# THE LOBBYING ACT: AN EFFECTIVE GUARDIAN OF THE REPRESENTATIVE SYSTEM?

The disclosure that Senator Richard M. Nixon of California used $18,235 from a privately created trust[1] to supplement his Senatorial expense account has evoked widespread interest and concern. The public's reaction emphasizes the belief that legislative duties should be discharged with judicial impartiality. Neither the charge nor the evidence has suggested that the money in question was improperly or illegally expended;[2] indeed, it was not the propriety of expenditure, but the sources of the funds which excited public scrutiny.[3]

The asserted need for such a fund presents basic questions concerning the locus of responsibility for maintaining the republican system. The success of the representative principle[4] depends upon: (1) free availability of public records and information—the electors must be possessed of adequate and reliable information if they are to effectively direct their representatives;[5] (2) the right to petition, which embraces the free and equal opportunity of each constituent to communicate his ideas and opinions to his representative;[6] (3) free speech—the electors must enjoy full and complete opportunity to discuss among themselves the problems of society.[7] Necessarily, how-

1. Although all observers have referred to the expense account as a "trust" fund, and there is no doubt that expenditures from the fund were made by a "trustee," no statement has been made as to the precise purposes of the trust or whether it was oral or written.

2. The funds were used for printing, mailing, radio and television time, meals for constituents, and general publicizing of the Senator's activities. Senator Nixon received an annual Congressional appropriation of approximately $50,000 for the administration of his office; he asserted that, because of the size of his state and its great distance from the Capitol, this appropriation was insufficient.

3. The propriety of the executive use of private funds for public purposes is raised by the charge that Governor Adlai Stevenson of Illinois supplemented the salaries of state administrative personnel by funds raised from private sources.

4. Representation is based upon population and territory. But as to the possibilities of functional representation in the United States, see MACDONALD, A NEW CONSTITUTION FOR A NEW AMERICA 127-139 (1921).

5. "If the public opinion which directs conduct of governmental affairs is to have any validity; if the people are to be capable of real self-rule, access to all relevant facts upon which rational judgments may be based must be provided." Note, 27 IND. L.J. 209, 211 (1951).

6. See note 22 *infra*.

7. "We have in this country but one security. You may think that is the Constitution—it is nothing but a bit of paper. You may think the statutes are your security—they are nothing but words in a book. You may think that elaborate mechanism of government is your security—it is nothing at all, unless you have sound and uncorrupted public opinion to give life to your Constitution, to give vitality to your

ever, the ultimate end will be frustrated if impartial representation[8]—freedom from obligation to any elector or particular group of electors—is not assured.[9]

The existence of highly organized lobbying groups coupled with increasing governmental participation in social and economic activities[10] accentuates the need for positive action to secure the conditions requisite to proper functioning of the representative system. Congressional power and ability to develop the above-mentioned modes of communication, particularly those utilized by lobbies, poses questions of constitutional and political import. Efforts to maintain the integrity of the representative system by compelling political candidates and committees, as well as lobbying groups, to disclose their financial sources and expenditures, while constituting an indispensable element in any such endeavor, confront difficult problems of coverage and enforcement.

## I

Evidence of the importance in keeping the people informed as to the activities of Congress and its members is found in the constitutional mandate that Congress maintain and publish a journal of its proceedings.[11] However, information may be withheld from publication when the members, in their judgment, feel that secrecy is necessary.[12] Thus, unlike the dual responsibility of the courts and legislature in the free speech area,[13] Congress has the *sole* power to determine the extent to which the public shall be apprised of its activi-

---

statutes, to make efficient your governmental machinery." Charles Evans Hughes, while campaigning against William Randolph Hearst for the governorship of New York. 1 PUSEY, CHARLES EVANS HUGHES 175 (1951).

8. As a practical matter it should be recognized that despite the fact that representation is based on territory, to the extent that legislators are influenced by pressure groups, a combination of functional and territorial represenation similar to the Soviet representative system is derived. MEISEL AND KOZERA, MATERIALS FOR THE STUDY OF THE SOVIET SYSTEM 106, 276 (1950). Consequently, impartiality is to this degree illusory. The point here, however, is not that this extra-legal functional representation is necessarily bad, but that such a situation should be disclosed.

9. Concerning the Nixon trust fund, Senator Clements of Kentucky said that if use of such a fund received popular approval, it would ". . . establish a code of ethics which will destroy representative democracy." Louisville Courier-Journal, Sept. 25, 1952, p. 1, col. 6.

10. "This has created a necessity for more extensive and better intercommunication between it [government] and the public in the interests of both." 1 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 13 (1947).

11. U.S. CONST. Art. I, § 5.

12. *Ibid.*

13. See p. 89 *infra.*

ties.[14] Congress has thus far discharged this responsibility adequately by publication of the Congressional Record and of committee hearings and reports.[15] Also, the public and press may and do attend nearly all legislative sessions and committee hearings.[16] Despite this excellent record, Congress has not yet fully recognized that proper utilization of newer mass communication developments, such as radio and television, could enhance political education. Of course, when such coverage is allowed, a balanced presentation of all viewpoints rather than one-sided sensationalism, should be required.[17]

Although justifiable limitations upon public scrutiny of congressional performance may arise where disclosure would impede national

---

14. U.S. CONST. Art. I, § 5. Thirty-three of the states have provisions in their constitutions relating to public sessions. 3 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, CONSTITUTIONS OF THE STATES AND UNITED STATES 1785 (1938). Twenty-eight of these allow for closed sessions when secrecy is required. Of these, ten expressly vest in each house the power to determine the necessity for secrecy. Idaho and New Mexico must keep all sessions open. Texas and Florida allow secret sessions only for the Senate in executive session. Ohio requires a two-thirds vote of members present to hold a secret session.

The importance attached to full disclosure of the legislators' discussion may be measured by the constitutionally granted immunity from libel and slander actions for statements made on the floor of the House and Senate. U.S. CONST. Art. I, § 6.

15. Most governmental publications, including congressional documents, reach very few people. As a result, the main reliance for imparting information concerning Congress is upon the press. Difficulties in obtaining adequate coverage of legislative activities are manifold; yet these could possibly be mitigated by the existence of a government-owned radio and television station which would operate for this purpose only. An FCC requirement, as a condition of licensing radio and television stations, that time be devoted to coverage of congressional activities would be another feasible device. Utilization of such techniques poses many problems not within the scope of this discussion.

16. The rules governing presence in the press and radio galleries are found in the Congressional Directory. Admittance to these sections has been denied to those directly or indirectly paid by groups having legislation before either house. CONG. DIR., 80th Cong., 2d Sess. 9 (1948).

The public and members of the press are admitted to all "open" committee sessions and are excluded from executive sessions. Occasionally reporters will be permitted to attend executive sessions, but this is unusual. Senate committees exercise broad discretion in this matter; each determines whether hearings are to be open or executive and controls the extent of coverage by radio, press and television.

17. SEN. RES. 319, 82d Cong., 2d Sess. (1952), introduced by Senator McCarran, provides for barring radio, television, photographs, and recording devices from all committee hearings. Such blanket prohibition contravenes the thesis that informing the people about the operations of Congress is essential. However, some hearings may require secrecy when the committee is performing a function similar to that of a grand jury. 35 J. AM. JUD. SOC'Y 131 (1952). Similar non-disclosure could be justified in the case of committees dealing with foreign affairs and other matters concerning national security. Speaker of the House Rayburn's ban on radio and television may have been due to the decidedly inadequate coverage of certain congressional activities.

The dangers inherent in partial disclosure of facts presented to congressional committees should not be underestimated. This was implicitly recognized by one

security, "[p]erhaps it is an universal truth that loss of liberty at home is to be charged to provisions against danger, real or potential, from abroad."[18] But despite probable continuance of the present world crisis, fears of an autocratic government based upon secret deliberations should be tempered by the realization that severe pressure can be applied by the electorate, should congressional resort to secrecy become abusive.[19]

In addition to congressional presentation to the public of its record of collective action, the individual legislator must attempt to communicate with his electors. Apparently Senator Nixon believed that the public funds appropriated for his use were insufficient to finance his imparting of information to which he felt his constituents were entitled. That necessity for such communication is but one facet of a more fundamental issue was illustrated by the concern of both major political parties that the Senator's utilization of private support for any purpose had cast doubt upon the impartiality of his representative position.[20] Even if Congress were to agree with Senator Nixon's position that the present allowance for administering a congressman's office is insufficient, it should not be assumed that a mere increase in appropriations available for use of public officials will foreclose the possibility of undue influence engendered by private aid.[21]

---

congressional committee, the Procurement and Buildings Subcommittee of the House Committee on Expenditures in the Executive Department, in its rules of procedure, which provided that "[t]he stenographic transcript of all testimony given in executive session shall be available to the public upon any part thereof being made public by the Subcommittee. . . ." Quoted in COHEN, MATERIALS AND PROBLEMS ON LEGISLATION 558 (1949). The rules further provided that "[n]o transcript of testimony under oath given at a public hearing or in executive session shall be altered or edited." *Ibid.*

18. James Madison, writing to Thomas Jefferson in 1798. Quoted in LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 23 (1950).

19. For an excellent discussion of the problems of free communication facing the country during the present crisis, see LASSWELL, *op. cit. supra* note 18 *passim.*

20. Congress has attempted to insure an impartial discharge of duty on the part of federal appointive employees in the executive branch by forbidding them from taking ". . . any active part in political management or political campaigns." 18 U.S.C. § 61h (1946). The Supreme Court upheld the Hatch Act against constitutional attack in United Public Workers v. Mitchell, 330 U.S. 75 (1946).

21. Another evident method of undermining the impartiality of the legislative position is through contributions to campaign funds. For a discussion of this problem and suggested remedies see Douglas, *What It Costs To Run,* 190 Atl. Monthly, August, 1952, p. 43.

II

Although the constitutionally preserved right to petition the government[22] has been variously construed,[23] essentially it seems to embody the people's right to make public officials responsive to their needs.[24] While responsiveness is largely achieved by public criticism of governmental action and inaction, and by exercise of the franchise, the main contemporary use of petition, *i.e.*, the presentation of views and problems before the particular branch of the government from which relief is sought, is not without its effect. The Constitution did not designate procedures to be followed in placing grievances before Congress, perhaps because the Constitutional Convention did not anticipate difficulties in this area. In contrast to this, however, Congress was given power to regulate the presentation of controversies to federal

22. The right to petition the government for redress of grievances is protected by the United States Constitution and forty-four state constitutions. 3 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, CONSTITUTIONS OF THE STATES AND UNITED STATES 1792 (1938). The right originated with the presentation of petitions to the King of England, generally for redress of private wrongs. POLLARD, EVOLUTION OF PARLIAMENT 42 (1920). The petitions were then presented to the High Court of Parliament and the King in his Council. By an ordinance of 1291, the practice was systematized; receivers examined the petitions and separated them into five categories: chancery; exchequer; the judges; the King and his Council; and those already answered. *Id.* at 39. When petitions concerning the same grievance were received in the Council, they were combined so as to attain added persuasiveness. It was at this time that the parliament became a deliberative assembly rather than a judicial tribunal. *Id.* at 60.

In later years the petition became a means of presenting popular views to the parliament. Petitions were circulated throughout the country for presentation to parliament by a large body of citizens. Although restrictions were placed upon the number of signatures and the number of people permitted to present them, this method became common in 1778, in connection with the controversy over the Roman Catholic Relief Act. 2 TAYLOR, ORIGIN AND GROWTH OF THE ENGLISH CONSTITUTION 499 (1900).

This method of influencing Congress has rarely been utilized in this country. 2 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 783 (1947).

23. Vermont, North Carolina, and Pennsylvania have construed the right of petition as one empowering the people to instruct their representatives. THORPE, CONSTITUTIONAL HISTORY OF THE AMERICAN PEOPLE 56 (1898).

Spayd v. Ringing Rock Lodge, 270 Pa. 101, 113 Atl. 70 (1921), held that the right to petition cannot be surrendered by the citizen and that a labor union cannot expel a member for signing a petition to the legislature the subject of which conflicted with the union's interest.

In Crandall v. Nevada, 6 Wall. 35 (U.S. 1868), the right to petition provision was used to invalidate a Nevada tax upon people leaving the state since the levy interfered with their right to go to Washington to petition the government.

The right to petition was also used by Justice Black as a basis for dissenting from a decision sustaining the constitutionality of the application of a group libel law to a defamatory petition. Beauharnais v. Illinois, 343 U.S. 250 (1952).

24. "This [right to petition] would seem unnecessary to be expressly provided for in a republican government since it results from the very nature of its structure and institutions. It is impossible that it could be practically denied until the spirit of liberty had wholly disappeared and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen." 2 STORY ON THE CONSTITUTION § 1894 (4th ed. 1873).

courts in all cases except those in which the Supreme Court has original jurisdiction.[25] It is still undecided whether Congress may limit the expression of opinion before it, and, if so, the extent permissible.

The general methods by which cases must be presented to the federal courts, and the manner in which they should be considered, has been well settled for many years, but solutions to analogous situations with reference to the legislature are far from apparent. Even if such procedures do become crystallized in the future, it will be manifestly impossible for all citizens to present their views before Congress; hence, communication with their representative is the natural alternative. Official responsiveness to a constituent's demands certainly must not, in a truly representative system, be gauged by whether or not the particular elector has aided in the financing of the representative with whom he seeks an audience.[26] That there is even the slightest possibility of such an occurrence is, of course, the basic objection to trust funds such as that used by Senator Nixon.[27] While it is not here contended that representatives would intentionally permit their decisions to be weighted by such considerations, as Senator Douglas pointed out in his recent book:[28] "What happens is a gradual shifting of a man's loyalties from the community to those who have been doing him favors. His final decisions are, therefore, made in response to his private friendships and loyalties, rather than to public good. Throughout this whole process, the official will claim—and may indeed believe—that there is no causal connection between the favors he has secured and the decisions which he makes. He will assert that the

25. U.S. CONST. Art. III, § 2.

26. Nevertheless, recent studies show that those persons who help finance a candidate's campaign wield an inordinate amount of influence. "[The] conclusion is that the representative process as practised in twentieth-century America involves, insofar as voting behavior is concerned, the attempt of the representative to mirror the political desires of those groups which can bring about his election or defcat." TURNER, PARTY AND CONSTITUENCY: PRESSURES ON CONGRESS 178 (1951). See also Douglas, *supra* note 21, at 44.

27. The following editorial comments were made the morning after the discussion by Senator Nixon of his expense fund and personal finances. Washington Post: "The central issue as we view it, remains unanswered by the Senator's talk. It is whether any such private fund can be squared with our American idcals of representative government. In our opinion, it cannot." Washington Star: "What Senator Nixon has said in his defense does not remove the fact that use of an expense fund such as he had rests on dubious ethical grounds." That opinion as to the moral implications of the fund was not unanimous was indicated by the Syracuse (N.Y) Post Standard: "We now feel, in light of the honest, clean-cut explanation, that the American people will realize that there is nothing legally or morally wrong with Nixon's fund, and that American fair play will forgive whatever error of judgment may have conveyed the appearance, but not the substance, of wrong." All of these excerpts were published in the New York Times, Sept. 25, 1952, p. 28.

28. DOUGLAS, ETHICS IN GOVERNMENT (1952).

favors were given and received on the basis of pure friendship, unsullied by worldly considerations. He will claim that the decisions, on the other hand, will have been made on the basis of the justice and equity of the particular case. The two series of acts will be alleged to be as separate as the east is from the west. Moreover, the whole process may be so subtle as not to be detected by the official himself."[29]

Assuming that the representative system is not impaired, some commentators assert that legislators should not be influenced by the people's views, but must instead exercise their collective judgment based upon an independent discovery of the facts.[30] Others argue that the legislator should be constantly aware of public opinion and reflect it accurately. While congressmen operate under both theories at present, the ultimate choice between them is certainly a political problem for the voter, depending upon which basis he uses for selecting representatives.[31]

Essentially the people's opinions reach the legislature in two ways: (1) directly, by presentation of views to Congress, its committees, and its members,[32] and (2) indirectly, by pressure group efforts to

29. *Id.* at 44.

30. MILL, REPRESENTATIVE GOVERNMENT 234 (1882). But see TURNER, *op. cit. supra* note 26, at 165: "The ideal of independence is often upheld by representatives in their speeches, and perhaps in their unrecorded activities in government, but their responsibility to the groups which can bring about their election is maintained in the votes of the great majority of congressmen. The number of congressmen is very small who over a large number of roll calls can successfully resist the pressure of constituency and party."

31. MILL, *op. cit. supra* note 30, at 234.

32. H.R. REP. No. 3138, 81st Cong., 2d Sess. 23-8 (1950).

". . . [T]he encyclopedia of lobbying practices needs frequent supplements to keep it up to date.

"And they best be cumulative supplements; for while lobbying techniques are continually being streamlined, the old standbys of pressure tactics are only slowly relinquished. New methods are added but old ones are not dropped. For example, direct contacting of legislators, the critical component of any traditional definition of lobbying, is still a common practice. Individuals and groups very properly seek to apprise legislators directly of their views on public issues. The variations on this old practice are, of course, endless.

"Some groups make their views known by letters, telegrams, and phone calls. Others depend largely on personal contact with Members of Congress, and still others think they can best serve their cause by organizing delegations for marches on the Capitol.

"Members of Congress are used to being sought out in their offices, in their homes, in the corridors of the office buildings and of the Capitol, in the cloakrooms and restaurants, on the floor of the Chamber itself. They expect and welcome letters, telegrams, and telephone calls from constituents and those outside their districts as well. In an age where the actions of Congress directly affect the lives of so many, legislators depend upon these communications in a very real and immediate way. They are both the pipelines and lifelines of our kind of representative government.

"But such statements and comments are not always as spontaneous, original, or genuine as they appear." *Id.* at 23.

"The service function in lobbying takes many different forms. When representatives of organized groups appear before committees of Congress, for example, they

use the influence of the constituency in order to shape the legislator's attitudes.[33]

To facilitate its understanding of the activity of those who make direct contact with legislators and legislative committees, Congress, in 1946, passed the Federal Regulation of Lobbying Act[34] in conjunction with the Legislative Reorganization Act. Persons receiving contributions or spending money to influence directly or indirectly the passage or defeat of legislation by Congress must file a quarterly report with the Clerk of the House disclosing the identity of contributors of $500 or more and also the name and address of each person to whom an expenditure of $10 or more was made.[35]

The Lobbying Act requires registration, with the Clerk of the House of Representatives and the Secretary of the Senate, by every person who engages himself for pay or any consideration for the purpose of attempting to influence legislation before Congress. Moreover, each registrant must file quarterly with both the Clerk and the Secretary, the name of his employer, the interest he represents, his salary and expenses, the legislation in which he has an interest, and the names of newspapers and periodicals in which he has published articles and editorials. Members of the press and public officials, when acting in their principal occupation, need not register, nor must a person who is merely appearing before a congressional committee.[36] Conviction for failure to comply results in a fine or a three year ban upon that person's lobbying activities.[37]

---

are not only presenting their own case but they are also providing Members of Congress with one of the essential raw materials of legislative action." *Id.* at 27.

33. H.R. REP. No. 3138, *supra* note 32, at 28-43.

"Ever since President Wilson's first administration, however, the ever growing army of pressure groups has recognized that the power of the government ultimately rests on the power of public opinion. This simple discovery lies at the root of the evolution of lobbying techniques since 1913. The extensive use of franked releases antagonistic to the chief items of the Underwood tariff bill of that year was probably the first large scale effort to bring public opinion to bear on legislation. In this sense, the use of highly charged franked releases as an instrument of pressure was the bridge between the old lobbying and the new. It opened the way to the development of entirely new dimensions in the theory and practice of lobbying. Today, the long run objective of every significant pressure group in the country is and must inevitably be the creation and control of the public opinion; for without the support of an articulate public, the most carefully planned direct lobbying is likely to be ineffective, except on small or narrow issues." *Id.* at 29.

The many techniques utilized by those attempting to affect public opinion are vividly presented in *Hearings before House Select Committee on Lobbying Activities,* (Pt. 8 Foundation for Economic Education) 81st Cong., 2d Sess. (1950).

34. 60 STAT. 839, 2 U.S.C. § 261 *et seq.* (1946).

35. *Id.* § 264.

36. *Id.* § 267.

37. A violation of the Acts by a person, which includes an individual, partnership or corporation, results in a fine or imprisonment or both. The Act also provides: "(b)

The specific constitutional issue raised by the Act is whether Congress can thus regulate the manner in which information is presented to it. Since the committee system is created solely through congressional initiative for the purpose of discovering certain facts and opinions and preparing legislative proposals, restrictions upon appearance before a committee are clearly within congressional power,[38] but regulation of procedures by which ideas may be communicated to individual congressmen presents a more difficult question. Arguably the Act's limitations, especially the three year ban on lobbying activities, restrict the freedom of speech of both those who wish to espouse their views and the individual legislator. Past judicial experience, *i.e.,* the standards embodied in Supreme Court decisions, has been confined to the problems of communication among the people. Pragmatically, whether the Court should apply the same standards to congressional regulation of procedures for direct presentation of views to Congress and its members depends upon the necessity for free and unregulated communication in this area. Yet determination of the need for, and the type of, supervision ought to be left to the legislature rather than to the courts, since legislators possess a unique knowledge of the problems confronting them. Congressional recognition of the same principle with regard to the judiciary is evidenced by its delegation of authority to the Supreme Court to promulgate rules of procedure for federal courts. Therefore, regulation in this area, because of its significant effect upon efficacious operation of the legislature, should be, like congressional dissemination of information to the people, solely a legislative responsibility. This suggestion merely recognizes, in effect, that legislators will be under constant political pressure to devise the best methods of gathering information, for it is the legislation based upon this data by which they will be judged on election day. Although the Supreme Court may intervene if congressional regulation is tantamount to complete prohibition, or becomes obnoxious to the public interest by according special interests undue advantage, it should otherwise defer to legislative determination of the necessary supervision.

Future legislation limiting those who may represent particular interests as lobbyists, and governing the place where presentation of

---

In addition to the penalties provided in subsection (a) of this section, any person convicted of the misdemeanor specified therein is prohibited for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from appearing before the committees of the Congress in support or opposition to proposed legislation. . . ." *Id.* § 269.

38. "Each house must also be allowed to proceed in its own way in the collection of such information as may seem important to a proper discharge of its functions. . . ." 1 COOLEY, CONSTITUTIONAL LIMITATIONS 275 (8th ed. 1927).

views may be effected, will encounter difficult enforcement problems, since contacts are often made through normal social relationships. It should be recognized, however, that the tightest surveillance of lobbying activities coupled with the most stringent enforcement sanctions will be of little real effect unless the conduct of the representatives themselves satisfies the highest ethical standards. As a possible aid in the furtherance of effective regulation of the channels of direct communication to Congress, the lobbyist should be placed on a professional level comparable to members of the bar, with immediate responsibility for self-policing but with remote supervision by the legislature and the courts.[39]

## III

Lobbyists attempt to influence Congress indirectly by conveying their ideas to the people in the hope that they will adopt them and attempt to mold their legislator's attitude through letter-writing campaigns, personal contacts, and threatened withdrawal of electoral support.[40] In addition to lobbies such as trade associations and unions, which maintain personal contact with congressmen and congressional committees, the so-called "research institute" endeavors to affect legislation by disseminating its social and economic philosophy among the electorate.[41] These groups make known their attitudes on current issues and political events mainly by distributing literature to: (1) interested persons who subscribe to their materials regularly;[42] (2) persons who order in quantity for redistribution;[43] (3) newspapers and other periodicals for republication and as a basis for articles and editorials;[44] and (4) persons whose names appear on purchased mailing lists.[45]

---

39. In other words a legislative bar. See 1 SUTHERLAND, STATUTORY CONSTRUCTION § 1224 (3d ed., Horack, 1943).

40. See note 33 *supra*.

41. H.R. REP. *supra* note 32, at 31-6; *Hearings, supra* note 33 (Pt. 5 Committee For Constitutional Government; Pt. 8 Foundation for Economic Education).

42. H. R. REP. *supra* note 32, at 35.

43. *Ibid.*

44. "Mr. Doyle. One other question: I noticed, in many California papers, what I would call standard editorials, of exactly the same text. In your processes, do you send out stereotyped editorials?

"Mr. Rumley: No; we do not send out canned editorials. We send out informative information which we hope the papers will print. In a fight like this one, we picked out about 20 editorials that told our side, and sent them to all newspapers in the United States." *Hearings, supra* note 33 (Pt. 5 Committee for Constitutional Government 117). See also, H.R. REP. *supra* note 32, at 37-9.

45. *Id.* at 35.

In addition to other disclosure provisions of the Lobbying Act, lobbies which receive contributions for the "principal purpose" of directly or indirectly influencing legislation before Congress, must reveal the names of all persons who contribute $500 or more and must furnish detailed accounts of all expenditures exceeding $10.[46] The organization must also keep the accounts necessary to furnish accurate reports.[47] In a suit brought to test the constitutionality of these provisions and to determine their applicability to its group, the National Association of Manufacturers contended that the registration and disclosure requirements violated freedom of speech. The district court held Sections 303-307 unconstitutional on two grounds: vagueness and violation of the First Amendment. The court found that as applied to N.A.M. the phrases "principal purpose" and "to influence directly and indirectly the passage or defeat of any legislation by the Congress" were too indefinite to constitute an ascertainable standard of guilt.[48] It also held that the penalty provision, which would ban lobbying activity for three years, deprives persons of constitutional rights under the First Amendment.[49]

Discourse between persons and groups traditionally has been protected by the constitutional guarantees accorded speech, press, and assembly.[50] Yet the courts have permitted exceptions to the seemingly

46. 60 STAT. 840, 2 U.S.C. § 264 (1946).

47. *Id.* § 262.

48. In United States v. Slaughter, 89 F. Supp. 205 (D. D.C. 1950), Judge Schweinhaut, who also participated in the N.A.M. case, held that "the phrase 'for the purpose of attempting to influence' is understandable in common parlance and susceptible of proof in a given case" and therefore was not too vague and uncertain as applied to a person's legislative representative. Judge Holtzoff, who wrote the court's opinion in the N.A.M. case, later ruled that defendant Slaughter's activities came within the provision excepting from the Act's requirements those who appear before congressional committees. 89 F.Supp. 876 (D. D.C. 1950).

49. National Association of Manufacturers v. McGrath, 103 F. Supp. 510 (D. D.C. 1952). An appeal was filed in the Supreme Court, No. 174, but the Solicitor General on July 3, 1952. Contentions: 1) the Act is not unconstitutional because of vagueness or violation of the First Amendment; 2) the district court erred in deciding constitutional questions before deciding the applicability of the Act to N.A.M.; 3) the proceeding was moot or abated when the decision was made since Attorney General McGrath had resigned. 21 U.S.L. Week 3049 (U.S. Aug. 12, 1952). The Supreme Court agreed with the latter argument in granting the motion to vacate. 72 Sup. Ct. 31 (1952).

50. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. AMEND. I. Previous to the adoption of the First Amendment, the protection of freedom of speech was applied only to previous restraints. 4 BL. COMM. *151. Cooley's comment on Blackstone repudiated the doctrine of prior restraints as being an ineffective protection. He described the purpose of the free speech clauses to be ". . . to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them." 2 COOLEY,

absolute safeguards embodied in the First Amendment when Congress has found a substantive evil which it has a right to prevent. However, the measure thus adopted must outweigh the public interest in free communication and must be no more restrictive than is reasonably and clearly necessary to prevent the particular evil.[51] Certainly the sanction provided by the Regulation of Lobbying Act, prohibition of lobbying for three years, meets these criteria since prohibiting the presentation of a certain point of view by the offending group, while at the same time other groups remain free to present that same view, is the only effective means of meeting a problem which could conceivably endanger the sanctity of the free representative system. Although the Supreme Court has invalidated legislation abridging free speech, congressional action to encourage and strengthen the philosophy permeating the First Amendment certainly ought to be possible.[52]

At present, neither adequate source material, such as cases or writings, or actual experience exists to guide Congress in initiating, and the courts in reviewing, affirmative action to foster the development of sound public opinion.[53] Conceivably, the compulsory disclosure provisions of the Lobbying Act could tend to stifle dissemination

---

CONSTITUTIONAL LIMITATIONS 885 (8th ed. 1926); *cf.* CHAFEE, FREE SPEECH IN THE UNITED STATES 1-35 (1941).

"Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble. . . ." U.S. CONST. AMEND. I. As to the development of this right, see Jarrett and Mund, *The Right of Assembly,* 9 N.Y.U.L.Q. REV. 1 (1931). See also Hague v. C.I.O., 307 U.S. 496 (1939).

51. Dennis v. United States, 340 U.S. 821 (1951); American Communications Association v. Douds, 339 U.S. 382 (1950); Thomas v. Collins, 323 U.S. 516 (1946). See also CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) *passim.*

52. "Speech should be fruitful as well as free. Our experience introduces this qualification into the classical argument of Milton and John Stuart Mill, that only through open discussion is truth discovered and spread. In their simpler times they thought it enough to remove legal obstacles like censorship and sedition prosecutions. Mill assumed that if men were only left alone, their reasoning power would eventually impel them to choose the best ideas and the wisest course of action. To us this policy is too exclusively negative. For example, what is the use of telling an unpopular speaker that he will incur no criminal penalties by his proposed address, so long as every hall owner in the city declines to rent him space for his meeting and there are no vacant lots available. . .

"We must do more than remove discouragements to open discussion. We must exert ourselves to supply active encouragements.

"Physical space and lack of interference will not make discussion fruitful. We must take affirmative steps to improve the methods by which discussion is carried on." CHAFEE, *op. cit. supra* note 51, at 599.

53. "We can speak with much less assurance about affirmative governmental action than was possible in dealing with governmental restrictions. Here we have no abundant material to guide us, either in judicial decisions or in writers like Milton and Mill." 2 CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 473 (1947). Compulsory disclosure of recipients of second class postal rates on periodicals has worked well. This has been true because officials are energetic when revenue is at stake. *Id.* at 492.

of ideas. Individuals and corporations might refrain from contributing to a particular organization if to do so would result in criticism generated by widespread dislike of the group's activities and opinions. And a decline in monetary receipts would undeniably diminish the organization's effectiveness. But the essential basis for any such consequence is not the Lobbying Act. The Act merely makes possible the effective marshalling of public opinion;[54] if this results in censure of the contributor's support, it will be because of the public's distaste for the group's program coupled with a failure to perceive the benefits to widespread political education by such dissemination.

Congress having enacted limited disclosure provisions, the groups affected thereby should not assume that their role is the negative one of circumventing revelation. Rather, their efforts should be directed to initiating and maintaining a positive program geared to overcome the Act's feared consequences by encouraging wider public acceptance of their views. If the latter approach proves successful, it would then be evident that the Act did not serve to restrict, but rather encouraged, the communication of ideas. In addition to furnishing the public more information upon which to base its political, economic and social judgments, such disclosure should enlighten the people as to the role of lobbies in a democratic society. Furthermore, the House Committee hearings on the effectiveness of the Act failed to indicate that it deterred contributions.[55]

Even if one concedes that the Act alone is liable to deter free expression to some extent, courts should recognize its potential benefits and permit legislative experimentation so that a sound policy of compulsory disclosure may be evolved. Since under the present Act, only major contributions and expenditures need be revealed, no tenable objection may be made that the expense of compiling the necessary data is so great as to materially hinder operations.

---

54. "Mr. Lanham. It means something to me to know who is financing this organization, just as it meant something to me to learn about Mr. Anderson's organization (i.e., the Public Affairs Institute). I know that his organization, Mr. Anderson's, will be slanted toward labor unions. I know that this organization, Mr. Read's organization, is supported by big corporations and no labor unions, and I know what to expect in their literature. I may agree with part of it and I may disagree. However, I think that the public ought to be able to tell, when the organizations mail out this stuff, who is financing it." *Hearings, supra* note 33, at 119. See also H.R. REP., *supra* note 32, at 15.

55. *Hearings, supra* note 33, Pts. 1-9.

## IV

The Lobbying Act requires disclosure of all income and expenditures, excepting those covered by the Corrupt Practices Act, by all persons who receive money or anything of value, and whose principal purpose is "to influence directly or indirectly, the passage or defeat of any legislation by the Congress of the United States." Mere recognition of the necessity for such publicity cannot assure realization of the Act's purposes; the Act's effectiveness will be severely limited if the courts narrowly interpret the "principal purpose" requirement of Section 307.[56] If the words are construed to mean the major purpose, many organizations which expend large amounts to influence legislation will not be covered since their major purpose is to conduct trade activities.[57] If the Act is to attain the end it purports to seek, courts must realize that a group may have several major purposes.[58] The Act would then cover groups which make continuous efforts to influence legislation and which receive large contributions to aid the accomplishment of this aim.

Should the broader construction be adopted, the question of whether a group is carrying on the requisite activity will be one of fact. The proposed interpretation of "principal purpose" is sufficiently definite to require disclosure by those organizations which receive financial assistance either to maintain direct communication with congressmen or to indirectly influence Congress.[59]

---

56. "The provisions of this chapter shall apply to any person except a political committee as defined in the Federal Corrupt Practices Act, and duly organized State or local committees of a political party, 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." 60 STAT. 841, 2 U.S.C. § 266 (1946) (emphasis added)

57. Section 305 of the Act conflicts with section 307, note 56 *supra*, in that § 305 requires that all persons who influence legislation report contributions and expenditures while § 307 says the Act is only applicable to those whose principal purpose is to influence legislation. However, it would seem that § 307 controls, since it is the coverage section and since the purpose of the Act was not to cover those who only incidentally influence legislation. SEN. REP. No. 1400, 79th Cong., 2d Sess. 27 (1946). N.A.M. contended in its injunction suit that principal purpose meant majority purpose. Plaintiff's Trial Brief, pp. 90-102; Plaintiff's Reply Brief, pp. 58-69.

58. The government contended that "principal purpose" means "substantial and not incidental purpose." Defendant's Trial Brief, pp. 82-106.

59. The District Court opinion on the constitutionality of Lobbying Act §§ 303-307 rested partially on the vagueness in the meaning of "to influence, directly or indirectly, the passage or defeat of legislation. . . ." In so doing the Court ignored familiar cases in which the nebulous concepts of "reasonable" and "unreasonable" were found to be sufficiently certain to avoid constitutional infirmity. United States v. Ragen, 314

The Lobbying Act expressly exempts practices and activities regulated by the Federal Corrupt Practices Act.[60] Although the Lobbying Act concerns legislation and the Corrupt Practices Act emphasizes election, the distinction is unrealistic since both purport to regulate methods of indirectly influencing legislation. Organizations which indirectly influence legislation may also attempt to affect elections even though their utterances concern issues rather than candidates. If the difference between the Acts is based upon direction of the group's activities, *i.e.,* toward legislation or toward elections, during a particular period of time, then the distinction is indefinite and an organization may be required to file under both Acts to avoid violations. For instance, suppose a group initiates a campaign against the Taft-Hartley Act more than one year before an election in which a senator taking the opposite view is up for re-election. If the attack on the legislation is maintained with the same intensity, or perhaps even increased, under which Act is it to file?

During the course of House Committee Hearings concerning lobbying activities, it was indicated that the Lobbying Act's meaning is unclear even to some members of Congress.[61] However, Congress seemingly intended that the long-term general *purpose* of the donee organization—rather than the specific activity engaged in at the time the donation is made—should be the prime determinant. For example, if a group's activities are not solely directed toward support of political candidates and it accepts contributions for its entire program it would

---

U.S. 513 (1941); United States v. Shreveport Grain & Elev. Co., 287 U.S. 77 (1932). See also United States v. Petrillo, 332 U.S. 1 (1947); Jaffee v. Cruttenden, 107 N.E. 2d 715 (Ill. 1952).

Moreover, the court refused to place the words in the context of the long history of lobbying techniques and also failed to take cognizance of congressional determination of techniques utilized by lobbyists to influence the passage or defeat of legislation. H.R. REP., *supra* note 32. Of the four types of activity which the court thought "may" be included in the disputed words, three were clearly set out in the passages quoted in notes 32 and 33 *supra*. The fourth type is admittedly included also. See *Hearings, supra* note 33. "In proper cases, such [congressional] reports are given consideration in determining the meaning of a statute, but only when that meaning is doubtful." United States v. Shreveport Grain & Elev. Co., *supra* at 83. Certainly it is a surprise to discover that, 40 years after the "new" lobbying techniques were evolved, a lobbyist may not know when he is attempting to indirectly influence legislation.

Apt comment upon the status of the present Lobbying Act came during the Hearings on its effectiveness:

"Mr. Albert. [To Mr. Read, President of Foundation for Economic Education]. However, I do feel sure that unless organizations as effective as yours in influencing legislation can be covered by a lobbying act, that the Lobbying Act is not worth the paper it is written on." *Hearings, supra* note 33, at 112.

60. 36 STAT. 823 (1910), as amended, 2 U.S.C. § 244 (1946).

61. *Hearings, supra* note 33, at 26. (Pt. 6 Americans for Democratic Action). For numerous definitions of the term "lobbying" see 96 CONG. REC. 9028 (1950).

be governed by the Lobbying Act. Thus, the Lobbying Act covers organizations which indirectly affect legislation by *all* methods, including the influencing of elections. On the other hand, the Corrupt Practices Act is aimed at groups which accept contributions *solely* to influence elections.[62]

Superficially, this dichotomy supplies sufficient criteria to enable an affected group to register and disclose under the proper Act. But closer investigation reveals the difficulties caused by the diversified activities of various organizations. If the original donee merely serves as a conduit between the donor and the ultimate recipient, which may be either another lobby or a political committee, two basic questions arise.[63]

First, under which Act should the initial donee disclose? In case the donee recontributes funds to a political committee, it is arguable that the original contribution was made solely to influence an election; therefore, the donation should be reported under the Corrupt Practices Act. On the other hand, as is signified by the suggested broad coverage of the Lobbying Act, use of this procedure could be construed as merely another means by which the lobby can in-

62. Only one organization whose principal purpose is to influence legislation, Americans for Democratic Action, has registered under the Corrupt Practices Act as well as having its legislative representatives register under the Lobbying Act. Under the above analysis, the ADA should register and disclose solely under the Lobbying Act; nevertheless, this specific example proves the validity of the distinction between the two Acts.

The following passage from the Hearing indicates the identification of lobbying activity with political activity.

"Mr. Halleck. Apparently they [ADA] have certain legislative objectives they want to achieve, if I understand it correctly; and that is the principal reason for the existence of ADA.

"Now, by their own construction they have placed themselves principally in th's category of political activities rather than lobbying activities. I would assume from that that ADA has concluded the most effective lobbying is to get out and engage in politics out in the country, and so they treat themselves primarily as a political committee, and then engage in, I would assume, the formation of public opinion back home that would be calculated to persuade political judgment.

". . .

"In other words, I think it is quite clear that so far as ADA is concerned your lobbying technique is principally a political technique.

". . .

"You figure that that is the best way to either bring about the adoption of legislation in Washington or to defeat it. Is that a fair statement, Mr. Biddle?

"Mr. Biddle [Former Attorney General of the United States appearing as National Chairman of ADA]. I think that is a fair statement." *Hearings, supra* note 33, Pt. 6 at 27.

63. This is undoubtedly a common method of avoiding the necessity of disclosing identity of contributors. Such evasion would be particularly fruitful for labor organizations and corporations which are prohibited by the Corrupt Practices Act from contributing to influence an election. It is also unlawful for any person to accept or receive such prohibited contributions. 43 STAT. 1074 (1925), as amended, 57 STAT. 167 (1943), 2 U.S.C. § 251 (1946).

directly influence legislation. The only conclusion which can be safely drawn from this perplexing situation is that the coverage and disclosure provisions of the Acts must be recast to conform to the actualities of present-day lobbying techniques.[64]

The second question is whether the group, be it a lobby or a political committee, which finally receives the contribution need disclose only the conduit organization, or the original donor, or both. Obviously, if the organization knows the identity of the primary source, it should be required to report it, as well as that of the ostensible donor. Proper effectuation of the Acts makes it imperative that the burden of proving the identity of the actual contributor be placed upon the group whose report is challenged.

A similar problem is also raised where one, instead of contributing directly to the lobbying group, pays the costs of printing literature which is distributed either by, or for the lobby. Inasmuch as the Lobbying Act defines contributions to include "anything of value," that the donation is not received directly by the organization is irrelevant—reporting of such contributions is required. Absence of an enforcement agency to deal solely with this problem area, however, is a great obstacle to effective implementation of the Act's objectives.

Other obvious methods are used to circumvent the requirement that all contributions of $500 or more be reported. Some groups now only accept donations of $499 or less.[65] The $500 limitation seems both arbitrary and unrealistic. Almost insurmountable enforcement problems can be best overcome by requiring disclosure of all contributions irrespective of amount.[66]

The present Act does not specifically require reporting of income received from corporations which "buy" large quantities of literature for redistribution.[67] Certainly this should be included since more

64. In the House Committee hearings, Rep. Halleck asked whether ADA chapters participated in political activity at the local level and was answered by James Loeb, then National Executive Secretary of ADA: "They do, and we very much encourage them to do so."

"Mr. Halleck. You see, there have been suggestions that maybe that is the most effective type of lobbying that one can imagine." *Hearings, supra* note 33, Pt. 6 at 13.

65. H.R. REP., *supra* note 32, at 12.

66. "Totalitarians, both of the left and of the right, attack democracy as a farce and fraud where special interests govern. It is perhaps unrealistic to expect successful candidates not to feel a certain responsibility to their financial angels. But we can at least demand a full disclosure of who—and how angelic—they are. I am therefore unequivocably for requiring publication of all campaign contributions right down to the last dollar. This would include not only donations to candidates, but also those to all participating committees." Humphrey, *Ethical Standards in American Legislative Chambers,* 280 ANNALS 53 (1952).

67. H.R. REP., *supra* note 32, at 12.

assistance may be rendered by assuming the task of distributing the information, than is received from those who merely donate. Furthermore, the disclosure objective of the Act might be better achieved if future legislation required that major contributors be listed on materials distributed.[68]

V

Preservation of the legislators' impartiality and integrity, a problem which goes to the very essence of representative government, is most inadequately assured by both the Lobbying and the Corrupt Practices Acts as the Nixon affair so vividly demonstrates. If the American ideal, a government responsive to the will of *all* the people, is to be fully realized, the identity of *all* who contribute financial aid in whatever form in order to influence legislation must be revealed. That the issue has been sharply focused in the heat of political battle, should not obscure the basic fact that preservation of an impartial representative system transcends partisan politics. Congressional efforts in this vital area having proven unsuccessful thus far, it is clear that the gravity of the situation makes it imperative that a dispassionate Congress conduct a comprehensive study of the entire problem. The issue may defy perfect solution, but congressional failure to meet this serious challenge to the integrity of the representative mode of government cannot be considered less than a breach of public trust, which could certainly lessen the people's confidence in their chosen form of government.

## STOP PAYMENT AND THE UNIFORM COMMERCIAL CODE

An Associated Press news dispatch of June 23, 1952 reported a statement by the President of the American Bankers Association that "there are now over 40 million checking accounts of individuals and businesses, 30 million more than 10 years ago. And twice as many

68. Mr. Francis Biddle commented on the advisability of disclosure: "If an organization definitely trying, definitely engaged in lobbying activities, if you want, educational lobbying activities buys a very large number [of materials] to distribute then I think the people ought to know about it. I do not think it is a matter of publishers selling their own books, but if an organization of a particular kind buys an immense number of books for a particular effort to further certain ideas that it has been putting out, which comes under the broad scope of lobbying. . . . I think that it is a significant effect of education for the American people to know about." *Hearings, supra* note 33, Pt. 6 at 53.