

A NOTE REGARDING CURRENT LOBBY REFORM PROPOSALS

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One of the earliest American political bosses is said to have responded to inquiries about a senator from New York: "Do I know him personally? I should rather think I do. I invented him."¹ Concern for the influence of lobbies is not new to American politics. Madison is probably the first American to philosophize upon the necessity for free associations in a democracy.² Others have since cautioned against the aggrandizement of power within lobbies at the expense of the majority's voice in public affairs.³ Various sorts of regulations have been imposed on lobbies at the state level⁴ and Congress followed suit in 1946 with the passage of the Federal Lobbying Act.⁵

The Federal Lobbying Act contains two substantive reporting and registration provisions. Section 264 requires all persons "receiving any contributions or expending any money" to maintain detailed accounts listing their contributors, contributions, and expenditures, and periodically to file statements reflecting those accounts with the Clerk of the House.⁶ In addition, Sect. 267 mandates registration with the Secretary of the Senate and the Clerk of the House of "(a)ny person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress."⁷

By means of a narrow construction, the Supreme Court upheld the constitutionality of the Act in *United States v. Harriss*.⁸ The Court there stipulated that a criminal statute is unconstitutionally vague if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."⁹ "On the other hand," the Court noted that: (1) "If the general class of offenses to which the statute is directed is plainly within its terms,"¹⁰ or (2) "if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute,"¹¹ the statute will not be struck down. Instead, the reasonable construction will be applied.¹²

Chief Justice Warren's majority opinion in *Harriss* held that the Act could be reasonably construed as constitutionally definite by a narrow interpretation of Sect. 266.¹³ The Court thereby established three prerequisites that a person must meet in order for the Act to cover him: (1) he must have solicited, collected or received

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1. The boss is Thurlow Weed (1797-1882). As a leader of the Whig and Republican parties and as editor of the Albany, New York, *Evening Journal*, Weed played a key role in the nominations of W. H. Harrison (1836, 1840), Henry Clay (1844), Zachary Taylor (1848), and Winfield Scott (1852). The remark is attributed to Weed in Frank M. Anderson, *The Mystery of a Public Man*. (Minneapolis: University of Minnesota Press, 1948), p. 177.

2. John Madison, *Federalist* No. 10, in *The Federalist*. (New York: Random House, 1937), pp. 53-62.

3. James MacGregor Burns, *Congress on Trial*. York: Harper and Brothers, 1949), pp. 28-31.

4. Edgar Lane, *Lobbying and the Law* (Berkeley and Los Angeles: University of California, 1964), p. 57 ff.

5. 2 U.S.C. Sects. 261-270, 2 U.S.C. Sect. 264.

7. 2 U.S.C. Sec. 267.

8. 347 U.S. 612 (1954). The majority included Chief Justice Warren and Associate Justices Burton, Clark, Frankfurter, Minton and Reed. Douglas, joined by Black, and, in a separate opinion, Jackson, dissented. The dissenters thought the Act unconstitutionally vague.

9. *Id.* at 617.

10. *Id.* at 618.

11. *Id.*

12. *Id.*

13. 2 U.S.C. Sect. 266 reads as follows: *Persons to whom chapter is applicable.* The provisions for this chapter shall apply to any person . . . who by himself, or through any agent or employee or other persons 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 person is to aid, in the accomplishment of any of the following purposes: (a) the passage or defeat of any legislation by the Congress of the United States, (b) to influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.

contributions, (2) one of his main purposes, or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress, and (3) the intended method of accomplishing this purpose must have been through direct communication with members of Congress.¹⁴

The avowed purposes behind the Court's construction of the Act were to have it not only meet "the constitutional requirement of definiteness"¹⁵ but to also keep it from infringing on "the freedoms guaranteed by the First Amendment -- freedom to speak, publish and petition the government."¹⁶ The second of these aims has apparently been highly successful. The estimated numbers of Washington lobbies grow each year.¹⁷

In practice, however, the "main purpose" and "direct communication" standards of *Harris* have raised rather than resolved doubts as to the precise meaning of the Act. If an organization does not subjectively consider one of its own main purposes to be lobbying, it does not have to register. And those associations which do register report only those legislative expenses which they themselves consider to be direct communications.¹⁸

There are currently more than forty lobby reform proposals before Congress.¹⁹ Major drafting considerations behind the formulation of these proposals include the introduction of registration and reporting requirements which, while sufficiently clear in meaning, do not infringe upon First Amendment freedoms. A secondary concern is the avoidance of an administrative nightmare. Arguably, a mass of administrative requirements would jeopardize the constitutionality of any measure in that its enforcement would probably inhibit the free exercise of First Amendment rights.

Three bills -- S. 774,²⁰ S. 815,²¹ and S.2477²² -- which typify the current drive towards lobby reform are now before the Senate Committee on Government Operations. In many respects, the bills are similar. All contain lengthy definitions of "lobbyists"²³ and "lobbying"²⁴ as well as detailed registration²⁵ and record keeping²⁶ requirements. Two of the proposals explicitly exempt periodicals and books distributed

14. 347 U.S. 612, 623 (1954).

15. 347 U.S. 612, 624 (1954).

16. 347 U.S. 612, 625 (1954).

17. Donald R. Matthews, "Senators and Lobbyists," in *Congressional Reform*, ed. Joseph S. Clark, (New York: Thomas Y. Crowell Co., 1965), p. 301.

18. *Congressional Quarterly*, July 27, 1974, at 1947.

19. 121 *Cong. Rec.* 11,509 (daily ed. Nov. 25, 1975).

20. S. 774, 94th Cong., 1st Sess. (1975).

21. S. 815, 94th Cong., 1st Sess. (1975).

22. S. 2477, 94th Cong., 1st Sess. (1975).

23. S. 815, for example, defines a lobbyist as "any person (including an individual, corporation, company, association, etc.)" who engages in lobbying (see note 34, *infra*) and who, (1) receives income of \$250 or more ... during a quarterly filing period; or of \$500 or more ... during four consecutive filing periods, when lobbying is a substantial purpose of such employment, (2) makes an expenditure for lobbying ... of \$250 or more during a quarterly filing period, or of \$500 or more during four consecutive filing periods, or (3) in the course of lobbying ... communicates orally on eight or more separate occasions with one or more Federal officers or employees." S. 815, Sect.3.

24. Lobbying, according to S. 815, "means a communication, or the solicitation or employment of another to make a communication, with a Federal officer or employee in order to influence the policy-making process, but does not include, (1) testimony before a congressional committee ... before a Federal department or agency ...; (2) a communication by a Federal officer or employee, or by an officer or employee of a state or local government, acting in his official capacity; (3) a communication or solicitation, other than a publication of a voluntary membership organization, through the distribution in the normal course of business of any news, editorial view, letter to an editor, advertising or like matter by ... radio, television, newspaper, book, or periodical; (4) a communication or solicitation by a candidate ... make in the course of a campaign for Federal Office as defined in 18 U.S.C. 591 (b) (i.e., "an individual whose name is presented for election as Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, whether or not such individual is elected"); or (5) a communication or solicitation by or authorized by, (A) a national political party ... or a National, State, or local committee ... regarding its activities, undertakings, policies (etc.) ... or (B) a political party of a State, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States ... regarding its activities, undertakings, policies (etc.). *Id.*

to the general public as well as radio or television broadcasts from coverage.²⁷ The third bill, S. 2477, does the same thing by implication.²⁸ They all stipulate that "compliance with the filing requirements," i.e., admission of lobbying, will "not be taken into consideration in determining, for purposes of the Internal Revenue Code of 1954" the validity of an organization's tax-exempt status.²⁹ In addition, all three bills contain civil and criminal sanctions against violations.³⁰

There are, however, important differences among these three bills. Though S. 2477 places the power and responsibility for the administration of the bill in the Comptroller General's office,³¹ the other two bills delegate this authority to the Federal Election Commission (FEC).³² Should the Commission survive the current uproar pursuant to the Supreme Court's decision in *Buckley v. Valeo*,³³ it will be the administering body if either S. 774 or S. 815 becomes law. This problem has yet to be resolved.³⁴

The feasibility of administering these acts will in large measure hinge upon the requirements of their respective record-keeping and reporting provisions. S. 2477 clearly has the most flexible record-keeping requirements. While the other bills contain lengthy statements as to specific information, S. 2477 states in comparatively general terms that "(e)ach lobbyist and each person who retains a lobbyist shall maintain such financial records and other records . . . as the Comptroller General shall prescribe as necessary for the effective implementation of this Act."³⁵ Administrative advantages attendant to this flexible approach are significant.³⁶ Furthermore, the constitutionality of this section does not, on its face, appear to be questionable. If doubts arise, they will concern the regulations promulgated by the Comptroller General. The law itself is thereby insulated from constitutional dispute.

25. Registration provisions featured within these acts typically involve the filing of a Notice of Representation with the oversight agency. The notice includes in S. 815, for instance, "(1) an identification of the lobbyist; (2) an identification . . . of each person on whose behalf the lobbyist expects to perform services . . . (3) a description of the financial terms and conditions . . . under which the lobbyist is employed . . . by any person, and the identification of that person; (4) each aspect of the policy-making process which the lobbyist expects to seek to influence, including any committee, department, or agency, . . . to whom a communication is to be made, the form of communication to be used, and whether the communication is to be for or against a particular measure or action; (5) an identification of each person who . . . is expected to be acting for such lobbyist . . . and (6) in the case of a voluntary membership organization, the approximate number of members and a description of the methods by which the decision to engage in lobbying is made." S. 815, Sect. 4.

26. The oversight agency may prescribe additional records to those usually cited by the bills as essential. Essential records include such things as "(a) the total income received by the lobbyist, and the amount of such income attributable to lobbying; (b) the identification of each person from whom income for lobbying is received and the amount received (with certain exceptions); (c) the expenditures of the lobbyist, including--(1) the total expenditures of the lobbyist . . . (2) an itemization of any expenditure for lobbying which exceeds \$10 in amount or value . . . (3) expenditures to employ any person who engages in lobbying on behalf of such lobbyist . . . (4) expenditures relating to research, advertising, staff, entertainment (etc.) . . . ; (and) (d) such other information as the Commission (or other oversight agency) shall prescribe." S. 815, Sect. 5.

27. S. 774, Sect. 2, and S. 815, Sect. 3.

28. S. 2477, Sect. 4.

29. S. 774, Sect. 6, S. 815, Sect. 7, and S. 2477, Sect. 8.

30. S. 774, Sect. 10, S. 815, Sect. 13, S. 2477, Sect. 13.

31. S. 2477, Sects. 3, 9, 10, 11, 12, 13, 14 (1975).

32. S. 774, Sects. 2, 8, 9, 10, and S. 815, Sects. 3, 8, 9, 10, 11, 12, 13, 14.

33. *Buckley v. Valeo*, 44 U.S.L.W. 4127 (U.S. Jan. 30, 1976).

34. The Court held that the appointments procedure whereby FEC members were appointed by the President *pro tempore* of the Senate and Speaker of the House is unconstitutional. Specifically, the Court referred to Art. II, Sect. 2, cl. 2 of the U.S. Constitution: "(The President) shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other officers of the United States whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." 44 U.S.L.W. 4127, 4162. The application of the appointments clause to FEC appointees is valid, the Court found, because "(u)less their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with" it, 44 U.S.L.W. 4127, 4166, and such selection procedures were not to be found elsewhere, 44 U.S.L.W. 4127, 4166-4170. Rather than order immediate destruction of the FEC, the Court stayed judgment for 30 days in order to give Congress an opportunity to reconstitute the Commission, which, as of April 15, 1976, had not yet been done.

35. S. 2477, Sect. 6.

Constitutional problems may arise over the reporting provisions of any of the three proposals. All three bills would require periodic reporting with the oversight agency of such information as "identification of the lobbyist," "identification of each person on whose behalf the lobbyist performed services . . .," "each aspect of the policymaking process the lobbyist sought to influence . . .," "Identification of each Federal officer or employee with whom the lobbyist communicated . . .," "identification of each oral or written communication . . .," "identification of each person . . . who engaged in lobbying on behalf of the reporting lobbyist . . .," "a copy of any written communication used by the lobbyist . . . to solicit other persons to lobby," "a description of the procedures . . . used by the lobbyist to solicit other persons to lobby . . .," "any expenditure made directly or indirectly to or from any Federal officer or employee which exceeds \$25 . . . including an identification of the person or persons making or receiving such expenditure . . .," "copies of the records required to be kept by the lobbyist," and "such other information as the Commission may by regulation prescribe."³⁷ Such requirements go far beyond most state legislation³⁸ as well as the Federal Lobbying Act, as interpreted by the Supreme Court in *Harris*.

Enforcement procedures vary somewhat among the three bills. S. 774 is the weakest in this area.³⁹ The other proposals, unlike S. 774, provide for the issuance of advisory opinions by the oversight agency.⁴⁰ S. 815 and S. 2477, in addition contain means whereby "any person" may file a complaint concerning statutory violations.⁴¹ The silence of S. 774 on these matters raises important doubts as to the possibility of its successful implementation. Finally, S. 815 is the only one of the proposals separately to construct an apparatus for judicial review.⁴²

The lobby reform proposals now before Congress have small support among the lobbies themselves. Common Cause, the sole advocate of these bills, stands opposed by an odd alliance: the U.S. Chamber of Commerce, the United Auto Workers (UAW), and Ralph Nader. Just why there are so many bills probably stems from a precipitous response to Watergate and the pressures of the election year atmosphere. According to most lobbyists, the proposals would purposely create tedious paperwork. Also, the bills would violate, in the opinion of most lobbyists, First Amendment guarantees of freedom of speech and the right to petition the government.⁴³

Public disclosure of lobbying activities is a desirable goal. It is doubtful, however, whether the bills here discussed – S. 774, S. 815, S. 2477 – or their look-alikes will shed more light than confusion. What is needed is a flexible law much like the record-keeping provision of S. 2477, discussed above. Such a law would place the major

36. By leaving the choice of reporting requirements to the oversight agency, the drafters of S. 2477 have allowed that agency the choice of means to fit the purpose of the bill. The oversight body is not likely to overload itself or the lobbies it oversees with unnecessary, detailed and time-consuming report forms. Such uneconomical and inefficient procedures are more likely to arise by the methods promulgated under S. 744 and S. 815. Since it is unclear just what must be required in the reports in order to implement a lobby reform proposal, it is more prudent to leave the choice to the implementing organization. If a particular technique proves inadequate or burdensome, the agency can remove it. Otherwise, an amendment to the Act – a time-consuming process itself – would be required.

37. S. 815, Sect. 6.

38. State legislation usually requires "only that 'the subject matter of the employment' be divulged, and although there has been no litigation on the point, it is unlikely that courts would construe this to require great detail. This assumption is reinforced by the fact that vague docket entries have been the rule in Massachusetts since the state attorney general held that the requirement was satisfied by an entry stating that the lobbyist was employed on 'all matters of interest to' employers. Registrants in other states have reached the same conclusion by themselves." Lane, *supra* at 119.

39. 3 S. 774, Sects. 8, 9, 10.

40. S. 815, Sect. 10, S. 2477, Sect. 11.

41. S. 815, Sect. 11, S. 2477, Sect. 12.

42. S. 815, Sect. 12.

43. *Congressional Quarterly*, Sept. 27, 1975, at 2067.

burden of promulgating disclosure requirements on the oversight agency. The law itself would thereby be insulated from constitutional dispute, and an incentive on efficient information processing would be instilled in the body which must process that information.