilton to John B. Church, March 10, 1784.

<sup>9</sup> "An Account of the Malignant Fever Lately Prevalent in the City of New York," by James Hardie, January 15, 1799.

<sup>10</sup> Dr. Browne's association of stagnant pools of water with the outbreak of yellow fever was, of course, correct. However, it is now recognized that yellow fever is not transmitted by people drinking from stagnant water, but by the bite of infected mosquitoes which breed there.



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that the solution was a public water supply for the city, using water from the Bronx River as its source.

In the idea of a private, state chartered water corporation, Burr saw the means to achieve his goal. “Burr .... secretly devised an added dimension to the water company which he proceeded to promote as though it were nothing more than a public service.”<sup>11</sup> Without publicly revealing his true purpose, he began to assemble a collection of prominent citizens to help promote the idea of a public water supply.

Burr began to assemble a board of directors, including himself, as well as John B. Church, Hamilton’s brother-in-law, Governor John Jay’s brother-in-law, Brockholst Livingston, John Broome, the Chairman of the city’s Health Committee, and other politically connected individuals.<sup>12</sup> He also began to solicit subscribers to a stock issue for the as yet unchartered company, with the largest subscriber being Chancellor Robert Livingston. Naming John Barker Church a director may indicate how much Burr wanted his charter. Later that year, Church would drop some disparaging remarks in public about bribes Burr had supposedly accepted from the Holland Land Company. A challenge of honor issued, and Church, who owned an ornate pair of dueling pistols, accepted. In the duel which followed, Church shot a hole through Burr’s coat.<sup>13</sup>

A city council resolution had supported the idea of a water supply in December. But it called on the Legislature to authorize an entirely municipal water system. This arrangement would interfere with Burr’s goal of creating a corporation that could operate as a bank.

As soon as the Assembly debate over the Virginia and Kentucky resolutions was over on February 16, Burr received permission for a 10-day leave of absence from the Assembly<sup>14</sup> to return to New York and determine what form of corporation the city would support.

11 Davis, M.L., *Memoirs of Aaron Burr* (New York, 1837) I, 413.

12 The first directors, as named in the Charter Legislation, were: Daniel Ludlow, John Watts, John B. Church, Brockholst Livingston, William Edgar, William Laight, Paschal N. Smith, Samuel Osgood (First Postmaster General of the U.S.), John Stephens, John Broome, John B. Coles and Aaron Burr. Chapter 84 of the Laws of 1799.

13 Fleming, Thomas, *Duel: Alexander Hamilton, Aaron Burr and the Future of America*, Page 87 (1999).

14 Assembly Journal - 1799, page 123.



Burr organized a bipartisan committee which included Alexander Hamilton as a member, that persuaded the Common Council to withdraw its objections to a private water utility, which they did on February 28.<sup>15</sup> Hamilton wrote Mayor Varick a memorandum containing the arguments for a private company. He also prepared a “memorial” to the Legislature in support of a private company.<sup>16</sup>

“An act for supplying the city of New-York with pure and wholesome water,” was introduced in the Assembly March 27, read a first time and by unanimous consent read a second time and committed to Mr. Burr, Mr. J. Lansingh, and Mr. McNeil.<sup>17</sup> Burr reported later that day the bill had been amended in committee,<sup>18</sup> and it may be that this was when the bill’s critical clause was inserted. It read: “That it shall and may be lawful for the said company to employ all such surplus capital as may belong or accrue to the said company in the purchase of public or other stock, or in any other monied transactions or operations not inconsistent with the constitution and laws of this State or of the United States for the sole benefit of the said company.”<sup>19</sup> It has since become known as the “surplus capital” clause, and its language authorized what would become a bank, under the state issued charter of the Manhattan Company.

Burr’s Committee report on the amended bill was delivered as the Assembly’s last order of business on the 27th, and the bill was taken up again as the first order of business, on third reading, at 9 AM the next morning. It passed without objection and was referred to the Senate that day.<sup>20</sup>

The full Senate took up the bill on the 29th, and the Senate Journal reflects that it passed with amendments,<sup>21</sup> although what these changes were is not indicated. Amendments are also not reflected in the Assembly Journal of that day, which merely notes the bill was delivered to the

15 Political Correspondence and Public Papers of Aaron Burr, (Kline and Ryan 1983) Volume I, page 400.

16 The Papers of Alexander Hamilton, Harold Coffin Syrett, Ed., page 449.

17 Assembly Journal - 1799, page 263.

18 Assembly Journal - 1799, page 263.

19 Chapter 84 of the Laws of 1799.

20 Senate Journal - 1799, page 110.

21 Senate Journal - 1799, page 117.



Council of Revision.<sup>22</sup>

Until the Constitution of 1821, bills that passed both houses were referred to the Council of Revision, which exercised a veto power over bills it thought improper. Comprised of the Governor, the Chancellor, and three judges of the state Supreme Court, their veto could be overridden by a two-thirds vote of each house. Chief Justice of the Supreme Court John Ten Eyck Lansing, Jr., raised objections to the “surplus capital” clause<sup>23</sup> but Chancellor Livingston, the largest stockholder in the company soon to be chartered by the legislation, persuaded the other Council members the clause was harmless.

On April 2nd, the Assembly Journal noted the following: “A message from the Hon. the Council of Revision, also delivered by the Hon. the Chancellor was read, that it does not appear improper that the bill entitled ‘An Act for the inspection of flour and meal,’ and the bill entitled ‘An Act for supplying the city of New-York with pure and wholesome water,’ should respectively become laws of this state.”<sup>24</sup>

With the delivery of that message, the Manhattan Company was chartered under Chapter 84 of the Laws of 1799, and Aaron Burr had his bank.

What is striking about Burr’s lobbying campaign, from a modern perspective, is how well it tracks with what would take place in any modern lobbying effort:

- He first identified an issue of public concern to many people (yellow fever). Even more important, it was an issue of public health concern.
- He found a scientific expert, Dr. Browne, who identified the cause of the problem and proposed a recognizable solution (a public water supply derived from the Bronx River).
- Burr took that proposed solution and developed it in a way to accomplish other goals.
- He connected his scientific expert with other stakeholders, in this case stockholders, to help propel the project forward.

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22 Assembly Journal - 1799, page 283.

23 Beatrice G. Reubens: Burr, Hamilton and the Manhattan Company, Part I: Gaining the Charter, *Political Science Quarterly*, 72 [1957]: 595.

24 Assembly Journal - 1799.



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- Instead of fighting potential opposition, he included them, by doing such things as making Hamilton's brother-in-law (John B. Church), Governor Jay's brother-in-law (Brockholst Livingston), and other prominent citizens, directors of the company. He also involved Hamilton directly in interceding with the Mayor, City Council and Legislature.
- He involved other legislators in the concept, before the bill was even introduced, by doing such things as being granted leave from the Legislature in the middle of the session to go to Manhattan and help shape the resolution from the City Council.
- He got the City to memorialize the Legislature, asking for the water company.
- His "surplus capital" language was likely inserted into the bill as an amendment after the bill's introduction, and the language itself was somewhat innocuous. It didn't clearly spell out, as the Bank of New York charter did, that the Legislative intent was to create a bank.
- It was an end of session special! It was introduced, amended, passed by both houses, and approved by the Council of Revision, in just one week.

Burr also paid the price of this lobbying success. Within days of its enactment, Burr's true intent became apparent to people back in Manhattan. It became a major issue in the Assembly elections that were held at the end of the month, and Burr was resoundingly defeated for re-election. What is notable here is that in responding to this first lobbying scandal, the public didn't call for new laws or regulations, they took things into their own hands - at the ballot box.

The Manhattan Company was never very successful at supplying water. It never served more than a few thousand people, and the quality of the water was reputed to be terrible. The water operation closed in 1840. But the financial institution fared somewhat better. The Manhattan Company evolved into the Chase Manhattan bank, and is now J.P. Morgan Chase.

Writing to Congressman James A. Bayard during the Electoral College impasse between Jefferson and Burr, Hamilton, certainly no friend of Jefferson's, roundly denounced Burr. "I have been present when he has contended against banking systems with earnestness and with the same arguments that Jefferson would use. Yet he has lately, by a trick, established a bank - a perfect



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monster in its principles, but a very convenient instrument of profit and influence.”<sup>25</sup>

In a letter to Chancellor Livingston about six months after the Manhattan Company was chartered, Burr briefed its largest stockholder on progress with both the laying of water pipes and the finances of the new institution. “Two projects are under Consideration” he wrote, “- 1 an office for the purchase & sale of annuities & insurance of lives, 2 a Tontine for raising a Capital by small quarterly subscriptions to be divided among the survivors at the expiration of seven Years.”

<sup>26</sup> Burr’s new financial enterprise never did sell any Tontine life insurance, but that form of insurance played the major role in the next great lobbying scandal.

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25 Hamilton to James A. Bayard, January 16, 1801.

26 Burr to Robert R. Livingston, September 20, 1799.



## THE ARMSTRONG COMMISSION

**I**t began, as so many scandals do, as an internal power struggle that made its way to the pages of the New York City tabloids. James Hazen Hyde, son of Henry Baldwin Hyde, founder of the Equitable Life Assurance Society, was known for his great personal charm, intelligence, good looks—and considerable wealth. Following his father’s death in 1895, the younger Hyde rose rapidly in the company, becoming second vice president in 1899 at the age of twenty-three. In 1902 he became chairman of the Executive Committee and the Finance Committee of the Society’s board of directors, with a salary of \$100,000. His rapid rise caused bitter resentment among the Equitable’s older executives.<sup>27</sup>

Hyde objected to company President James W. Alexander’s attempt to have his own son, Henry Martyn Alexander, appointed to the Executive Committee.<sup>28</sup> From then on, Alexander and other senior officers sought to curb Hyde’s power and remove him from office.

Hyde’s famous party at Sherry’s in New York City on January 31, 1905, provided grist for his enemies’ mill. Given as a coming-out party for his niece, it took the form of an eighteenth century costume ball with over six hundred guests. The Metropolitan Opera Orchestra provided music for one of the ballrooms. The evening cost Hyde over \$10,000, but it was his own money. Joseph Pulitzer’s New York World described it as a lavish French ball, claimed it cost \$100,000, and began an exposé on the troubles at the Equitable. A few days later, it printed a document in which Alexander and other Equitable officials threatened to quit unless Hyde resigned.

Two investigations into the Equitable gave added weight to everything the press was saying. One was an internal investigation headed by steel magnate Henry Clay Frick. It charged that exorbitant salaries were paid to officers and favored employees, excessive commissions were being given to field agents, inadequate accounting procedures for disbursements existed, and company funds were being used to support prices of Wall Street securities in which Equitable officers

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<sup>27</sup> <http://www.advisortoday.com/vftf/armstrong.html>

<sup>28</sup> <http://www.advisortoday.com/vftf/armstrong.html>



were intimately interested. A study released a few weeks later by the New York State Insurance Department confirmed the Frick committee's findings.

On July 20, 1905, Governor Frank W. Higgins sent a message to the Senate and Assembly, which were then meeting in extraordinary session for an impeachment trial. "The unfortunate scandals recently made public by the internal dissensions in the Equitable Life Assurance Society and by the comprehensive investigations of the Superintendent of Insurance have, ... aroused a feeling of intense alarm in the breasts of the thousands of our citizens who have invested their money in policies of life insurance ..." <sup>29</sup> The Governor's message went on to recommend a joint committee of investigation, "I therefore, pursuant to the Constitution, do hereby recommend for your consideration the question of the appointment of a joint committee of the Senate and Assembly with the usual powers of such committees, to investigate after your adjournment, the operations of life insurance companies doing business in the state," <sup>30</sup>

Senator William W. Armstrong of Rochester offered a resolution to appoint a joint committee consisting of three Senators and five members of the Assembly "to investigate and examine into the business and affairs of life insurance companies doing business in the state of New York." <sup>31</sup> Unanimously adopted by both houses, <sup>32</sup> Armstrong was named Chairman, and a corporate lawyer who had served as counsel to a legislative investigation into gas pricing in New York earlier in the year, was named Chief Counsel to the Committee. A former law professor at Cornell University, the counsel's name was Charles Evans Hughes.

A particular focus of the investigation was Tontine life insurance, a form which frequently paid policyholders less than its estimated value, and which was eventually outlawed as a result of the investigation, as well as the overall business practices of life insurance companies.

The Committee's report was released on February 22, 1906, and it offered a scathing indictment of many insurance company practices. It also devoted two sections to the dealings

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29 Assembly Journal 1905, page 1208.

30 Assembly Journal 1905, page 1209.

31 Senate Journal 1905, page 1126.

32 Senate Journal 1905, page 1128. Assembly Journal 1905, page 1211.



between the companies and political figures.

The first of these, a one-page section entitled Political Contributions, made the following recommendation: “Contributions by insurance companies for political purposes should be strictly forbidden.”<sup>33</sup>

The second, more extensive section, was on Lobbying. While conceding that “Professional services in promoting or opposing legislation may be entirely honorable and are frequently necessary,”<sup>34</sup> the report cited a number of serious abuses. Among other instances, it cited one example in particular: “Andrew Hamilton, who within ten years received upwards of \$1,000,000 from the New York Life on the warrant of its President in connection with its bureau of legislation and taxation, has remained abroad and has failed to render any proper account showing the disposition of the money.”<sup>35</sup>

The report went on to cite Massachusetts and Wisconsin as two states which had begun to regulate lobbying, and recommended that New York do the same, with a lobbying statute comprised of the following elements:

- Registration of lobbyists with the Secretary of State.
- A ban on reimbursement contingent on the success of the lobbyist, as a way of removing the incentive for bribery.
- The Secretary of State should establish a docket of registered lobbyists and their issues.
- That corporate lobbying expenses be filed with the Secretary.
- That municipal officials and those offering professional services that involved no direct contact with the Legislature, such as drafting legislation, be exempted.

The Legislature acted swiftly. By the end of that session, “An act to amend the insurance law generally” had set up a model for life insurance policies and regulation of insurance compa-

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33 Armstrong Committee report, page 393.

34 Armstrong Committee report, page 397.

35 Armstrong Committee report, page 394.



nies,<sup>36</sup> political contributions by corporations were prohibited,<sup>37</sup> and “An Act to amend the legislative law relative to services in legislative matters,”<sup>38</sup> had all passed. The latter law incorporated most of the committee’s recommendations for the regulation of lobbying.

It applied to all those hired to promote or oppose the passage of legislation, or its approval by the Governor, and within two months after the end of a legislative session, required lobbyists or their employers to file a statement of compensation or expenses with the Secretary of State, specify the nature of the legislation that had been promoted or opposed, and the filing was to be made under oath. It banned contingent fee agreements, and violations of the law were a misdemeanor, punishable by up to a year in jail and a fine.

In 1954, the US Supreme Court ruled on whether a federal law requiring lobbyists to disclose their compensation violates the First Amendment guarantees of freedom of speech, freedom of the press, and the right to petition the Government.<sup>39</sup> Delivering the opinion of the court, Chief Justice Earl Warren wrote: “we believe that Congress, at least within the bounds of the Act as we have construed it, is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection.”

There was one other major result of the Armstrong Committee investigation. Based on the work of the Committee, Chief Counsel Charles Evans Hughes, a corporate lawyer and former law professor, who had never been involved in politics, was pushed to become the Republican candidate for Governor by a former New York Governor and sitting President, Theodore Roosevelt. Hughes won the 1906 election. Three years later, he was appointed a Justice of the United States Supreme Court. He resigned to challenge Woodrow Wilson’s re-election bid in 1916, and came within 4,000 votes of winning California, which would have made him President. He returned to the Supreme Court in 1930 as Chief Justice, and ended his career in public life in 1941 upon stepping down as Chief Justice. He is considered to have been one of the most influential jurists to have held that post.

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36 Chapter 326 of the laws of 1906.

37 Chapter 239 of the laws of 1906.

38 Chapter 321 of the laws of 1906.

39 United States v. Harriss, 347 U.S. 612 (1954).



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## NEW YORK TEMPORARY STATE COMMISSION ON LOBBYING

In 1977, amid a spate of Watergate-era political reforms, the 1906 lobbying act<sup>40</sup> was repealed, and a new Regulation of Lobbying Act was adopted. The Regulation of Lobbying Act<sup>41</sup> was a response to criticism that the Secretary of State's office was lax in its enforcement of the existing lobbying act, in part because it was charged with many other duties. In response, the Legislature established a single office devoted to the regulation of lobbyists and the enforcement of the Regulation of Lobbying Act, the New York Temporary State Commission on Lobbying.

Among the other changes it brought to the existing system is that it set up a schedule of four periodic reports to be filed by lobbyists on specific dates, and an annual report filed by the client. The lobbyist was required to register within ten days of being retained, and file a copy of the contract or authorization, clearly stating the compensation and terms of the agreement, along with the registration. Contingent fee lobbying was again banned, and a new type of lobbying was added to those being regulated - in addition to legislation, those seeking "the adoption or rejection of any rule or regulation having the force and effect of law or the outcome of any rate making proceeding by a state agency," were now defined as lobbyists.<sup>42</sup>

Violations of the Act, when committed knowingly and willingly, were subject to potential conviction of a Class A Misdemeanor, and those failing to file a report within the allotted time period were subject to a fine, which could be assessed if the person failed to file the required reports within ten days of receiving a written notice of violation.

Even as it expanded the scope and enforcement of lobbying regulation, the Legislature paid due attention to the importance of the right to petition government for redress of grievances. "The legislature hereby declares that the operation of responsible democratic government requires that the fullest opportunity be afforded to the people to petition their government for the redress of grievances and to express freely to appropriate officials their opinions on legislation

40 § 66 of the Legislative Law.

41 Chapter 937 of the Laws of 1977.

42 Chapter 937 of the Laws of 1977, § 3. (a).



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and governmental operations;”.<sup>43</sup>

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<sup>43</sup> Chapter 937 of the Laws of 1977, § 1. Legislative declaration.



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## THE PHILIP MORRIS SCANDAL

**I**t was an unexpected result of the big tobacco companies settlement with the State Attorneys General in 1998, and once again it resulted from a newspaper investigation.

As part of the litigation, thousands of pages of internal tobacco company documents, including expense records for lobbying activities, were made public. An analysis by New York Times reporter Clifford Levy, indicated that the Philip Morris company, and in particular company lobbyist Sharon Portnoy, made expenditures far in excess of what was disclosed to the state lobbying commission in its filings.<sup>44</sup> The expenditures by Philip Morris, concluded the Times, went to “at least 115 current and former members in the 211-person Legislature,” and ranged “from meals at fine restaurants to seats at the men’s final of the United States Open tennis tournament to hotel reservations and tickets for the Indianapolis 500.”<sup>45</sup> The expenditures themselves were not illegal, because the prohibition on gifts applied only to cases where it could be determined that the intent was to influence the Legislator in question on a specific piece of legislation - a difficult thing to prove. But not reporting them was illegal.

That same day, the Lobbying Commission opened an investigation into whether the expense report filings were accurate.<sup>46</sup> By September 13, Philip Morris had revised its filings. In her original filings, Portnoy claimed she spent \$190,188 on dinners and other gifts for lawmakers from 1996 to 1998. But the amended report filed with the lobbying commission as a result of the inquiry, listed her lobbying expenses during that period as \$522,817. The Commission continued its investigation.

Two months later, Philip Morris agreed to pay a \$75,000 fine, the largest ever imposed by the Lobbying Commission, for underreporting lobbying expenses. “In addition,” reported

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44 “Tobacco Giant Spends Heavily Around Albany,” by Clifford J. Levy, New York Times, July 27, 1999.

45 “Tobacco Giant Spends Heavily Around Albany,” by Clifford J. Levy, New York Times, July 27, 1999.

46 “State Queries Tobacco Giant Over Lobbying,” by Clifford J. Levy, New York Times, July 28, 1999.



the Times, “one of the company’s chief lobbyists in the Capitol has been barred from lobbying on any issue before state government for three years, as part of a settlement with the Temporary State Commission on Lobbying. The lobbyist, Sharon T. Portnoy, a Philip Morris employee, also agreed to pay \$15,000 in fines for her role in the matter.”<sup>47</sup>

As part of the settlement agreement, Portnoy had agreed not to work in New York. Significantly, she had surrendered the right to petition government over a civil, not a criminal offense. Although settlement agreements often result in one of the parties surrendering their rights for a specified period of time, nothing in the law demanded, or even authorized, this particular sanction. The settlement was sharply criticized by Attorney General Eliot L. Spitzer for being too lenient. He called it “horrendous.”<sup>48</sup> Spitzer had called on the commission to refer the matter to him for a possible criminal investigation. He was quoted by the Times in the same story as saying, “The agreement reached today with Philip Morris and Sharon Portnoy was ill-considered and inadequate from a perspective of insuring public integrity.” Lobbying Commission Executive Director David Grandeau refused Spitzer’s demand of a referral on the grounds that nothing in the law authorized him to make such a referral.

On April 7, 2000, the Connecticut Office of State Ethics announced it had also entered into a stipulation and order with Sharon Portnoy. The Ethics office said the following: “Under the settlement, the Respondent agreed to pay a civil penalty of \$4,000 for failing to register as a lobbyist and failing to file required disclosure reports. Additionally, Ms. Portnoy was banned from lobbying in Connecticut for one year as a result of her intentional use of false information in preparing and signing Philip Morris’ expenditure reports. This marks the first time in Commission history that the Code’s lobbying ban has been imposed.”<sup>49</sup>

The Philip Morris scandal came as New York’s existing Lobbying Act was set to expire. Until the scandal, there had been no great impetus to enact sweeping changes, and most observ-

47 “In New York, A Record Fine Over Lobbying,” by Raymond Hernandez, New York Times, November 13, 1999.

48 “In New York, A Record Fine Over Lobbying,” by Raymond Hernandez, New York Times, November 13, 1999.

49 <http://www.ct.gov/ethics/cwp/view.asp?a=2307&Q=301622&ethicsPNavCtr=%7C>



ers believed the Act would be renewed virtually as it was. That had changed.

As reported in the Times, “The majorities in both the State Senate and the Assembly had been quietly planning to push through a renewal of the current law governing lobbying, which expires at the end of the year.’

‘The law was first approved in the 1970’s, when lobbying expenditures were far smaller than they are now, and some advocacy groups contend that it is so feeble that lobbying is hardly regulated.’<sup>50</sup>

Between the Philip Morris scandal and the drumbeat for change aroused by the “advocacy” groups, simple reauthorization of the existing statute was no longer feasible. Senate Majority leader, Joseph L. Bruno, and the Assembly Speaker, Sheldon Silver, indicated that they were no longer wedded to the current law, and Governor George E. Pataki was quoted as saying, “We should have a tougher law.”<sup>51</sup>

Negotiations on a new law continued through the Fall, and it was not just “an end of session special,” but an “end of year special.”

With the end of year expiration deadline looming, A. 9094 was introduced at a special session of the Assembly on December 22, under a message of necessity from the Governor that allowed it to be voted on in less than the Constitutionally mandated three day waiting period. It was referred to and reported by three committees, Governmental Operations, Codes and Rules, and passed by the Assembly that day.<sup>52</sup>

Delivered to the Senate that day and referred to that body’s Rules committee, the Senate returned three days after Christmas to pass the bill.<sup>53</sup>

It was signed into law by Governor Pataki with one day to spare before expiration of the

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50 “Legislature to Consider Tightening Lobbying Law,” by Clifford J. Levy, New York Times, August 5, 1999.

51 “Legislature to Consider Tightening Lobbying Law,” by Clifford J. Levy, New York Times, August 5, 1999.

52 Rules calendar number 1395.

53 Rules calendar number 1732.

Lobbying Act, on December 30, 1999.<sup>54</sup>

Among its other new provisions, the Act set an absolute limit of \$75 on the value of any one gift to an elected official, required lobbyists to file compensation and expense reports every other month throughout the year, required lobbyists to maintain expense receipts for a period of three years, required the reporting of lobbyists who lobbied municipalities, authorized the lobbying commission to conduct audits of lobbyists chosen on a random basis, and required the lobbying commission to make lobbyist information available to the public on the internet. It also required, for the first time, that advertising expenses on public issues which might be deemed as seeking to influence legislation, be reported.

As interpreted by Lobbying Commission staff, the \$75 gift limit applied only to any one instance, not as a cumulative total. This meant a lobbyist could, for instance, buy numerous meals for a particular legislator throughout the year, as long as no one of those meals totaled more than \$75 for the legislator personally. This staff interpretation would remain an item of contention between the Commission and the advocacy groups until a vote of the Commission formally established a total gift limit of \$75 during 2006, just about a year before the law abolishing the New York Temporary State Commission on Lobbying was adopted.

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<sup>54</sup> Chapter 2 of the Laws of 1999.

*to petition the Government for a redress of grievances.*

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## THE COMMISSION ON PUBLIC INTEGRITY

In 2006, the Lobbying Commission reported there were 5,117 lobbyists, representing 3,277 clients, registered with the Commission. At the state level alone, those lobbyists reviewed and provided government with their clients positions, on the 20,562 bills before the Legislature and 1,898 rules, regulations, and rates pending before state agencies.<sup>55</sup>

During the thirty years since the Lobbying Commission's creation, the amount of money spent on lobbying in New York rose from \$6 million to \$151 million,<sup>56</sup> although that is something of an apples and oranges comparison, since the latter figure included spending on a number of items not reported in the 1978 report, including public advertising campaigns, municipal lobbying, procurement lobbying, and Indian tribe casino lobbying. The amount spent on lobbying in 2006 amounted to just over 1/10 of one percent of the state's \$113.5 billion budget.<sup>57</sup> Or, put in another context, it amounted to just 15 one-thousandths of one percent of the states overall economy of more than 957 billion,<sup>58</sup> the 11th largest economy in the world.

Lobbyists are in part responsible for that economic success. Much of what lobbyists do is to keep mistakes from being enacted into law. They keep well-intentioned people from passing laws that have unintended consequences. To reiterate what the Armstrong report noted, "Professional services in promoting or opposing legislation may be entirely honorable and are frequently necessary."

Little more than a week after Governor Eliot Spitzer's inauguration, a group of self-styled "civic groups"<sup>59</sup> called on the new Governor and Legislative leaders to embrace a package of ethics reforms in response to what they termed an "unprecedented" series of ethical controversies

55 Lobbying Commission Annual Report 2006.

56 Lobbying Commission Annual Report 2006.

57 2007-08 New York State Executive Budget.

58 U.S. Department of Commerce, Bureau of Economic Analysis, Regional Economic Analysis Division -- October 26, 2006.

59 The groups were: Brennan Center for Justice at the NYU School of Law, Citizens Union, Common Cause/NY, League of Women Voters/N.Y.S., New York Public Interest Research Group.



and scandals, although they made no mention of what those scandals were.<sup>60</sup> Among the package of reforms the groups called for were the creation of “an independent ethics watchdog to replace the current State Ethics Commission’s and Legislative Ethics Committee’s oversight of state law; ban “pay to play” activities, strengthen ethics guidelines and boost openness.”<sup>61</sup>

The civic groups got more than they bargained for. As part of his proposal to reform New York government, Governor Eliot Spitzer submitted legislation to establish the Commission on Public Integrity.<sup>62</sup> Among its many provisions, it abolished the Temporary Commission on Lobbying and merged it with the state Ethics Commission to create the new entity.

The proposal to eliminate the Lobbying Commission and merge its functions with the new Commission on Public Integrity, alarmed the civic groups. Blair Horner, legislative Director of New York Public Interest Research Group, was quoted as saying, “We’re mystified by this legislation, in the sense that it muzzles the only effective watchdog in New York, and replaces it with something people say will be better, but for which there’s no proof it will be better,” he said. “Only in Albany could the only effective ethics watchdog get fired, while the others remain in business.”<sup>63</sup> What the civic groups seemed to fail to comprehend is that in calling on government for what they called “reforms,” they were exercising the right to petition for redress of grievances. They were, in fact, lobbying.

The Governor’s legislation was introduced in the Assembly on January 26, 2007, the day the Lobbying Commission held its final hearing on proposals to amend the Lobbying Act. By March 15, it had been introduced, amended in both houses, and passed by both. It was signed into law March 26, exactly two months from the date of its first introduction.<sup>64</sup>

Among the many new provisions applied to lobbying is the authority granted the Commission to debar a lobbyist for a repeat violation of the provisions requiring bimonthly expense

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60 Joint press release-January 8, 2007. <http://www.lwvny.org/press/press010807.pdf>

61 Ibid.

62 A. 3736 - Governor’s Program Bill # 2.

63 “Ethics Bill Lets Legislators Keep Policing Themselves,” by Michael Cooper, New York Times, February 18, 2007.

64 Chapter 14 of the Laws of 2007.



reporting or prohibiting the giving of gifts to public officials. “Any lobbyist or client that knowingly and wilfully fails to file a statement or report within the time required for the filing of such report, knowingly and wilfully files a false statement or report, or knowingly and wilfully violates section one-m of this article, after having been found by the commission to have knowing and wilfully committed such conduct or violation in the preceding five years, may be subject to a determination that the lobbyist or client is prohibited from engaging in lobbying activities, as that term is defined in paragraph (v) of subdivision (c) of section one-c of this article, for a period of one year.” While the legislation provides that violations can be found by the Commission as misdemeanors or felonies, it does not specifically require that either of these penalties must be found for a lobbyist to be barred. It appears that this may authorize the Commission to infringe on a fundamental constitutional right, the right to petition for redress of grievances, for a civil, rather than a criminal violation of law.

In addition the legislation authorizes the Commission to consider, among other things: “The amount of compensation expended, incurred or received shall be a factor to consider in determining a proportionate penalty.”<sup>65</sup> This would appear to create different classes of rights holders based solely on their financial status.

Perhaps most disturbing, the Commission is authorized to investigate, file and prosecute criminal charges, then sit as a judicial body to render a verdict on the charges it has brought. A system where the staff of one agency simultaneously fills the role of collector of evidence, judges whether the evidence it has collected constitutes a breach of law, renders a verdict on the quality of its own work, then imposes a penalty it judges fit, would seem to be a startling departure from our normal system of jurisprudence.

This raises the question of whether the historical evolution of lobbying regulation has reached a point where it infringes on the right to petition for redress of grievances.

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65 § 1-o (c) (ii) (B)

## EPILOGUE

**O**n June 16, 1812 City Bank of New York was chartered by New York State. Samuel Osgood, former Postmaster General and an original director of the Manhattan Company, was elected its first President. The bank was a predecessor company to Citigroup, which today is the world's largest company, with total assets of \$2.2 trillion.

On December 4, 2006, the Bank of New York and Mellon Financial Corporation announced that they would merge, creating the world's largest securities servicing and asset management firm.

The Manhattan company, which once proposed to supply the city of New York with a supply of pure and wholesome water, is now J.P. Morgan Chase. In March, a survey released by the financial industry publication Absolute Return, showed that the company's asset-management unit had become the largest hedge-fund firm in the United States.

The ornate dueling pistols, with which John Barker Church had once shot a hole through the coat of Aaron Burr, and which Burr and Hamilton used in their more fateful duel on July 11, 1804, were purchased from the Church family by the Chase Manhattan Bank in 1930. They are in the care of the company archive of J.P. Morgan Chase.

Chancellor Robert R. Livingston, a member of the "Committee of Five" which drafted the Declaration of Independence; who administered the oath of office to George Washington when he first became President of the United States; and whose intervention, as a member of the Council of Revision, prevented the charter of the Manhattan company from being vetoed; went on to negotiate the Louisiana Purchase as Ambassador to France. His bronze statue is one of two from New York to stand in Statuary Hall in the U.S. Capitol. The original marble carving from which the mold for that Bronze statue was cast, stands in the state Capitol - in the Senate lobby.

# The Right To Petition Government for Redress of Grievances

## A Documentary History

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**MAGNA CHARTA – 1215:** *“the said four Barons shall come to us, or to our Justiciary if we be out of the kingdom, and making known to us the excess committed, petition that we cause that excess to be redressed without delay.”*

**ENGLISH DECLARATION OF RIGHTS – 1689:** *“That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal;”*

**DECLARATION OF INDEPENDENCE – 1776:** *“In every stage of these oppressions we have petitioned for redress in the most humble terms: our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.”*

**NEW YORK STATE CONSTITUTION – 1777:** *“And whereas, no answers whatever to the humble petition of the colonies for redress of grievances and reconciliation with Great Britain has been, or is likely to be, given, but the whole force of that kingdom, aided by foreign mercenaries, is to be exerted for the destruction of the good people of these colonies.”*

**BILL OF RIGHTS - FIRST AMENDMENT – 1791:** *“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.”*

**NEW YORK STATE CONSTITUTION – 1938, ARTICLE I, BILL OF RIGHTS:**

§8. *“Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”*

§ 9. 1. *“No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof;”*

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