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A New Concern in Europe: Lobbyists, the Merchants of Influence

Odile Prevot*

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I. INTRODUCTION

Concerned about the realization of the European Market, lobbyists are seeking to modify the decisions made in Brussels. The lobbying phenomenon has involved many controversial issues that will be resolved during the spring of 1992.

The United States has been familiar with the concept of lobbying for many decades, but such familiarity is not the case in Europe. As the following anecdote demonstrates, the practice of lobbying has not always been exclusive to the Americans. A French lobbyist, the *Comte de Vergennes*, Minister of Foreign Affairs under Louis XVI, visited Washington D.C. in 1793 and influenced Congress to grant a refund for the armaments that France had delivered to the United States during the Revolutionary War. Lobbying had been practiced for many years on both the American and European continents; but Europe has never regulated methods, proceedings, or codes of conduct for lobbyists.

The fact that none of the European countries have regulated lobbyist activity does not mean that these countries are not concerned about these purveyors of influence. The lobbies of the European Parliament in Strasbourg, Capitol Hill in Washington D.C., and even the California State Capitol specialize in influencing legislative and administrative action.

The term "lobbying" is generally understood to mean bringing positive influence to bear on lawmakers to advance a given interest.[1] In recent years, lobbying has become an accepted part of the European Economic Community's (EEC) legislative process, although the methods and approaches required differ considerably from those employed in national areas. With the advent of 1992, the European Community (EC) is moving rapidly towards the realization of the Single Market. Implementation of EC '92 goals started slowly, but by late 1991 the process had become the principal topic of discussion in capitols and boardrooms across Europe.

1. FAIR POLITICAL PRACTICES COMM'N, STATE OF CALIFORNIA, INFORMATION MANUAL ON LOBBYING DISCLOSURE PROVISIONS OF THE POLITICAL REFORM ACT (1990).

EC '92 finally had gathered the critical mass needed to attract and hold public attention. Even if the EC government misses the December 31, 1992 deadline for enactment of all proposals for unifying western Europe, the process of unification will be irreversible because the goals of EC '92 are not new.[2]

Many companies, both within and outside the EC, now understand the need to protect and advance their interests in the formative stages of the law-making process, that is, while legislation is being drafted and debated. Accordingly, companies need to communicate their interests to EC decision-makers effectively, and to take the initiative in proposing alterations or additions to putative legislation. Therefore, although lobbying of politicians and lawmakers may not be a new idea, recently it appears to have assumed more importance within the EC. Even after the rules for the Single Market have been promulgated, many details will need to be addressed by the EC decision-making bodies. For this reason, many people in Brussels expect that lobbying will continue as a valuable, and often necessary, activity.[3]

Are consultants and representatives of organizations continuing to practice lobbying activities without any safety net, with no regulation, code of conduct, or code of business ethics? This issue has been raised for several years,[4] but remained unanswered until 1991. This article discusses whether it is finally necessary to regulate the so-called European "merchants of influence."

2. Article 2 of the Treaty of Rome, signed in 1957, states as the EC's primary goals, "[A] harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it." TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 2.

3. Interview with Florence Maisel-Monterde, Associate Director of INTEREL, Public Affairs and Communication Institutionnelle, in Paris, France (Oct. 9, 1991).

4. *Written Question No. 2325/84 to the Commission: Community Lobbyists*, Jens Peter, Rainbow Group (Mar. 18, 1985); *Written Question No. 620/85 to the Commission: Lobbyists*, Dieter Rogalla, Socialist Group (Dec. 31, 1985).

II. A Practice Not Accepted

Some contend that the term "lobbyist" necessarily connotes United States. Perhaps this association is because it was in America that pressure groups gained respectability after starting from less than respected origins; and a general view that the vast majority of lobbying that occurs in the world takes place in Washington D.C. Today, lobbyists have invaded all parts of the world.[5]

A. Lobbying Throughout the World

From North to South, East to West, the internationalization of exchanges, the quest for capital to invest, and the development of economies is evident. Despite their uniformity of purpose, the methods used by lobbyists are different.

In the vast majority of EC-member state parliaments, there are no rules or provisions governing the activities of lobbyists. This is true of the parliaments of Belgium, Greece, Spain, Ireland, Italy, the Netherlands, Portugal, the United Kingdom (U.K.), and the German Bundestag.[6] In the Italian Chamber of Deputies, five bills aimed at recognizing and regulating professional public relations activities have been tabled.[7]

There are no specific rules governing the organization and activities of lobbyists in the Danish Parliament (*Folketing*), or the French National Assembly.[8] Nevertheless, both chambers give de facto recognition, and certain parliamentary privileges, to such groups.[9] In the *Folketing*, delegations or representatives of concerned organizations may be admitted to parliamentary committees under the following conditions: (1) members of the delegation must belong to the organization which has submitted a

5. Jean-Dominique Giuliani, Marchands d'Influence, Les Lobbies en France 163 (1991).
6. Rules of Procedure of the Bundestag, Annex II, Doc. No. DG IUR% PR001 (June 1991) (available at Library of the European Parliament, Luxembourg (noncirculating material)).
7. *Id.*
8. *Id.*
9. *Id.*

request to appear; and (2) the lobbyists are permitted to appear for a maximum of fifteen minutes.[10]

There are no specific rules affecting lobbyists in the National Assembly of the French Republic. Lobbyist access to the French Parliament's office and meeting rooms is governed by general rules of access.[11] In general, arrangements are similar to those applied in the European Parliament and political groups which freely decide who to receive and with whom to consult. However, access to, and movement within, the premises of the National Assembly is regulated by a general directive of the Assembly which specifies who may enter.[12]

Although no explicit reference is made to lobbyist activities, Switzerland and Luxembourg are beginning to formulate rules which would govern lobbyists' activities. In Switzerland, lobbyists actually exercise their power more on the international level than on the national level. European influence groups are in Brussels to learn what will occur during 1992, but they are also in Washington D.C., where they do not hesitate to use the services of professional lobbyists from either Switzerland or the United States to obtain the ends they seek. Large companies headquartered in Switzerland have lobbyists in all parts of the world, which gives them the opportunity to be present wherever decisions which may affect them are being made. Functioning nationally, Swiss companies do not hesitate to hire prestigious foreign personalities to lobby on their behalf. The Swiss multinational corporations are highly efficient at influencing decisions, anywhere in the world, which may affect their business.

The Luxembourg Chamber of Deputies has enacted rules governing lobbyist activities. Rule 25(1) of the new Rules of Procedure refers to extra-parliamentary cooperation, and makes provisions for a committee to receive and hear the opinion of extra-parliamentary persons and organizations, to request information or documentation, and to accept or request extra-parliamentary

10. *Id.*
11. General Directive of the French National Assembly, art. 26.
12. *Id.*

cooperation when considering a bill. Such consultations must relate to the subject under consideration by the committee and, following an assessment of the need for consultation, must be approved by an absolute majority of its members.[13]

Precise and systematic rules regulating lobbying exist only in Australia, Canada, and the German Bundestag.[14] Observation of what Canada and Australia are doing to regulate lobbying efforts will help to understand the future evolution of English lobbying regulation. In these two past colonies of the British Empire, lobbyists are accepted, but their activities are restricted.[15] Lobbyists in both Canada and Australia must be registered.[16] Currently, more strict regulations are in the process of being drafted.[17]

In the German Bundestag, each year a public list is compiled, including all associations, organizations, or undertakings which wish to express their interests to the Bundestag or the federal government.[18] Entry onto this list is a precondition for representatives of interest groups to be received by parliamentary committees, or to be issued a pass admitting them to Parliament's premises.[19] The list must contain the following information: (1) Name and location of the association or interest group; (2) the composition of the group's board of directors and board of management; (3) the group's sphere of interest; (4) the number of members in the organization; (5) the names of the association's appointed representatives; and (6) the address of the group or association's office at the seat of the Bundestag and the federal government.[20]

Once an interest group has provided all the necessary information to the corresponding services of the Bundestag, the

13. Luxembourg Chamber of Deputies Rules of Procedure 25(1) (1991).
14. *Le Lobbying, Sport National Allemand*, LE MONDE, Feb. 18, 1992 [hereinafter *Le Lobbying*].
15. *See* GIULIANI, *supra* note 5, at 163.
16. *Id.*
17. *Id.*
18. *Le Lobbying*, *supra* note 14.
19. *Id.*
20. Rules of Procedure of the Bundestag, Annex II, Doc. No. DO JUR% PR001 (June 1991).

service may issue a pass on request.[21] The list does not entitle lobbyists to be heard in hearings or before committees, or to be issued a pass. Indeed, once a pass has been issued, it can be declared invalid by the Bundestag. The invalidation of passes remains entirely at the discretion of the corresponding office of the House.[22] The Bundestag and its committees can also invite associations or experts who do not appear on the list to their meetings when considered necessary.[23]

Rules governing the activities of lobbyists have a considerable tradition in the United States. Therefore, it is imperative to understand the lobbying arrangements used in that country before examining the problems that the U.S. is facing due to lobbying activities.[24]

The three main laws which regulate lobbying at the federal level are: the Federal Regulation of Lobbying Act, the Byrd Amendment, and the Foreign Agents Registration Act. In addition to this legislation, another consideration is the Senate and House Rules on Gifts, Travel, Reimbursements, and Honoraria to members of Congress, which might be described as an internal regulation on ethics.[25]

The first of the federal laws, the Federal Regulation of Lobbying Act, restricts the activities of pressure groups as they pertain to the U.S. Congress. This statute lists those persons who must register as lobbyists, and the information which they must periodically supply, in a manner typical of the caustic approach to such rules under Anglo-Saxon legal practice.[26]

21. *Id.*
22. *Id.*
23. *Le Lobbying*, *supra* note 14. The 1990 public list of the Bundestag was comprised of 1501 associations. *Id.*
24. *See* Serge Marti, *Le Lobbying Social Hippon Aurait Atteint 400 Millions de Dollars en 1991*, LE MONDE, Dec. 10, 1991.
25. *See* DONALD H. HAIDER, WHEN GOVERNMENTS COME TO WASHINGTON (1974). These rules vary slightly for each of the chambers of Congress. Rather than laying down major obligations for lobbyists, they are chiefly addressed to members of Congress, and apply equally to congressional officials and employees. *Id.*
26. *Id.*

In the U.S., lobbying is defined as any activity which involves influencing or seeking to influence the legislative process through direct contacts with members of Congress or their staff. According to the Federal Regulation of Lobbying Act, lobbying comprises four key elements: (1) legislative activity, (2) intention to influence the legislative process, (3) intention to influence Congressional members or their staff, and (4) direct communication with members of Congress or their staff. An activity is not considered lobbying where one of these features is lacking.[27]

The Byrd Amendment sets forth restrictions and prohibitions on the use of federal funds in lobbying activities. Further, it provides new and more precise rules concerning expenditures incurred in lobbying activities by persons receiving any type of federal grant or funding.

The Foreign Agents Registration Act consists of a series of registration obligations for any person wishing to act as a lobbyist on behalf of a foreign national, and requires the submission of periodic reports on their lobbying activities.[28]

The problems that the U.S. is experiencing from lobbyists' efforts are voiced in congressional concern about the effects of foreign influence on the U.S. government and the American public. U.S. Senators have, therefore, proposed amendments to the Foreign Agents Registration Act of 1938.[29] The Act neither prohibits representation of foreign interests in the U.S., nor prevents dissemination of foreign propaganda.[30] Since 1974, 47% of former senior officials in the Office of the U.S. Trade Representative (USTR) have registered with the Justice Department[31] as foreign agents, or worked for firms that had so registered.[32] "The Office of the USTR has become almost a training ground for foreign

27. *Id.*
28. *See* Phillip J. Perry, *Recently Proposed Reforms to the Foreign Agents Registration Act*, 23 COUNELL. INT'L L.J. 133 (1990).
29. *Id.*
30. *Id.*
31. *See* NIKKEI WEKLY., Sept. 7, 1991.
32. WASH. POST, Dec. 14, 1991, § 1, at A25 (statement of the Center For Public Integrity, a new labor, business, and foundation-financed public-interest group in Washington D.C.).

lobbyists."[33] Recently, however, attention has been focused on the powerful Japanese lobby in Washington. "[T]here is no question that lobbyists—and the Japanese lobbyists in particular—are having an effect on politics and policy [in the United States]."[34]

An examination of lobbying throughout the world would not be complete without giving attention to those countries who are trying to discover democracy: a prime example is Hungary. Because of its trader traditions and its opening to western Europe, Hungary has undergone precocious liberalization.[35] After the Revolution of 1956, the Janos Kadar regime tried to accomplish a soft normalization. Kadar was open to lobbyists because he knew that Hungarians needed to find their way to a new job, or to give communism the opportunity to survive, even if the population did not want it.[36] Lobbyist groups were recognized and they existed even if no proper rules governed their activities.[37] However, when the economy worsened the lobbyists lost their power. In the early 1980s, a new type of lobbyist appeared with a new dream; to be the preferred interlocutor of the huge investors from the capitalist countries.[38] For the Hungarian lobbyist, lobbying means democracy.

B. Europe, Native Country of Lobbyists

The European Community tries to maintain a balance between the Anglo-Saxon common and Latin civil legal traditions. Regarding the practice of lobbying, however, there is no doubt about the English influence. The Anglo-Saxon common law model has more influence on this issue than the Latin civil law model.

A whole spectrum of people and organizations now lobby for their clients in the EC. There are 500 European associations and

33. *Id.*
34. *See* JEFFREY H. BIRNBAUM, LOBBYISTS AND YOU (1990).
35. Guy Sorman, *14 Triomphes du Libéralisme*, LE FIGARO DU SAMEDI, Jan. 18, 1992 (No. 14746).
36. *Id.*
37. *See* GIULIANI, *supra* note 5, at 193.
38. *Id.* at 195.

3000 lobbyists involved in the EC decision-making process.[39] Certainly these influence groups need to make themselves more visible to members of the decision making bodies. The large number of professional EC public affairs consultants now working in this area is a testament to the extent to which organizations now value active lobbying.[40] Based mostly in Brussels, some lobbyists have affiliated offices in other major cities. For example, there are thirteen lobbyist firms registered with the *Association Française des Conseils en Lobbying* in Paris.[41] These consultants represent a broad range of clients from national and international corporations,[42] to trade associations, charities, environmental groups,[43] and local government authorities. They provide a wide range of information and advisory services. Lobbyists also assist in identifying issues, developing strategic programs, managing media relations, and making presentations to the EC.[44] Not all professional consultants provide the same range of services. Some lobbyists may provide monitoring services, while others do not.[45] In selecting a lobbyist or consultant, it is therefore necessary to assess what type of services are called for, and then determine whether a particular organization can provide those services.

Because the legislative procedure of the EC is complex, those who wish to exercise influence within it should first understand the system before they may effectively communicate their interests to EC decision-makers.

1. Understanding the System

A knowledge of the various channels through which proposed laws pass, the bodies involved, and the time at which deliberations occur, assist the lobbyist in determining when and where

39. Interview with Florence Maisel-Mouterde, *supra* note 3.
40. *Id.*
41. THIERRY LEFEBURE, LOBBY OR NOT TO BE 161 (1991).
42. Interview with Florence Maisel-Mouterde, *supra* note 3.
43. Interview with Olivier Bobille, *Chargé de Mission Affaires Européennes et du Bureau CNIH de Bruxelles*, in Brussels, Belgium (Oct. 8, 1991).
44. *Id.*
45. *Id.*

representations to EC officials should be made. Lobbyists also need to be aware of the voting majorities required to pass legislation, and time limits on their activities; both of which vary according to the legislation involved and the procedure being used by the system. The essential structure of the EC law-making system is one in which the Commission proposes, the European Parliament advises, and the Council decides. Supervising the activities of these institutions and ensuring that they act within the scope of their powers is the job of the European Parliament.[46]

a. The Commission

The Commission consists of seventeen officials, known as the Commissioners, designated by the individual governments. The Commission is the policy-initiating body; virtually all policy decisions originate with the Commission. It initiates policy and passes the recommended measures on to the Council of Ministers. Proposals for new laws emanate from the Commission and are drafted by members of the Directorate General responsible for the policy area concerned.[47]

A positive exchange of opinions and information, before a proposal is drafted and submitted to the Council, is viewed by many lobbyists as highly beneficial.[48] Dialogue at this point on the possible effects of the proposal and alternative methods of achieving objectives may reduce or obviate the need for future activity.[49]

b. The Council

The Council consists of the foreign ministers of the member states. The ministers deliberate and decide on the measures

46. *See* CHRISTIAN GAVALDA & GILBERT PARLEANI, DROIT COMMUNAUTAIRE DES AFFAIRES 97 (1988).
47. *Id.* The Commission is internally divided into departments responsible for specific areas such as agriculture, internal markets, social affairs, and transportation. *Id.*
48. *See Id.* at 90-91.
49. *Id.*

recommended by the Commission, accepting or rejecting the proposal. The Council is the principal law-making body of the EC, altering or amending Commission proposals.[50] Since the Council determines what is to become law, and is comprised of member-state representatives, it is also worthwhile to consider lobbying the Council through national channels.[51]

c. *The European Parliament*

The European Parliament is composed of 518 members which are directly elected to that position by the country they represent.[52] The formal opinion of the Parliament is required on most proposals, before they can be adopted by the Council. Its powers have been greatly strengthened by the cooperation procedure for certain measures under the Single European Act.[53]

The role of the European Parliament remains largely consultative except for its ability to control, within limits, certain types of EC budgetary expenditures. The preparatory work for plenary sessions is completed in eighteen specialized committees.[54] A proposal from the Commission is first referred to one of the committees for a report and to others for an opinion. The reporting committee then formally nominates a *Rapporteur*,[55] chosen by the political parties.[56]

In the committee, there is generally a first reading of a preliminary paper from the *Rapporteur*, and a presentation of the Commission's proposal. Once adopted, the committee's report is placed on the agenda for a forthcoming session.[57] The Parliament generally meets in full session once a month in Strasbourg, France. The majority of legislative proposals under the Single European

50. *Id.*
51. GAVALDA & PARLEANI, *supra* note 46, at 90-91.
52. *Id.* at 98.
53. EEC TREATY.
54. *See* GAVALDA & PARLEANI, *supra* note 46, at 98.
55. Mr. Marc Galle of Belgium, member of the Socialist Party, is the *Rapporteur* in charge of the regulation on lobbyists.
56. *See* LEFEBVRE, *supra* note 41, at 162.
57. *Id.*

Act fall under the cooperation procedure: after giving its opinion on the Commission proposal, the Parliament may modify its stance before the Council of Ministers reaches a common position on the proposal. This common position is returned to the Parliament for a second reading.[58] Because of its mainly consultative role, the Parliament may have less significance for lobbyists than does the Council.

The system of review and debate through the Council, the European Parliament, and the committees which assist them, is comprehensive. It is therefore essential that lobbying activities occur at the optimal time in the process. Once a proposal has been formally drafted by the Commission, it would be extremely difficult to substantially alter it. Once a proposal has been accepted by the Council, there may be little chance of changing what is to become law.

2. *Brussels: the Lobbies Under Pressure*

The actions of lobbyists in Brussels and Strasbourg are different than lobbyist actions in the individual member states. It is an extremely different political world. "Brussels, [Belgium] is the native country of lobbyists, they are everywhere."[59] But lobbyists in Brussels are different from the lobbyists in the member states. "They are European; that means fast, rich, organized, effective, imaginative, and tenacious."[60]

Lobbying of the European Parliament has increased considerably in the past decade.[61] This increase has come not only from commercial lobbyists, but also from single issue pressure groups and other organizations.[62] The concerns expressed by the Parliament over representational activities in Brussels and Strasbourg, arise from the practices of a small minority of

58. *Id.*
59. JACQUELINE NONON & MICHEL CLAMEN, L'EUROPE ET SES COULOIRS, LOBBYING ET LOBBYISTES 31 (1990).
60. *See* GIULIANI, *supra* note 5, at 207.
61. *Id.*
62. *Id.*

professional and personal interest advisers who have abused the facilities of the Parliament.[63] Most lobbyists in Brussels and Strasbourg stress their concern over such abuses, and express hope that such abuse will not occur at the Commission or Council levels.[64]

Presently, the bulk of policy and legislative representation concentrates on the Commission. However, the European Parliament is constantly growing in significance to political lobbyists and lobbying organizations.[65]

3. *Resources, Strategies, and Tactics*

Strategies and tactics are central to the achievement of group purposes in EC lobbying. It must first be described how the interest groups pursue their objectives; what strategies they use. Secondly, what actions they take in fulfilling those strategies, specifically, their tactics.

Lobbying involves communications, whether direct or indirect. The intermediate objective of all interest groups is maximizing their influence; to develop and improve their access to the decision-making bodies of the EC.[66] The general public, segments of the media, and others, accord interest groups considerable legitimacy.[67] The lobbying tasks of interest groups, once having gained access, are defined in terms of trying to convince and persuade legislators. This means persuading the Commission, Council, and Parliament that broader constituencies will be affected by their particular decisions or actions.[68] To accomplish this task

63. *See* LEMBURUS, *supra* note 41, at 168.
64. Letters from Peter Verhille, a representative of ACCESS (a London, England-based lobbying group), and H.H. Lever, *Conseil Europeen de l'Industrie Chimique* (Brussels, Belgium), to the European Parliament Committee in charge of the lobbyists regulation, Committee on the Rules of Procedure, the Verification of Credentials and Immunities.
65. *Id.*
66. Interview with Dennis O. Flatt, Vice President and Legislative Representative of Kaiser Foundation Health Plan, Inc., in Sacramento, California (Jan. 10, 1992).
67. *Id.*
68. *Id.*

the direct approach, the personal presentation of a case, is widely considered to be the most effective tactic for communication.[69]

The quality of the lobbyist, as well as the substance of the information they carry, is important to successful lobbying.[70] Many lobbying organizations in Europe do not possess the necessary resources to be effective. Nevertheless, they try to properly assess each specific case before a decision-making body of the EC, and appraise their available options.[71] European lobbyists maintain continuing relationships with EC officials and understand that the approaches to the EC governing organizations should not be made until the desired objectives have been precisely determined.[72]

Time is an important factor in determining not only when to make approaches to the Commission, Council, and Parliament, but also in deciding what approaches to pursue. First, a lobbyist should be selective in whom to approach. The person confronted should be someone closely involved in the formulation and evolution of the matter under consideration.[73] Second, representations should be kept clear and framed within concise, constructive presentations.[74] It is also advisable that the lobbyist be aware of the individual sensitivities of those with whom they speak. An aggressive stance may gain attention, but not obtain results. National cultural mores and rules of conduct also play an important role in affecting EC policy determinations.[75]

"To lobby the EC successfully, you have to get in early, and stay in; be on the spot and base your positions on evidence."[76]

69. Interviews with Judith E. Wolen, Legislative Advocate, Associate of Frank Murphy, Jr., Attorney at Law; David C. Knight, Government Relations Director, Beneficial Management Corporation of America; and Denny Samuel, Senior Representative California State Relations, the Chevron Companies, in Sacramento, California (Jan. 13, 1992).
70. Interview with George H. Cope, Jr., President of Aggregate Producers Association, in Sacramento, California (Jan. 6, 1992).
71. *Id.*
72. *Id.*
73. *See generally* NORDON & CLAUSEN, *supra* note 59, at 169. Both authors are involved in the EC decision-making process. They give advice to beginner lobbyists.
74. *Id.*
75. *Id.*
76. Interview with Florence Maisel-Mouterde, *supra* note 3.

There is, therefore, an investment of time and effort to be made. "But the EC officials and the members of the European Parliament are much more open to act on well-founded arguments than their national counterparts. Euro-lobbying definitely pays-off."[77]

III. A Code of Professional Ethics

A. *"Act Now or Suffer Later"*[78]

In lobbying the European Parliament,[79] it is not enough to put forth general positions and hope that members of the European Parliament (MEPs) and their assistants will translate them into amendments, resolutions, or questions. Everything must be drafted by the lobbyist. Therefore, it is important to know the practical tips, and the channels for lobbying the Parliament.

1. *Channels of Lobbying*

Many organizations have found the European Parliament to be the catalyst for introducing new policies, legislation, and, of course, budget lines.[80]

The first stage of lobbying the EC is to contact the *Rapporteur*, because if he accepts your position the battle is half won. Once the draft report of the *Rapporteur* is circulated to the Committee,[81] the lobbyist must write to, and speak with, members of the Secretariat, and Ordinators in the political parties. In practice, in order for proposed amendments to stand a chance of being

77. *Id.*

78. Interview with Olivier Bobille, *supra* note 43 (translating Mrs. Edith Cresson's opinion about lobbyists in Europe, *Agir Pour ne Pas Subir, Bruxelles, Mode d'emploi*). Mrs. Cresson was the Prime Minister of France until April 1, 1992, and was the Minister of European Affairs until 1991.

79. *Id.* It is important to remember that EC decisions are amended, rejected, or approved by national and political representations in the European Parliament. *Id.*

80. Interview with Olivier Bobille, *supra* note 43 (explaining this assertion). Every effort is being made to increase the budgetary powers of the Parliament and give it the power of the purse that all legislative assemblies possess. *Id.*

81. *Id.* The preparatory work for a Plenary session is done in 18 specialized committees. The proposal from the Commission is first referred to one or another of the committees for a report, and to others for an opinion. *Id.*

accepted, they need the support of both the Socialist and the European People Groups, which are the two largest political affiliations.[82]

The second stage is a reading of the proposal in the European Parliament.[83] The same process of examination is followed in committee, and then in the plenary session, with a number of options and strict time limits on the process. It is significantly more difficult for the lobbyist to have any influence at this stage because an absolute majority of members is required for an amendment to be adopted.[84]

Choosing the right channel can only be done on an ad hoc, case-by-case basis.[85] Good lobbying depends on the proper assessment of each specific case and appraising the available options. Approaches to the EC should not be made until defined objectives have been precisely determined together with a plan for pushing the relevant request through the process.[86]

2. *Practical Tips for Lobbying*

The gray booklet,[87] which lists the names and addresses of the MEPs by committee and political group, is particularly useful to the lobbyist. Another useful indicator of upcoming issues is an internal publication, *Work in Progress in Parliamentary Committees*, which announces not only the state of current work, but what legislation is forecasted to be introduced in the other institutions of the EC decision-making bodies.[88]

82. *Id.* The distribution by political group in January 1991 is as follows: The Socialist Group has 180 members, the Group of the European People Party (Christian-Democratic Group) has 121 members. *Id.*

83. *Id.*

84. *Id.*

85. Lepêsure, *supra* note 41, at 108 (explaining Nike's file: in 1988, a problem developed with a Korean company over a restriction on the importation of sports shoes to the EC; the Parliament asked American lobbyists to defend the Korean company).

86. *Id.*

87. Available from the European Parliament, Luxembourg.

88. *See* Lepêsure, *supra* note 41, at 114-15.

The itinerant nature of the Parliament, along with the Secretariat in Luxembourg, and most committee meetings in Brussels, and the plenary sessions in Strasbourg, poses a significant problem for the lobbyist.[89] It is best to deal with *rapporteurs* before or after committee meetings in Brussels because they have more time at their disposal. It is also very useful for a lobbyist to attend public committee sessions in order to hear what is said by whom, and thereby determine which committee member to contact on any given issue.[90]

When following up proposals at the European Parliament in Strasbourg be aware that the building is a veritable fortress. Visits must be arranged in advance, with an invitation from an MEP, in order to obtain a pass to get into the building.[91] Once allowed to enter the Parliament, one can roam quite freely. It is, however, very difficult to talk to people in Strasbourg for any length of time. It is, rather, the place to contact several people, for short periods of time, on several issues. This can be done from the phone at the desk near the entrance.[92]

B. The European Parliament: Should Lobbying Be Regulated?

On May 24, 1991, Mr. Enrique Baron Crespo, President of the European Parliament, asked the Committee on the Rules of Procedure to consider a request from the Enlarged Bureau to submit proposals for drawing up a code of conduct, and a public register for the lobbyists accredited by Parliament.[93]

On June 21, 1991, the Committee appointed its Chairman, Marc Galle, *Rapporteur* on the subject of lobbyist regulation. On September 18 and 19, 1991, the Committee decided to hold a public hearing in connection with the preparation of the report. The

89. Interview with Olivier Bobille, *supra* note 43.
90. *Id.*
91. *Id.*
92. *Id.*
93. Telephone Interviews with staff members of the European Parliament (Oct. 1991).

hearing was held in Brussels in the course of the committee meetings of January 22 and 23, 1992.[94]

At the end of 1991, the Committee on the Rules of Procedure, the Verification of Credentials and Immunities, received letters from representatives of organizations wishing to take part in the public hearing.[95] Invitations to *participate* in the hearing were extended to six persons who had made themselves known to the Committee Secretariat.[96] They were chosen because they had the widest representational *mandate* possible, covering several member States. A member of the U.S. Congress was also invited but did not attend.[97]

The *framework* of the hearing in January 1992 was a questionnaire submitted by the *Rapporteur*, Mr. Marc Galle, to the Committee on the Rules of Procedure, the Verification of *Credentials* and *Immunities*.[98] This questionnaire contained six questions which each of the guests answered.[99] They also submitted the positions of lobbyists in the hope that this would assist in the Committee's deliberations.[100]

Questions Asked at the Public Hearing

Question 1. *Should Parliament confine itself to drawing up a body of rules concerning itself alone, or should it work towards introducing Community legislation on the representation of interest groups to all of the EC institutions?*

Most of those who answered this question were in favor of a "body of rules concerning [lobbying in the] the European

94. *Id.*
95. Telephone Interview with Philippe Vesteijel, *Director General des Commissions et Delegations, DG2 Direction A, Commission Politique* (Feb. 27, 1992).
96. *Id.*
97. *Id.*
98. *Id.*
99. Doc. EN/CM/115663, PE 153.280 (1991) (available at the Library of the European Parliament, Luxembourg).
100. The letters from the representatives of organizations wishing to take part in the hearing have been published on December 2, 1991 by the European Parliament. PE 154-304/add; Doc. EN/CM/120151 (available in the Library of the European Parliament, Luxembourg).

Parliament itself."[101] However, there is a flaw in seeking to control those who attempt to influence the Parliament, but not those who seek to influence the EC's other institutions, especially the Commission. President Jacques Delors[102] stated in January 1991 that "the Commission will not adopt any kind of rules on the subject matter [of lobbying]."[103] In this respect, the European Parliament should provide a lead for the other European institutions. The rules it adopts could well serve as a model for the other EC policy making institutions.

Question 2. *As to the definition of the concept of representation of special interests: What activities and persons would be concerned in the rules on representation of interests? What, accordingly, should the criteria be for lobbyist accreditation to the Parliament?*

Throughout the world those parliaments which have addressed the question of determining what constitutes lobbying have found it difficult to define the activity. In 1988, a Report on the Registration of Lobbyists by the Association of Secretaries General of Parliaments noted that none of the national parliaments of the EC member states had a precise definition of "lobbyist" in official use. Only the Bundestag had a registration system, adopted in 1972 which is now part of their Rules of Procedure.[104]

Based on the comments made during the January hearings,[105] the twenty-five members of the Parliament's Rules Committee had a key problem to resolve before taking any action requiring

101. Those answering in favor were the lobbyist groups: ICL, FEP, *Dumez La Giraudiere Larroze*, CEPIC, and CNPF.

102. Jacques Delors has been the President of the EC Commission since January 6, 1985. He was previously the French Minister of Economy and Finance from 1981 to 1983. He also served the French government as the Minister for Economic and Financial Affairs and the Budget in 1983 to 1984. In 1979, he was elected to the European Parliament where he chaired the Parliament's Economic and Monetary Committee. Mr. Delors can claim considerable credit for reviving the European Community in the 1980s after the stagnation of the 1970s.

103. Answer from Jacques Delors and Cardoso E. Cunha to the Written Question from M. Metten, Nos. 833/89 and 834/89, O.J. (C 117) (Jan. 24, 1991).

104. Rules of Procedure of the Bundestag, Annex II, Doc. No. DO JUR% PR001 (June 1991).

105. Telephone Interview with Marc Galle of Belgium, member of the Socialist Party, the *Rapporteur* in charge of the regulation on lobbyists (Feb. 27, 1992).

registration, or compliance with a code of conduct, namely, how to define a lobbyist. Rules restricting the access of registered lobbyists to the Parliament will be extremely difficult to enforce because of this definitional problem.[106] However, some MEPs felt that it would benefit the Parliament "to know exactly which lobbyists are representing which interests."[107] The definition of the term "representation of interests" had been suggested in one response to the questionnaire. "It could include personal appearances in the parliamentary buildings, meeting in other places, invitations to dinner or other events. Also included could be a range of ways of communicating, including phone, fax, letters, video and special presentations."[108]

The following answers to questions three, four, five, and six, were given almost unanimously by all the groups in attendance at the hearing. There was no vigorous opposition to these four questions.

Question 3. *What should be the accreditation procedure? Should it be confined to listing the approved representatives in a register, or should a specific accreditation unit be set up within the framework of the Committee on the Rules and Procedure with the task of verifying fulfillment of the conditions required for registration?*

It was recommended that the accreditation be regulated by a specific accreditation unit set up within the framework of the Committee on the Rules and Procedure. This unit would define the conditions for the registration of representatives and determine whether or not representatives fulfill these conditions.[109]

The proposed accreditation unit would be responsible for the publication of approved representatives in a register which would be updated and reissued every six months. This register would list the names and addresses of approved representatives, the names of

106. *Id.*

107. Interview with Paul Benhaoum, *Chargé de Mission de Mr. J.L. Borloo*, Mayor of Valenciennes City, in Valenciennes, France (Oct. 7, 1991).

108. Answer by Fred Tuckman, Doc. EN/CM/118787, PE 154.303 (Dec. 5, 1991).

109. Telephone Interview with Philippe Vennejol, *supra* note 95.

their clients and their places of business, and the issues or matters upon which their lobbying activity is taking place. The accreditation unit must ensure that the register clearly states who is lobbying the European Parliament, and on what issue.[110]

An accreditation system based on the following criteria has also been proposed:[111] (1) A requirement for MEPs to declare all assistants and administrative staff employed by them or using their facilities. The staff will be registered, and the register made available for public inspection; (2) considerable tightening of security at entrances to, and within, the European Parliament buildings to ensure that only those with an appropriate pass use European Parliament facilities is the most important requirement; (3) the panel should be drawn exclusively from EC institutions with two representatives each from the Parliament, the Commission, and the Council Bureau.[112]

Others present on January 22 and 23, 1992, however, spoke in favor of a minimum of formality, a mere register of lobbyists rather that the creation of an investigatory committee.[113]

Question 4. *As to the effects of registration: Should the benefits be limited to obtaining a laissez-passer for the Institutions' premises? Should the representatives be expected in return to fulfill certain requirements, e.g., to submit a regular statement of the activities?*

If the registration of representatives to the European Parliament is indispensable those persons should have access to the premises of the European Parliament on the basis of a permanent *carte d'acces.*[114] The Public Policy Europe Group added in relation to a declaration of activities, a serious concern of any possible requirement to declare clients.[115] A number of firms have clients who insist on their advisers signing confidential nondisclosure

110. *Id.*
111. Public Policy Europe Group (a lobbyist group).
112. *Id.*
113. *Id.*
114. Interview with Paul Benhaoum, *supra* note 107.
115. Answer by Public Policy Europe Group, Doc. EN/CN/118767, PE 156.303 (Dec. 5, 1991).

agreements, which prohibit them from disclosing to outsiders any details of their relationships with those organizations.[116] There is concern that a requirement to list clients could cause some organizations to end the relationships with their advisers. Public Policy Europe Group mentioned that "some organizations that are already considering the drafting of bogus contracts under which political consulting services would be provided by them through a third party, such as their advertising agents, in order to avoid explicit disclosure."[117]

Question 5. *Should the different types of activities carried out by the representatives be defined on a limitative basis?*

Most of the answers focused on the general social and ethical principles of due respect, pertinence, courtesy, and competence.[118] There is no need, indeed it would be democratically incorrect, to restrict lobbying activities. MEPs and others can always choose not to receive representatives, or to reject the advice of those they do receive.[119]

Question 6. *Should consideration be given to drawing up a code of conduct for the members and officials having contacts with the special interest representatives?*

It was recommended by most of the questionnaire respondents that the Committee on Rules and Procedure give consideration to drawing up a code of conduct for MEPs, their staff, and officials of the Parliament that have contacts with the accredited representatives of present interests. It was recommended that the Committee pay particular attention to the following issues:[120] (1) Ensure that MEPs orally declare their financial, professional, and other relevant interests, before speaking in Parliament or in one of its bodies; (2) MEPs' staff and any family members who may have

116. *Id.*
117. *Id.*
118. Answer by *Federation Bancaire de la Communeaum Européenne.*
119. *Id.*
120. External Affairs and Communications (ICL) and *Conseil Europeen Des Fabricants de Sucre* (lobbyist groups).

access to the European Parliament and other EC institutions be permitted use of offices, phones, and facilities, and have access to papers, only in a privileged manner.[121]

It was mentioned by the National Council for Voluntary Organization in London,[122] in August 1991, that a distinction must be made between a code of conduct for profit making, and nonprofit making bodies. A code should be drawn up in conjunction with representatives of lobbyists.

III. CONCLUSION

Many Europeans who have not directly observed the EC's policy-making institutions in operation will steadfastly deny that lobbying occurs in Brussels or in the national capitals of the EC member states. In contrast to the U.S. Congress, few of the national parliaments of the EC member states regulate lobby groups' activities. Only the Bundestag has a complete set of rules. The United Kingdom, France, and Denmark have only sketchy regulations.

The European Parliament under great pressure from lobbyists recognizes the need to exchange information with these outside sources but with some regulation on lobby groups' access to the European Parliament's facilities, data bases, and working groups.[123] Lobbying is no longer a uniquely American phenomenon. There is a European style of lobbying. Its style is derived partly from the EC's complex institutional structure, and partly from the distinctive culture of legislative advocacy in Europe.[124] "Many non-EEC companies, trade associations and even governments refuse to believe that Community Institutions can be lobbied successfully."[125]

121. *Id.*
122. The Voluntary Sector Parliamentary Workers Group represents the interests of lobbyists and others from the social economy working with politicians domestically and internationally. T[illegible]
123. *See* James N. Gardner, *Lobbying, European Style*, EUROPE MAGAZINE, Nov. 1991, at 30.
124. *Id.*
125. *Id.*

In actuality, members of the European Parliament and lobbyists depend on each other for their survival. This interdependence can give rise to practical problems. For this reason, the Parliament has commissioned a study from Belgium Socialist MEP, Marc Galle, on the question of regulating lobbyists. At the public hearing on regulating lobbyist activities of January 1992 held by the Parliamentary Committee on Rules and Procedure, there was no significant opposition to a potential lobbyist registration requirement so long as no complicated procedures were involved.[126]

Some of those present at the hearing spoke in favor of the creation of an independent organization for professional lobbyists with an accreditation committee. Marc Galle favored locating this organization outside the Parliament. He also suggested a new press center in Strasbourg, as a place where MEPs and lobbyists could obtain information without having to find their way through the maze of corridors in the Parliament building. Another socialist MEP, Alman Metten of the Netherlands, protested against the lack of organization and of the exponential growth of lobbyist groups in Brussels.

A more serious concern is that many Parliament employees also work for lobbyist groups, and it is becoming difficult to tell "who is working for whom."[127] "If they are European, that's alright. If they are foreigners . . . that's a good question, we did not envisage this issue."[128] At the end of March 1992, Mr. Galle and Philippe Ventujol would like to see, at the very least, a definitive draft of a lobbying regulation. "If everything works out with the Commission, we may see the end of the tunnel in May, 1992."[129]

Every mendicant must be aware of this new concern. Those who are most knowledgeable about the act of political persuasion

126. Telephone Interview with Marc Galle, *supra* note 105.
127. Interview with Olivier Bobille, *supra* note 43.
128. Telephone Interview with Philippe Ventujol, *supra* note 93. Mr. Ventujol is working on the lobbyist regulation at the European Parliament. Mr. Ventujol added that the first priority will be given to a European group of interest before any foreign agents of influence, but if a lobbyist from a foreign country wants to prowl at the European Parliament he can do it if he fulfills the requirements.
129. *Id.*

must know that prowling the European Parliament has become a new profession *En Vogue*. "In comparing lobbyists to predators, lobbyists are not painted as badly. But if I compare the lobbyists to geishas, I am apparently referring to their skill at entertaining rich and powerful men, creating an atmosphere that puts those men at ease! . . . After this research, I would probably lean to the latter."[130]

130. Interviews with Judith B. Wolen, David C. Knight, and Denny Samuel, *supra* note 69.

Book Reviews

EFFECTIVE LOBBYING IN THE EUROPEAN COMMUNITY. By JAMES GARDNER, Kluwer Law & Taxation Publishers, 1991.

Reviewed by Michaela Platzer*

The Europe 1992 program has brought a whole new army of workers to Brussels: the lobbyists. Hundreds of legislative measures are winding their way through the European Community's (EC) legislative maze, with bottom line implications for U.S. businesses operating and/or exporting to the lucrative $5 trillion EC market. Once the EC single market program is complete, U.S. manufacturers will have to comply with thousands of European product standards, Europe-wide environmental regulations, explicit labor relations requirements, and hundreds of other measures governing everything from the EC's financial services market to telecommunications. Consequently, lobbying the EC's vast legislative apparatus is imperative for American businesses. The voice of U.S. business must be heard as new legislative proposals are being formulated, not after they have received final EC approval. An estimated 3000 lobbyists work in Brussels. Additionally, several thousand lobbyists operate at the national level within each EC country. Large U.S. law firms, from Jones Day Reavis & Pogue to Squires Sanders and Dempsey, the "big six" accounting firms, public relations groups such as Burson Marsteller and Hill & Knowlton, and representatives of American states from California to Virginia, are all active players in lobbying the legislative institutions of the European Community. Groups need not necessarily be based in Brussels to have their voices heard. Business organizations such as the U.S. Chamber of Commerce based in Washington, D.C., with 185,000 members, have made European Community decision-makers aware of their

*Director, Europe 1992, U.S. Chamber of Commerce.

NOTE

FEDERAL LOBBYING DISCLOSURE REFORM LEGISLATION

GUY PAUL LAND*

In the wake of Watergate and recent congressional scandals, Congress has focused on lobbying disclosure reform. The proposals now before Congress are designed to provide greater accountability in the political process and to open government to increased public oversight and review. Under the proposals suggested, numerous lobbyists in the nation's capital will be required to disclose their affiliations and efforts.

In this Note, Mr. Land examines the strengths and weaknesses of disclosure requirements now before Congress. He focuses particularly on the constitutional arguments surrounding "direct" and "grass-roots" lobbying and concludes that lobbying disclosure legislation is both constitutional and necessary.

Introduction

Spurred by the exposure of government abuses during the Watergate scandals and alarmed by the growing dissatisfaction of the American people with the processes of government, Congress has turned its attention toward making the political process more accountable and more open.[1] Lobbying disclosure reform, first introduced in 1970,[2] attracted considerable discussion in the Ninety-

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The author expresses his appreciation to Robert Peak, Harvard Law School Class of 1979, and Steven Steinbach, Yale Law School Class of 1981, for their insightful criticisms of earlier drafts of this Note.

1 Legislation in this area includes the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified in scattered sections of 5, 39 U.S.C.); The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified in scattered sections of 2, 18, 47 U.S.C.), *as amended by* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976) (codified in scattered sections of 2, 26 U.S.C.), and Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980) (to be codified in scattered sections of 2, 18, 26 U.S.C.) [hereinafter cited as Campaign Act]; the Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974) (amending 5 U.S.C. § 552 (1970)); the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified in scattered sections of 2, 5, 18, 28, 39 U.S.C.). *See also Lobby Reform Act of 1977: Hearings on S. 1785 and S. 2026 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 1st & 2d Sess. 1-2 (1977-1978) (statement of Sen. Ribicoff) [hereinafter cited as *1978 Senate Hearings*]; *id.* at 6 (joint statement of Sens. Kennedy, Clark, and Stafford).

2 The House held hearings on lobbying regulation in 1970 and 1971, and the Committee

fourth and Ninety-fifth Congresses[2] and is a key political process reform issue facing the Ninety-sixth Congress.[4] The proposals currently before Congress seek greater accountability from the numerous lobbyists who flock to the nation's capital to influence government decisions or who encourage others to affect policy determinations. Proponents of reform decry the weaknesses in the current law, while opponents of the pending reform measures question the constitutionality and practicality of the legislation.

Most parties to the debate acknowledge that lobbyists frequently perform useful functions. They recognize that in a representative democracy the right of the individual to seek to influence government decisionmaking is a fundamental constitutional safeguard.[5] Furthermore, lobbyists perform valuable services for members of Congress and the federal agencies. The task of keeping abreast of the thousands of bills introduced in Congress each session imposes a substantial burden on individual members of Congress. Lobbyists help members of Congress assess the impact

on Standards of Official Conduct reported out a Lobbying Activities Disclosure Act in 1971, but no measure ever received the approval of the full House in the Ninety-first or Ninety-second Congress. *See Lobbying: Hearings on H.R. 5259 Before the House Comm. on Standards of Official Conduct*, 92d Cong., 1st Sess. (1971); *Regulation of Lobbying: Hearings on H.R. 1031 Before the House Comm. on Standards of Official Conduct*, 91st Cong., 2d Sess. (1970).

3 *See, e.g., 1978 Senate Hearings, supra* note 1; *Lobbying and Related Activities: Hearings on H.R. 1180, H.R. 5578, and H.R. 5795 Before the Subcomm. on Ad. Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *1977 House Hearings*]; *Lobbying Reform Legislation: Hearings on S. 774, S. 815, S. 2068, S. 2167, and S. 2477 Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 Senate Hearings*]; *Public Disclosure of Lobbying Act: Hearings on H.R. 15 Before the Subcomm. on Ad. Law and Government Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 House Hearings*]; *Lobbying — Efforts to Influence Governmental Actions: Hearings Before the House Comm. on Standards of Official Conduct*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 Standards of Official Conduct Hearings*]. *See also* H.R. REP. No. 95-1003, 95th Cong., 2d Sess. (1978) [hereinafter cited as H.R. REP. No. 95-1003]; S. REP. No. 94-763, 94th Cong., 2d Sess. (1976) [hereinafter cited as S. REP. No. 94-763]; H.R. REP. No. 94-1474 (part 1), 94th Cong., 2d Sess. (1976) [hereinafter cited as H.R. REP. No. 94-1474].

4 *See* H.R. REP. No. 96-590, 96th Cong., 1st Sess. (1979) [hereinafter cited as H.R. REP. No. 96-590]. For a brief discussion of the difficulties confronting the Ninety-sixth Congress, *see Players on Lobby Disclosure Bill Lining up for Rematch*, 37 CONG. Q. WEEKLY REP. 188 (1979).

5 *E.g., 1975 Senate Hearings, supra* note 3, at 18 (joint statement of Sens. Stafford and Kennedy); *id.* at 321 (statement of Rep. Railsback); *1977 House Hearings, supra* note 3, at 159 (statement on behalf of A.C.L.U.).

of particular proposals on the member's own constituents. By researching complex new areas of proposed legislation, issuing condensed legislative summaries, providing specialized information, and advising legislators and administrators on the meaning and impact of legislation, lobbyists supply an important information service to government decisionmakers.[6]

Yet lobbyists also create possible "dangers to the public interest and to the integrity of the law-making process."[7] Relying upon the information and expertise which well-funded lobbyists can command, legislators may receive and consider only one side of a complex issue. Because the official lacks adequate resources for independent investigation, the lobbyist's recommendations, which are the product of detailed examination, may become conclusive and may replace a full-scale, neutral investigation. In addition, legislators may be swayed by the weight of a lobbying effort rather than by the weight of the argument. With readily available resources to stimulate letter-writing campaigns, lobbyists may cause a congressman to be showered with messages on a piece of legislation. These letters, when combined with active work by professional lobbyists in Washington, may persuade the congressman not to examine the merits of the issue for himself.[8]

Another danger arises when lobbying goes beyond the mere exchange of information and expression of opinion. Interested

6 *See, e.g., 1975 Senate Hearings, supra* note 3, at 392 (testimony of Richard D. Godown, Gen. Counsel, Nat'l Ass'n Mfrs.); *id.* at 18 (joint statement of Sens. Stafford and Kennedy); *id.* at 106 (statement on behalf of Common Cause); *1975 Standards of Official Conduct Hearings, supra* note 3, at 159-60 (testimony of Rep. Bennett); *id.* at 165 (testimony of Rep. Koch). *See also A Model New York Lobbying Statute*, 4 COLUM. J.L. & SOC. PROBLEMS 69 (1968).

For further discussion of lobbying, *see generally* E. LANE, LOBBYING AND THE LAW (1963); CONG. Q. SERVICE, THE WASHINGTON LOBBY (1971); Smith, *Regulating National and State Legislative Lobbying*, 43 U. DET. L.J. 663 (1966); H. EASTMAN, LOBBYING: A CONSTITUTIONALLY PROTECTED RIGHT (1977).

The representative role of the lobbyist assumes great importance in most models of interest group politics and has received considerable attention from political scientists. *See, e.g.*, D. TRUMAN, THE GOVERNMENTAL PROCESS (2d ed. 1971); V. O. KEY, POLITICS, PARTIES AND PRESSURE GROUPS (1964); R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1963). For a strong critique of the interest group model, *see* T. LOWI, THE END OF LIBERALISM (1969).

7 *1977 House Hearings, supra* note 3, at 134 (statement on behalf of Common Cause).

8 *See, e.g., id.; 1975 Senate Hearings, supra* note 3, at 107 (statement on behalf of Common Cause); *1975 Standards of Official Conduct Hearings, supra* note 3, at 204-06 (statement of Rep. Winn); *1978 Senate Hearings, supra* note 1, at 1 (statement of Sen. Ribicoff).

groups may acquire inordinate levels of influence on major public issues through the skillful manipulation of expertise, inside information, secret contacts, and personal pressures. Members of Congress and the executive branch may lose sight of the public interest amid the continuous barrage of requests from special interests seeking special treatment through privileged contacts.[9] This surreptitious "influence peddling" on behalf of rich and powerful interests also fuels a public cynicism about the responsiveness of government.[10] The American people have become suspicious of wealthy individuals and powerful interest groups that seem to have acquired special access to Congress and federal agencies and to have usurped some control over the government from the hands of the ordinary citizen.

Proposed lobbying disclosure reform must recognize the importance of the lobbyist's role in providing information and assessing the interests of a representative's constituency. The legislation must be intended neither to discourage legitimate lobbying activities nor to limit their scope. It must, however, confront the inherent dangers which lobbying poses to the political process and seek to minimize these risks by providing for broad disclosure of significant lobbying activities and of the financial base for the lobbying effort.

Lobbying efforts usually fall into one of two categories. The first, "direct" lobbying, consists of direct contacts, either in person or through some other form of communication, by an interested party with a government official. The second, so-called "lobbying solicitation" or "grass-roots" lobbying, typically takes the form of a solicitation from an interested organization that encourages a third party to communicate with a decisionmaker. Each type of lobbying presents its own set of dangers, necessitating a different legislative approach. To be comprehensive, however, lobbying reform legislation must address the issues raised by both types.

9 *See, e.g.*, *1975 Senate Hearings*, *supra* note 3, at 19 (joint statement of Sens. Stafford and Kennedy). *See also* Note, *Public Disclosure of Lobbyists' Activities*, 38 FORDHAM L. REV. 524 (1970).

10 *See, e.g.*, *1975 Senate Hearings*, *supra* note 3, at 19 (joint statement of Sens. Stafford and Kennedy); *1975 Standards of Official Conduct Hearings*, *supra* note 3, at 304 (statement of Rep. Winn).

This Note will discuss the major decisions facing Congress in drafting and considering lobbying disclosure legislation. Part I will examine the major weaknesses in the current federal lobbying regulation laws under the Federal Regulation of Lobbying Act of 1946. Part II will consider the constitutional and policy issues raised by the proposed reforms of disclosure of direct lobbying activities. Part III will address the unique problems created by the proposed disclosure of lobbying solicitation. Finally, Part IV will examine the disclosure and enforcement provisions of the latest proposals.

I. THE STATUTORY BACKGROUND

A. *The Federal Regulation of Lobbying Act of 1946*

Lobbying of Congress is currently subject to the Federal Regulation of Lobbying Act,[11] passed as Title III of the Legislative Reorganization Act of 1946.[12] The only federal statute purporting to regulate lobbyists, the Act applies to any person who "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" or to influence the passage or defeat of any legislation before the Congress.[13] Each person qualifying under the Act must register and file quarterly reports with the Secretary of the Senate and the Clerk of the House. These reports must state the amount of money received and expended by the lobbyist during the preceding quarter, the recipients and purposes of those funds, the lobbyist's publications, and the legislation for which lobbying occurred.[14] These provisions do not apply to persons who appear before a committee of Congress to state a position on legislation or to public officials acting in their official capacities.[15]

Soon after its passage, the Act was upheld by the Supreme Court in *United States v. Harriss*,[16] despite a resolute constitutional challenge. In order to validate the statute, the Court found

11 2 U.S.C. §§ 261-270 (1976).

12 Act of Aug. 2, 1946, ch. 753, 60 Stat. 812.

13 2 U.S.C. § 266 (1976).

14 *Id.* § 267.

15 *Id.*

16 347 U.S. 612 (1954).

it necessary to construe the Act narrowly. The Court limited the operation of the statute in three ways. First, the Court stated that in order to qualify as a lobbyist under the law, a person must have solicited, collected, or received contributions for the purpose of influencing legislation.[17] *Harriss* thus exempts from coverage those lobbyists who spend their own money and do not collect contributions.[18] Second, the Court stated that the Act applies only to those individuals and contributions whose "principal purpose" is to influence legislation.[19] Citing the legislative history of the Act, the Court held that the reporting requirements do not apply to "those contributions and persons having only an 'incidental' purpose of influencing legislation."[20] Third, the Court construed the language of the Act to refer to " 'lobbying in its commonly accepted sense' — to direct communications with members of Congress on pending or proposed federal legislation."[21] Under the common interpretation of this portion of *Harriss*, the statute does not cover lobbying solicitation.[22]

B. *Weaknesses in the Current Law*

The present Act, by its construction in *Harriss*, fails in three ways to remove the dangers to the political system posed by lobbying. First, its coverage of direct lobbying activities is inadequate.

17 *Id.* at 619-20.

18 *See 1977 House Hearings*, *supra* note 3, at 187 (statement of Deputy Att'y Gen. Flaherty).

19 347 U.S. at 621-23.

20 *Id.* at 622.

21 *Id.* at 620 (quoting United States v. Rumely, 345 U.S. 41, 47 (1953)).

22 Since *Harriss*, lobbyists and those charged with the enforcement of the Act have consistently read the quoted language as a prohibition on the regulation of lobbying solicitation. *See, e.g., 1977 House Hearings*, *supra* note 3, at 261-62 (statement on behalf of A.C.L.U.). Upon closer scrutiny, however, the issue does not appear to be so straightforward. Indeed, in the sentences immediately following that quoted in the text accompanying note 21 *supra*, the Court asserts:

> The legislative history of the Act makes clear that, at the very least, Congress sought disclosure of such direct pressure, exerted by the lobbyists themselves or through their hirelings or *through an artificially stimulated letter campaign*. It is likewise clear that Congress would have intended the Act to operate on this narrower basis even if a broader application to organizations seeking to propagandize the general public were not permissible.

347 U.S. at 620-21 (footnotes omitted) (emphasis added). In a footnote, the Court cites the Senate and House reports accompanying the bill as authority for the proposition that Congress sought to reach lobbyists who "initiate propaganda from all over the country in the form of letters and telegrams." *Id.* at 621 n.10. In fact, the challengers in *Harriss* were

Second, by common interpretation it leaves untouched all forms of lobbying solicitation. Third, the disclosure and enforcement provisions of the Act are weak and ineffective.

The primary weakness in the law's treatment of direct lobbying lies in the Court's interpretation in *Harriss* that the Act applies only to persons whose "principal purpose" is lobbying.[23] Many trade associations, labor unions, professional organizations, consumer groups, and Washington lawyers can thus avoid registering under the Act, because lobbying is not their principal purpose.[24] Much of the effective lobbying, however, is done by precisely these groups. The American Telephone and Telegraph Company (AT&T), for example, reportedly spent over $1 million in one quarter of 1976 in lobbying for a communications bill which would have enhanced AT&T's dominance in the field. Yet none of these lobbying expenses was reported under the present lobbying act, presumably because lobbying is not AT&T's principal purpose.[25]

The Act's second shortcoming is that the common construction of *Harriss* leaves the whole range of lobbying solicitation untouched.[26] Thus, even if an organization attempts to influence

charged with, *inter alia*, failing to report expenditures on a campaign to induce various interested groups and individuals to communicate by letter with members of Congress. *Id.* at 615. At no point does the Court explicitly rule unconstitutional the disclosure of expenditures for letter-writing campaigns. Rather, the distinction the Court seems to draw is one between campaigns designed to produce "direct pressure" and those whose object is "to propagandize the general public." *Id.* at 621.

Justice Douglas, in his dissent, also recognizes that the majority makes this distinction, although he views the statute as unconstitutionally vague and feels that the majority's distinction cannot be found in the statute itself. *Id.* at 628-33. Douglas provides examples which demonstrate the distinction drawn by the majority: "a manufacturers' association which runs ads in newspapers for a sales tax" is not covered, while a "business, labor, farm, religion, social, racial or other group which raises money to contact people with the request that they write their Congressman to get a law repealed or modified" is covered. *Id.* at 630. Thus Douglas also interprets the majority opinion to uphold the coverage of letter-writing campaigns, the classic form of lobbying solicitation. However, because of the almost unanimous view to the contrary, this Note will proceed on the assumption that the 1946 Act does not reach lobbying solicitation.

23 347 U.S. at 621-63. *See* text accompanying notes 37 to 39 *infra*.

24 *See, e.g., 1978 Senate Hearings*, *supra* note 1, at 7-8 (joint statement of Sens. Kennedy, Clark and Stafford).

25 123 CONG. REC. S11109 (daily ed. June 29, 1977) (joint statement of Sens. Kennedy, Clark, and Stafford). Likewise, the El Paso Natural Gas Company reportedly paid a Washington, D.C., law firm $353,113 to lobby for a bill concerning divestiture of a pipeline firm. El Paso did not file a lobby report with the Congress for this period, and the law firm reported receiving only $6,227 as compensation for lobbying expenses from El Paso. *1977 House Hearings*, *supra* note 3, at 127-28 (statement on behalf of Common Cause).

26 *See* note 22 *supra*.

legislation by conducting an expensive media or mailing campaign to urge others to contact congressmen, its activities fall outside the Act's reporting requirements. Congressmen acknowledge the widespread use of letter-writing campaigns and congressional observers report that lobbying solicitation, the "growth area of lobbying,"[27] is fast becoming the most important method for influencing legislation.[28] According to a number of congressmen, such grass-roots efforts now frequently overpower more traditional direct contacts in their effectiveness in shaping legislation.[29]

In 1974, for example, the American Trial Lawyers Association reportedly created an elaborate lobbying system to thwart no-fault automobile insurance by arranging for Western Union mailgrams opposing the legislation to be sent automatically to key representatives. Association members needed only to call Western Union offices around the country and to give the names of friends and associates. For each name given, ten messages were sent to Capitol Hill. The Association reportedly also arranged for Western Union's sales force to encourage local trial lawyers' associations and other interested groups to use the mailgram service. The result was a deluge of messages to key congressional offices protesting no-fault insurance, all seemingly sent individually by concerned constituents. Despite the sizable expenditure and considerable influence of this activity, the Association's conduct stands beyond the scope of the present law.[30]

A probable reason for the considerable increase in the use of lobbying solicitation lies in the very fact that these efforts are not covered by current legislation. A growing emphasis on the

27 Mohr, *Business Using Grass-Roots Lobby*, N.Y. Times, April 17, 1978, at A1, col. 4.

28 *See, id.*; Mohr, *Growth of Grass-Roots Lobbying Draws Congressional Attention*, N.Y. Times, April 21, 1978, at D5, col. 1. Representative Railsback gives an example of one organization's preference for lobbying solicitations: "Very seldom have I had somebody from the National Rifle Association come by and lobby me, but boy, if I haven't got a pile of mail from people in my home district all very similar in language. In other words, [it] has probably been motivated by an indirect mail campaign." *1977 House Hearings*, *supra* note 3, at 67.

29 *See* Mohr, *supra* note 27.

30 *1975 Senate Hearings*, *supra* note 3, 44-45 (statement on behalf of Common Cause). Other examples of large scale lobbying solicitations are plentiful. In 1977, Mobil Oil ran an advertisement about President's Carter's energy package "in nearly every Congressional district" which urged readers to "write your Congressman and Senators now, while there's still time. . . . Write on your own stationery, or on the coupons below." Mobil Oil does not register as a lobbying organization. COMMON CAUSE, THE POWER PERSUADERS 29-30 (1978).

disclosure of direct lobbying has subjected the efforts of prominent interest groups to increased public exposure. At the same time, limitations on campaign contributions[31] threaten to curtail the influence of these groups. The growth of lobbying solicitation may reflect the desire of well-financed interest groups to continue to have a major impact upon decisionmaking without being subject to the possibly counterproductive effects produced by disclosure and publicity. As one area of the political process is made more open and accountable through disclosure, interest groups have turned their energy to exploiting the remaining areas where secrecy prevents public observation and accountability. The failure of the current registration Act to cover lobbying solicitations affords these groups ample opportunity to influence government decisions without public scrutiny and thereby perpetuates the evils of undisclosed lobbying.

In addition to failing to cover major areas of lobbying activities, the present Act's third inadequacy is its weak enforcement of the disclosure requirements in those areas that are covered.[32] The Act assigns the major responsibility for its enforcement to the Clerk of the House of Representatives and the Secretary of the Senate. Lobbyists must register and file quarterly reports with the Clerk and Secretary, who in turn print this information in the Congressional Record.[33] But neither the Clerk nor the Secretary has been authorized to investigate potential violations of the Act's registration, recordkeeping, or reporting provisions. The Clerk and Secretary lack any specific power or responsibility to ask the

31 The Campaign Act, *supra* note 1, limits political contributions by groups or individuals to candidates for federal office to $1000 and limits contributions by a political committee to $5000 to any single candidate, 2 U.S.C. § 441a (a). The Act imposes an overall annual limitation of $25,000 by an individual contributor. *Id.* This Act also requires detailed disclosure of political contributions. 2 U.S.C. § 434.

32 *See 1977 House Hearings*, *supra* note 3, at 187 (statement of Deputy Att'y Gen. Flaherty); 123 CONG. REC. S11109 (daily ed. June 29, 1977) (joint statement of Sens. Kennedy, Clark, and Stafford).

33 2 U.S.C. § 267 (1976). *See 1975 Standards of Official Conduct Hearings*, *supra* note 3, at 177 (statement of Deputy Comptroller General Keller), at 206-08 (statement of Edmund Henshaw, Clerk of the House of Representatives). While the Act imposes recordkeeping requirements on lobbyists, the Clerk has no right of access to these records. General Accounting Office, The Federal Regulation of Lobbying Act — Difficulties in Enforcement and Administration (Apr. 2, 1975), *reprinted in 1975 Senate Hearings*, *supra* note 3, at 185 [hereinafter cited as GAO Report].

Justice Department to institute enforcement proceedings against violators.

In its application to lobbying activities, its disclosure requirements, and its enforcement procedures, then, the current Act fails to cover substantial lobbying activity. It allows that activity, with its often deleterious effects upon the process of government, to continue unrecorded and undisclosed. A comprehensive and effective reform of the present law must, therefore, extend the application of the disclosure requirements and must strengthen the hand of those charged with enforcement.

II. Lobbying Reform Legislation: Direct Lobbying

A. *Scope of the Legislation*

Since 1975, House and Senate proponents of lobbying reform have struggled to enact legislation that would greatly expand the scope of the requirements of the 1946 Act.[34] The proposed legislation would expand the applicability of lobbying disclosure in two ways. First, the proposals would eliminate the principal purpose

34 In 1976, both the House and the Senate passed lobbying disclosure bills, but time pressures and disagreements prevented the enactment of legislation. *See Time Runs Out for Lobby Revision Bill*, 34 Cong. Q. Weekly Rep. 2683 (1976). For a general discussion of the legislative developments during the Ninety-fourth Congress, *see Bill Revising Lobby Law Ordered*, 34 Cong. Q. Weekly Rep. 715-16 (1976); *House Judiciary Slowly Finishing its Version of Lobby Registration Bill*, 34 Cong. Q. Weekly Rep. 2119-20 (1976); *Lobbying Revision Bill*, 34 Cong. Q. Weekly Rep. 2501 (1976); *O'Neill Sees No Problem Clearing Lobbying Bill Before Congress Adjourns*, 34 Cong. Q. Weekly Rep. 2675 (1976).

The version passed by the Senate, S. 2477, 94th Cong., 2d Sess., 122 Cong. Rec. S9365 (daily ed. June 15, 1976) (text as passed by the Senate) [hereinafter cited as S. 2477], was introduced by Senators Kennedy and Stafford, and provided registration and reporting requirements for organizations that in any quarter made at least 13 lobbying contacts or spent at least $250 on direct lobbying or $5000 on lobbying solicitation. In contrast, H.R. 15, 94th Cong., 2d Sess. (1976), *reprinted in* H. Rep. No. 94-1474, *supra* note 3, at 1 (text as reported out by the Judiciary Committee) [hereinafter cited as H.R. 15], the Railsback-Kastenmeier bill passed by the House in modified form, applied to organizations which in any quarter spent $1250 to retain outside lobbyists or employed one person who spent at least 20% of his time in lobbying activities.

Early in the first session of the Ninety-fifth Congress, supporters of disclosure reform in both Houses introduced bills similar to those passed in 1976. Peter Rodino, Chairman of the House Judiciary Committee, reintroduced H.R. 15 as H.R. 1180, 95th Cong., 1st Sess. (1977), *reprinted in 1977 House Hearings*, *supra* note 3, at 2 (text as introduced by Rep. Rodino) [hereinafter cited as H.R. 1180]. After several rounds of hearings and mark-up sessions, H.R. 1180 was submitted to the full House as H.R. 8494, 95th Cong., 2d Sess. (1978), *reprinted in* H. Rep. No. 95-1003, *supra* note 3, at 1 (text as reported out by Judiciary Committee) [hereinafter cited as H.R. 8494]. H.R. 8494 retained most of the elements of the Railsback-Kastenmeier proposal, but it did not extend to lobbying solicitation. A series of amendments on the floor further weakened the bill by raising the threshold level and enlarging the exemptions. The bill as amended won full House approval in April 1978. 124 Cong. Rec. H3269, 95th Cong., 2d Sess. (daily ed. April 26, 1978).

test and would impose disclosure requirements upon any organization that exceeded certain thresholds of direct lobbying activity.[35] Second, the proposals would set relatively low thresholds.[36]

In addition to H.R. 1180 and H.R. 8494, several other lobbying reform bills were introduced in the House in the Ninety-fifth Congress, but none of these was voted out of committee. Of importance to the discussion in this Note are the following: H.R. 5795, 95th Cong., 1st Sess. (1977), *reprinted in 1977 House Hearings*, *supra* note 3, at 27 (text as introduced by Reps. Railsback and Kastenmeier) [hereinafter cited as H.R. 5795]; H.R. 5578, 95th Cong., 1st Sess. (1977), *reprinted in 1977 House Hearings*, *supra* note 3, at 51 (text as introduced by Rep. Edwards) [hereinafter cited as H.R. 5578]; H.R. 6202, 95th Cong., 1st Sess. (1977), *reprinted in 1977 House Hearings*, *supra* note 3, at 511 (text as introduced by Rep. Kindness) [hereinafter cited as H.R. 6202].

In the Senate, Senators Kennedy and Stafford made several significant changes in S. 2477 before reintroducing it as S. 1785, 95th Cong., 1st Sess. (1977), 123 Cong. Rec. S11109 (daily ed. June 29, 1977) (text as introduced by Sens. Kennedy and Stafford) [hereinafter cited as S. 1785]. In addition, Senators Mathias and Muskie sponsored S. 2026, 95th Cong., 1st Sess. (1977), *reprinted in 1978 Senate Hearings*, *supra* note 1, at 363 (text as introduced by Sens. Mathias and Muskie) [hereinafter cited as S. 2026]. The Governmental Affairs Committee held hearings in both sessions but was unable to report out a clean bill. For a discussion of the history of the proposals during the Ninety-fifth Congress, *see Committee Approves Lobby Disclosure Bill*, 36 Cong. Q. Weekly Rep. 530-31 (1978); *Outlook Dim for Lobby Bill Tougher than the One House Is To Consider*, 36 Cong. Q. Weekly Rep. 620 (1978); *Lobby Disclosure Bill Near Death*, 36 Cong. Q. Weekly Rep. 1918 (1978).

Action continues to be stronger in the House than in the Senate in the Ninety-sixth Congress. Congressman Rodino has introduced H.R. 81, 96th Cong., 1st Sess. (1979), which is identical to the committee version of H.R. 8494. After additional hearings and mark-up, a clean bill, H.R. 4395, 96th Cong., 1st Sess. (1979), *reprinted in* H.R. Rep. No. 96-590, *supra* note 4, at 1-10 (text as reported out by Judiciary Committee) [hereinafter cited as H.R. 4395], was reported out by the House Judiciary Committee. H.R. 4395 adopts thresholds similar to H.R. 81 and does not extend to lobbying solicitation. Floor action is currently pending, 37 Cong. Q. Weekly Rep. 2883 (1979). The Senate has been slower to act, preferring to let the House take the lead. Senator Lawton Chiles has introduced S. 1564, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. S10466 (daily ed. July 24, 1979) (text as introduced by Sen. Chiles) [hereinafter cited as S. 1564], which is procedurally similar to H.R. 4395 but which sets significantly lower expenditure levels for triggering the disclosure requirements. After a series of hearings before the Government Operations Committee, Chiles introduced a new bill, S.2160, 96th Cong., 1st Sess. (1979). *See Players on Lobbying Disclosure Bill Lining Up for Rematch*, 37 Cong. Q. Weekly Rep. 188 (1979); *Favorable Action on Lobby Disclosure Appears to be More Likely This Session*, 37 Cong. Q. Weekly Rep. 818 (1979); *House Subcommittee Votes Lobby Disclosure Measure*, 37 Cong. Q. Weekly Rep. 1134 (1979).

35 *See, e.g.*, S. 1564 § 4; H.R. 4395 § 3.

36 For example, H.R. 4395 applies to organizations that either (1) spend more than $5,000 per quarter in retaining a lobbyist and in preparing lobbying communications or (2) employ at least one individual who spends at least part of 13 days per quarter in making lobbying communications and spends more than $5,000 on lobbying communications. H.R. 4395 § 3(a). H.R. 8494 had used $2500 rather than $5000 as the expenditure minimum. H.R. 8494 § 3(a). S. 1564 sets considerably lower thresholds, requiring registration and reporting by any organization which spends in excess of $500 per quarter on lobbying activities. S. 1564 § 4(a). Otherwise, the criteria for the appreciation of S. 1564, set forth in § 4(a), parallel those of § 3(a) of H.R. 4395.

1. Status Test vs. Activity Test

The first problem confronting the drafters of new lobbying legislation is to determine which lobbying organizations and activities will be covered by the legislation. As a preliminary matter, this determination should be clearly and concisely set forth so that lobbyists, would-be lobbyists, regulators, and the courts can readily determine when the legislation applies.

One possible formulation of the term "lobbyist" embodies a status test. A status test determines the applicability of the statute to an organization in terms of one or more characteristics which tend to be constant and easily ascertainable. The principal purpose test of the 1946 Act[37] is an example of a status test.

A clearly formulated status test has the advantage of simplicity and can thus be applied with certainty; an organization can determine with relative ease whether it meets the criteria for being classified a lobbyist under a statute employing a status test. The disadvantage of a status test is that the legislative intent behind a statute incorporating such a test can easily be thwarted. The same specific characteristics typically set out in a status test which facilitate its application also serve as a guide to those who wish to evade the reach of the statute. By careful restructuring, an organization that conducts significant lobbying activities can avoid qualifying as a lobbyist. Under the 1946 Act, for example, an organization can avoid complying with the disclosure requirements by ensuring that lobbying is not its principal purpose.[38] The desire to discard the principal purpose test and to compel all significant lobbyists to disclose their activities has justifiably led reformers to reject a status definition in favor of a new approach.[39]

In contrast to existing law, the reform proposals uniformly adopt an activity test. Under this test, an organization which does

37 For a discussion of the principal purpose test, *see* text accompanying notes 23 to 25 *supra*.

38 The Supreme Court in United States v. Harriss, 347 U.S. 612 (1954), defined "principal" purpose as a "substantial" purpose, *id.* at 622, so that presumably an organization could qualify as a lobbyist if it did a significant amount of lobbying, even if its primary purpose was not lobbying. The Court gave no guidelines, however, as to what makes a purpose "substantial" as opposed to "principal," and lobbyists have generally understood the Act to require that lobbying be the organization's primary purpose.

39 *See* S. REP. NO. 94-763, *supra* note 3, at 11; H.R. REP. NO. 95-1003, *supra* note 3, at 13.

more than a threshold amount of lobbying in any reporting period qualifies as a lobbyist and must register and report its activities.[40] In identifying those lobbying activities that are to be covered by the legislation, current proposals rely on the concept of a "lobbying communication" as the core element in triggering application of the disclosure requirements. A lobbying communication is defined broadly as "an oral or written communication directed to a member, officer or employee of the Congress to influence an issue before the Congress . . . ."[41] In other words, a lobbying communication is any form of communication with Congress that may be viewed reasonably as an attempt to affect the disposition of any pending or proposed matter.[42] As the core of the current proposals, the lobbying communication concept is far more inclusive than the principal purpose test, and it works a considerable expansion of the applicability of the disclosure requirements.

2. Thresholds

The effectiveness of an activity test rests in large part upon the selection of an appropriate threshold activity at which to invoke

40 *See, e.g.*, S. 1564 § 4; H.R. 4395 § 3.

41 S. 2026 § 3(8). Essentially the same definition is found in the other bills. *See, e.g.*, H.R. 4395 § 2(9) ("an oral or written communication directed to a Federal officer or employee to influence the content or disposition of any bill, resolution, or treaty which has been transmitted to or introduced in either House of Congress, any report of a committee of Congress, any nomination submitted to the House of Representatives or the Senate, or any hearing or investigation being conducted by the Congress or any committee or subcommittee thereof . . ."); S. 1564 § 3(8). H.R. 15 contained no definition, although lobbying communication was as central a concept in the application of this bill as in the other bills. H.R. 15 § 3.

42 Lobbying communications should cover person-to-person contacts, telephone conversations, letters, or other communications of some substance. *See, e.g.*, S. REP. 94-76, *supra* note 3, at 21: "Either brief encounters or social communications which do not involve a discussion of an issue before Congress are not included. On the other hand, a conversation is a lobbying communication no matter how brief, if it seeks to influence an issue before Congress. The term is intended to include conversations that in time and in content constitute a single logical whole."

Although some bills, *e.g.*, S. 2477 § 3(e) and H.R. 6202 § 2(8), define lobbying communication as a "communication . . . intended to influence an issue," proof of "actual subjective intent" should not be required. Rather, the definition should turn on a reasonable conclusion about the objective appearance of the communication. S. REP. NO. 94-763, *supra* note 3, at 20. *See* S. 2026 § 3(6), H.R. 5578 § 3(7), and S. 2477 § 15(11) for the definition of "to influence." For the definition of "issue before the Congress," *see, e.g.*, H.R. 5795 § 2(8); S. 2477 § 15(12). H.R. 4395 and S. 1564 describe with greater particularity the relevant object of the communication, requiring that the matter be formally before the Congress. H.R. 4395 § 2(9); S. 1564 § 3(8).

the statute's disclosure and reporting requirements. Although the proposals contain various kinds of thresholds for determining when an organization qualifies as a lobbyist, all of the proposals use an expenditure threshold for organizations that retain outside lobbyists.[43] When an organization spends greater than a certain amount — from $500 to $5000 in the current proposals[44] — in retaining an outside lobbyist in preparing the lobbyist's communications, it must register and report.[45]

For lobbying activities by an organization's own employees, the proposals offer three different threshold measures: number of lobbying contacts,[46] number of employees spending a specified amount of time lobbying,[47] and a combination of employees'-time-spent and expenditures.[48] Differences in the kinds of thresholds adopted by the House and by the Senate in 1976 were partly responsible for the failure of the conference committee to work out an acceptable version of reform legislation.[49] All of the major proposals discussed in the Ninety-fifth and Ninety-sixth Congresses, however, contain more than one type of threshold measure.[50]

With general agreement in Congress on the nature of the threshold requirements, the major obstacle to effective thresholds has been overcome. Congressional debate over the level at which thresholds are to be set,[51] though important for the reasons

43 *See, e.g.*, H.R. 4395 § 3(a)(1) ($5000); S. 1564 § 4(a)(1) ($500); H.R. 8494 § 3(a)(1) ($2500); H.R. 5795 § 3(a)(1) ($1250); S. 1785 § 4(a)(1) ($1250); S. 2026 § 4(a)(1) ($2500).

44 *See* note 43 *supra*.

45 *See* H.R. 4395 §§ 3-6; S. 1564 §§ 4-7.

46 *See, e.g.*, H.R. 6202 § 3(a)(2) (12 contacts); S. 2477 § 3(a)(2) (12 contacts); S. 1785 §§ 4(a), 6(a) (15 contacts — short-form threshold only).

47 *See, e.g.*, S. 1785 § 4(b)(2) (one employee who lobbies 24 hours or 2 employees who lobby 12 hours each); H.R. 5795 § 3(a)(2) (one employee who lobbies 30 hours or two employees who lobby 15 hours each).

48 H.R. 4395 § 3(a)(2) ($5000 and one employee who lobbies on 13 days or two employees who lobby on seven days per quarter); S. 1564 § 4(a)(2) ($500 and one employee who lobbies on 13 days or two employees who lobbying on seven days); H.R. 5578 § 4(a)(2) ($2500) and one employee who lobbies 20% of his time); S. 2026 § 4(b) ($2500 and one employee who lobbies eight hours per week).

49 S. 2477 used a contacts threshold, § 3(a)(2); H.R. 15 used an expenditures and employees'-time-spent threshold, § 3(a)(1), (2). Rep. Railsback rejects the contacts measure "because I think that contacts alone do not necessarily mean that people who would be affected by lobbying reform legislation [with a contacts threshold] are professionals." *1977 House Hearings*, *supra* note 3, at 80.

50 *See, e.g.*, H.R. 4395 § 3(a); S. 1566 § 4(a); S. 1785 § 4(b); H.R. 8494 § 3(a).

51 *See, e.g.*, *Committee Approves Lobby Disclosure Bill*, 36 CONG. Q. WEEKLY REP. 330 (1978) (major debate in the Judiciary Committee was over thresholds).

discussed below, has thus been more extensive than the practical consequences of that decision justify. The quibbling over the threshold level stands less as a discussion of vital constitutional and policy issues than as an effort to delay or impede the enactment of *any* threshold level or of any reform legislation at all.[52]

Two goals underlie the search for an appropriate threshold under the activity test. First, the threshold level should be drawn so as to require registration and reporting from only those lobbying organizations which the drafters intend to subject to the disclosure provisions. The goal is to set thresholds low enough to include significant lobbyists within the scope of the statute, yet high enough to exclude groups that cannot have a substantial impact on congressional decisionmaking and for whom the disclosure and reporting requirements might impose severe hardship.[53]

Second, the threshold should minimize the amount of unnecessary recordkeeping. An inherent feature of an activity test is that some organizations may not be able to determine until the last day of any reporting period whether they will spend sufficient time or money on lobbying to cross the threshold level. Large lobbying organizations can easily estimate that they will cross the activity theshold by the end of the reporting period. Those organizations will keep the necessary records in anticipation of compelled disclosure. A small lobbying organization, on the other hand, may not be able to estimate accurately whether it will cross the activity threshold. Despite a substantial likelihood that such an organization will not break the threshold level, the practical effect of a threshold that is drawn too low will be to force small lobbying organizations to maintain the records required for disclosure even when they were not required to do so. Thus, in adopting an activity test to avoid the practical problems of the principal purpose test, the reform proposals may create their own uncertainty and

52 Although S. 1564 used an unusually low threshold ($500), S. 2160 adopts a level similar to that in the House, indicating that a general consensus seems to have been reached. *See* note 89 *supra*.

53 *See 1977 House Hearings*, *supra* note 3, at 128-30 (statement on behalf of Common Cause); *1978 Senate Hearings*, *supra* note 3, at 11 (statement of Ass't Att'y Gen. Wald). Many congressmen have concluded that the way to strike a proper balance is to devise thresholds that effectively cover "professionals." *See, e.g.*, *1977 House Hearings*, *supra* note 3, at 80 (testimony of Rep. Railsback).

may lead some groups to maintain records unnecessarily. Such results might prove highly unpopular and might ultimately undermine congressional support for a disclosure statute.

A solution to the problem of unnecessary recordkeeping is provided by the two-tier reporting system, which employs two activity thresholds and was contained in a 1977 Senate proposal. The lower threshold is drawn to include small groups engaged in minor lobbying. Breaking this low level invokes short-form filing requirements. The higher threshold level is drawn to include only those organizations engaged in a substantial lobbying effort. Surpassing this higher level invokes long-form filing requirements.[54]

In theory, the two-tier system offers an effective solution. While it covers virtually all lobbyists who could exert any significant influence on congressional decisions, it minimizes the problems created when small groups are forced to comply with extensive disclosure requirements. To be sure, the system does not fully eliminate the problem of unnecessary recordkeeping; organizations which have passed the lower threshold may need to maintain more complete records as they approach the higher threshold. On the other hand, only those organizations with adequate resources to comply with the long-form recordkeeping requirements will, in theory, surpass the lower threshold. At the same time, the better two-tier system would employ a lower threshold than would normally be employed in the absence of the two-tier system; the higher threshold would be set somewhat higher than it would be if only one threshold were employed.[55] When the two tiers are close

54 This is the scheme employed in the Kennedy-Stafford proposal, S. 1785. Any organization that makes over 15 lobbying contacts in a quarter, § 4(a), is required to file abbreviated reports pursuant to § 6 unless the organization exceeds the expenditure and time-spent-lobbying threshold, § 4(b), in which case full reports must be filed pursuant to § 7. The Chiles proposal currently before the Senate, S. 1564, has, unfortunately, abandoned the two-tier technique.

55 The thresholds in the Kennedy-Stafford bill, S. 1785, did not adequately reflect the proposition that the lower threshold level should serve as a fine-tuning mechanism that eliminates undue pressures on organizations with inadequate resources to maintain the detailed records of the second tier. In the Kennedy-Stafford bill, the short-form threshold is higher than the single threshold adopted by the Senate in 1976, and the long-form threshold is lower than the single threshold considered by the House in 1978. *Compare* S. 1785 § 4(a) (15 contacts) *with* S. 2477 § 3(a)(2) (12 contacts); *compare* S. 1785 § 4(b)(2) (one employee who lobbies 24 hours or two employees who lobby 12 hours each) *with* H.R. 4395 § 3(a)(2) ($5000 and one employee who lobbies 13 days or two employees who lobby seven days each).

together the advantage gained by the use of the two-tier system is reduced.

Thus, a two-tier system represents the most effective activity test of those which have been proposed. It would appear to overcome the weaknesses of the principal purpose test and cover the major lobbying efforts which influence congressional decisions. By employing distinct lower and higher thresholds it will eliminate most of the objections to the recordkeeping and reporting requirements, while furthering the statute's broader objective of providing for disclosure of all significant lobbying activity.[56]

B. *Constitutional Constraints*

1. The Constitutional Problem

In responding to the weaknesses of current federal lobbying legislation, the reform proposals of the Ninety-sixth Congress would extend disclosure beyond the limits of the 1946 Act and its interpretation in *United States v. Harriss*.[57] Since the *Harriss* court read the 1946 Act narrowly to avoid holding it unconstitutional,[58] the proposed bills extending the Act could encounter constitutional challenge.

Two separate aspects of the new legislation may impose burdens on the exercise of the First Amendment rights of free speech, petition, and association. The disclosure provisions themselves provide the first burdens. By requiring that contributors' names and amounts be disclosed,[59] the proposals would open up to public view heretofore private associations. The possibility of such disclosure could inhibit a person from associating with an organization that advocates an unpopular cause. Similarly, by requiring that the subject matter of lobbying communications be revealed,[60] the current bills may inhibit the free flow of ideas on

56 Under the two-tier system, the "raise-the-threshold" solution to the unnecessary recordkeeping problem entails less of a sacrifice of regulatory effectiveness than does a single-threshold system. Lobbyists who fall just under the higher threshold in the two-tier system still must file the short form. In contrast, lobbyists who fall just under the raised threshold in a single-threshold system do not report at all.

57 347 U.S. 612 (1947); *see* notes 16 to 22 and accompanying text *supra*.

58 347 U.S. at 623-26.

59 *See, e.g.*, H.R. 5795 § 4(b)(3). The current House version, H.R. 4395, has abandoned this disclosure requirement, § 6.

60 *See, e.g.*, H.R. 4395 § 6(b)(6).

public issues, especially those which are sensitive, and may cause concerned individuals to refrain from expressing their views to their elected representatives.

The second possible infringement of First Amendment rights results from the recordkeeping and reporting obligations imposed by the bills. For an organization that is small or poorly funded, these duties may place a severe strain on the group's ability to pursue its interests in the political arena. Unable to comply with the legislation's requirements without considerable hardship, such an organization may simply forego its right to contact government officials.[61]

An examination of the constitutional issues raised by disclosure of direct lobbying must rest in large part upon two authorities: the 1954 Supreme Court decision in *Harriss*, which upheld the current disclosure provisions, and the 1976 decision of the Court in *Buckley v. Valeo*,[62] which considered the constitutionality of the Federal Election Campaign Act of 1971, as amended up to 1974.[63] Since the reporting and disclosure requirements of the Federal Election Campaign Act are similar to those of the proposed lobbying disclosure legislation, and since the two acts touch identical First Amendment rights in serving similar government interests, a constitutional discussion must rely heavily upon the *Buckley* decision.[64]

61 In First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), the Court stated that the free speech protections of the First Amendment extended to business corporations and other artificial entities even where the speech does not pertain directly to the corporation's business interests. *Id.* at 778-86. To the extent that recordkeeping burdens prohibit an organization from lobbying, those impositions also infringe individual association for the purpose of expressing viewpoints to decisionmakers.

62 424 U.S. 1 (1976) (per curiam).

63 Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified in scattered sections of 2, 18, 47 U.S.C.), *as amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.) [hereinafter cited as 1974 Campaign Act]. The Act was amended again in 1976 and 1980. *See* Campaign Act, *supra* note 1.

64 The basic lobbying disclosure requirement itself was sustained in *Harriss* but the principal purpose test imposed by the Court, *see* text accompanying note 19 *supra*, probably means that *Harriss* is not controlling in the expanded areas of disclosure. This Note assumes that a court, in judging the constitutionality of the proposed legislation, would rely upon *Buckley*. It is not inconceivable, however, that a court would conclude that the governmental interests which justify disclosure in a political campaign have a different weight than those which justify a lobbying disclosure law. In view of the Court's recognition of the importance of disclosing lobbying, *see, e.g.*, United States v. Harriss, 347 U.S. at 625, it is more likely that a court would stress the similarities rather than the differences between the governmental interests in regulating the two areas.

While *Harriss* and *Buckley* are the most direct precedents, the Supreme Court has recognized generally that the compelled disclosure of information about an organization's participants may seriously infringe a right of association protected by the First Amendment.[65] Observing that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,"[66] the Court has found a vital connection between the ability to associate and the effective expression of ideas. Accordingly, the Court has held that the First Amendment protects the right of association.[67] At the same time, the Court has noted that compelled disclosure of information about the participants of a group or association may subject unpopular groups or causes and their supporters to ostracism and recrimination.[68] Thus compelled disclosure may itself be a restriction on freedom of association and, concomitantly, of free speech and petition.

Yet the Court has recognized that there exist some government interests sufficient to justify those intrusions upon rights of association and speech.[69] Nevertheless, it is only when a govern-

65 Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961) (upholding temporary injunction which restrained enforcement of a statute requiring certain non-profit organizations to file membership lists); Shelton v. Tucker, 364 U.S. 479 (1960) (invalidating Arkansas statute which compelled teachers to disclose all of their organizational affiliations within the preceding five years); Talley v. California, 362 U.S. 60 (1960) (reversing conviction based on ordinance banning the distribution of hand bills that did not carry the name and address of the author, printer, and sponsor); Bates v. City of Little Rock, 361 U.S. 516 (1960) (overturning conviction under municipal ordinance which required organizations operating within the municipality to file financial statements showing the names of all their contributors as an incident of a license tax on persons engaging in business within municipal limits); NAACP v. Alabama, 357 U.S. 449 (1958) (reversing civil contempt judgment against the NAACP for refusing to disclose its membership list); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1953) (rejecting effort of Florida legislature to obtain local NAACP membership lists in connection with investigation of Communist activities).

66 NAACP v. Alabama, 357 U.S. 449, 460 (1958).

67 Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam) ("'freedom of association is a 'basic constitutional freedom' . . . that is 'closely allied to freedom of speech and [is] a right which, like free speech, lies at the foundation of a free society' "); *see also* Elrod v. Burns, 427 U.S. 347 (1976); Cousins v. Wigoda, 419 U.S. 477 (1975); Kusper v. Pontikes, 414 U.S. 51 (1973); NAACP v. Button, 371 U.S. 415 (1963).

68 In *Buckley*, the Court asserted that public disclosure of contributors "may . . . expose contributors to harassment or retaliation." 424 U.S. at 68. The Court has not drawn a distinction between disclosure of membership lists and disclosure of contributors. *Id.* at 66.

69 *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

Professor Tribe's analysis of the Supreme Court decisions in the First Amendment area

ment interest is compelling that the Supreme Court has upheld such an infringement.[70] In addition, the Court has established requirements to govern the means chosen to further the government interest: (1) a substantial relation must exist between the government interest asserted and the means chosen to further that interest;[71] (2) there must be no less restrictive alternative means of

employs a "two track" model. In track one, government action is directly aimed at the "communicative impact" of free speech. The Court, in considering track one infringements, will hold the regulation unconstitutional "unless the government shows that the message being suppressed poses a 'clear and present danger,' constitutes a defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the Court has drawn to distinguish those expressive acts privileged by the first amendment from those open to government regulation with only minimal due process scrutiny." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 582 (1977). Government action in track two is aimed at the "noncommunicative impact" of an act and thus only indirectly infringes protected communication. In this track, the Court strikes a balance between the values of freedom of expression and the government's interests in regulating the activity, with the Court upholding the regulation "so long as it does not unduly constrict the flow of information and ideas." *Id.* Lobbying disclosure legislation, of course, presents the possibility of an indirect infringement of First Amendment rights.

Tribe's two-track analysis provides a useful tool in analyzing the distinctions between direct and indirect infringements. Unfortunately, the Supreme Court has not employed the technique with the clarity that Tribe suggests. Tribe notes that in track one, the Court will require the showing of a compelling state interest and will insist that there be a close nexus between ends and means through a statute which is narrowly drawn. Yet the Court has often adopted a similar tests in the context of track two infringements. *See, e.g.*, Nixon v. Administrator of Gen'l Services, 433 U.S. 425 (1977); Elrod v. Burns, 427 U.S. 347 (1976); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); Shelton v. Tucker, 364 U.S. 479 (1960). At the same time, the balancing test Tribe stresses in the track two context emerges, at least implicitly, in the Court's track one decisions. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973). Indeed, balancing is the test employed by the Court in either track. In cases of indirect infringement, the Court goes through much of the analysis for direct restraint but ultimately balances the state's asserted interest against the degree of infringement. The real difference between direct and indirect cases rests in the relative weight which, implicitly at least, the Court assigns to the First Amendment right and to the government interest. *See, e.g.*, Nixon v. Administrator of Gen'l Services, 433 U.S. 425, 467-68 (the First Amendment claim "is clearly outweighed by the important governmental interests promoted by the Act"); Elrod v. Burns, 427 U.S. 347, 362 (1976) (the "gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights").

70 *See, e.g.*, Nixon v. Administrator of Gen'l Services, 433 U.S. 425, 467 (1977) ("compelling public need"); Elrod v. Burns, 427 U.S. 347, 362 (1976) (interest advanced must be "paramount" and of "vital importance"); Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam) (infringement cannot be justified by "mere showing of some legitimate governmental interest"); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (state may prevail "only upon showing a subordinating interest which is compelling"); *see also* Sweezey v. New Hampshire, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring).

71 *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 546 (1963); Shelton v. Tucker, 364 U.S. 474, 485 (1960); Bates v. City of Little Rock, 361 U.S. 516, 525 (1960); NAACP v. Alabama, 357 U.S. 449, 464-65 (1958). *See also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789-90 (1978) (no showing of significant corporate influence over state referenda to justify means of protecting electoral process).

furthering the government's interest,[72] or, alternatively, the reach of the means must not be overbroad.[73]

2. The Government Interest in Lobbying Reform

The decisions in *Harriss* and *Buckley* illustrate the analysis which the Court has employed in considering cases of First Amendment infringement. In those decisions, the Court rejected constitutional challenges to disclosure requirements where the asserted government interests involved the protection of the political process. Upholding the current lobbying disclosure law through a narrow reading of the Act, the *Harriss* Court validated the strong government interest in helping elected representatives evaluate the pressures to which they are subjected.[74] It found this "vital national interest"[75] sufficient to offset any possible indirect

72 *See, e.g.*, Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 185 (1979); Nixon v. Administrator of Gen'l Services, 433 U.S. 425, 467 (1977); Elrod v. Burns, 427 U.S. 347, 363 (1976); NAACP v. Button, 371 U.S. 415, 433 (1963); Shelton v. Tucker, 364 U.S. 479, 493 (1960); *see also* Kusper v. Pontikes, 414 U.S. 51, 59 (1973) and Dunn v. Blumstein, 405 U.S. 330, 353 (1972), involving a similar standard in a case of direct infringement.

73 *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 68-74 (1976) (per curiam). There is no clear distinction between least restrictive means and overbreadth analyses. Frequently, the Court seems to be discussing the same consideration while using different language. *But see* discussion in L. TRIBE, AMERICAN CONSTITUTIONAL LAW 710-24 (1977). Professor Tribe cogently explains the overbreadth doctrine as follows: "overbreadth analysis ordinarily compares the *statutory* line defining burdened and unburdened conduct with the *judicial* line specifying activities protected and unprotected by the first amendment; if the statutory line includes conduct which the judicial line protects, the statute is overbroad." *Id.* at 710. Yet such an examination is, in effect, a consideration of whether the statute is drafted in the least restrictive way. *See id.* at 712; Broadrick v. Oklahoma, 413 U.S. 601 (1973). *See also* Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). Furthermore, several recent decisions indicate that the Court is reducing the importance of the overbreadth analysis, *see, e.g.*, Buckley v. Valeo, 424 U.S. 1 and Broadrick v. Oklahoma, 413 U.S. 601, while retaining some vitality in the least restrictive means test, *see, e.g.*, Nixon v. Administrator of Gen'l Services, 433 U.S. 425 (1977) (dicta); Kusper v. Pontikes, 414 U.S. 51 (1973).

74 347 U.S. at 625-26. The Court stated:

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent.

Id. at 625.

75 *Id.* at 626.

First Amendment infringement resulting from the statute. In *Buckley*, the Court examined the constitutionality of Federal Election Campaign Act requirements which compelled disclosure of the names and addresses of contributors to political parties.[76] The Court acknowledged that these requirements could burden the right of association, but it held that the infringement was outweighed by three government interests that the requirements furthered:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office . . . .
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity . . . .
>
> Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations . . . .[77]

New lobbying disclosure legislation furthers similar government interests and advances related interests which the Court has recognized in other contexts. First, the reporting and disclosure provisions foster a strong government interest in enabling representatives to make more rational decisions in the public interest. Helping legislators separate private pressure from the public interest is, as *Harriss* noted, necessary for "full realization of the American ideal of government by elected representatives."[78] Similarly, *Harriss*'s acceptance of the government's interest in disclosing "who is being hired, who is putting up the money, and how much,"[79] parallels *Buckley*'s emphasis on the electorate's need to know "where political campaign money comes from and how it is spent."[80] In essence, lobbying disclosure serves both functions. While it helps legislators decide issues, it also facilitates the public's evaluation of its representatives, enabling the public to

76 424 U.S. at 60-68.
77 *Id.* at 66-68.
78 347 U.S. at 625.
79 *Id.*
80 424 U.S. at 66.

examine political decisions in light of the efforts made to influence those decisions.

Second, lobbying disclosure advances a strong government interest in avoiding corruption or the appearance of corruption in the processes of government.[81] Lobbying disclosure, like the campaign contribution disclosure, may "discourage those who would use money for improper purposes."[82] At the same time, the exposure provided by the legislation would tend to remove even the appearance of impropriety in efforts to affect government decisions.

A third interest, preserving the individual citizen's confidence in government, also emerges from the reporting and disclosure requirements. In a challenge to the Hatch Act's prohibition against active involvement by federal employees in political campaigns,[83] the Supreme Court noted the importance of public confidence in the system of representative government and found this a sufficiently important government interest to help offset the First Amendment infringement inherent in the Hatch Act's limitations.[84]

Finally, the lobbying reform legislation furthers a more general, often recognized, interest in protecting the effective functioning of government processes. In a sense, this interest is simply a composite of the others, raised to a higher level of generality. Maintaining public confidence, preserving the processes of government from corruption, enabling the electorate better to evaluate the performances of their representatives, and assisting those representatives in sorting out the myriad pressures to which they are subject — each a legitimate interest in its own right — combine in this much more fundamental object of government concern. In a variety of contexts the Court has validated the legitimacy of this

81 First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973); United States v. Harriss, 347 U.S. 612 (1954); Burroughs & Cannon v. United States, 290 U.S. 534 (1934).
82 Buckley v. Valeo, 424 U.S. at 67.
83 5 U.S.C. § 7324(a) (1976).
84 United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973); *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978) (dicta).

justification for government encroachment on First Amendment rights.[85]

85 The power of Congress or the states to protect the integrity of governmental processes has been recognized in a variety of contexts. In Burroughs & Cannon v. United States, 290 U.S. 534 (1934) (upholding Federal Corrupt Practices Act), the Court cited the vital character of the election of the President to the political system and upheld Congress' power to regulate such an election. There the Court asserted that Congress possessed the "power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or corruption." *Id.* at 545. Likewise, in Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961), the Court acknowledged the existence of a compelling interest in protecting the "free functioning of our national institutions." *Id.* at 97.

In United Pub. Workers of America v. Mitchell, 330 U.S. 75 (1947), the Court upheld the Hatch Act's restrictions on the political activities of government employees, stating that Congress has the power to "protect a democratic society against the supposed evil of political partisanship by classified employees of government." *Id.* at 96. Moreover, "[t]o declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system." *Id.* at 99. The Court "unhesitatingly" affirmed *Mitchell* in United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 556 (1973). In Elrod v. Burns, 427 U.S. 347 (1976), the Court, while rejecting the state's claim that patronage dismissals are crucial to the health of the two-party system, acknowledged that "[p]reservation of the democratic process is certainly an interest protection of which may in some instance justify limitations of First Amendment freedoms." *Id.* at 368. *See also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788 (1978) (dicta); Nixon v. Administrator of Gen'l Services, 433 U.S. 425, 467 (1977), *quoting* Communist Party v. Subversive Activities Control Bd., 367 U.S. at 97; Buckley v. Valeo, 424 U.S. 1, 66 (1976) (per curiam); United States v. Harriss, 347 U.S. 612, 625-26 (1954).

On the other hand, the Court has been reluctant to find a sufficiently important state interest in areas relating to other political matters. Cousins v. Wigoda, 419 U.S. 477, 487-91 (1975) (rejecting state action to protect electoral process where that action conflicted with right of political association as expressed in procedures of the national Democratic party for the selection of convention delegates); Kusper v. Pontikes, 414 U.S. 51, 56-61 (1973) (rejecting, on least drastic means grounds, state interest in preventing political "raiding" by means of an election statute which prohibited a person from voting in the primary of a political party if he had voted in the primary of any other party within the preceding 23 months); Williams v. Rhodes, 393 U.S. 23, 31-33 (1968) (finding no compelling state interest in election law which requires a new party to obtain petitions signed by qualified electors totalling 15 percent of the number of ballots cast in the preceding gubernatorial election); NAACP v. Button, 371 U.S. 415, 438-44 (1963) (state interest in regulating traditionally illegal practices of barratry, maintenance, and champerty does not justify statute which prevented organizations from soliciting where, in the context of NAACP objectives, litigation is a form of protected political expression).

In a number of cases involving interrelated equal protection and First Amendment challenges to state election laws, the Court has acknowledged a strong state interest in protecting the integrity of the political system. *See, e.g.*, Storer v. Brown, 415 U.S. 724 (1974) (upholding state restrictions on rights of independent candidates to be on the ballot as a means of maintaining the integrity of various routes to the ballot); American Party of Texas v. White, 415 U.S. 767 (1974) (disqualifying those who have voted at a party primary from signing petitions for another party seeking ballot positions for its candidates for the same offices is permissible means of furthering state interest in insuring integrity of the nominating process); Rosario v. Rockefeller, 410 U.S. 752 (1973) (state has interest in preventing interparty "raiding" to preserve the integrity of the electoral process); Tennessee v. Fortson, 403 U.S. 431 (1971) (state has interest in regulating the number of candidates on the ballot and in protecting its political processes from frivolous or fraudulent

3. The Means Available to Proponents of Lobbying Reform

The Court's First Amendment decisions have required more than the mere existence of a strong government interest to offset the infringement of protected rights. Rather, they have required that the means selected to further those interests bear a "substantial relation"[86] to the interest and that the means selected be the least restrictive method of carrying out the government's asserted justification.[87] Thus in *Bates v. Little Rock*,[88] for example, the Court accepted the state's asserted interest in imposing occupational license taxes, but the Court found that the state's means, a requirement that NAACP membership lists be disclosed, lacked any substantial relation to the state's legitimate goal. Similarly, in *Kusper v. Pontikes*,[89] the Court acknowledged a legitimate state interest in preventing "raiding" of one political party by another, but found that the device the state employed to prevent raiding was not the least "drastic" means of doing so.[90]

Once again, the analysis adopted by the Court in *Buckley* is closely analogous to that which the Court should employ for lobbying. In *Buckley*, the Court found a "substantial relation" between the government interest and the information required to be disclosed.[91] Because of the close similarity between the interests and disclosures at issue in *Buckley* and those present in lobbying legislation, the reasoning and conclusions of the Court in *Buckley* have compelling force in the lobbying context.

By its very nature, the means employed by the proposed statutes — disclosure — diminish the danger of secret influence; such exposure makes it easier for legislators and decisionmakers to resist undue or unethical pressure directed toward potential government

candidates). *But see* Labin v. White, 415 U.S. 709 (1974) (invalidating use of qualifying fee, without more, as means of pursuing legitimate interest in controlling the length of the ballot); Bullock v. Carter, 405 U.S. 134 (1972) (rejecting large filing fees as necessary for protecting integrity of political process); Dunn v. Blumstein, 405 U.S. 330 (1972) (invalidating state one-year residence requirement as unnecessary to achieve compelling state interest in preventing fraud in election process).

86 Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam).

87 See note 73 and accompanying text *supra*.

88 361 U.S. 516, 524-25 (1960).

89 414 U.S. 51 (1973).

90 *Id.* at 61 (*Kusper* examined a *direct* infringement on first amendment rights).

91 424 U.S. at 64. The Court concluded that the disclosure requirements "directly serve substantial government interests." *Id.* at 68.

action.[92] Armed with the information disclosure provides, the legislator becomes better able to weigh the varying views designed to influence his decision and to act more rationally in the public interest.[93] Once these influences are exposed, the public also can weigh the pressures upon decisionmakers in light of the public's own standards of performance. Bringing these formerly secret influences to light affords the public an opportunity to appreciate more fully the constraints under which their officials work.[94] In this way, the disclosures permit the public to observe the forces that help shape the political process and offer the possibility that the public will regain some confidence in that process.[95]

Disclosure of lobbying activities is also the least restrictive means for pursuing the government's compelling interests in this area. It is important to note that the lobbying proposals in no way seek to limit or restrict lobbying — a much more drastic method of pursuing the government's goals.[96] Indeed, it seems that the technique of disclosure is the only way, short of direct limitation of lobbying activities, that lobbying can be protected yet opened to public view. Similar reasoning appears to have guided the *Buckley* Court, which noted in passing that the campaign contribution disclosure requirements "appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."[97]

As a corollary to the "least restrictive means" inquiry, the

92 *See 1977 House Hearings, supra* note 3, at 135 (statement of Common Cause).

93 *See* United States v. Harriss, 347 U.S. at 625.

94 *See, e.g.*, Fritz v. Gordon, 83 Wash. 2d 275, 517 P.2d 911 (1974) (upholding stringent state lobbying disclosure law). The Washington Supreme Court noted that disclosure provisions "may provide the electorate with a heretofore unavailable perspective regarding the role that money and financial influence play in government decision making." *Id.* at 310, 517 P.2d at 931.

95 *See, e.g.*, *1977 House Hearings, supra* note 3, at 284-85 (statement of Public Citizens Congress Watch); *id.* at 135 (statement of Common Cause); *1975 Standards of Official Conduct Hearings, supra* note 3, at 204-05 (statement of Rep. Winn).

96 None of the proposals imposes any limits on the amount of lobbying a lobbyist may do. The legislation thus differs from the California Political Reform Act of 1974 (passed by voter initiative June 4, 1974), CAL. GOV. CODE § 81000 *et seq.* (West 1976), which totally prohibited lobbyists from making campaign contributions to state candidates or elected officials. The California Supreme Court found this portion of the statute in violation of the first amendment right of association. The Court stated that the state means was not "closely drawn" to avoid unnecessary infringement. The Court did, however, uphold the statute's registration and reporting requirements. A petition for certiorari in the U.S. Supreme Court has been filed on the issue of contribution prohibition. California Fair Political Practices Comm'n v. Superior Court, 25 Cal. 3d 33, 598 P.2d 46, 127 Cal. Rptr. 855 (1979), *petition for cert. filed*, 48 U.S.L.W. 3465 (Jan. 22, 1980).

97 424 U.S. at 68.

Court frequently subjects the state's technique to an overbreadth analysis.[98] This analysis seeks to ascertain whether the statute is sufficiently narrowly drawn to avoid undue restraints on the exercise of protected rights. The state's method, though in furtherance of a legitimate state end, may nevertheless reach too broadly, covering in its sweep the infringement of rights that are insufficiently related to the state's goal.[99]

The lobbying reform legislation employs a number of devices to restrict its sweep and limit its infringement of protected rights. The use of the two-tier threshold for triggering the reporting and disclosure requirements is a good example. As noted earlier,[100] the recordkeeping and reporting provisions could bring substantial harm to small organizations. Yet because these groups are small and their lobbying efforts are, presumably, likewise small, their impact on public decisions would also be limited. Consequently, the information gained from them would not go far in advancing the state's legitimate interest in disclosure. Should these groups be covered, the costs of infringement would probably not be outweighed by the benefits to be gained from the required recordkeeping and disclosure.

The *Buckley* Court rejected a somewhat similar overbreadth attack on campaign contribution disclosure requirements. There, the challengers asserted that the disclosure provisions were unconstitutionally overbroad in their application to minor parties and individuals "because the governmental interest in [the disclosed] information is minimal and the danger of significant infringement on First Amendment rights is greatly increased.[101] The Court, however, held that on the record before it "the substantial public interest in disclosure identified by the legislative history of the Act outweighs the harm generally alleged."[102]

The campaign law considered in *Buckley* required political committees to keep records for every contribution in excess of $10.[103] Furthermore, each individual or group that made contributions or

98 *See* note 73 and accompanying text *supra*.

99 *See* Broadrick v. Oklahoma, 413 U.S. 601 (1973).

100 *See* notes 53 to 61 and accompanying text *supra*.

101 424 U.S. at 69.

102 *Id.* at 72.

103. 1974 Campaign Act, *supra* note 63, § 302(b). The minimum level for recordkeeping is currently $50. 2 U.S.C. § 432 (b) (1976), *as amended by* 1974 Campaign Act, *supra* note 63.

expenditures over $100 in a calendar year was required to file a statement with the Federal Election Commission.[104] In challenging these provisions on overbreadth grounds, appellants asserted that the thresholds were set so low that only insignificant information would be disclosed and the amounts reported would be too low to have a corrupting influence.[105]

The Court found these assertions unpersuasive. It required only that the threshold levels established by Congress be rational to pass overbreadth scrutiny. Hesistant to encroach on the legislative power, the Court declined to interfere with the judgment of Congress in this complex legislative area.[106]

Given extensive congressional deliberations thus far in the area of lobbying reform, whatever threshold for triggering lobbying disclosure ultimately emerges in the final bill will almost certainly be demonstrably rational. Thus, any overbreadth challenge to that threshold is likely to fail.

The definition of lobbying communication also offers the possibility of an overbreadth challenge. If Congress were to require disclosure of all lobbying communications, the legislation could apply to areas of communication in which the government's interest in disclosure is not sufficiently strong to justify the infringement of First Amendment rights. Consequently, the various bills have fashioned a number of exemptions to strengthen the disclosure provisions against constitutional challenge and, as a matter of policy, to encourage communications which Congress feels are vital to its representative functions.

One exemption is common to all of the proposals: The statute would not apply to "a communication by an individual, acting solely on his own behalf, for redress of his personal grievances or to express his own personal opinion."[107] The constitutional problems raised by mandatory disclosure are potentially the greatest when disclosure extends to a private individual making a lobbying

104 1974 Campaign Act, *supra* note 63, § 305. The minimum level for reporting was raised to $250 in 1980. Campaign Act, *supra* note 1, § 304(c) (to be codified as 2 U.S.C. § 434(c)).

105 424 U.S. at 82-83.

106 *Id. See also Buckley's* treatment of the overbreadth challenge to campaign contribution ceilings, *id.* at 29-30 (Congress' failure to engage in fine-tuning).

107 *See, e.g.*, H.R. 5578 § 3(9)(A); H.R. 4395 § 2(9(c).

communication on his own behalf. Both the danger of recrimination for the advocacy of private beliefs and the burdens of reporting and recordkeeping have their greatest "chilling" effect in the context of individual private lobbying. By exempting these communications, the statute significantly narrows its intrusion upon constitutional rights.[108] Moreover, this exemption leaves untouched the goals of lobbying disclosure, since the influence of a single individual acting solely on his own behalf is not, except in special circumstances, likely to be substantial.

Other exemptions narrowing the scope of the statute include contacts by organizations composed purely of volunteers;[109] communications made by the media as a part of regular press coverage;[110] political activities by national and state political parties[111] (which are already subject to disclosure under the Federal Election Campaign Act);[112] inquiries to congressmen that merely seek information and deal only with the existence or status of any issue;[113] communications between an organization and the elected representatives from the state in which the organization has its

108 Of course, because of the interrelation of the rights of association and expression, coverage of groups may still infringe upon individual free speech, but such infringement is considerably more remote than in legislation that would cover individual lobbying per se. Extending the coverage to organizations still raises problems of First Amendment rights of association and the organizations' own First Amendment rights. *See* note 61 *supra*.

109 Most of the older proposals protected an organization composed purely of volunteers from being required to comply with the disclosure provisions by restricting the definition of an organization to a group "which has paid officers, directors or employees." *See, e.g.*, H.R. 5795 § 2(12); S. 1785 § 3(i); S. 2028 § 3(10)(a). *But see* S. 1564 § 3(9); H.R. 4395 § 2(10).

110 *See, e.g.*, H.R. 4395 § 2(9)(b). Communications which are paid advertisements in newspapers, periodicals, or radio and television broadcasts are not exempted, *id.*; *see* H. REP. No. 96-590, *supra* note 4, at 25.

111 *See, e.g.*, H.R. 8494 § 3(b); S. 1785 § 3(g)(3). H.R. 4395 expresses a broader exemption: "This Act shall not apply to practices or activities regulated by the Federal Election Campaign Act of 1971." H.R. 4395 § 3(b)(1). *See also id.* § 2(10)(A); S. 1564 § 3(9)(A). The exemptions dealing with political activities serve two functions. First, they prevent duplication of disclosure by organizations covered by the Federal Election Campaign Act. Second, they avoid a large-scale overhauling of the nature of the relationship between a political party and its members in Congress.

112 Campaign Act, *supra* note 1, §§ 302-304 (to be codified as 2 U.S.C. §§ 432-434).

113 *See, e.g.*, H.R. 4395 § 2(9)(D); S. 1564 § 3(8)(D). Although disclosure of lobbying communications from a congressman's home district is necessary to give the public a completely accurate picture of influence, a principal fear among drafters is that disclosure requirements would choke their lines of communications with constituents. *See* 122 CONG. REC. S9349 (daily ed. June 15, 1976) (remarks of Sens. Ribicoff and Percy). *But see id.* at S9349-50 (remarks of Sen. Hathaway).

principal place of business (the "home state" exemption);[114] communications made at the request of Congress or its representatives;[115] communications by employees of the executive branch, a federal agency, or corporation when those individuals are acting in their official capacities;[116] or communications by officials of state and local governments acting in their official capacities.[117] These exemptions exclude from the reach of the statute a number of forms of lobbying which most directly touch First Amendment rights. Together they restrict the sweep of the statute, narrowing its coverage and limiting its potential infringement on protected rights. At the same time, they do so without significantly impairing the underlying objectives of lobbying disclosure.

Lobbying disclosure legislation thus in all likelihood stands as a constitutionally permissible means of advancing the compelling state interests in the proper functioning of the government. The particular details of the statute's reach and operation raise policy issues, not constitutional ones.

III. Lobbying Solicitation

The rapid growth in the use of lobbying solicitation to influence legislation creates another set of difficulties for lobbying disclosure reform. Legislation that covers only the activities of direct lobbying — where the lobbying organization or individual directly contacts government officials — leaves untouched these important grass-roots and letter-writing lobbying campaigns. Expanding the reporting and disclosure provisions, however, raises significant constitutional and policy issues which are absent in a discussion of direct lobbying.

114 At least one version of the legislation would exempt organizations having their principal place of business in a Standard Metropolitan Statistical Area within which a congressional district partially falls. *See* S. 1785 § 4(d). The principal versions currently before the House and the Senate extend the exemptions to any congressman from the state in which the organization has its principal place of business. H.R. 4395 § 2(9)(B); S. 1564 § 3(8)(D).

115 *See, e.g.*, H.R. 4395 § 2(9)(A). This exemption is necessary to protect the "informational gathering process of the Federal Government." H.R. REP. No. 94-1475, *supra* note 3, at 22.

116 *See, e.g.*, H.R. 4395 § 2(10)(A); S. 1785 § 3(g)(1).

117 *See, e.g.*, H.R. 4395 § 2(10)(A); S. 1564 § 3(9)(A). Most of the proposals explicitly exclude from the exemption employees of a national association of state or local officials. *See, e.g.*, H.R. 4395 § 2(10)(A).

A. *Constitutional Issues*

Broadly drawn legislation covering solicitation efforts may adversely affect rights of association and free speech and the free discussion of ideas.[118] Advocates of unpopular issues or members of unpopular groups may be reluctant to press their case before the public if their identity must be disclosed. Rather than subjecting themselves to possible recrimination resulting from such exposure, they may simply forego their right to speak on public issues and abandon their efforts to persuade the public.

While the initial considerations in solicitation legislation parallel those in direct lobbying,[119] the wide sweep of a solicitation statute — encompassing contacts with members of the public as well as with government officials — presents much closer constitutional questions under the least restrictive means and overbreadth analyses. Language in *United States v. Harriss*[120] supports the constitutionality of requiring disclosure of lobbying solicitation, but the popular interpretation of *Harriss* has not gone this far.[121] The analogy with *Buckley v. Valeo*,[122] which was useful in the area of direct lobbying, is less helpful here, as *Buckley* did not address disclosure requirements in a context similar to solicitation. Consequently, the constitutional issues here require further elaboration.

As discussed in the context of direct lobbying, the Supreme Court requires existence of a compelling government interest whenever it examines the constitutionality of government interference with First Amendment rights.[123] In addition, the Court has established requirements to govern the means chosen to further the government interest: (1) a substantive relation between the government interest asserted and the means chosen;[124] and (2) no less restrictive alternative means for achieving the desired governmental goal.[125] Alternatively, the means must not have an impermissibly broad sweep in its operation.[126] The government interests

118 *See* notes 57 to 61 and accompanying text *supra*.

119 *See* notes 57 to 117 and accompanying text *supra*.

120 347 U.S. 612 (1954).

121 *See* note 22 *supra*.

122 424 U.S. 1 (1976) (per curiam).

123 *See* note 76 *supra*.

124 *See* note 71 *supra*.

125 *See* note 72 *supra*.

126 *See* note 73 *supra*.

asserted in lobbying solicitation provisions are essentially the same as those advanced by provisions affecting direct lobbying.[127] Preserving the integrity and effective functioning of the governmental process, protecting that process from corruption or the appearance of corruption, reinforcing public confidence in the workings of government, and facilitating rational legislative decision-making are government interests that are as compelling in the context of lobbying solicitation as they are in the area of direct lobbying.

Similarly, disclosure of lobbying solicitation activities bears a substantial relationship to these government ends. The disclosure of the identity and depth of interest of an organization employing a mass letter-writing campaign, for example, helps both legislators and the electorate evaluate the lobbying pressures and judge the ultimate government decision against the background of the broader public interest. Knowing who is behind a grass-roots drive may result in a fuller discussion among the public of the particular issue itself. Better informed about the orchestrators of a grass-roots effort — through revelation of their identity and their degree of influence, which may be expressed in their expenditures — the public can better weigh the merits and consequences (including the potential beneficiaries) of public issues. Like direct lobbying disclosure, exposure of lobbying solicitation reveals to the public the range and degree of interests seeking to affect government decisions. At the same time, the light of exposure reduces the possibility for improper, undisclosed pressures on decisionmakers and diminishes the opportunity for public cynicism about the integrity of government decisions.

In lobbying solicitation, as in direct lobbying, disclosure seems the least restrictive technique for furthering strong government interests. It is considerably less restrictive than, for example, expressly limiting the amount of solicitation a group can do. But is the coverage of *all* lobbying solicitations the most narrow method? Here the analysis in effect merges the Court's insistence on the least restrictive alternative and its inquiry into the statute's possible overbreadth. Can the state further its interest with another

127 *See* notes 78 and 80 and accompanying text *supra*.

statute which does not infringe as heavily upon First Amendment rights?

In *United States v. Rumely*,[128] the Supreme Court construed narrowly a resolution authorizing a congressional committee to conduct an investigation of lobbying activities. Limiting the definition of lobbying to its "commonly accepted sense," the Court held that the resolution applied only to "representations made directly to the Congress, its members or its committees" and rejected committee efforts to secure information from an organization which sold books on political topics.[129] In the words of the Court, "the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment."[130]

Likewise, in *Harriss* the Court recognized the possibility of constitutional limits on disclosure of solicitation efforts. But in language that has frequently been misinterpreted,[131] the Court asserted that disclosure of certain solicitation efforts could be sustained against constitutional attack even though less narrowly drawn requirements would have to fall.[132]

Faced with the government's almost limitless definition of lobbying, the Court in *Harriss* and *Rumely* refrained from defining the constitutional limits of disclosure of lobbying solicitation. Yet the two cases do not stand for the proposition that Congress may not legislate in this area. Rather, they leave open the possibility that measures which are narrowly drawn and refrain from touching the full range of political discussion may fall within constitutional bounds. It is within this limited range that the disclosure of lobbying solicitation must come.

To meet the Court's demand for a narrowly drawn statute, the legislation must apply only to those solicitation efforts which expressly ask the recipient to contact a government official.[133] A

128 345 U.S. 41 (1953).
129 *Id.* at 47.
130 *Id.* at 46.
131 *See* note 22 *supra*.
132 347 U.S. at 620-23.
133 The proposals typically define lobbying solicitation as "any oral or written com-

statute would sweep too broadly if it included in its definition of lobbying solicitation any communication which consists of political discussion and which only indirectly and remotely could spur a recipient to write his congressman.[134]

Drafting the statute this narrowly, though it inevitably leaves untouched some activity directed implicitly at generating additional pressure on Congress, does not undercut the primary thrust of the disclosure provisions. In the example given in the preceding paragraph, the individual recipient contacts the legislator on his own initiative; he has been neither instructed to do so nor given the form and substance of the communication. To be sure, the information supplied by the organization has perhaps created a climate conducive to the individual's action, but any form of publicity about a political issue could be said to do this. Indeed, all political publicity is designed to stimulate popular response with an eye toward translating that response into government action. Drawing the line between explicit and implicit solicitation preserves the complete integrity of both general political discussion and broader attempts to influence public opinion, while it brings within its purview those efforts which explicitly stimulate contacts with officials and subjects to disclosure the major forms of artificially generated letter-writing campaigns.

Such a distinction sufficiently narrows the reach of the statute to bring it within constitutional limits. It follows the language of *Harriss*. It also follows a similar distinction drawn by the Court in *Buckley*. There the Court considered provisions of the Federal Election Campaign Act[135] which applied the Act to "[e]very person . . . who makes contributions or expenditures" and which defined "contributions" and "expenditures" as the use of money or other valuable assets "for the purpose of . . . influencing" the

munication urging, requesting, or requiring another person to make a lobbying communication." *See, e.g.*, H.R. 5795 § 2(11).

134 In New York Times v. Sullivan, 376 U.S. 254 (1964), the Supreme Court proclaimed the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. Any lobbying statute which reached general political discussion would inevitably run afoul of this principle and would probably not survive a constitutional challenge.

135 1974 Campaign Act, *supra* note 63, at § 301(e)-(f) and § 305 (current version at Campaign Act, *supra* note 1, § 301(8)-(9) and § 304(c) (to be codified at 2 U.S.C. §§ 431(8)-(9) and 434(c)).

nomination or election of candidates for federal office.[136] Acknowledging the statute's goal of promoting full disclosure,[137] the Court nevertheless emphasized the necessity of construing "expenditure" narrowly to prevent an impermissibly broad definition.[138] The Court construed the term "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[139] The Court went on to note that this reading "is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate."[140] The Court's distinction between express advocacy and that which is only implied parallels the distinction between implicit and explicit lobbying solicitations.

Distinguishing between those solicitation efforts which expressly request contacts with government officials and those which only indirectly lead to such contacts adequately serves the goals underlying lobbying disclosure reform. At the same time, such a demarcation satisfactorily minimizes the constitutional uncertainty faced by that reform legislation.

B. *Policy Issues*

The principal policy issue in the debate over lobbying solicitation has been whether the disclosure legislation should cover it at all.[141] In grass-roots lobbying, the organizations whose interests the solicitations promote have at best indirect contact with congressmen. Frequently, their efforts may generate little or no response. At the same time, the resulting lobbying communications may vary somewhat from the suggestions made by the soliciting organization. In addition, the letter-writing campaigns generated by lobbying solicitation may demonstrate the deeply felt

136 424 U.S. at 77.

137 *Id.* at 78.

138 *Id.* at 80.

139 *Id.*

140 *Id.*

141 *See, e.g.*, *Players on Lobby Disclosure Bill Lining up for Rematch*, note 34 *supra*. In the Ninety-fifth Congress, the House Judiciary Committee's version of H.R. 8494 did not cover lobbying solicitation, but this coverage was added on the floor of the full House prior to passage. The current committee version, H.R. 4395, does not include lobbying solicitation. However, S. 1564 does cover solicitations in § 6(b)(8).

views of the authors rather than a superficial expression of concern prompted by repeated urgings from the soliciting organization.

Nevertheless, in light of one business leader's assertion that lobbying solicitation is the "only lobbying that counts,"[142] any comprehensive congressional lobby reform legislation must include coverage of lobbying solicitation. Although direct lobbying continues to be important, congressional observers note a major increase in the use of grass-roots lobbying.[143] Indeed, in many legislative areas, lobbying solicitation appears to have supplanted direct lobbying as the most effective way of influencing legislation. Employing a variety of techniques — persuading community leaders to contact their congressman, generating mass mailing campaigns, creating "lobby teams" — organizations of nearly every description have shifted many of their efforts away from direct lobbying and to solicitation programs. Through sophisticated computer analyses, organizations are able to "target" those individuals and congressional districts that are most likely to respond favorably to the solicitation effort. Aided with substantial funding, often from well-financed political action committees, lobbying organizations skillfully coordinate selected direct lobbying with carefully orchestrated solicitation efforts. The result is a major impact on government decisions.[144]

Because of their importance in shaping government actions, solicitation campaigns must be subject to the general disclosure requirements of lobbying legislation. Legislators should know whether a lobbying solicitation effort lies behind an apparently spontaneous manifestation of constituent concern. Armed with information about the interests behind a letter-writing campaign, legislators can better evaluate the flood of letters that crosses their desks. Indeed it is in this area that disclosure of lobbying solicitation may be more useful than disclosure of direct lobbying. In

142 *See* Mohr, *Grass-Roots Lobby Aids Business*, N.Y. Times, Apr. 17, 1978, at A1, col. 4 (quoting Richard L. Lesher, Pres. of Chamber of Commerce of U.S.).

143 *See id.* at col. 3. According to one congressman, Representative Benjamin Rosenthal, "There has been an enormous increase in indirect lobbying." *Id.* at D7, col. 1. House Speaker Thomas P. O'Neill, Jr., has likewise observed a shift in the importance of grass-roots lobbying. *Id.* at col. 2.

144 For discussions of lobbying solicitation, *see generally* Mohr, *Grass-Roots Lobby Aids Business*, N.Y. Times, Apr. 17, 1978, at A1, col. 3; Mohr, *Growth of Grass-Roots Lobbying Draws Congressional Attention*, N.Y. Times, Apr. 21, 1978, at D5, col. 2.

direct lobbying, the legislator usually knows on whose behalf a lobbyist is working. Disclosure there merely helps him balance the lobbying organization's interest against the public interest. In solicitation campaigns, on the other hand, the legislator may be unaware of who is behind the campaign; he is thus unable to take into account the biases and resources of the organization orchestrating the lobbying effort.

Equally important is the public's need to know the sources of the solicitation effort. First, the public should have the right to know what groups are seeking to affect public policy through grass-roots appeals. Because government decisions ultimately involve public allocational decisions, the public is entitled to know who is trying to shape these decisions, to what end, and with how much vigor.

Second, information of this sort may be necessary for other interested citizens to mount effective campaigns urging contrary decisions. In this respect, lobbying solicitation disclosure facilitates the free and active discussion of significant public issues. Informing the public about the forces seeking to marshal the public's support allows the public better to make its decision whether to join the campaign.

Thus disclosure of lobbying solicitation helps protect the functioning of the representative process, informs the public of major efforts to shape public decisions, and fosters the vigorous discussion of public issues. These salutary effects of disclosure are far superior to continued secrecy under the current system.

In drafting lobbying solicitation legislation, the same goals of proper threshold levels,[145] meaningful disclosure provisions,[146] and adequate enforcement procedures[147] set out in direct lobbying legislation should extend to disclosure of lobbying solicitation. Since the object of the legislation is to provide information on all significant lobbying activity, disclosure of the lobbyist's efforts must include a statement concerning the use of lobbying solicitation. Here the thresholds are more appropriately geared to the size of the solicitation effort, that is, to the number of persons the

145 *See* notes 43 to 56 and accompanying text *supra*.

146 *See* notes 152 to 168 and accompanying text *infra*.

147 *See* notes 178 to 190 and accompanying text *infra*.

solicitation is calculated to reach.[148] Five hundred people, the figure used in most of the proposals,[149] seems an adequate standard. Disclosure can be accomplished in part through a description of the means employed for those solicitation efforts calculated to reach more than 500 people.[150] To help weigh the impact of the organization's effort, particularly in letter-writing campaigns, a sample of the solicitation should be filed with the report.[151] This would provide congressmen with an easy way to examine the spontaneity of letters and telegrams received by their offices. Since the organization will presumably already have both information on the means employed and the sample solicitation itself, the addition of provisions covering lobbying solicitation creates fuller disclosure without creating substantial recordkeeping costs.

IV. Disclosure and Enforcement

A. *The Disclosure Provisions*

The disclosure provisions of the legislation lie at the center of lobbying reform. Only through broad disclosure provisions can the legislation achieve its goal of increasing the accountability of the legislative process and of opening to public scrutiny those pressures affecting government decisions. Yet the more rigid and extensive the disclosure requirements become, the more complex and expensive become the requisite bookkeeping and the burden on lobbying organizations.[152]

To be effective, the legislation must require disclosure of four kinds of information. First, the reported information must inform

148 The proposals generally combine an expenditure threshold with the circulation one. Thus, S. 1785, for example, covers organizations that spend $5,000 or more in lobbying solicitations that are calculated to reach 500 persons. S. 1785 § 4(b)(3).

149 *See, e.g.*, S. 1785 § 7(b)(5). Part of the effectiveness of grass-roots lobbying lies in its ability to get influential members of a congressman's district to contact the official. None of the proposals attempts to deal expressly with this form of solicitation. Although a thorough disclosure measure would ideally include these as well, the practical limitations of keeping track of these individual solicitations necessitates their exclusion from the legislation. To the extent that the solicitation forms a part of a broader campaign of contacting influential people, however, it should be included.

150 *See, e.g.*, S. 1785 § 7(b)(5)(A).

151 *See, e.g.*, H.R. 5795 § 6(b)(7).

152 *See 1977 House Hearings*, *supra* note 3, at 361 (statement on behalf of National Wildlife Federation); *id.* at 286-87 (statement on behalf of Public Citizens Congress Watch); *1975 Senate Hearings*, *supra* note 3, at 221 (statement on behalf of AFL-CIO).

the public and legislators of the identity of lobbying organizations and of their individual lobbying agents. Second, it must outline the issues upon which the lobbyist is working. Third, it must indicate the degree of interest, as expressed through its lobbying activities, that the organization has in particular issues. Finally, it must reveal, through a disclosure of contributors, the persons on whose behalf the lobbyist is acting. Within each of these areas, the legislation must strike an appropriate balance between the benefits of full publicity and the burdens of reporting.

To achieve these broad disclosure goals, all versions of the legislation establish registration and reporting guidelines.[153] Each proposal requires full identification of the lobbying organization, its principal place of business, the nature of its business or activities, and the names of its executive officers and directors.[154]

Although these provisions give a general description of the lobbyist without creating extensive recordkeeping problems, they alone do not supply enough information. So that congressmen may know which lobbyists are connected with which lobbying organizations, the legislation must also require an identification of any person employed or retained by the organization as lobbyists.[155] For the same reason, lobbying organizations should be required to disclose the identity of individuals who lobby for the organization on a volunteer basis.[156] To be sure, this may require additional recordkeeping;[157] but, because of the significant lobbying efforts made by "professional volunteers" on behalf of organizations,[158] the failure to disclose the identity of these lobbyists would create a major loophole in an otherwise comprehensive lobbying statute.

153 *See, e.g.*, S. 1785 §§ 4-8; H.R. 8494 § 406; S. 1564 §§ 5-6; H.R. 4395 §§ 4-6.

154 *See, e.g.*, S. 1564 § 3(7). As a part of the organization identification, some proposals require a description of the methods used by the organization to arrive at its position on any issue for which it lobbied. *See, e.g.*, H.R. 5795 § 4(b)(1).

155 *See, e.g.*, H.R. 4395 § 4(b)(2).

156 Only volunteers contributing their efforts to an organization with paid employees would be covered, as purely voluntary organizations are exempted from the legislation.

157 The responsibility for reporting the information rests with the organization, not with the individual volunteers. *See, e.g.*, H.R. 4395 § 6(b).

158 "Professional volunteers" exert substantial effort to influence legislation through extensive lobbying without receiving any compensation for their efforts. *1977 House Hearings*, *supra* note 3, at 263 (statement on behalf of Chamber of Commerce). Throughout the debates, Ralph Nader has been cited as the prime example of an unpaid lobbyist. *See, e.g.*, *Outlook Dim for Lobby Bill Tougher than the One House Is To Consider*, 36 CONG. Q. WEEKLY REP. 620 (1978).

Beyond requiring disclosure of a lobbying organization's identity and that of its agents, disclosure provisions must demand a reporting of the issues upon which it has lobbied.[159] Still, desire for disclosure of all issues upon which an organization lobbied must be balanced by a concern for the recordkeeping difficulties such disclosure would entail. A lobbyist working on a complex of legislative issues could conceivably be required to list hundreds of issues.[160] This difficulty can be avoided in two ways. First, the statute could set a ceiling on the number of issues reported, so that the organization would need to report only a limited number of its most active concerns.[161] Setting an arbitrary ceiling, however, would allow large organizations that vigorously lobby on many diverse issues to escape reporting their efforts in areas in which their activity could have a major impact.

A second, more acceptable, solution calls for a listing and description of general areas, rather than specific issues, on which the organization has lobbied.[162] This plan would set no ceiling on the number of issues reported, but would reduce the need for extensive recordkeeping by simplifying the listing of specific issues.[163]

An evaluation of the organization's lobbying activity also requires disclosure of the degree of effort the organization has made to influence congressional decisions. This can usually be accomplished through the reporting of expenditures.[164] At a

159 *See, e.g.*, S. 1564 § 6(b)(6); H.R. 4395 § 6(b)(6).

160 *1977 House Hearings, supra* note 3, at 263 (statement on behalf of Chamber of Commerce). A person working on tax reform, for example, might be required to list separately investment tax credit, pension fund deduction, charitable contributions, and depletion allowance.

161 H.R. 4395 § 6(b)(6) limits the organization's description of issues requirements to the fifteen issues on which it spent the greatest proportion of its efforts. *See* H.R. 8494 § 6(b)(6) (requiring description of issues upon which the organization spent "significant amount of its efforts"). S. 1564 § 6(b)(6) calls for a description of the twenty issues which the organization estimates accounted for the most significant amount of its lobbying efforts. However, this provision is apparently intended to identify the organization and not to limit the reporting requirements since the following section requires a description of each issue which was the subject of one or more lobbying contacts. *Id.* at § 6(b)(8)(A)(i).

162 No proposal has adopted this approach for primary issue disclosure, although it is employed for issues of secondary importance in S. 1785 § 6(b)(4).

163 Information about the organization's activities in the abstract, however, is not very useful to legislators who are confronted by individual lobbyists acting under the organization's authority. Each organization should also report the general issues worked on by each individual who lobbied for the organization.

164 The proposals include an itemized listing of each expenditure in excess of $35 made

minimum, the legislation must require disclosure of the total expenditures on lobbying activities.[165] It should also call for a breakdown of expenditures according to the listed general areas on which the organization lobbied.[166] Finally, it should include the expenditures of the organization for individual lobbyists.[167] Taken together, these disclosures of expenditures would reveal the amount of interest and effort the organization devoted to the particular issues for which it lobbied and would provide a means for gauging the impact of lobbying groups upon final government decisions.

Finally, an effective statute must require the disclosure of the names of contributors to the organization so that legislators and the public may know the real interests behind lobbying efforts. It is indeed distressing to note that the current major lobbying bills before Congress, H.R. 4395 and S. 1564, each lack contributor disclosure provisions. However, a number of previous proposals have included such provisions[168] and their approach deserves discussion.

One problem of contributor disclosure provisions is that they may force lobbying organizations to report huge numbers of relatively minor contributions. The cost of such reporting and recordkeeping could be quite burdensome. A method of eliminating this difficulty would be the use of a minimum contribution level necessary to trigger the disclosure requirements.

Such an approach would exclude ordinary dues from coverage, thereby avoiding complete membership disclosure, and would provide information about the contributors whose interests in the organization exceed the interests of contributors paying only a nominal membership fee. Since the purpose of lobbying legislation is to secure information on significant lobbyists, there is little in-

to or for the benefit of any federal officer or employee and a disclosure of any expenditure for a dinner or reception for federal officers or employees where the cost exceeded $500. *See, e.g.*, S. 1564 § 6(b)(2)-(3).

165 *See, e.g.*, H.R. 8494 § 6(b)(2).

166 Only one of the current major proposals calls for a disclosure of expenditures by issue. *See* § 1564 § 6(b)(8)(A)(i). Such breakdown, however, is only to indicate that more than $500 was spent on the issue. The actual amount spent in excess of $500 need not be reported. *Id.*

167 *See, e.g.*, S. 1785 § 7(b)(2)(B).

168 *See, e.g.*, S. 1785 § 5(c)(2); H.R. 1180 § 6(b)(8); H.R. 5795 § 4(b)(3).

terest in knowing about small contributors. Thus, a simple figure, like the $3000 figure adopted in several versions of proposed legislation,[169] should be sufficient both to avoid full membership disclosure and to supply necessary information on significant contributions.[170]

To provide a degree of privacy for the individual contributors and for the internal operations of the organization, the disclosure of contributors should be organized by category of amount contributed, rather than by listings of specific amounts. These categories, however, must be sufficiently narrow at both high and low levels to give useful information about contributors. Although several proposals have established meaningful categories at the lower levels,[171] none of the proposals adequately covers larger contributions. Thus, one proposal,[172] by lumping all contributions of more than $50,000 into one category, fails to distinguish between contributions of $60,000 and contributions of $600,000, even though the difference in impact between those two would be considerable.[173]

The disclosure of contributors to an organization may inevitably include a listing of people whose contributions were in no way intended to relate to lobbying. This would result, in part, from the abandonment of the principal purpose test. Contributors may not view an organization with many purposes, only one of which is lobbying, as a registered lobbyist. The organization's lobbying report would list the contributor even though he did not know that the organization was a lobbyist or that his contribution would be disclosed. Such disclosure would create an erroneous impression

169 *See, e.g.*, H.R. 5795 § 4(b)(3).

170 The committee version of S. 2477 used a percent-of-income formula for establishing individual contribution minimums. This provision required an organization to identify each organization contributing 1 percent or more of the total received by the lobbyist. The bill required disclosure of individual contributors if they contributed $1,000 or more and such contribution constituted 5 percent or more of the total income received by the lobbyists during the period. S. 2477 § 4(a)(3) (text as reported out by Judiciary Committee), *reprinted in* S. REP. No. 94-763, *supra* note 3, at 59. This method seems likely to allow large organizations to escape reporting significant contributions.

171 *See, e.g.*, S. 1985 § 5(c)(2), establishing the following: Category A — $3,000 to $10,000; Category B — $10,001 to $25,000; Category C — $25,001 to $50,000; Category D — $50,001 to $100,000; Category E — $100,001 to $250,000; Category F — over $250,000. H.R. 5795 § 4(b)(3) adopts the following categories: $4,000 to $9,999; $10,000 to $24,999; $25,000 to $49,999; $50,000 and over.

172 H.R. 5795 § 4(b)(3).

173 The schedule established in S. 1785 seems good as far as it goes. The categories above $250,000 should be $250,000 apart.

that the contributor supports the lobbying effort, when in fact he did not even know about it.[174]

The possibility that donations to multi-purpose organizations might subject one's gift to publicity could retard contributions to organizations and ultimately curtail the ability to raise funds.[175] Of course, contributions specifically earmarked for uses other than lobbying would not be subject to the reporting guidelines, but contributions applied to a general operating fund would be disclosed just as contributions specifically given to support lobbying.

The adoption of a two-tier reporting threshold would minimize this problem.[176] Lower tier organizations, which do only small amounts of lobbying and whose contributors might be unaware of their lobbying activity, would not be required to disclose their contributions, while contributors to groups with more active lobbying, whose individual disclosure would be required, could reasonably be charged with knowledge of the lobbying.[177]

B. *The Enforcement Provisions*

Because the General Accounting Office has been so critical of the enforcement of the current law,[178] reform legislation must establish effective enforcement provisions. Most draft proposals adequately deal with the problem of enforcement by giving the Comptroller General and/or the Attorney General extensive powers to monitor and to investigate compliance with the act and to impose certain administrative penalties for non-willful violations.[179] Under one proposal, the Comptroller General is empowered to subpoena information necessary for accomplishing his work under the act,[180] administer oaths,[181] hold investigatory hear-

174 *1977 House Hearings*, *supra* note 3, at 262 (statement on behalf of Chamber of Commerce).

175 *1977 House Hearings*, *supra* note 3, at 146 (statement on behalf of American Civil Liberties Union).

176 *See* text accompanying notes 54 to 56 *supra*.

177 This provides yet another reason for setting the higher threshold considerably farther from the lower threshold than is now done in S. 1785.

178 GAO Report, *supra* note 33. *See* text accompanying notes 32 and 33 *supra*.

179 *See, e.g.*, S. 1785 §§ 10-16; H.R. 8494 §§ 7-8; S. 1654 §§ 8-9.

180 S. 1785 § 10(a).

181 *Id.* at § 10(c).

ings,[182] issue regulations,[183] and publish "advisory opinions"[184] interpreting substantive provisions of the act. If, after an investigation, the Comptroller General has reason to believe there has been a violation, he can attempt to obtain voluntary compliance through informal conference,[185] or he may refer such violations to the Attorney General,[186] who can seek mandatory injunctive and other appropriate relief.[187] If the Attorney General fails to bring a civil or criminal enforcement action within sixty days of the Comptroller General's referral,[188] the Comptroller General may himself institute a civil action.[189]

Armed with these broad investigatory and prosecutorial powers, both the Comptroller General and Attorney General should be able to monitor organizations subject to the act. By requiring businesses to keep all records maintained in the ordinary course of business, the provisions would also expedite the detection of violations and the imposition of appropriate sanctions against violators.[190] These provisions should go far towards curing the failings of the 1946 Act.

Conclusion

A comprehensive lobbying statute, requiring disclosure of lobbying efforts in the context of both direct lobbying and lobbying solicitation, should be an integral part of Congress' effort to achieve greater accountability and openness in government. Serving twin interests of rational decisionmaking and public evaluation of the influences which affect congressional decisions, such legislation offers the possibility of a political system which functions more responsibly toward the public interest. Perhaps more importantly, lobbying disclosure legislation can also play a role in restoring public confidence needed for the democratic process to thrive or long endure.

182 *Id.* at § 10(d).
183 *Id.* at § 11(a)(8).
184 *Id.* at § 13(a). A brief discussion of the problems of advisory opinions may be found in *1977 House Hearings*, *supra* note 3, at 118, 125-26 (statement of Deputy Comptroller of the Currency Keller).
185 S. 1785 § 14(b)(1).
186 *Id.* at § 14(b)(2).
187 *Id.* at § 14(c).
188 *Id.* at § 14(e).
189 *See, e.g.*, S. 1785 § 9(b).
190 Under the most recent proposals, violators are subject to civil penalties of up to

Although the issues in drafting an effective lobbying statute are complex and difficult, Congress has weighed the competing considerations adequately. More than five years of vigorous debate and numerous drafting sessions have explored all the avenues of lobbying reform. Further delay is neither necessary nor wise. Other pressing problems face the Congress — an energy program, economic woes, foreign policy crises. Confronted with such headline issues, Congress may be tempted once again to shelve lobbying legislation. Yet the very importance of these headline matters makes the need for effective new lobbying legislation all the more urgent.

$100,000 for willful violations of the Act. H.R. 4395 § 8(a); S. 1564 § 9(a). The Justice Department has recommended two levels of criminal penalties, one consisting of "heavy fines for malfeasant organizational defendants" and another providing for the imprisonment of those individual officers, employees, or agents of any organizational defendants who "willfully cause the submission of intentionally false or fraudulent reports." *1977 House Hearings*, *supra* note 3, at 193 (statement of Deputy Attorney General Flaherty).

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deficiencies" and emerging areas of public concern cannot all be foreseen and predicted.

Any revision of the Communications Act, therefore, will require the same adaptability to changing technology and market conditions that the 1934 Act originally possessed. Such flexibility is crucial if the proposed legislation is to be capable of solving the new problems of the 1980's and 1990's — and not merely problems clearly indentifiable today.

FREEING CONGRESS FROM THE SPECIAL INTEREST STATE: A PUBLIC INTEREST AGENDA FOR THE 1980's

DAVID COHEN*
AND
WENDY WOLFF**

During the 1970's significant institutional reforms, such as opening committee meetings to the public, were implemented to increase the accountability and responsiveness of Congress. In this Article, Mr. Cohen and Ms. Wolff of Common Cause, described by its members as a citizens' lobby representing the "public interest," briefly outline these reforms and argue that despite the advances achieved, Congress continues to be dominated by special interest groups and unable, or unwilling, to deal effectively with the complex problems confronting the nation.

From a public interest point of view, they outline nine general proposals for Congress to consider, designed to limit the power of special interests or lead to more effective and responsive government. Included in their list are social reforms, such as Sunset legislation that have already been advocated by others but have yet to be implemented. They further offer some new proposed reforms, such as rotation of committee assignments, which they argue should also be instituted if Congress is to deal effectively with the difficult issues facing the nation in the 1980's.

Introduction

Our political system today is widely perceived as suffering from a variety of serious problems. The symptoms are discussed endlessly in public conversations: the percentage of voter participation drops with each election, factionalism increases, the politics of self interest influence public policy, fewer citizens identify with political parties, and confidence in our political institutions plummets. The uneasiness is pervasive, even among those who are strong defenders of our political and legislative system.

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The authors are grateful for the valuable help received from their colleagues at Common Cause. In particular, Bruce Adams, director of issue development, Michael Cole, director of legislation and Georgianna Rathbun, vice president for editorial policy, made many helpful suggestions and comments on drafts of the article. Kenneth Guido, Common Cause general counsel, and Ann McBride, associate director of legislation, navigated us through the intricacies of the franking statute and ethics code, respectively.

The United States government has undergone major changes since the end of President Eisenhower's term. Special interests now play a prominent role in determining government policy on domestic issues. Those interests have in turn proliferated to such an extent that factions often concentrate on pursuing their own immediate agendas without considering the impact on the nation as a whole. The intensity of the competing and conflicting demands of legitimate interest groups, both private and public, has led to government by interest group veto, a system which significantly alters the formulation and implementation of domestic policy. This system has made Congress the pivotal institution that holds together the Special Interest State.[1]

Congress has always been pressured by interest groups. This is not a new phenomenon in American politics. What is new, however, is the increasing complexity of the problems facing the federal government in the post-Great Society era, many of them cutting across the jurisdictions of federal departments and congressional committees.[2] During the same period, single and special interest groups have grown in power, and their campaign contributions have become an important factor in congressional campaigns.[3] Neither the Senate nor the House of Representatives presently has any defense against these narrow interest pressures.

The result is that now, more than ever, special interests dominate government policy on domestic issues. They have constructed "iron triangles" in which the interest group forms a close alliance with the relevant agency officials and members of the congressional committee handling its area of concern.[4]

At the same time, the advent of the Special Interest State has changed the nature of representation. Many legislators increasingly view their responsibility as simply to mirror their congressional

1. For a further discussion of the Special Interest State as seen by Common Cause, *see* COMMON CAUSE, THE GOVERNMENT SUBSIDY SQUEEZE (1980). *See also* H. KAUFMAN, ARE GOVERNMENT ORGANIZATIONS IMMORTAL? (1976).

2. *See, e.g.*, text accompanying note 100 *infra*.

3. *See, e.g.*, COMMON CAUSE, HOW MONEY TALKS IN CONGRESS (1979); *see* text accompanying notes 156 to 162 *infra*.

4. John W. Gardner, Common Cause Founding Chairman, has described this tripartite arrangement as the "unholy trinity." *See* Gardner, *Restructuring the House of Representatives*, 411 ANNALS 169, 171 (1974).

district in the state.[5] In tandem, they feel compelled to represent their campaign contributors, especially if the issue important to the contributor is not particularly visible and is not strongly opposed within the legislator's state or district. The mirror image approach to representation, combined with the practice of representing campaign contributors, results in too few members of Congress looking at the broader national interest and attempting to sort out contending claims, to mediate differences, and to push for solutions that meet the national interest.

The founding chairman of Common Cause, John W. Gardner, has compared today's policymaker to a person trying to win a game of checkers. Someone puts a thumb on one checker and says, "Go right ahead and play. Just don't touch this checker." Someone else puts a thumb on another checker and says, "Don't touch this one." Others do the same. Pretty soon, all thumbs, no moves! Think of the owners of the thumbs as special interests. No one of them wants to make the game unwinnable. They just do not want their particular checker touched. But collectively, they paralyze policymaking.[6]

The dominance of interest groups may thus reinforce public pessimism about government's ability to deal with basic national problems in a fair and equitable manner. It fosters the belief that politicians are dominated by narrow interests at the expense of the public good. The result is a civic skepticism that leads citizens to withdraw from politics. Voters no longer see the link between their vote and governmental action on matters that concern them.[7]

Yet the Special Interest State was not created overnight. It has grown steadily, pervading the political system so completely that it cannot easily be uprooted. A challenge for the 1980's is to enable Congress to withstand special interest pressures in formulating and

5. The mirror example is constantly raised in conversations with legislators. *See* E. DREW, SENATOR 113-14 (1979). Former senator Edmund S. Muskie has been quoted as saying, "People are dissatisfied with Congress, I think, because Congress represents them too well." *See* Farney, *Congress, Fragmented and Fractious, Gets Less and Less Done*, Wall St. J., Dec. 14, 1979, at 1, col. 6.

6. Speech by John W. Gardner, National Conference of Bar Presidents and the National Association of Bar Executives (Aug. 6, 1979).

7. For a discussion of civic skepticism, *see* A. MCFARLAND, PUBLIC INTEREST LOBBIES: DECISION MAKING ON ENERGY (1976).

implementing national policy. The magnitude of the challenge is suggested by the following questions:

- Are special interests required to operate openly?
- Are legislators free of financial dependence on special interests for campaign funds and honoraria?
- Is the political system structured to allow maximum electoral competition?
- Is Congress able to formulate and implement a coherent national policy?

At present, the answer to each of these queries is "no."

Before these questions can be answered in the affirmative, major legislative and organizational changes will be needed. During the 1970's, the House and Senate made a number of modifications in their rules, practices, and procedures designed to make Congress a more open institution.[8]

In general, those changes have significantly altered the way decisions are made in the House and Senate. Some increased the accountability of legislators to their constituencies or their institution,[9] and some strengthened the capacity of the leadership to overcome isolated enclaves of uncontrolled power.[10] No changes, however, have yet dealt with a number of problems that are directly related to the Special Interest State, such as the way the system protects congressional incumbents[11] and the fragmentation of policymaking within the institution.[12]

This Article will discuss and evaluate the changes that were made in the 1970's and will set forth proposals for further institutional changes from a "public interest" perspective. Such changes are needed in the 1980's if Congress is to resist the pressures of the Special Interest State.

I. Congress Before the Changes of the 1970's

Rules, practices, and procedures are at the heart of the way the House and Senate work. The committee chairmen who controlled Congress from the late 1930's through the mid-1960's understood

8 *See* text accompanying notes 29 to 85 *infra*.
9 *See* text accompanying notes 36 to 74 *infra*.
10 *See* text accompanying notes 60 to 85 *infra*.
11 *See* text accompanying notes 140 to 152 *infra*.
12 *See* text accompanying notes 88 to 93 *infra*.

this fundamental point and took pains to master the rules and procedures. These leaders felt secure because they held positions of power solely through their accumulated years of seniority.[13] They represented safe districts where they were rarely, if ever, seriously challenged in their bids for re-election. As a result, many committee chairmen felt free to ignore House rules, operate in an arbitrary manner, and otherwise abuse the power of their offices.[14]

Gradually, however, a new generation of senators and representatives who wanted to shape events and gain recognition was elected. They were neither bound by tradition nor patient enough to wait for decades to achieve some influence. Members of Congress who were first elected from the mid-1950's through 1964 found that many of the rules, practices, and procedures of the House and Senate were used by congressional leaders to prevent them from influencing policy or even from dealing with matters of high public concern on which they had campaigned.[15] They saw that a minority had the power repeatedly to prevent action desired by the majority on issues like civil rights, medicare, and other uncompleted aspects of the New Deal. In each case, procedures were used by those in power to block action favored by a majority of legislators — procedures such as the two-thirds Senate vote required to close debate and end a filibuster, the power of the House Rules Committee to keep legislation from the House floor, or arbitrary behavior by House committee chairmen.[16]

Over the years, procedural frustration of the majority occurred more often in the House of Representatives than in the Senate. One reason is the greater rigidity of House rules, which, unless an exception is specifically made, forbid attaching unrelated, or "non-germane," amendments to legislation[17] and require bills

13 The seniority system has been widely criticized, *see, e.g.*, D. Pearson & J. Anderson, The Case Against Congress 263-92 (1968) [hereinafter cited as Pearson & Anderson].
14 *See* Common Cause, Report on House Committee Chairmen (1975) [hereinafter cited as Report on House Committee Chairmen]. The Democratic Study Group and Congress Watch, the Ralph Nader lobbying organization, provided substantial research assistance in preparation of the report.
15 *See, e.g.*, Pearson & Anderson, note 13 *supra*.
16 *See, e.g.*, Pearson & Anderson, note 13 *supra*; *see also* G. Galloway, The History of the House of Representatives (1976).
17 W. H. Brown, Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States 96th Congress, H.R. Doc. No. 95-403, 96th Cong., 2d Sess. 490 (1979) [hereinafter cited as House Rules].

reported from committee to be reviewed by the Rules Committee and given a "rule" defining the conditions for consideration on the floor.[18] By exercising such power, the House Rules Committee creates a potential bottleneck that does not exist in the Senate, where the Majority Leader may schedule any bills that have been reported by legislative committees for floor consideration. In the Senate, even if a bill is buried in committee, its supporters can offer it as an amendment to unrelated legislation in order to obtain a floor vote.[19] Thus, except on issues that are filibustered, even less powerful senators are able to bring matters that concern them to the Senate floor.[20]

Because incoming members of Congress were disturbed by these rigid rules, a mood conducive to change built steadily throughout the 1960's among the ranks of newer members of the House. As a result, the majority of the changes of the 1970's took place in the House.[21]

A further catalyst for change was the establishment of the Democratic Study Group (D.S.G.), an organization of generally younger liberal and moderate Democratic Representatives who

18 *See id.* at 356-58. Fights over the House Rules Committee occurred perennially. After the 1948 election, the House adopted the twenty-one-day rule. Under this procedure, if a legislative committee's chairman decided to invoke the rule in the case of a bill reported by his committee, the Rules Committee had twenty-one days to grant that bill a rule for floor consideration. If the Rules Committee did not act within this time, the full House could vote a rule on the bill. Not only did this system encourage the Rules Committee to act, but it thwarted the Committee's power to trade the grant of a rule for legislative concessions from the bill's parent committee. In 1951, the twenty-one-day rule was repealed after a coalition of Southern Democrats and conservative Republicans gained a majority in the House.

In 1965, the twenty-one-day rule was re-enacted after the Democrats won large numbers of formerly Republican seats in the 1964 landslide. *See House Rules Changes Enhance Majority Rule*, 21 CONG. Q. ALMANAC 585 (1965). In 1967, after 47 House Democrats lost their seats, the rule was again repealed. H.R. Res., 90th Cong., 1st Sess., 113 CONG. REC. 28 (1967).

19 *See* SENATE COMM. ON RULES AND ADMINISTRATION, 96TH CONG., 1ST SESS., STANDING RULES FOR CONDUCTING BUSINESS IN THE UNITED STATES SENATE 6, 9 (Comm. Print 1979) [hereinafter cited as SENATE RULES].

20 For example, Medicare legislation was bottled up in the House Ways and Means Committee in the early 1960's and did not reach the House floor for a vote. In the Senate, however, the issue was voted on three times in the period from 1960 to 1964. Floor votes were taken in 1960 and 1962 on a health care proposal offered as an amendment by Senator Clinton P. Anderson to other legislation, although the proposal was defeated both times. In 1964, an amendment to provide for health care for the aged through Social Security offered by Senator Albert Gore was adopted by the Senate but killed in conference with the House. H.R. 11865, 88th Cong., 2d Sess. (1964). *See Medicare Program Dies in Conference*, 20 CONG. Q. ALMANAC 231 (1964).

21 *See* text accompanying notes 29 to 85 *infra*.

saw themselves as national Democrats responsive to the "Presidential party."[22] The D.S.G. was first formed in the late-1950's, because of the resentment felt by many liberal House Democrats over the inability of the House to pass progressive legislation.[23] Previously, the House Democratic Party[24] had no formal institutional procedures to set party priorities or discuss important issues. D.S.G. chairmen were legislators who understood and emphasized the institutional responsibilities and the internal workings of Congress.[25]

One successful early effort by the D.S.G. to bring about change came in 1970. As part of the Legislative Reorganization Act Amendments of that year, the House agreed that floor votes on amendments would be taken by a form of roll call known as a recorded teller vote, rather than by the long-established procedure of non-recorded teller vote.[26] Under the new system, a recorded vote

22 The division between presidential and congressional parties is described by James MacGregor Burns. *See* J. M. BURNS, THE DEADLOCK OF DEMOCRACY: FOUR PARTY POLITICS IN AMERICA (1967).

23 *See Democratic Study Group: A Winner on House Reforms*, 31 CONG. Q. ALMANAC 1366 (1973).

24 *See* BURNS, *note 22 supra*.

25 The chairmen of the Democratic Study Group were:

Year	*Congress*	*Chairmen*	*State*
1959-60	86th	Lee Metcalf	Montana
1961-62	87th	Chet Holifield	California
1963-64	88th	John A. Blatnik	Minnesota
1965-66	89th	Frank Thompson, Jr.	New Jersey
1967-68	90th	James G. O'Hara	Michigan
1969-70	91st	Donald M. Fraser	Minnesota
1971-72	92nd	Phillip Burton	California
1973	93rd	John C. Culver	Iowa
1974	93rd	Thomas S. Foley	Washington
1975-76	94th	Bob Eckhardt	Texas
1977-78	95th	Abner J. Mikva	Illinois
1979	96th	David R. Obey	Wisconsin

Telephone interview with staff member of Democratic Study Group in Washington, D.C. (Dec. 20, 1979).

26 *See* Legislative Reorganization Act of 1970, Pub L. No. 91-510, § 120, 84 Stat. 1140 (1970). The non-recorded teller vote used by the House had its roots in the British House of Commons, which had long since abandoned the practice.

The procedure worked in this way: the House was in the Committee of the Whole considering amendments to legislation. Amendments were voted on by voice vote, followed by a division in which members stood at their seats to signify an aye or a nay vote. On important issues, the losing side would demand a teller vote. The presiding House Chairman of the Committee of the Whole would appoint as tellers the principal mover of the amendment and the principal opponent. Both would stand in the center of the center aisle and count (or "tell" — hence the name) first the aye votes and then the nay votes as the representatives on

would be taken on an amendment at the request of twenty representatives.[27]

In marshalling support for the recorded vote, the D.S.G. publicized the issue extensively, resulting in newspaper editorials across the country supporting the proposed changes.[28] The D.S.G. thus demonstrated that outside pressures could be mobilized to modify House procedures. Its success underlined the need for accountability for voting and laid the groundwork for adoption of far more extensive reform changes in the 1970's.

II. Changes Made in the 1970's

In the 1970's, the principal changes in the House and Senate included measures designed to improve accountability, such as open committee bill-drafting meetings,[29] personal financial disclosure,[30] and codes of official conduct.[31] In the House, changes were also made to strengthen the roles of the party caucus and party leaders, including the election of committee chairmen by the majority party caucus[32] and the selection of majority party committee members by the leadership of its Steering and Policy Committee.[33]

In order to evaluate the effect of the major institutional changes made in Congress over the last ten years, the following analysis will attempt to consider whether each change has weakened or strengthened: (1) the position of leaders in Congress and their ability to influence legislative actions; (2) the legislators' sense of

each side filed past them. Amendments adopted by the Committee of the Whole could be put to a roll call vote after the bill had been read for amendment. Occasionally a roll call was taken, and sometimes votes would be reversed. All lobbyists — liberal, conservative, special interest, public interest — urged House members to give them a teller vote, even though they knew the same member would vote differently on a roll call vote. Often members would be absent from the proceeding to avoid taking a stand on an issue. *See First Congressional Reform Bill Enacted Since 1946*, 26 Cong. Q. Almanac 447 (1970).

27 *Id.* One-fifth of the number that constitutes a quorum can demand a roll call vote. House Rules, *supra* note 17, at 297. In the Committee of the Whole, a quorum is 100 members. *Id.* at 553. At the start of the 96th Congress, this rule was changed to increase from 20 to 25 the number required to obtain a roll call vote. *Id.* at 298.

28 *See, e.g.*, *Lights on in Congress*, N.Y. Times, July 22, 1970, at 40, col. 1.

29 *See* text accompanying notes 35 to 42 *infra*.

30 *See* text accompanying notes 42 to 48 *infra*.

31 *See* text accompanying notes 45 to 59 *infra*.

32 *See* text accompanying notes 63 to 74 *infra*.

33 *See* text accompanying notes 75 to 77 *infra*.

responsibility to the institution; (3) Congress' ability to deal with major problems affecting the country; and (4) the legislators' accountability to the voters.

A. *Changes Affecting Accountability*

In the struggle over House and Senate rules, legislators pressing for change were aided by an outside coalition of citizen, labor, and consumer organizations, including Common Cause.[34] While some changes were effected by legislation, many were simply adopted as House or Senate rules changes.[35]

Each of the changes designed to make legislators more accountable to their constituents and their institution stemmed from a perception of public dissatisfaction with the operations of Congress. Each reform was therefore designed to allow the media and the public to pay closer attention to the way Congress conducts its business.

1. Open Meetings

Before rules changes in the 1970's were adopted, House and Senate committee hearings on non-defense matters were generally open to the public, but the bill-drafting sessions — at which most of the substantive work of the committees was conducted — were almost always closed.[36] A requirement to hold bill-drafting meet-

34 For example, the League of Women Voters, the AFL-CIO, and Common Cause lobbied for more open committee hearings. *See Senate and House Open up Their Sessions in 1973*, 29 Cong. Q. Almanac 1074, 1074-77 (1973).

Common Cause's particular contribution in lobbying for congressional changes was to build citizen awareness about the needs for specific institutional changes. Activities aimed at the new Congress began during the 1972 election campaign, when Common Cause members in congressional districts across the country asked all candidates in each House and Senate race to answer written questions regarding their positions on key issues. Candidates were informed that their responses would be made public through the news media and that the winners would be held to their commitments. The issues discussed included both proposed legislation and the internal House and Senate changes that the majority party caucuses would consider at the beginning of the new Congress, such as open meetings and electing committee chairmen. Aimed at controlling the excessive power of the House Ways and Means Committee, similar activities took place in the 1974 campaign.

35 Unlike bills, which are first considered by committees and may take many months before they are voted on by Congress, rules changes to be voted on are determined by the majority party caucus, usually either before a new Congress begins or shortly thereafter.

36 *See, e.g.*, L. Gilson, Money and Secrecy 22 (1972).

ings in the open was adopted first by the House in 1973 as a rules change.[37] The Senate turned down a similar proposal that year in a vote in which senators with considerable seniority opposed the provision while newer senators supported it.[38] Most senators, perhaps feeling more insulated from the voters by their six-year terms, were less responsive than representatives to support for open meetings. Over time, however, the newer senators had an impact, and many senior senators switched their positions, so that on November 5, 1975, the Senate adopted an open meetings provision.[39] Under the new rules in both bodies, meetings are presumed to be open, unless the committee members take a recorded vote to close a meeting. Such a vote can apply only for a limited period — either for a single day's meeting or for as long as the committee is considering a particular bill.[40] In the 95th Congress, House-Senate conference committee meetings were also opened.[41]

37 H.R. Res. 259, 93rd Cong., 1st Sess., 119 CONG. REC. 6713 (1973). The issue first drew attention in the 1972 election campaign. Both Democratic and Republican candidates overwhelmingly supported the proposed change; virtually no one declared for secrecy or was undecided. Common Cause released the replies to its questionnaire, *see* note 34 *supra*, to the local press in each congressional district before the election. Then, after the election, it released the replies of the winning candidates to the national press, to show that an overwhelming majority had pledged support. The effect was to focus the attention of Washington journalists on commitments representatives had made to their constituents.

In fact, open committee meetings was one change that was proposed from outside rather than from within the Congress. In 1973, an open meetings provision was not even on the D.S.G.'s original list of proposed changes. It was added only after Common Cause publicly reported the support of a majority of House members for an open meetings requirement.

38 S. Res. 69, 93rd Cong., 1st Sess., 119 CONG. REC. 5907 (1973). The first Senate proposal on open meetings was modeled on the House rule. Those opposed to open meetings countered with a rule that said meetings are presumed to be closed unless voted open by the specific committee. The presentation of this alternative indicated that Senators opposed to open meetings realized they could not win without an alternative proposal. The Senate vote followed lines of seniority rather than ideology, with most senior Senators opposed to the open meeting rules. Of the 21 Senators voting who had 15 years of service or more, 19 voted against the proposal, while 16 of the 22 senators with 3 years or less of service voted for it. *See Senate, House Modify Secrecy Rules*, 29 CONG. Q. ALMANAC 716, 717 (1973). Some Senate committees experimented with opening their meetings prior to the Senate rules, *see* note 40 *infra* and accompanying text, and found that it worked. The most notable examples were the Senate committees on Banking, Housing, and Urban Affairs and Interior and Insular Affairs. *Id.*

39 S. Res. 9, 94th Cong., 1st Sess., 121 CONG. REC. 403 (1975). The open meetings provision was adopted by the Senate as a rules change and, like the earlier House action, took effect immediately.

40 HOUSE RULES, *supra* note 17, at 370, 396-98. In the Senate, such closed meetings or series of meetings concerning the same subject may not exceed fourteen calendar days. SENATE RULES, *supra* note 19, at 32.

41 H.R. Res. 5, 95th Cong., 1st Sess., 123 CONG. REC. 145-47 (daily ed. Jan. 4, 1977). These, too, may now only be closed by taking a recorded vote by House and Senate con-

Before the era of openness, interest group lobbyists enjoyed a special advantage in their ability to discover what was happening inside a committee through "iron triangle" connections. Having open bill drafting sessions, however, now helps to curb the influence of special interests on committees; both the public and the press can watch their legislators in action.[42]

2. Financial Disclosure and Ethics Codes

In 1977, the House and Senate acted to require senators and representatives and their spouses to make comprehensive public disclosure of personal financial holdings.[43] These actions did not come easily. Common Cause, among others, had been pressing for such requirements since the early 1970's. In 1976, however, an added impetus was provided by the quadrennial Commission on Executive, Legislative and Judicial Salaries, whose nine members were appointed by President Ford, the Congress, and the Chief Justice of the United States.[44] In reporting to President Ford its recommendations for salary increases on December 6, 1976, the Commission also proposed that a new "Code of Public Conduct" for top officials in all three branches of the government be tied to the increase. The Commission saw adoption of such a Code as "the indispensable prelude to a popular acceptance of a general increase in executive, legislative and judicial salaries. Such a reform must be sufficiently tangible to persuade a substantial majority of

ferees separately. The House voted the additional step of requiring a vote of the whole House if the conferees are to be permitted to attend a closed conference.

42 Open committee meetings have led to open meetings in the House Democratic caucus, with recorded votes taken on all issues except the election of committee chairmen. *See* CONG. Q. SERVICE, GUIDE TO CONGRESS 230-A (2d ed. 1976). Following the example set by the Republicans, the Democratic caucus is now open most of the time. *Id.* at 227-A. When the caucus in one instance was closed, the press considered it an exceptional event which merited coverage. In 1978, before the 96th Congress began, Majority Leader Jim Wright was photographed putting up a "Keep Out" sign as a closed Democratic caucus debated whether it had a responsibility to vote on subcommittee chairmen censored or reprimanded by the House for violating the Ethics Code. In a closed meeting, the caucus voted that it had no such responsibility, although the vote was recorded and made public. *See* note 26 *infra*; *Democrats Soften Proposed Ethics Changes*, 36 CONG. Q. WEEKLY REP. 3399 (1978).

43 S. Res. 110, 95th Cong., 1st Sess. (1977); H.R. Res. 287, 95th Cong., 1st Sess. (1977); *see House, Senate Adopt New Code of Ethics*, 33 CONG. Q. ALMANAC 763 (1977).

44 The Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, 81 Stat. 613 (1967), provides for the establishment of the commission to review top-level salaries every four years.

Americans that the post-Watergate era has truly begun. Such a majority is by no means persuaded now.'"[45]

With the support of the Speaker of the House and the Senate Majority Leader, both the House and Senate adopted new rules calling for financial disclosure requirements and strict codes of conduct.[46] The financial disclosure provision subsequently became part of the Ethics in Government Act of 1978, which applied to the executive and judicial branches of the federal government as well as to the legislature.[47] The law requires disclosure of income and gifts over $100, assets and transactions in real estate, stocks and commodities over $1,000 and liabilities over $10,000 by categories of amount.[48]

The Ethics Codes, which are embodied in House and Senate rules,[49] bar gifts from lobbyists of over $100[50] and forbid House and Senate members from accepting contributions for so-called unofficial office accounts — often referred to as slush funds — for items such as newsletters, special mailings, or entertaining.[51] Effective January 1, 1979, the Codes placed a limit on outside earned income of 15 percent of the legislator's official salary.[52] The Senate, however, in March 1979, postponed until 1983 the effective date of its earned income limit.[53]

45 *See Commission Favors Pay Raise for Top-Level Federal Employees, Congress*, 32 CONG. Q. ALMANAC 3314 (1976).

46 *See* note 43 *supra*.

47 Pub. L. No. 95-521, 92 STAT. 1824 (1978).

48 *Id.* The categories used — less than $5,000; $5,000-$15,000; $15,000-$50,000; $50,000-$100,000; $100,000-$250,000; and, over $250,000 — are sufficient to indicate whether conflicts, or apparent conflicts of interest exist without posing an invasion of privacy problem. There is no requirement for disclosure of income tax returns, which might contain information irrelevant to the conflict question and, therefore, could involve invasion of privacy.

49 *See* SENATE RULES, note 19 *supra*; HOUSE RULES, note 17 *supra*.

50 SENATE RULES, *supra* note 19, at 51; HOUSE RULES, *supra* note 17, at 632.

51 SENATE RULES, *supra* note 19, at 57; HOUSE RULES, *supra* note 17, at 653.

52 HOUSE RULES, *supra* note 17, at 656; *see* S. Res. 110, 95th Cong., 1st Sess. (1977).

53 On March 8, 1979, the Senate, in a rushed voice vote, effectively repealed the earned income limit by voting to postpone the restriction for another four years. S. Res. 91, 96th Cong., 1st Sess., 125 CONG. REC. S2273 (daily ed. March 7, 1979). The postponement is expected to become permanent. *See Senate Suspends Income Limit by Voice Vote*, 37 CONG. Q. WEEKLY REP. 399 (1979).

A Common Cause study published in May, 1979, comparing outside earned income levels of senators with their vote on the outside earned income limit found that many senators were voting for their personal financial self-interest. The financial disclosure

The Ethics Codes also established processes for dealing with complaints regarding individuals charged with violating the Codes. These procedures make the House and Senate Ethics Committees responsible for fact-finding, judging specific cases, and recommending penalties if appropriate.[54]

Although these changes in the Ethics Codes were intended to increase the accountability of individual legislators to the voters, the application of these provisions has been uneven. In 1976, before the current Ethics Codes were adopted, the House reprimanded Representative Robert Sikes for violating House rules regarding conflicts of interest.[55] At the beginning of the subsequent session of Congress, Sikes was removed as chairman of an appropriations subcommittee by his colleagues in the party caucus.[56]

The House, however, does not always treat violations of its own rules so severely. In 1979, two legislators reprimanded by the House for rules violations in connection with the "Korean scan-

reports indicate that over half of the Senate received more than $8,625 (15 percent of a senator's salary at that time) in outside earned income in 1978 and would have been affected by the limit. An overwhelming percentage of those whose income would have been affected by the limit voted to kill it in 1979. Of the 25 top earners of outside income in 1978, 23 voted against the limit in 1979. Seventy percent of those who voted in 1979 against the limit had more than $8,625 in outside earnings in 1978; and 76 percent of those supporting the limit had less than $8,625 in outside earnings. The bulk of senators' outside earned income in 1978 came from honoraria. In repealing the limit on outside earned income, the Senate left standing a $25,000 per year statutory ceiling on honoraria which was set in the 1976 campaign finance law. Nineteen senators earned over $24,000 in honoraria in 1978. *See* COMMON CAUSE, A COMMON CAUSE STUDY OF OUTSIDE EARNED INCOME BY UNITED STATES SENATORS (1978).

54 *See* S. Res. 110, 95th Cong., 1st Sess. (1977); H.R. Res. 383, 95th Cong., 1st Sess., 123 CONG. REC. H11881 (daily ed. March 9, 1977).

55 H.R. Res. 1421, 94th Cong., 2d Sess., 122 CONG. REC. H7924 (daily ed. July 29, 1976). *See Congress 1976: Spotlight on Ethics*, 32 CONG. Q. ALMANAC 23, 30 (1976). Common Cause filed the complaint against Representative Sikes. Even after the CBS television program "60 Minutes" exposed Representative Sikes' violations, representatives still refused to file a complaint against one of their own; although on April 6, 1976, forty-four representatives did transmit to the House Committee on Standards of Official Conduct the complaint filed by Common Cause. The complaint charged Sikes with purchasing 2,500 shares of stock in the First Navy Bank after urging state and federal officials to establish the bank at the Pensacola Naval Station in his district and with failing to report his ownership of the bank stock and 1,000 shares of stock in Fairchild Industries in the financial statement he filed with the House of Representatives.

56 *See 95th Congress Elected New Leaders*, 33 CONG. Q. ALMANAC 3, 10 (1977). The caucus was able to remove Representative Sikes as a subcommittee chairman because one caucus change made in 1974 provided that the chairmen of the House Appropriations Committee subcommittees would be voted on by the caucus under the same process used for committee chairmen. *See Order in the House*, 30 CONG. Q. ALMANAC 4 (1974).

dal" were permitted by their Democratic committee colleagues to retain their subcommittee chairmanships.[57]

In the Senate, Agriculture Committee Chairman Herman Talmadge was "denounced" on October 11, 1979, for violation of the Ethics Codes.[58] Assuming he is re-elected this year, it is not yet known whether an effort will be made to strip him of his chairmanship.[59] Thus, while adoption of the Ethics Codes was an important step toward accountability, attention is still needed to ensure strict and uniform enforcement.

B. *Strengthening Leadership*

During the 1970's, a number of changes were also made in the House to strengthen the majority party leadership. The most significant of these include: (1) choosing committee chairmen by vote of the Democratic Caucus;[60] (2) empowering the Democratic Steering and Policy Committee to make committee assignments;[61] and (3) authorizing the Speaker to appoint the Democratic members of the Rules Committee.[62]

1. Committee Chairmen

The main impetus for efforts at institutional change, particularly in the House, was concern about the lack of accountability of committee chairmen, who were free to act arbitrarily in exercising

57 *See Congress Ends 'Koreagate' Lobbying Probe*, 34 CONG. Q. ALMANAC 803 (1978). The legislators involved were Representatives Edward R. Roybal and Charles H. Wilson. The two chairmanships in question were not among those that are voted on by the Democratic caucus.

58 *See* note 42 *supra*. S. Res. 249, 96th Cong., 1st Sess., 125 CONG. REC. S14358 (daily ed. Oct. 11, 1979).

59 On September 14, 1979, in response to the Senate Ethics Committee's report that Senator Talmadge should be "denounced" by the Senate, Common Cause issued a statement to the press that said, in part, "Regardless of the language used by the Senate Ethics Committee in the Talmadge case, the key test for the Senate will be whether Senator Talmadge is removed from his chairmanship of the Agriculture Committee." Statement of David Cohen, President of Common Cause, on Action by Senate Ethics Committee Regarding Talmadge Case (Sept. 14, 1979).

60 *See* text accompanying notes 63 to 74 *infra*. The use of the caucus as an instrument of organizing power and responsibility owes much to the ideas and advocacy of Representative Richard Bolling. His two books on the House are most important for understanding not only the historical context of House action, but the institutional and political forces at work. *See* R. BOLLING, HOUSE OUT OF ORDER (1965); R. BOLLING, POWER IN THE HOUSE (1968).

61 *See* text accompanying notes 75 to 77 *infra*.

62 *See* text accompanying notes 78 to 85 *infra*.

their powers. A 1975 report on House committee chairmen cited a number of illustrations of such arbitrary behavior. For example, in one instance, it charged that:

> [The chairman had] violated the letter and spirit of the Caucus and Committee rules by budgeting only a skeletal committee staff and by denying subcommittee chairmen the right to any staff. In order to advance legislation he favors, [he] often resorts to procedural abuses, such as cutting short debate and ruling Members out of order. As a result of the small staff and his tendency to steamroll legislation, major legislation often is not adequately considered by the committee. As Chairman, [he] has the responsibility to propose rules that conform to the Caucus Rules, but in fact the committee's own rules violate the Caucus Rules in several respects.[63]

Another chairman was reported to have violated the rules, treated members unfairly, and abused his power. According to the criticisms: "He has denied subcommittee chairmen the right to hire their own staff, he harasses and discriminates against Members who disagree with him, he creates 'special' subcommittees to evade Caucus Rules regarding subcommittee membership and jurisdictions, he used his chairmanship to oppose the Caucus policy. . . ."[64]

Previously, under the seniority system, House committee chairmen held power solely by virtue of length of service on a committee. Since many held safe seats from one-party districts, they were in effect accountable to no one. With no way of counteracting this control, many of the party's leaders could be reduced to virtual supplicants in dealing with these chairmen. Members who advocated responsive leadership and outside lobbying groups frustrated with the ability of these chairmen to bottle up legislation had a mutual interest in altering the method of choosing committee chairmen.

House Republicans took the first step in dealing with the seniority issue in 1969 by deciding that their caucus, the Republic Conference, would elect the ranking majority party member of each committee by secret ballot.[65] This seemingly simple change was ac

63 REPORT ON HOUSE COMMITTEE CHAIRMEN, *supra* note 14, at 3-4.

64 *Id.* at 8.

65 Letter from the staff of the House Minority Leader's office to Common Cause (Feb. 1, 1980).

tually a major breakthrough in re-asserting party leadership over ranking committee members, and an important precursor of the procedures that were later adopted by the Democratic party.

The Democratic party, however, took longer to alter its procedures, probably in part because more was at stake — the chairmanships of committees, rather than simply the ranking minority positions. An early effort to hold Democratic chairmen accountable was a proposal adopted in 1971 which required a vote of the Democratic caucus on a committee chairmanship if ten or more members requested one.[66] This approach was generally unsatisfactory, however, because the direct confrontation it involved tended to inhibit challengers. As a result, this rule change produced in 1971 only one challenge, an unsuccessful one.[67]

In early 1973, at the beginning of the Ninety-third Congress, House Democrats took another step toward reform by establishing a procedure that no longer required the approval of ten representatives to challenge a chairman. Instead, the caucus voted that each chairmanship would automatically be considered separately. The vote on each chairman would be taken by secret ballot if one-fifth of the members present requested such a vote in open session.[68] The pattern was set in the first vote, in which one-fifth of the caucus members requested a secret ballot vote on the chairmanship of the Agriculture Committee.[69] The precedent established, a secret ballot was requested for each of the remaining chairmanships.[70] Although all chairmen were re-elected that year, substantial votes against several of them indicated their colleagues' dis-

66 *See Seniority System Challenged in Both Houses*, 27 CONG. Q. ALMANAC 17 (1971).

67 *See id.* at 17-18. The chairman who was challenged but re-elected on Feb. 3, 1971, was Representative John McMillan, the long-time chairman of the House Committee on the District of Columbia, who had blocked Home Rule legislation for the District and had not hidden his anti-black attitudes.

68 *See Seniority Rule: Change in Procedure, Not in Practice*, 33 CONG. Q. WEEKLY REP. 136-37 (1973). In raising the issue of automatic election of committee chairmen with House candidates in the 1972 election, Common Cause urged an open ballot as a means of ensuring accountability and letting the public know where a representative stood on specific chairmen. Many representatives who supported change, however, believed that a secret ballot was essential in order to allow legislators to vote their beliefs without fear of intimidation by powerful chairmen. Faced with this argument, Common Cause altered its position and agreed to a secret ballot. The validity of the argument was virtually conceded when opponents of change argued for the open ballot. *Id.* at 136.

69 *Id.* at 137.

70 *Id.*

satisfaction and foreshadowed the defeat of a number of the incumbent chairmen in 1975.[71]

After the 1974 congressional elections, an additional change was made in the caucus rules to require an automatic secret ballot vote on all chairman candidates nominated by the Democratic Steering and Policy Committee.[72] At the start of the new Congress in 1975, an overwhelming majority of House Democrats believed that certain committee chairmen had abused their power. As a result, the caucus defeated three of these chairmen.[73]

Since adoption of this procedure in 1975, the election of committee chairmen has become an accepted process in the House. Because chairmen are aware that their performance will be scrutinized and that they will be voted on by their colleagues, there are now fewer complaints of arbitrariness and challenges to chairmanships.[74]

71 *Id.* at 136. The 1973 votes on the three chairmen ultimately deposed in 1975, *see* note 73 *infra*, were as follows:

(1) W. R. Poage, Agriculture Committee, 169 to 48;
(2) F. Edward Hebert, Armed Services, 154 to 41; and
(3) Wright Patman, Banking and Currency, 155 to 40.

See Lyons, *Seniority Survives Votes in House*, Wash. Post, Jan. 24, 1973, §A, at 4, col. 1.

72 *See Congressional Reform Made in 1975*, 31 CONG. Q. ALMANAC 26, 27 (1975).

73 *See id.* at 32. The chairmen defeated were W. R. Poage of Agriculture, F. Edward Hebert of Armed Services, and Wright Patman of Banking and Currency, *see* note 71 *supra*. First-term House Democrats invited all incumbent chairmen to meet with them and respond to questions. Both senior and junior members were delighted that, for the first time, chairmen were paying attention to caucus members.

Just prior to the caucus elections, Common Cause issued its REPORT ON HOUSE COMMITTEE CHAIRMEN, *see* note 14 *supra*, describing and evaluating committee chairmen in terms of use, or abuse, of their power, their procedural fairness, and their record of following or disregarding caucus rules.

74 In 1977, the Democratic caucus approved all the recommendations of the Steering and Policy Committee for committee chairmen, although substantial numbers of votes were cast against several. *See House Democrats Approve Leadership Nominees for Committee Chairmen*, 34 CONG. Q. WEEKLY REP. 145-46 (1977). In 1979, Representative Jamie L. Whitten "was the only member in line for a House committee chairmanship (Appropriations) who faced significant opposition. A coalition of consumer, environmental and civil rights groups had been campaigning against him, and three younger Democrats circulated a 'Dear Colleague' letter opposing Whitten." Whitten was elected by a vote of 157 to 88. No other chairman received as many as 50 negative votes. *See Committee Assignments Finished, Chairmen Picked, Congress is Ready to Work*, 37 CONG. Q. WEEKLY REP. 153 (1979).

The method of choosing committee chairmen in the Senate was influenced by the House reforms. For example, Senate Republicans in 1973 decided that the ranking minority member of each committee would be chosen by a vote of the Republican members of each committee. *See Seniority: Republicans Modify Selection Process*, 33 CONG. Q. WEEKLY REP. 57 (1973). Since 1975, Senate Democrats have taken a separate vote on a committee

2. House Democratic Steering and Policy Committee

Until the 1974 elections, committee assignments for Democratic representatives were made by the Democratic members of the powerful House Ways and Means Committee.[74] At a series of Democratic caucus meetings in December, 1974, however, the committee assignment power was transferred to the members of the Democratic Steering and Policy Committee,[75] creating an important new tool to enforce party discipline. Representatives often seek to move from their original committee assignments to positions on committees that are viewed as more powerful, such as Appropriations, Budget, and Ways and Means. With its committee assignments role, the Steering and Policy Committee thus was in a position to grant desirable committee assignments according to responsiveness to the party line.[77]

3. Rules Committee

For years, the House Rules Committee had also been an isolated enclave of power and an obstructive force in the House of Representatives, often blocking legislation that was strongly supported by the House majority leadership.[78] For example, in 1963, the

chairman if requested by one-fifth of the Democratic caucus. *See* 31 CONG. Q. ALMANAC, *supra* note 72, at 39. In practice all committee chairmen are voted on. For example, in November 1979, Senator John L. McClellan, who chaired the Appropriations Committee, died. This caused a shift among the chairmen of three committees. Senator Russell B. Long, a senator who normally gets his way, tried to have the caucus waive the election procedure in this instance, but Senator Jennings Randolph objected, and the caucus voted overwhelmingly to follow the election procedure. *See* Germond & Witcover, *Political Notebook*, Wash. Star, Feb. 5, 1978, §A, at 3, col. 1.

75 *See* 31 CONG. Q. ALMANAC, *supra* note 72, at 26.

76 *Id.* at 127. Reform transferring the power from the Ways and Means Committee was given high priority by Common Cause. *See generally* note 34 *supra*. At a press conference on Nov. 20, 1974, less than two weeks before the caucus began, Common Cause announced that an absolute majority of House Democrats favored stripping Ways and Means of its committee assignment functions. Common Cause Press Release, Washington, D.C. 2-3 (Nov. 20, 1974) (statement of John W. Gardner).

77 This committee is made up of the members of the House leadership, twelve members elected by the caucus on a regional basis, and three others appointed at large by the Speaker. *See Leadership, Votes, Membership Changes, Rules Action*, 29 CONG. Q. ALMANAC 27, 31 (1973).

78 *See* R. BOLLING, POWER IN THE HOUSE 195-220 (1968).

House had to resort to the threat of a discharge petition in order to prod a civil rights bill out of the Rules Committee.[79]

Earlier efforts to control the Rules Committee had not succeeded in making the committee an arm of the leadership.[80] By 1974, it thus had become clear that if the Democratic leadership were to manage the scheduling of legislation and establish House floor priorities, the members of the Rules Committee would have to be responsible to the leadership.[81] In December of that year, the Democratic caucus gave the Speaker the power to name the Democratic members of the House Rules Committee.[82] Since they must rely on the Speaker for their posts, Rules Committee members are encouraged to be responsive to the party leadership, especially on matters of high priority.[83]

Except for some modifications in the rules governing fili-

79 *See* 1 CONG. Q. SERVICE, CONGRESS AND THE NATION 1615, 1635 (1965). The discharge petition process is explained as follows:

> A bill's sponsors may also try to bypass the [Rules] Committee by the *discharge petition* procedure. Under this method, if the Rules Committee does not grant a rule to a bill within seven legislative days of a request for it by a chairman of the legislative committee that reported the bill, backers may move to force a rule from the Committee by introducing their own rule for debate, and then filing a petition to discharge that resolution from the Rules Committee. A successful petition needs the signatures of a majority of the House. Once a majority signs, a sponsor may call up the petition for floor consideration. If it is adopted by the House, the House next considers the resolution and if that is adopted, proceeds to the bill itself.

Id. at 1424.

80 *See id.* at 1426. Indeed, previously in the same year the number of seats on the Rules Committee had been expanded from 12 to 15 members specifically to ensure a continued liberal majority. *See Criticism of Congress Provokes Few Changes*, 18 CONG. Q. ALMANAC 369 (1963).

81 *See Power Flows Away from Senior Members as Congress Changes Many Procedures*, 31 CONG. Q. ALMANAC 28, 29 (1975).

82 *See id.*

83 Speaker O'Neill has not been hesitant to place pressure on the Rules Committee when he thinks it is reverting to its old habits of obstructionism. One example occurred during Rules Committee consideration of the House Code of Conduct in 1977. The Code included a proposed limit on the amount of outside income that representatives could earn, a provision that was strongly opposed by members of the House who were attorneys, many of whom were earning high fees from their private law practices. Two lawyers serving on the Rules Committee, Claude Pepper and Morgan F. Murphy, were determined to use the Rules Committee to block the limit on outside earned income. Other members present at the committee meeting reported that O'Neill reminded Murphy and Pepper that he had appointed them to the committee and that he would consider it a blow to his leadership if they did not vote to grant the rule as requested. As a result, they voted for the rule. Without the Speaker's pressure, they likely would have employed the obstructive tactics used by the

busters,[84] the majority party in the Senate has taken no analogous measures to strengthen its party leadership. The committee chairmen, therefore, move at their own pace in preparing legislation for the Senate floor. In addition, despite some changes, Senate action can still be blocked by a minority of Senators through use of the filibusters.[85] Thus, the majority party in the Senate presently lacks the power to induce coherence among its members and to ensure consideration of priority legislation.

III. Agenda for the 1980's

Even when President Carter received notably low public confidence ratings in June 1979, Congress was scoring consistently lower in public opinion polls.[86] The present lack of public confidence suggests that, despite reform efforts, troubling deficiencies continue to plague Congress.

The reforms in the 1970's discussed above[87] helped to make legislators more accountable to the voters and strengthened the House leadership against arbitrary uses of power. Yet, the ability of congressional leaders to influence final results appears to have declined in recent years. One major reason is that the changes did little to overcome fragmentation in policy-making, a major institutional weakness in both the House and Senate. To begin with, neither the caucuses nor the House Steering and Policy Committee have yet been used successfully as a means of forging a coherent party policy.[88] This lack of formal policy-setting procedure in turn

Rules Committee in previous years. *See House, Senate Adopt New Code of Ethics*, 33 Cong. Q. Almanac 763, 766-67 (1977).

84 *See* text accompanying notes 127 to 138 *infra*.

85 *See, e.g.*, *The 95th Congress*, 34 Cong. Q. Almanac 3, 3-4 (1978).

86 Twenty-nine percent of those surveyed in a June, 1979, Gallup Poll approved of the way President Carter was handling his job as President; only 19 percent approved of the way Congress was handling its job. *See Gallup Poll Ratings for President and Congress Sink to New Lows*, N.Y. Times, June 21, 1979, §B, at 10, col. 5.

87 *See* text accompanying notes 29 to 85 *supra*.

88 Efforts were made starting in the mid-1960's to revive the House Democratic caucus as a means of formulating party policy. From the end of the Wilson Presidency, the Democratic caucus had been a dormant institution, meeting chiefly to elect the Speaker and Majority Leader or, on the few occasions when the Democrats were in the minority, the Minority Leader. Divisions between the liberal and conservative wings of the Democratic party led Speakers to bypass the caucus as a policy-making body in order to avoid un-

makes it possible for special interests, with their close ties to particular committees, to exert far more influence over national policy than they could if the majority party had an established, cohesive national agenda.

Under the current committee systems in both the House and Senate, committee members often pay more attention to special interests then they do to party leadership. Committee jurisdictions are splintered, making it difficult for the party leadership to assert control over the numerous committees and subcommittees.[89] Legislators who remain on the same committees for decades build close relationships with related interest groups, enhancing the groups' influence in committee deliberations. In the Senate, a handful of senators can block action on major legislation merely by threatening a filibuster.[91] Furthermore, Congress habitually considers each legislative proposal discretely, making it virtually impossible to relate a program to others with similar or even conflicting goals.[92]

Another major reason for the weakness of congressional leadership is the growing power of the special interests to hamper its ability to influence, if not determine, outcomes and produce coherent and far-sighted legislation. Special interests take advantage of the fact that political competition is a given and that incum-

necessary conflict. They found it easier to move the work of the Congress along by relying on informal arrangements than by formally fixing responsibility within the institution.

The efforts to build the caucus as a policy-making body focused originally on instituting monthly meetings. When such regular meetings were first held in 1969, the caucus was a fragile institution. Even efforts to have an agenda circulated in advance caused dissension. Once the caucus began meeting monthly, it was used as a forum for discussion. Initially, the idea was to have the caucus instruct the Democratic members of the appropriate committee to report a particular bill for action by the full House. The most notable examples of this approach were legislation to end the Vietnam War in 1972 and 1973 and to repeal the oil depletion allowance in 1974 and 1975. The controversy surrounding attempts to pass these bills created a climate for change by focusing caucus attention on the power of committee chairmen to block legislation from consideration by the full House, the need to curb the excessive power of the Ways and Means Committee, and the ability of the Rules Committee to prevent the House from voting on major amendments. IV Cong. Q. Service, Congress and the Nation 768-69 (1975).

89 There are currently more than 60 committees and 250 subcommittees in the Congress not including joint committees. *See* Cong. Q. Service, Committees of the 96th Congress (Special Report, April 14, 1979).

90 *See* note 4 *supra*.

91 *See* note 85 *supra*.

92 *See, e.g.*, IV Cong. Q. Service, Congress and the Nation 761 (1974); *see generally Senate Reorganizes Its Committees*, 33 Cong. Q. Almanac 781 (1977).

bents still depend on special interests to finance their re-election campaigns.[93]

Further, Congress spends so much of its time dealing with routine matters that it often fails to anticipate general issues and problems and is hard pressed to deal with the tough, complex issues currently facing the country.[94] Unless Congress is willing to take some far-reaching steps to reduce the number of routine matters it handles and to create a modern, responsible organization capable of grappling with and solving fundamental issues, it may increasingly become an institution in which parochial and short-term concerns predominate to the neglect of broad, long-term solutions to problems.

Changes in the 1970's successfully dealt with the principal concern of that time — to pull power away from the autocratic chairmen who controlled House and Senate committees. Equally strong action is needed now, however, to restore institutional effectiveness and vitality. These are not goals that can be permanently achieved through one particular reform, but rather, must be part of a continuing process. Since distortions of influence, power, workload, and productivity will always reappear, institutional changes in the House and Senate must include mechanisms for constant review and regular, orderly change. A strategy for the 1980's must include the adoption of organizational changes to enable Congress to deal with tough problems in a cohesive and even-handed way. To that end, it must include passage of legislation designed to weaken the hold that special interests have on Congress, the need being particularly great since these interests are devoting ever greater resources to exerting their influence.[95]

The following is a discussion of a number of proposals designed to address one or more of these problems. Some of these remedies can be adopted as House or Senate rules changes,[96] while others will require enactment of new legislation.[97] No single action will in itself afford a complete solution, but taken together, they should

93 *See* AMERICAN ENTERPRISE INSTITUTE, PUBLIC FINANCING OF CONGRESSIONAL CAMPAIGNS 15-19 (1978).

94 *See, e.g.*, PEARSON & ANDERSON, note 13 *supra*.

95 *See* COMMON CAUSE, HOW MONEY TALKS IN CONGRESS 6 (1979).

96 One example is filibuster reform; *see* text accompanying notes 127 to 138 *infra*.

97 One example is Sunset legislation; *see* text accompanying notes 115 to 119 *infra*.

result in a more effective Congress, responsive to broader, national concerns.

A. *Committee Reorganization*

Despite changes in the 1970's, the House and Senate committee systems badly need reorganization. Both proliferation of subcommittees and their overlapping jurisdictions contributed significantly to the fragmentation of policy-making. The party leadership and the Congress as a whole hesitate to undertake any reorganization because it inevitably involves some shifts of responsibility and power — a sensitive subject to any legislative body.

While the number of Senate subcommittees declined somewhat in the 1970's, the number of House subcommittees rose dramatically.[98] The growth of subcommittees in the House stemmed initially from an effort to undercut the power of a few senior representatives. This increase in the number of subcommittees was coupled with a limitation of one subcommittee chairmanship per legislator, thus enabling more people to serve as subcommittee chairmen.[99] The result, however, has been even greater policy fragmentation. For example, in the House, jurisdiction over energy legislation is now scattered among 83 subcommittees and committees.[100]

98 According to Congressional Quarterly Research Service, the number of House and Senate subcommittees in 1959, 1969, and 1979 were as follows:

	House	*Senate*
1959	106	80
1969	110	108
1979	158	101

Telephone discussion by Mary Fienup to Congressional Quarterly Research Service (Dec. 20, 1979).

99 Long before the changes of the 1970's, some House committees adopted their own rules creating subcommittees in an effort to stamp out the arbitrary abuse of power by committee chairmen. An example is the action taken in the 86th Congress by the House Education and Labor Committee to combat its authoritarian chairman, Representative Graham Barden. Because there was no practical way to relieve Barden of his chairmanship, the approach was to establish several subcommittees whose chairmen would have control over bills within their jurisdiction, thus removing Barden's power to assign and block bills. The House Interior and Insular Affairs Committee followed a similar practice. Conversations of David Cohen with Andrew Biemiller, Legislative Director of the AFL-CIO, and Representative James G. O'Hara, then chairman of the D.S.G. (Nov. 1968). The subcommittee system was thus created to deal with a particular problem, but as time passed and the problems changed, the system did not.

100 HOUSE SELECT COMM. ON COMMITTEES, TO ESTABLISH A STANDING COMM. ON ENERGY, H.R. REP. NO. 96-741, 96th Cong., 2d Sess. 7 (1980); *see* H.R. Res. 132, 93rd Cong., 1st Sess. (1973).

Within the House, the growing complexity of problems which cut across committee jurisdictions led to a reorganization effort. In 1973, a Select Committee on Committees under the chairmanship of Representative Richard Bolling was established to recommend changes.[101] This was a bipartisan committee — its vice-chairman was Republican Representative Dave Martin — created by the House leadership with the support of the minority party.[102] It engaged in serious and comprehensive efforts to revise committee jurisdictions.[103] Nonetheless, the Committee's recommendations were defeated on the House floor by a coalition of committee and subcommittee chairmen and ranking minority party members, all of whom felt threatened by the proposed changes.[104] Lobby groups that supported the organizational status quo played a major part in the defeat of the Bolling Plan.[105]

In early 1977, the Senate undertook a committee reorganization effort that did have limited success in reducing the number of

101 *See Jurisdictional Overhaul Recommended for House*, 29 CONG. Q. ALMANAC 755, 755-56 (1973).

102 *See id.*

103 The Bolling Committee recommended shifting the workload away from powerful committees, especially the Ways and Means Committee, which has extensive jurisdiction over taxes, tariffs, social security, welfare, medicare, medicaid, and health insurance. It also tried to divide the House Education and Labor Committee into a Committee on Labor and a Committee on Education. *See Major House Committee Reform Rejected*, 30 CONG. Q. ALMANAC 634 (1974).

104 House members fighting change dealt the Bolling plan a lethal blow in June, 1974, by using the power of the caucus to keep the reorganization off the House floor until the proposals were substantially amended. *See id.* A much less ambitious proposal, which left committee jurisdiction largely unchanged, was passed instead. One part of the Bolling plan that was retained by the House enables complex legislation to be jointly referred to more than one committee. President Carter's 1977 welfare reform plan was simultaneously parcelled out to several committees, each of which separately examined relevant aspects of the plan. *See Carter, Congress and Welfare: A Long Road*, 33 CONG. Q. ALMANAC 471 (1971). The 1979 Energy Mobilization legislation was also considered in this manner. *See* 37 CONG. Q. WEEKLY REP. 2712 (1979).

One result of this approach is to increase the power of the Rules Committee. Using its authority to establish procedures for considering a bill, the Rules Committee can favor the portions reported by one committee over those emerging from another, thus actually shaping the final legislation in ways that are not possible where a bill is considered exclusively by a single committee.

105 *See* 30 CONG. Q. ALMANAC, *supra* note 103. Most interest groups fought the House reorganization; its only outside supporters were Common Cause, the League of Women Voters, and Americans for Democratic Action. Environmentalists, organized labor, the Chamber of Commerce, and many others bitterly opposed change and defended their familiar turf. *Id.* at 634-37. For example, organized labor, which had built a comfortable relationship with the existing Education and Labor Committee, opposed the creation of separate committees on labor and education. *Id.* at 634.

standing committees.[106] Most notably, the Senate managed to consolidate energy jurisdiction, previously scattered among a number of committees,[107] in a newly-created Senate Energy and Natural Resources Committee, responsible for energy policy as well as for public lands and parks.[108]

Where more powerful committees were concerned, however, reforms were less successful. For example, the sweeping jurisdiction of the Senate Finance Committee — including government debt, general revenue sharing, health and social security, trade tariffs and quotas, and most revenue measures[109] — was left untouched by the Senate reorganization effort.[110] And such neglect meant that the Committee would continue to wield considerable power over substantive policy where it reviewed proposed tax preferences.[111]

Thus, both Houses of Congress are still awaiting an effective overhaul of committee structures to eliminate overlap and duplication, encourage more rational consideration of important public policy decisions, and provide a more balanced allocation of power.[112] Until such overhaul occurs, special interest groups, by

106 S. Res. 4, 95th Cong., 1st Sess., 123 CONG. REC. S7-S13 (daily ed. Jan. 4, 1977). The Temporary Select Committee System was chaired by Senator Adlai Stevenson. *See Senate Reorganizes Its Committee*, 33 CONG. Q. ALMANAC 781 (1977).

Common Cause supported the Senate effort as it had the House proposals, testifying before the committee on July 20, 1976. *Hearings on Jurisdictions, Referrals, Numbers and Sizes, and Limitations on Membership, Before the Temporary Select Comm. to Study the Senate Comm. System*, 94th Cong., 2d Sess. 5 (1976) (statement of David Cohen).

107 *See* text accompanying note 100 *supra*.

108 *See Congress Reforms Budget Procedures*, 30 CONG. Q. ALMANAC 145 (1974).

109 SENATE COMM. ON FINANCE, 95TH CONG., 1ST SESS., HISTORY OF THE COMMITTEE ON FINANCE, S. DOC. NO. 95-27 (1977).

110 *See* Parris, *The Senate Reorganizes Its Committees, 1977*, 94 POLITICAL SCI. Q. 319, 324 (1979). Five of the twelve members of the Senate Select Committee served on the Senate Finance Committee, giving the latter the best possible protection from interference with its existing jurisdiction and power. *Id.* at 324.

111 *See* note 109 *supra*.

112 Although its goals are not so ambitious as those of the earlier Bolling Committee, a new committee reorganization effort is under way in the House, with the creation in 1979 of a Select Committee on Committees chaired by Representative Jerry M. Patterson. *See House Committee Review Approved by Close Margin*, 37 CONG. Q. WEEKLY REP. 515 (1979). Common Cause testified before the Committee on Dec. 4, 1979, and advocated, among other changes, creation of a House Energy Committee to provide a single forum for the consideration of energy legislation thus replacing the fragmented way in which energy legislation is currently considered in the House. Other interest groups invited to appear at the hearing declined the invitation, but then worked behind the scenes with House members to block creation of an Energy Committee. The test of the Select Committee's success will be whether House members reduce the total number of subcommittees — and thus the

maintaining their close relationships with the relevant federal agencies and congressional committees,[113] will continue to maintain an iron grip over their particular areas of national policy.

B. *Committee Rotation*

Members of Congress who spend most of their congressional careers on the same committee or subcommittee tend to develop cozy relationships with the federal agencies and narrow interest groups they deal with.[114] One way to combat this problem in the future would be to rotate committee memberships, perhaps every six to eight years.

Not only would longstanding alliances be broken up, but also legislative oversight of executive branch programs would be enhanced. Since these programs would regularly be judged by legislators who had no role in initially establishing these programs, considerations of personal pride or political gain would not exist to undermine objective evaluations.

Rotation would similarly serve to loosen the grip that the seniority system presently exerts on Congress. Faced with a shorter and certain tenure, committee chairmen would be induced to organize the business of their committees rather than to consolidate a power base. Further, committee members would not be inclined to defer to some senior member whose apparently encompassing knowledge of the subject area might actually conceal a lack of new ideas. Merit, not length of service, would become a more important consideration in determining congressional leaders; this in turn would help to attract persons with the highest qualifications to serve in Congress.

Although critics might object that rotation would undermine the specialization necessary for Congress to operate effectively, six to eight years is ample time for a senator or representative to develop the necessary expertise and provide valuable service on a committee. Also, entrenched specialization has the drawback of often bullying legislators into uncritical acceptance of what so-called

number each member can serve on — and whether they create a single committee to deal with energy policy.

113 *See* note 4 *supra* and accompanying text.

114 *Id.*

committee experts assert — not necessarily a creative legislative process. To be sure, such a system would necessitate the upgrading of congressional committee staffs, but this step is long overdue and necessary in any event.

C. *Sunset Legislation*

Under current legislation, government programs and tax benefits may have virtually a perpetual life. The little congressional oversight that takes place is often controlled by special interest groups that benefit from the status quo,[115] and programs are generally reviewed in a vacuum rather than viewed in relation to others in the same area.[116] A long-discussed reform, Sunset legislation, is designed to change all this.[117] Sunset is a procedure which would place all existing as well as new government agencies, programs, and tax expenditures on a schedule requiring in-depth review of each, on a periodic basis.[118] The heart of any Sunset legislation is an automatic termination procedure that will force committees and the full Congress to consider existing programs and agencies and either take action to continue or modify them or allow them to expire by inaction.

To be effective, any future Sunset legislation should include the following four key elements: (1) an automatic termination provision; (2) a process of coordinated review of similar programs; (3) special intensive education of priority programs; and (4) review of tax expenditures along with related direct spending programs.

By including such provisions, Sunset legislation would result in a number of improvements in the performance of Congress and of government in general. It would require the committees of Congress to provide evaluations and recommendations to the House and Senate concerning existing programs and agencies. It would provide a means for eliminating wasteful, duplicative, and ineffi-

115 *Id.*

116 *See* note 92 *supra*.

117 *See* Sherman, *Sunset Implementation: A Positive Partnership to Make Government Work*, 38 PUB. AD. REV. 78 (1978); As of December 1978, Sunset laws had been enacted in 29 states. COMMON CAUSE, MAKING GOVERNMENT WORK: A COMMON CAUSE REPORT ON STATE SUNSET ACTIVITY (1978). Common Cause has been supporting Sunset legislation in the states as well as at the federal level.

118 COMMON CAUSE, MAKING GOVERNMENT WORK, *supra* note 117, at 5. *See also id.* at 28 (six-year cycle).

cient government subsidies and agencies. For the first time, Congress would be forced to coordinate total federal spending — tax expenditures as well as direct spending — in specific policy areas.[119] Overall spending priorities could more readily be set, thereby inducing prudent use of the available financial resources and providing the organizational capability for developing new initiatives. Automatic termination would prod House and Senate members into considering the utility of existing programs and induce them to make judgments about the inflationary impact of direct and indirect federal spending programs that would otherwise be buried or ignored by the congressional committee system.

Under an optimal Sunset program, the majority party in the House and Senate would require committee chairmen to monitor on a continuing basis the way in which legislation within their jurisdiction is implemented. An ideal Sunset system would also enable the majority party to take responsibility for formulating an oversight approach at the start of each Congress to guide each committee in the areas it should emphasize. Review should be a continuing process in which House and Senate leaders may propose adjustments and revisions in committee functions and domains.[120]

D. *National Party Agenda*

Officeholders and party officials should be responsible for deciding a national party agenda and should be held accountable for ensuring its consideration by Congress. Voters today have no way of holding elected officials accountable for specific legislative

119 *Cf.* "It should be noted that Sunset does not impose zero-base budgeting but does offer a method of analysis consistent with ZBB." AMERICAN ENTERPRISE INSTITUTE, ZERO BASE BUDGETING AND SUNSET LEGISLATION 25 (1978).

120 Despite the introduction of numerous bills over the years, Congress has yet to pass a comprehensive Sunset statute, *i.e.*, one which would apply to all existing, as well as proposed, programs and agencies. Although the Senate in 1978 passed such a statute, it died because a similar House bill never got out of committee. A current bill — H.R. 5858, introduced by Representative Gillis Long, 125 CONG. REC. H10555 (daily ed. Nov. 9, 1979) — appears to be moving slowly forward in the House. This bill, however, differs radically from the traditional Sunset scheme since it would require review only of programs that each Congress decided needed review and would provide for program termination only if Congress voted to do so. *See Revised Sunset Proposal Being Pushed in House*, 37 CONG. Q. WEEKLY REP. 2532 (1979). Such an emasculated Sunset scheme would appear to change little in existing practice.

programs, and political parties do not feel compelled to deliver on campaign promises.[121] Party platforms often appear to be no more than politically expedient promises and unrealistic wish lists for America's interest groups. Innovative approaches are needed if parties are to take responsibility for their legislative records.

One approach would be for each party, after the election, to develop its own priority agenda for the next Congress. The participants in developing the agenda would be elected officials — senators, representatives, governors, and state legislative and local government leaders. State party chairpersons would also be participants, and the President would make his views known to his party. Under this system, the elected officials and party leaders would gather for two meetings, roughly a month apart. The first would consist of public hearings and panel discussions for interested citizens, interest groups, and party members; the second would be made up of public sessions at which party leaders would set legislative priorities.

Officeholders would make a public commitment to see that Congress considered the party's priorities, but would not be required to commit their final votes in advance. In the legislative committees, majority party members would be obligated to allow their party's priority legislation to be voted on by the full House and Senate; Senate members should be bound not to filibuster. The minority party, in turn, would be prompted to develop an affirmative alternative program rather than simply to react negatively to the majority program.

Such a system would not prevent political leaders from dealing with emergencies or changing conditions by binding them to an inflexible legislative agenda. Ideologically and regionally divisive issues would be less likely to be among those chosen as priority party issues and would continue to be lobbied in the traditional way. Nevertheless, this new system would at least ensure that a coherent program identified with a political party would be considered and voted on by the House and Senate in a timely manner.

No new laws are required to establish this party agenda-setting arrangement. All that is needed is for officeholders to make the

121 For a general discussion of the decline of parties and voter disenchantment, *see* E. C. LADD, WHERE HAVE ALL THE VOTERS GONE? (1978).

commitment to do the job, and for Democratic and Republican party leaders to take the initiative in implementing the idea — perhaps through state party organizations or congressional policy committees.

E. *Multi-Year Budgeting*

Congress and the President need to consider the budget in terms of overall national needs rather than in terms of a multiplicity of parochial interests.[123] To change the budget significantly in any one year is difficult because seventy-five percent is made up of "uncontrollables" — expenditures that are mandated under existing laws.[123] Yet these uncontrollables are the inevitable result of previous decisions on programs, decisions often made without regard to their long-term costs. Under multi-year budgeting, the President and Congress would consider budget resolutions that include the next three to five years (although not in specific detail), rather than just the budget for the coming year. These multi-year budgets would encourage more responsible long-term planning because they would allow Congress and the President to see where today's vote leads the budget next year and beyond. Such a system would complement a Sunset procedure for reviewing existing programs.

In 1979, the President sent Congress a multi-year budget which set targets for future years.[124] In the spring of 1979, the Senate approved a multi-year budget resolution which set alternative targets for balancing the budget by fiscal years 1981 and 1982.[125] The

122 The Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. §§ 1301 to 1353, 1400 to 1407 (1976), seeks to remedy the two major failings of the old budget process — lack of information and failure to debate national priorities in an orderly and sustained way. The Act established the Congressional Budget Office to provide Congress with budgetary expertise and created Senate and House Budget Committees. These committees propose resolutions setting spending priorities and fiscal policies which are intended to guide the authorizing and appropriating committees in their allocation of federal funds. *See* 30 CONG. Q. ALMANAC, *supra* note 108, at 145. Although there have been difficulties with this procedure, it provided an important measure of discipline. *See Budget Committee at Center of Crucial 1979 Policy Fight*, 37 CONG. Q. WEEKLY REP. 11 (1979).

123 *See, e.g.*, HOUSE COMM. ON THE BUDGET, FIRST CONCURRENT RESOLUTION OF THE BUDGET — FISCAL 1980, H.R. REP. NO. 95, 96th Cong., 1st Sess. 181 (1979).

124 *See Fiscal 1980 Budget: 'The Policy of Restraint,'* 37 CONG. Q. WEEKLY REP. 110 (1979).

125 *See* 34 CONG. Q. ALMANAC, *supra* note 85, at 4.

House of Representatives, however, did not consider a multi-year budget resolution; therefore, the resolution is not currently part of Congress' budget procedures.[126] At a time when the public is demanding greater control of the federal budget, the House should join the Senate and the President in taking this significant step toward responsible multi-year planning and management of the federal budget.

F. *Senate Filibuster*

The filibuster presents a serious problem for the Senate. It weakens the Senate by hampering its ability to act on important national issues even after thorough debate. In recent years, the mere threat of a filibuster has had a substantial impact on the issues scheduled for floor action.[127]

Until 1975, the filibuster rule[128] permitted unlimited debate on a bill unless two-thirds of the senators present and voting voted to close the debate, an action known as invoking cloture.[129] In 1975, the rule was modified to permit debate to be closed by a vote of sixty senators.[130] No sooner had this change been adopted, however, than a new technique was invented — the post-cloture filibuster — which required the support of fewer senators than the number required to prevent cloture.[131] Even after a limit had been placed on debate, one or two senators were able to block action by such dilatory tactics as offering hundreds of minor amendments to a bill.[132] Rather than protecting the rights of the minority, the technique has become a method of outright obstructionism.

To combat this tactic, Senate rules were again modified early in 1979.[133] An absolute limit of 100 hours was set on the floor time that may elapse, once cloture is invoked, before a final vote must

126 *See* Rule XXII, SENATE RULES, *supra* note 19, at 14.

127 *See* 31 CONG. Q. ALMANAC, *supra* note 72, at 35.

128 S. Res. 4, 94th Cong., 1st Sess., 121 CONG. REC. 12-13 (1975).

129 *See* SENATE RULES, *supra* note 19, at 28; 24 CONG. Q. ALMANAC, *supra* note 85, at 4-5; Cooper, *The Senate and the Filibuster: War of Nerves and Hardball*, 36 CONG. Q. WEEKLY REP. 2307, 2310 (1978).

130 Cooper, *The Senate and the Filibuster*, *supra* note 129, at 2307.

131 S. Res. 61, 96th Cong., 1st Sess., 125 CONG. REC. S1329 (daily ed. Feb. 8, 1976).

132 *See* SENATE RULES, *supra* note 19, at 15; 34 CONG. Q. ALMANAC, *supra* note 85, at 4-5.

133 *Id.*

take place on the pending legislation.[134] Under this provision, all Senate activity, including quorum calls and votes on amendments, count toward the 100-hour limit.[135]

In spite of these changes, the filibuster remains a powerful weapon to delay or prevent floor consideration of legislation on which the sixty votes necessary to invoke cloture are not available.[136] Given the heavy Senate workload, its leadership is reluctant to risk bringing up legislation on which a filibuster is threatened.[137] Thus, a small, determined minority — sometimes just a handful of senators — can block action on a bill favored by the majority of the Senate.[138]

Because of these problems, Congress should place particular emphasis on reform of the filibuster rule. Any such reform would ideally obviate minority obstruction of important issues, so that legislation would be scheduled in an orderly manner in the Senate. One approach wold be to require a descending number of senators necessary to stop a filibuster. A limit would be established so that no more than four cloture votes could be taken on any piece of legislation. For example, the first vote to end debate could require two-thirds of those present and voting; the second, sixty senators; the third, three-fifths of those present and voting; and, finally, a constitutional majority of fifty-one senators. Such a system would ensure adequate debate on major issues while testing the Senate's resolve to bring these issues to an eventual floor vote.[139]

134 *See* 34 CONG. Q. ALMANAC, *supra* note 85, at 4.

135 Just one example is lobby disclosure legislation, which was kept off the Senate floor by the threat of a filibuster in the 95th Congress after the House had passed a comprehensive bill.

136 In the 1970's, filibusters have been used on domestic issues ranging from antitrust and labor legislation to natural gas deregulation and campaign finance legislation. From the 1930's through the 1960's, filibusters were generally undertaken only on major national legislation, particularly that dealing with questions of civil rights. During the last decade, however, filibusters have been used against many different types of bills. *See* CONG. Q. WEEKLY REP., *supra* note 129, at 2307. Apparently, determined minorities in the Senate have found more to be determined about.

137 *Advantages of Incumbency*, 37 CONG. Q. WEEKLY REP. 1351 (1979).

138 *Id.*

139 Since a vote cannot take place until 48 hours after a cloture petition is filed, this length of time is guaranteed for debate. *See* Rule XXII, SENATE RULES, *supra* note 19, at 14.

G. *Incumbency and Franking*

Incumbency continues to be a significant factor in elections, especially for House seats. Even in 1974 — the Watergate year that was notable for turnover in the House — 89 percent of the House incumbents running for re-election won.[140] In most years, the figure is over ninety percent, and in 1976 and 1978, ninety-five percent or more of the representatives who ran for re-election won.[141] Senate seats, on the other hand, have turned over more rapidly,[142] although incumbents there also enjoy a significant edge in seeking re-election.

Among other advantages, incumbents receive large amounts of campaign contributions from groups with a direct interest in the issues the legislators consider in committee.[143] Congressional and state legislative district lines are often drawn to benefit incumbents.[144] Moreover, House and Senate incumbents benefit from the perquisites of office which allow them to present themselves in a favorable way to the electorate. While many of the privileges of office were originally established to assist senators and representatives in doing their job, some have been routinely used to promote the incumbents' re-election. And of all the incumbents' political tools, none is more subject to abuse than the franking privilege, which enables legislators not only to respond to letters from constituents, but also to saturate their districts or states with postage-free mass mailings.[145] Taxpayers in 1978 paid nearly $50 million in

140 *Advantages of Incumbency*, 37 CONG. Q. WEEKLY REP. 1351 (1979).

141 *Id.*

142 *Id.* In 1974, however, a larger percentage of incumbents was re-elected in the Senate than in the House. *Id.* One observer attributes the higher turnover rate in the Senate to the fact that votes for Senate candidates are based to a greater extent on the issues and votes for representatives are based more on the delivery of constituent services. E. Uslaner, Ain't Misbehavin: The Logic of Defensive Issue Voting Strategies in Congressional Elections (1979) (research paper for University of Maryland, College Park) (on file with HARV. J. LEGIS.). There is, however, evidence that constituent services are becoming a more important factor in Senate elections too. E. Uslaner, The Case of the Vanishing Liberal Senators: The House Did It (1979) (research paper for the University of Maryland, College Park) (on file with HARV. J. LEGIS.).

143 *See* text accompanying notes 156 to 168 *infra*.

144 *See* text accompanying notes 172 to 178 *infra*.

145 *See* text accompanying note 155 *infra*.

postage for representatives and senators[146] — up from $7.6 million in fiscal year 1966.[147]

In 1973, Common Cause filed suit in U.S. District Court, charging that the frank was being used to promote incumbents' re-elections and seeking an injunction against congressional mass mailings.[148] The suit alleged that widespread use of the frank by elected officials during periods preceding elections gave incumbents an unfair advantage and that such use was unlawful, since the franking statute limited the use of postage-free mail to "official business."[149] Shortly after the suit was filed, Congress amended the statute,[150] ostensibly to clarify the law and plug existing loopholes. These amendments, however, delineated the franking privilege in the broadest possible terms, without even attempting to restrict its potential use as a tool to promote an incumbent's re-election. Consequently, Common Cause amended its complaint in March, 1974, charging that the law itself was unconstitutional as a violation of the First Amendment right of association, the equal protection clause of the Constitution, and the article II, section 8 requirement that government funds be spent only for public purposes.[151] The suit argues that the franking statute is unconstitutional and, as part of the proposed remedy, requests an injunction barring mass mailings under the statute until it is redrafted in constitutional form.

Although the suit is still pending, depositions taken from congressional staff members have provided considerable information about the way the franking privilege is used by members of Congress. Among other things, these depositions have shown that more mail is sent during election periods than at any other time;[152]

146 *Hearings Before the Subcomm. on Legislative Appropriations of the House Comm. on Appropriations, Legislative Branch Appropriations for 1979*, 95th Cong., 2d Sess. 165 (1978).

147 *Hearings of the Special Ad Hoc Subcomm. of the House Comm. on Post Office and Civil Service*, 93rd Cong., 1st Sess. 89 (1973).

148 Common Cause v. Bailar, No. 1887-73 (D.D.C., filed Oct. 5, 1973).

149 39 U.S.C. § 3210 (1976).

150 Pub. L. No. 93-191, § 1(a), 87 Stat. 737 (1973).

151 Common Cause's goal is to have the franking statute declared unconstitutional and to obtain an injunction barring mass mailings under the statute until it is redrafted in constitutional form.

152 The statement is based on daily volume totals supplied by the U.S. Postal Service under motions for the production of documents in connection with *Common Cause v. Bailar*, note 148 *supra*. (Graph summarizing voluminous data on file with HARV. J. LEGIS.).

that the congressional leadership advises new members on the use of the frank in ways that will increase their chances for re-elections;[153] and that direct mail consultants have designed programs for using the frank to promote re-election of incumbents.[154]

In connection with this case, evidence obtained from the U.S. Postal Service demonstrates that, not only is more franked mail sent during an election year, but also the distribution of mailings during those election years shows a strikingly political pattern. For example, in 1972, the semi-monthly volumes of congressional mailings averaged twelve million pieces of mail; but in the semi-monthly period immediately preceding the election, approximately twenty million pieces were mailed. In 1974, peaks of twenty-four million pieces sent were recorded during semi-monthly periods immediately preceding the general election and early spring and late summer primary seasons. By contrast, during 1973, a non-election year, an average of approximately nine million pieces of mail was sent during the comparable semi-monthly periods.[155]

H. *Partial Public Financing of Congressional Campaigns*

The dependence of House and Senate candidates on campaign contributions of special interests is another factor hampering electoral competition and adding to the dominance of special interests.[156] Essentially, the incumbent candidate, feeling indebted to

153 Deposition of Richard P. Conlon on Feb. 10, 1976, at 6-8, 14-15, 30-31; deposition of Edwin John Feulner on Nov. 25, 1975, at 9-14; deposition of Harry Fox on Jan. 15, 1976, at 17-19; Common Cause v. Bailar, No. 1887-73 (D.D.C., filed Oct. 5, 1973) (copies of cited pages on file with HARV. J. LEGIS.).

154 *See, e.g.*, Angle, *Lawsuit Target: 346 Million Free Mail Out of Congress*, Wash. Star, Feb. 8, 1976, §A, at 1, col. 1; Landauer, *Lawmakers Use Mail Privileges to Help Win Elections, Common Cause Argues*, Wall St. J., June 2, 1975, at 5, col. 1. Depositions taken in connection with *Common Cause v. Bailar* include examples of such programs. *E.g.*, Deposition of Robert F. Jones on Feb. 19, 1976, Exhibit 3; deposition of Joyce P. Baker on March 26, 1976; Common Cause v. Bailar, No. 1887-73 (D.D.C., filed Oct. 5, 1973) (copies of cited exhibits on file with HARV. J. LEGIS.).

155 *See* note 152 *supra*.

156 In the past ten years, many books and articles have been written on campaign financing. *See, e.g.*, H. ALEXANDER, FINANCING THE 1976 ELECTION (1977); AMERICAN ENTERPRISE INSTITUTE, PUBLIC FINANCING OF CONGRESSIONAL CAMPAIGNS 15-21 (1978). The news media regularly cover the sources and amounts of candidates' campaign contributions. Two recent Common Cause documents provide additional data on the activities of political action committees (PACs) and their impact on legislative and political processes. COMMON CAUSE, HOW MONEY TALKS IN CONGRESS (1976); F. Wertheimer, Of Mountains: The PAC Movement in American Politics (Sept. 4, 1979) (paper submitted for the Conference on Parties, Interest Groups and Campaign Finance Laws, sponsored by the American Enterprise Institute, Washington, D.C., Sept. 4-5, 1979).

the special interests that contributed to his campaign and wanting to encourage future contributions, rewards those interests by granting them access and an opportunity to influence public policy.

Special interests have learned to use money with increasing skill and effectiveness. The number of political action committees (PACs) organized by special interests to contribute money to federal election campaigns has skyrocketed in the last few years. At the end of 1974, there were only 608 PACs;[157] by the end of 1978, they numbered 1,938.[158] The amount of money these committees contribute to candidates has been increasing just as rapidly. In 1974, PACs spent $12.5 million on House and Senate races;[159] in 1978, the amount jumped to $35 million.[160] Incumbents overwhelmingly receive most of these funds. According to Federal Election Commission figures for the 1978 campaign, in races where incumbents were running for re-election, three quarters of the special interest group money went to incumbents.[161] Behind the PAC contributions are Washington lobbyists representing special interests who seek favorable government expenditures, tax benefits, and regulations in return for their largesse. Viewing campaign contributions as investments, these special interests funnel their money to those already in office who have the power and can grant the favors.[162]

One way to rectify the present system of financing congressional general elections is to increase the role of small, individual contributions while cutting back on special interest contributions. Under a partial public financing system, a candidate for Congress would qualify for public funds by raising a threshold amount in private

157 *Corporate Political Action Committees Are Less Oriented to Republicans than Expected*, 36 CONG. Q. WEEKLY REP. 849, 853 (1978).

158 Press Release from Federal Elections Commission (May 10, 1979) (on file with HARV. J. LEGIS.).

159 1 COMMON CAUSE, 1974 CONGRESSIONAL CAMPAIGN FINANCES viii (1974).

160 Press Release from Federal Election Commission (May 10, 1979) (on file with HARV. J. LEGIS.).

161 Press Release from Federal Election Commission (June 29, 1979) (on file with HARV. J. LEGIS.).

162 Officials of political action committees are not shy about confirming this publicity. For example, Justin Dart, Chairman of Dart Industries, has said dialogue with politicians "is a fine thing, but with a little money they hear you better." Mr. Dart represents one of the largest corporate PACs. *See* N. Ulman, *Business Lobby: Companies Organize Employees and Holders into a Political Force*, Wall St. J., Aug. 15, 1978, at 1, col. 1.

contributions to demonstrate his or her viability as a candidate. This approach is generally similar to that used to finance the presidential primaries of 1976 and 1980.[163] These private contributions then would be matched by an equal amount of public money taken from a fund established by a voluntary, one-dollar tax check-off system. Wealthy candidates who accept public financing would no longer be free to spend unlimited amounts of their own money in the campaign.[164]

Partial public financing of congressional elections[165] would improve the political system in several ways. First, it would increase the importance and number of small contributors because each small contribution would be matched by public funds. Secondly, it would reduce candidates' dependence on the contributions of special interest groups by giving them an alternative means of financing campaigns. And, third, it would enhance competition among challengers and incumbents, by increasing substantially the amount of funds available to challengers and lessening the financial advantage that incumbents now enjoy.

A comparison of the 1976 presidential campaign with that of 1972 is illustrative of the impact that partial public financing would have on the number of sources of congressional campaign contributions. In 1976, each major party candidate received $21.8 million in funds provided by millions of Americans through the voluntary, one-dollar income tax checkoff.[166] By contrast, in 1972, the more than $20 million received by President Nixon's re-election committee was donated by only a relative handful of 153 contributors.[167] The success of the presidential public financing

163 *See* AMERICAN ENTERPRISE INSTITUTE, *supra* note 93, at 26-30.

164 The current outlook for campaign financing reform is bleak:

> After six years of sporadic and unsuccessful efforts to enact public financing legislation, the death knell for [such] legislation may have been sounded by the House Administration Committee May 24, 1979, when it decisively voted 8-17 not to report a bill [H.R. 1] to provide federal funding for House general election campaigns. ... H.R. 1 had been heavily promoted by the White House, the Democratic congressional leadership, the Democractic Study Group and a host of outside organizations, including the public affairs lobby Common Cause. ... Hearings on a Senate version [S. 623] were indefinitely postponed.

CONG. Q., THE WASHINGTON LOBBY 67, 67, 72 (3d ed. 1979).

165 As proposed in H.R. 2, 96th Cong., 1st Sess. (1979), *reprinted in Public Financing of Congressional Elections: Hearings on H.R. 1 and Related Legislation Before the House Comm. on House Administration*, 96th Cong., 1st Sess. 2-21 (1979).

166 H. ALEXANDER, *supra* note 156, at 359.

167 (awaiting substantiation).

system should provide a strong impetus for adoption of a similar system for congressional races.[168]

I. *Lobby Disclosure*

In addition to contributing to their campaigns, many special interest groups seek to influence legislators through well financed lobbying operations. Yet, the current lobby disclosure law, enacted in 1946,[169] has so many loopholes that the public and even members of Congress do not know who is spending how much money to influence congressional decisionmaking. A 1978 Common Cause study, reviewing special interest lobbying on President Carter's proposed energy package in 1977, showed that very little of that lobbying activity was disclosed under the terms of the present law.[170] If Congress and the public are to make informed judgments on legislative issues, it is essential that they know who is seeking to influence congressional decisionmaking; they thus should have ready access to information on lobbying activities and expenditures.

An effective lobby disclosure law would emphasize disclosure of the amounts spent to influence policy-making in Congress by

168 There is intense opposition among political action committees to any modification of the campaign finance laws governing their contributions. In 1979, when H.R. 1, the congressional public financing bill, was blocked from further consideration. *See Public Financing Loses in Committee Again*, 37 CONG. Q. WEEKLY REP. 1000 (1979). Congressman Railsback introduced a bill that would place tighter limits on the amounts that PACs could contribute to House candidates. H.R. 4970, 96th Cong., 1st Sess. (1979). Subsequently offered as an amendment to the Federal Election Commission authorization bill, S. 832, 96th Cong., 1st Sess. (1979), the bill would reduce the total amount a PAC may contribute to a single candidate in the primary and general election campaign from $10,000 to $6,000, and would, for the first time, place an overall limit of $70,000 on the amount that a House candidate may accept from all PACs. *See New Limits on PAC Contributions Advanced*, 37 CONG. Q. WEEKLY REP. 2337 (1979). Organizations with PACs that contribute large amounts to candidates, such as the American Medical Association, National Rifle Association, and countless business interests, opposed the bill so strongly that even after it had passed the House, they were encouraging a Senate filibuster of legislation (which must pass the Senate, even though it only applies to House races). On Oct. 26, 1979, Senate Minority Leader Howard H. Baker, Jr., announced that he would be in the "forefront" of a filibuster to stop the bill. *See* Ehrenhalt, *Senators to Fight House PAC Limits*, Wash. Star, Oct. 26, 1979, §A at 5, col. 3.

169 Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270 (1976). *See* Land, *Federal Lobbying Disclosure Reform Legislation*, 17 HARV. J. LEGIS. 295 (1980) (this issue).

170 COMMON CAUSE, THE POWER PERSUADERS: A COMMON CAUSE STUDY OF WHAT THE FEDERAL LOBBY LAW DOES NOT REVEAL ABOUT SPECIAL INTEREST LOBBYING ON THE CARTER ENERGY PACKAGE (1978).

organizations with paid lobbyists. Because groups and individuals clearly have the right to petition the government for the redress of grievances and to compete in the marketplace of ideas, the right to lobby itself should not be limited. In fact, the free and robust exercise of this right is a sign of a healthy political system. Because of the substantial resources that organized interests now devote to influencing public policy, however, it is important to provide the public with basic information about these lobbying activities, including: (1) the identities of the organization's lobbyists; (2) a list of the major issues on which the organization lobbies; (3) estimates of the total amount of money spent by the organization on lobbying; (4) the amount of money spent on major grassroots lobbying campaigns; and (5) the identities of organizations which are major contributors to the lobbying organization.[171]

3. *Redistricting*

Another technique by which incumbents' seats are protected is gerrymandering. Under the present system, state legislators often determine the boundaries of congressional voting districts to protect the seats of those already in office, rather than to ensure political competition.[172] Manipulation of these boundaries for political purposes often deprives voters of their legitimate power by stifling competition, retaining partisan advantages which virtually eliminate political mavericks, and discouraging the election of representatives of racial minority groups.[173]

After the 1980 census, substantial redistricting will be needed to adjust for population shifts, both within states and between states.[174] To prevent gerrymandering in determining the new district boundaries, a three-part approach is needed that (1)

171 For a discussion of current lobby disclosure reform efforts, *see* Land, note 169 *supra*. H.R. 4395, currently being considered, includes all of these elements in some form, the more controversial being provisions to require disclosure of expenditures for grass roots lobbying and the names of organizations contributing more than $3,000 a year to lobby groups. CONG. Q., THE WASHINGTON LOBBY 61, 66 (3d ed. 1979).

172 *See* Wells, *"Affirmative Gerrymandering" Compounds Districting Problems*, 67 NAT'L CIVIL RIGHTS REV. 10 (1978).

173 For a more detailed discussion, *see* COMMON CAUSE, TOWARD A SYSTEM OF "FAIR AND EFFECTIVE REPRESENTATION" (1977) [hereinafter cited as FAIR AND EFFECTIVE REPRESENTATION].

174 *Id.* at 1.

removes redistricting from state legislatures, (2) sets strict standards for drawing district lines, and (3) establishes a procedure for prompt judicial review to enforce the standards.

The most important standard should be that congressional districts be compact and composed of contiguous territory, enhancing voter (and candidate) convenience. To the extent possible, established local political boundaries should be honored in order to minimize voter confusion, enable constituencies to organize for political action in an effective manner, and limit the ability to gerrymander. Standards adopted should prohibit the drawing of district lines in a way that would work to the advantage or disadvantage of any political party, incumbent legislators, or other group. District lines, however, should not be drawn for the purpose of diluting the voting strength of language or racial minority groups.[175]

The responsibility for congressional reapportionment should be placed in the hands of independent state redistricting commissions.[176] These commissions would hold public hearings and consider the views of citizens, political parties, officeholders, and others in order to make the redistricting process a public matter rather than one operating behind closed doors and without public discussion.

Finally, to ensure that redistricting standards established by Congress are followed, the plan drawn by each redistricting commission should be expeditiously reviewed by the courts.[177] It is important that all challenges to reapportionment plans be resolved and plans finalized well in advance of state legislative and congressional elections. Finality in reapportionment is a matter of such importance and sensitivity that it warrants the prompt attention of the highest court in each state. Therefore, these courts should be granted original jurisdiction over reapportionment matters, and challenges should be filed and decided upon within a specified time soon after a plan is prepared.[178]

175 These standards are adopted from the strong anti-gerrymandering provisions in the Hawaii Constitution. FAIR AND EFFECTIVE REPRESENTATION, *supra* note 173, at 29.

176 The legislature has primary responsibility for preparing the reapportionment plan in thirty-seven states. Only nine states give primary authority to a board or commission, although others provide for advisory or back-up boards; in either case, "[m]any are dominated by legislators or other public officials and lack the necessary independence." FAIR AND EFFECTIVE REPRESENTATION, *supra* note 173, at 8-10. Some states already ensure the independence of their respective redistricting commissions. Michigan, Montana, and Vermont prohibit public officials from serving on the commission; Hawaii, Michigan, and Missouri prohibit commissioners from running for legislative office for a period after service on the commission in order to avoid self-dealing. *Id.* at 31.

177 For a fuller discussion of Common Cause's proposal regarding reapportionment, see Adams, *A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective Representation,"* 14 HARV. J. LEGIS. 825 (1977). *See also* FAIR AND EFFECTIVE REPRESENTATION, note 173 *supra*. Common Cause presented testimony to the Senate Committee on Governmental Affairs on the Congressional Anti-Gerrymandering Act of 1979 on June 20, 1979. *A Bill to Establish a Fair Procedure for Establishing Congressional Districts: Hearing on S. 596 Before the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 37 (1979) (statement of David Cohen).

Conclusion

The proposed legislative actions and organizational changes suggested above will inevitably engender substantial resistance from Congress and from organized interest groups outside of Congress.[179] It is reasonable to expect that in the 1980's greater, rather than fewer, resources will be devoted to influencing the legislative and political system. Lobbying by determined interest groups is a given in American politics; legislative commmittees will continue to be the first line of attack and defense for the special interest lobbies.

If the current legislative system of narrow representation is to be reformed, institutional processes must thus be built in to compensate for these factors. The legislative and organizational rules changes advocated in this article are designed to increase political competition, reduce candidates' financial dependence on special interests, strengthen the House and Senate majority leadership vis-à-vis congressional committees, and provide procedures to help political parties decide and adhere to national priorities. Together, these changes could enable Congress to act in a deliberative, orderly, and expeditious manner and deal with the complex public issues of the 1980's.

178 FAIR AND EFFECTIVE REPRESENTATION, *supra* note 173, at 33-34.

179 *See, e.g.*, notes 112 and 168 *supra*; FAIR AND EFFECTIVE REPRESENTATION, *supra* note 173, at 33-34.

COMMENTS

FEDERAL LOBBYING DISCLOSURE LEGISLATION

INTRODUCTION

Lobbying is a billion dollar industry[1] encompassing activities of organizations and individuals who receive or expend substantial sums of money to influence legislative or executive action, either through direct communication with decisionmakers or through soliciting others to engage in such efforts. Although the pressure exerted by lobbyists significantly affects the substance of laws that govern the entire nation, lobbying practices are largely unchecked by federal legislation.

While the majority of communications between lobbyists and legislators are legitimate,[2] some techniques practiced by lobbyists, though not clearly illegal, border on impropriety.[3] Reports of gifts, favors, and special deals arranged between lobbyists and legislators[4] have

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1. This estimate of the amount spent annually on lobbying appears in *Lobby Reform Legislation: Hearings on S. 2477 Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. 497 (1975) (remarks of Sen. Muskie) [hereinafter cited as *1975 Senate Hearings*]. Senator Muskie stated that "not more than one-tenth of 1 percent of that figure is reported under the current law." *Id.* For the causes of this underreporting, see note 61 & accompanying text *infra*.

2. Such communications include the personal presentation of the lobbyist's case before the legislator, testimony at committee hearings, contacting friends or constituents of legislators, and public relations campaigns. W. KEEFE & M. OGUL, THE AMERICAN LEGISLATIVE PROCESS 336-37 (4th ed. 1977) [hereinafter cited as KEEFE & OGUL].

3. For example, the effect of a campaign contribution on the conscience of the legislator has been compared to that of a bribe, because such a contribution causes him to wonder

> to what extent [the] contribution [reflects] recognition of his qualities of statesmanship and to what extent it reflects approval of his particular past or anticipated action on a matter close to the contributor's heart. It begs the question to say that such contributions are proper when the purpose for which they are given is the election of the candidate and not the purpose of influencing his vote. And what if they are given for both purposes?

Celler, *Pressure Groups in Congress*, 319 ANNALS 1, 4-5 (1958) [hereinafter cited as Celler].

4. Many Members of Congress have been charged with having accepted from lobbyists such favors as airplane tickets, transportation in corporate jets, expense-paid vacations, credit cards, gifts, meals, entertainment expenses, office supplies, special rates in buying or leasing cars, special stock offers at greatly reduced prices, and other advantageous business deals. CONGRESSIONAL QUARTERLY, THE WASHINGTON LOBBY 39 (2d ed. 1974). Some of these transactions have been limited by the codes of ethics recently passed by the House and Senate. *See* note 28 & accompanying text *infra*.

contributed to the public's general distrust of such relationships.[5] The secrecy surrounding such relationships has bred suspicion, even where suspicion is unwarranted.[6] At the present time, complete information[7] about those who attempt to influence legislation and legislators is not available to the public.

Newspaper articles report daily about intensive lobbying campaigns being conducted in Congress. In larger numbers than ever before, professional lobbyists can be seen pressing their claims at every stage in the lawmaking process. With billions of dollars at stake in the battle over the President's energy plan, oil companies, utility interests, automobile manufacturers, environmentalists, and consumer organizations are spending large amounts to persuasively represent their interests. Likewise, it is obvious that the President's comprehensive tax reform proposals, hospital cost control proposals, and airline deregulation proposals will meet serious resistance from "well heeled" special interest groups anxious to retain the status quo. Few if any of these enormous lobbying activities will be disclosed under current law.[8]

In addition to acting as representatives of the increasing number of groups with a specialized interest in legislative action,[9] lobbyists serve as advisors to decisionmakers who must interpret the meaning and impact of proposed legislation.[10] For instance, lobbyists define

5. *See* U.S. NEWS & WORLD REPORT, July 25, 1977, at 30. "To many Americans, the word 'lobbying' conjures up a picture of sexual escapades, free-flowing alcohol and black bags crammed with illicit cash." *Id.*

6. *See* KEEFE & OGUL, *supra* note 2, at 354. The authors point out that the sinister image of lobbying is perpetuated by the failure to release complete information regarding the profession.

7. *E.g.*, whom they represent, the legislation they are trying to influence, and the methods by which they exert pressure on decisionmakers.

8. JOINT STATEMENT OF SENATORS KENNEDY, CLARK AND STAFFORD PROPOSING THE LOBBYING REFORM ACT OF 1977 2-3 (letter of June 29, 1977 on file at Senator Kennedy's office) [hereinafter cited as JOINT STATEMENT].

9. *See, e.g.*, Roberts, *Lobbyists In Capital Bringing Flair To Job*, N.Y. Times, Oct. 10, 1977, at 19, col. 1. The article addresses the development of a three-year-old lobbying firm, Timmons & Company. It costs a special interest organization about $100,000 per year to hire Timmons to act as its lobbyist. Timmons accepts only twelve clients at one time. These clients are usually wealthy, powerful, and conservative corporations. During 1977, they included Standard Oil of Indiana, American Petroleum Institute, Genesco (a clothing manufacturer), G.D. Searle Pharmaceuticals, The American Rifle Association, The Business Roundtable (a group of principal executives from major companies), and The American Trial Lawyers Association.

10. *See* KEEFE & OGUL, *supra* note 2, at 350, where the authors conclude:

> Pressure groups have come to be indispensable sources of information in the legislative process. No lawmaker brings to his job the technical knowledge requisite to an intelligent evaluation of all legislation; nor is the legislature as a whole geared to supply the necessary quantity of expert help. Accordingly, legislators turn to pressure groups and executive agencies for pertinent opinions, data, and analysis —and the information they provide may not be available anywhere else.

Id.

policy alternatives, illuminate issues, marshal evidence and support, and promote bargaining. Disclosure legislation would enhance the reputation of the lobbying profession by legitimizing the role lobbyists play in the legislative and executive process. Moreover, legislation requiring disclosure of lobbying practices would not only acquaint government officials and the electorate with the identity of the source of lobbying pressures, but would encourage activities designed to counterbalance those of lobbyists, thereby providing legislators with more complete information to be utilized in the decisionmaking process.

This comment addresses the need for effective legislation requiring the disclosure of lobbying activities and evaluates recent congressional efforts designed to fill this need. Although lobbying activity ostensibly has been regulated since 1946,[11] that law has been ineffective due to its structural deficiencies and to restrictive judicial interpretations of its provisions.

As a result of these defects in the Act, vast amounts of lobbying activity go unreported and undisclosed, tremendous resouces are spent by special interest groups desperate to win the favors that government can bestow. Recently, for example, American Telephone and Telegraph Company reported in the course of a proceeding before the Federal Communications Commission that it spent over one million dollars in a single calendar quarter in 1976 in lobbying for a communications bill—nicknamed the "Bell Bill" by congressmen—which would enhance A.T.&T.'s dominance in the field, make it more difficult for other firms to compete, and reverse the FCC's current policy for promoting competition in communication. Yet A.T.&T. filed no report of this lobbying activity under the Act.[12]

A second example shows the difference between the real costs of lobbying and what is reported to Congress under the Act. El Paso Natural Gas Company, in answer to a specific request, disclosed to the Federal Power Commission that in 1971 it had spent $893,862

11. Federal Regulation of Lobbying Act of 1946, 2 U.S.C. §§ 261-270 (1970).

12. JOINT STATEMENT, *supra* note 8, at 2. The legislation is formally entitled the "Consumer Communications Reform Act." It was introduced early in 1976 and gained momentum but died at the end of the 94th Congress. The bill was reintroduced in the 95th Congress and has been heavily lobbied by A.T. & T. The lobbying figures came to light *only* because the Bell System is required to report such expenditures under the Consumer Communications Reform Act. A.T. & T. lobbying expenditures on the "Bell Bill" totalling $2,568,674 are listed with the FCC for the years 1975-76. Interview with Claudia Higgins, staffmember, Government Affairs Committee, United States Senate, in Washington, D.C. (May 18, 1977).

lobbying for a bill concerning divestiture of a pipeline firm. In particular it paid a Washington, D.C. law firm $353,113 to lobby for a bill. El Paso did not file a report with Congress concerning these activities, and the law firm reported only $6,227 in lobbying expenses.[13]

Both houses of the 94th Congress passed their own respective lobbying bill, but neither bill was actually enacted into law.[14] These bills demonstrate a desire toward expanding disclosure requirements to activities not covered by the 1946 law. The 95th Congress has continued the effort toward comprehensive lobby disclosure legislation,[15] with parameters set largely by the two prior bills.

A comprehensive lobbying disclosure act, however, may be subject to substantial constitutional challenges. Constitutional validity is called into question by disclosure provisions that require an organization to report its efforts to solicit other individuals or groups to lobby.[16] Also subject to dispute are provisions that require lobbying organizations to identify their large contributors. Finally, provisions that cause relatively small expenditures in the area of lobbying to trigger disclosure requirements will be examined in terms of their compatibility with protections guaranteed by the first amendment.

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13. *Lobbying and Related Activities: Hearings on H.R. 1180 Before the House Comm. On The Judiciary*, 95th Cong., 1st Sess. 127-28 (1977) (remarks of Fred Wertheimer, Common Cause) [hereinafter cited as *1977 House Hearings*].

14. H.R. 15, 94th Cong., 2d Sess., 122 CONG. REC. H11416 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess., 122 CONG. REC. S9365 (daily ed. June 15, 1976).

15. As of June 1977, the House had introduced fifteen bills that would have required disclosure of lobbying activities. *See, e.g.*, H.R. 557, 95th Cong., 1st Sess., 123 CONG. REC. H196 (daily ed. Jan. 6, 1977); H.R. 1160, 95th Cong., 1st Sess., 123 CONG. REC. H211 (daily ed. Jan. 6, 1977); H.R. 5578, 95th Cong., 1st Sess., 123 CONG. REC. H2599 (daily ed. Mar. 4, 1977); H.R. 5795, 95th Cong., 1st Sess., 123 CONG. REC. H2777 (daily ed. Mar. 30, 1977). The staff of the Senate Committee on Government Affairs has drafted proposed lobbying legislation which is expected to be discussed when the full committee holds a mark-up. *See* note 69 *infra*. This proposal was referred to as the "consensus bill" during the spring of 1977, and was essentially a compromise between the House and Senate approaches to lobbying regulation. Huger, *Success Eludes Groups Seeking Mutually Acceptable Lobbying Disclosure Bill*, 35 CONG. Q. 745 (1977). *See* notes 106-14 & accompanying text *infra*. Most of the provisions of this draft proposal were incorporated into S. 1785, introduced in the Senate by Senators Kennedy, Clark, and Stafford on June 29, 1977. S. 1785, 95th Cong., 1st Sess., 123 CONG. REC. S11108 (daily ed. June 29, 1977).

16. Soliciting others to lobby is also referred to as grassroots or indirect lobbying. By means of educational and propaganda campaigns, the grassroots lobbyist seeks to influence public opinion in certain segments of the population. The public often responds with massive letter-writing campaigns, telephone and telegraph messages to congressmen, and delegation visits to Washington. CONGRESSIONAL QUARTERLY, THE WASHINGTON LOBBY 5-6 (2d ed. 1974). *See* note 192 *infra*.

I. THE NEED FOR DISCLOSURE OF LOBBYING ACTIVITIES

Although lobbyists unquestionably have a constitutional right to represent their employers' special interests before the legislative and executive branches of government,[17] the public, the media, and competing interests should not be denied access to information regarding the extent of these activities. Such information is necessary for a reasoned public judgment as to what measures should be taken to counterbalance the actions of the lobbyists. Rational decisionmaking demands openness so that all aspects of an issue may be presented before a decision is made.[18] A democratic political system cannot function at maximum efficiency without providing the means by which other individuals or groups may offset the political pressure generated by particular lobbying groups.[19] Disclosure should increase public participation in government with the benefit that Congress will receive different viewpoints.

Not only the public at large, but also congressmen and executive branch officials will benefit greatly from the disclosure of lobbying activities. They must deal daily with lobbyists who strongly and persuasively press their clients' interests. If both the lobbyist's sponsor and the extent of the monetary effort to influence the government decisions are known, the government official is better able to ascertain the intent of those lobbying efforts. Disclosure would thus lead to more knowledgeable and rational decisionmaking by government officials.

The importance of the need for lobbying disclosure legislation was highlighted by a lobbying campaign initiated during the spring of

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17. *See* Moffett v. Killian, 360 F. Supp. 228, 231 (D. Conn. 1973), in which the court noted that "[t]he mere fact . . . that one earns a living by exercising First Amendment rights does not vitiate the ability to assert those rights . . . . Furthermore, one does not forfeit First Amendment rights because he pays someone to exercise them for him." (citations omitted).

18. KEEFE & OGUL, *supra* note 2, at 352. The authors support the idea that "[a] public passive or oblivious to concessions made to pressure groups is not likely to find its interest, to the extent that it can be identified at all, zealously guarded by the legislature. Countervailance demands awareness, involvement, and comparable power." *Id.*

19. Celler, *supra* note 3, at 7. The author, a former congressman, explains the legislator's quandary:

> It is disturbing to sit through legislative hearings at which the conflicting interests who should be heard are unequally represented in the presentation of their views. Worst of all, from the standpoint of a Congressman's desire to legislate intelligently, are those situations in which only the proponents of the suggested legislation are heard from. The Congressman may know or suspect that there are serious opposing considerations, but they are simply not presented. He is faced with a dilemma as to how far he can or should go to supply the omission.

Id.

1977 after the Food and Drug Administration issued a ban on the artificial sweetener saccharin. Instantly "The Calorie Control Council" launched a full-scale advertising campaign urging citizens to press Congress for a reversal of the ban. An advertisement placed in *The Washington Post* exhorted readers to write or phone their congressmen and express their hostility to this arbitrary action by big government. The campaign was to be an "experiment in democracy." There was no identification of the council in the advertisement beyond a post office box number. Since there is no current registration requirement for special interest organizations engaged in grassroots activities, the council's membership remained a mystery, yet their campaign was making a substantial impact on congressional thinking. A curious attorney, Thomas Asher, traced the advertisement to a large advertising agency in Atlanta, and through the agency discovered that the Calorie Council was composed of major and minor manufacturers of dietary products and not consumers. The investigation of Asher revealed to the public, the media, competing interests, Members of Congress, and executive branch officials facts that were not readily available to them under current legislation.[20]

Disclosure will also serve to increase the accountability of government officials for their ultimate decisions. Some officials now benefit from the secrecy of lobbying activities since it disguises their part in the lobbying exchange. Publicity and the knowledge that their actions will be scrutinized will force these officials to judge their role in lobbying activities objectively.

Some of the most effective lobbying is done behind the scenes where publicity and public accountability are lacking. For example, in November 1977, when the Conference Committee was in the final stage of ironing out differences between the Senate and House versions of the Clean Water Bill of 1977, paper companies and their trade organizations successfully lobbied specific key conferees for the introduction and passage of advantageous amendments. While these activities were subsequently reported,[21] this type of intensive personalized lobbying to effect favorable amendments in proposed legislation at the subcommittee, full committee, or conference committee stage often goes unreported.

Finally, disclosure of lobbying activities will increase public confidence in its representatives in government.[22] Because of the secrecy

20. Rothman, *Phony Consumer Groups*, 225 THE NATION 239 (1977).

21. Morgan, *Industry Giants Muster Money and Clout*, Wash. Post, Nov. 13, 1977, § A, at 1, col. 1.

22. *See* Ladd, *The Polls: The Question of Confidence*, 40 PUB. OP. Q. 544 (1977). In

surrounding lobbying activities, the average citizen often feels overwhelmed by organized groups, which effectively dilute the strength of his interest. Thus, undisclosed lobbying works against the public interest and endangers the integrity of the legislative process.[23]

It is important to stress that disclosure of lobbying activities means bringing such activities into public view, not proscribing them. Rather than prohibiting legitimate lobbying activities, only the disclosure of the aims, expenditures, and financial backing of such activities would be required. Advocates of strict regulation of lobbying have argued, however, that monetary disclosure alone is unsatisfactory.[24]

Information should be disclosed to enable an exact determination of what influences the government official's decisions. This information could be ascertained only by knowing who contacted the official, the subject matter discussed, the exposure time, and the influence the contact had. Although disclosure provisions could require logging of all contacts between lobbyists and government officials in this man-

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March of 1976, pollster Louis Harris concluded that "public opinion in major U.S. institutions is at its lowest point . . . since the Harris Survey began making such measurements ten years ago." *Id.* at 546. While Ladd contends that it is impossible to ascertain the true depth of public dissatisfaction with its government, *id.* at 552, he bases the following conclusion on statistics gathered by various polls taken between 1974 and 1976:

> When 61 percent of a populace think quite a few of their leaders are crooked and 62 percent insist that their national government is run on behalf of a few big interests, when nearly four people out of every five profess to feel that the system is so arranged that the rich fatten up and the poor suffer . . . well, it is possible to argue that the country has problems, and maybe that there is a crisis of confidence, even an incipient crisis of legitimacy.

Id. at 550.

23. *See* R. RIPLEY, CONGRESS PROCESS & POLICY 213 (1975) [hereinafter cited as RIPLEY], in which the author outlines some of the possible dangers in unchecked interest groups:

> [Lobbyists] participate in cozy little sub-government arrangements that essentially make policy in many areas without benefit or hindrance from other sources. They provide a large amount of issue-related information to legislators that naturally tends to be biased. Their very existence usually works for the maintenance of the status quo; they play an important role in keeping the agenda of Congress looking pretty much the same from year to year. They buttress Congress's preference for familiar, nonthreatening solutions to familiar issues.

Id.

24. *See* Senator Kennedy's Open Communications Act of 1976, an amendment introduced in conjunction with S. 2477, 94th Cong., 2d Sess., 122 CONG. REC. S9278 (daily ed. June 14, 1976). The amendment would have established recording procedures for all lobbying contacts with high-level officials in executive departments and regulatory agencies. Although this legislation was defeated in the 94th Congress, Senator Kennedy introduced it in the 95th Congress as S. 316, 95th Cong., 1st Sess., 123 CONG. REC. S860 (daily ed. Jan. 18, 1977).

ner, government officials would not likely be able to offer the precise reason for weighing the influences responsible for a particular decision. This last link—the weight of lobbyists' efforts—can only be conjecture. Whether logging of contacts should be required either by the lobbyist or the government official or both necessitates striking a balance between the value of the information and the time and inconvenience of logging. Congressmen and executive branch officials have strongly resisted any effort which would require them to record contacts in this manner.[25] Since they have contacts with many individuals every day who seek to influence their vote or decision, logging would consume large amounts of time while failing to measure accurately the impact of each lobbyist's contact.

The effect of lobbying activities may, nevertheless, be determined without requiring that contacts be recorded. Public knowledge of the amount of money that lobbyists spend on their activities coupled with the disclosure of the issues they attempted to influence can provide sufficient information from which the general impact of the lobbying effort can be inferred. Without this minimal disclosure, however, the problems generated by the secrecy of lobbying activities will persist.[26]

As an alternative to disclosure legislation, one Congressman has suggested that some lobbying activities be made illegal.[27] Rather than rely on disclosure to encourage self-correction of lobbying abuse, this

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25. The story of one representative's efforts in support of legislation that would require congressmen to log all contacts received from lobbyists is illustrative:

> Rep. Barbara C. Jordan (D. Tex.) noted that all the proposed bills before the [House] subcommittee required the lobbyists alone to make disclosures. The bills are supposed to combat public distrust and cynicism, she said, "[but] the truth of the matter is that distrust does not run to the lobbyist . . . the public doesn't say we don't trust Exxon or Shell. They say we don't trust Barbara Jordan."
>
> She asked the sponsors of one measure whether there should not be some reporting burden on senators and representatives. "To be very candid," Rep. Tom Railsback (R. Ill.) replied, "such a . . . requirement might defeat the bill."

Gordon, *The Sad Saga of Lobby Reform*, Wash. Post, Nov. 21, 1976, § B (Outlook), at 3, col. 1. *See* note 127 *infra*.

26. *See* KEEFE & OGUL, *supra* note 2, at 353, for a similar observation regarding lobbying disclosure laws: "[t]he most that can be said for even the best law, however, is that it may alert legislators and the citizenry to what is going on around them. Lobby law is an instrument, one of several, and it is difficult to think of it as a panacea." *Id.*

27. *See* STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., REPORT ON REGULATING LOBBYING AND RELATED ACTIVITIES 77 (Comm. Print 1976) (dissenting views of Rep. Edwards) [hereinafter cited as HOUSE COMMITTEE REPORT]. Representative Edwards suggested replacing disclosure requirements with strict spending ceilings for those lobbying activities that benefit public officials. *Id.* A similar approach to lobbying disclosure has been enacted into law by the California legislature. *See* Political Reform Act of 1974, CAL. GOV'T CODE §§ 81000-91014 (West 1976).

approach would simply prohibit the questionable tactics. Certain controversial lobbying efforts can be forbidden. For example, both congressional ethics committees have approved legislation that frustrates certain lobbying activities by forbidding congressmen from accepting gifts from lobbyists and requiring disclosure of their financial activities.[28] A further illustration is the California lobbying law[29] which uses this technique by limiting lobbyists entertainment expenses and requiring monthly reports on each meal or drink that a lobbyist purchases for a legislator.[30] It is not only these questionable activities, however, that lobbying disclosure legislation would reveal. The public would also be able to know which decisions special interest groups are trying to influence. Thus, if congressmen allow potential campaign contributions,[31] influence over significant groups of

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28. On March 2, 1977, the House passed a code of ethics limiting outside earned income to 15% of a congressman's annual salary, not including income from a family business or stock dividends. Representatives and other top level House employees are now prohibited from accepting any gifts valued at $100 or more from foreign nations or anyone having an interest in legislation (*e.g.*, lobbyists). In addition, there are provisions requiring disclosure of the source and amount of any income over $100; the source and value of gifts over $100, and transportation, food, lodging, or entertainment valued at over $250; the general amount of any financial holdings in excess of $1,000 (except homes); any debt exceeding $2,500 (except home mortgages); and any transaction in securities or commodities exceeding $1,000. All representatives, their principal aides, and the staffs of congressional committees must file annual financial affairs reports with the Clerk of the House. H.R. Res. 287, 95th Cong., 1st Sess., 123 CONG. REC. H1566 (daily ed. Mar. 2, 1977). The Senate adopted a similar code of ethics, S. Res. 110, 95th Cong., 1st Sess., 123 CONG. REC. S5381 (daily ed. Apr. 1, 1977).

The main drawback in relying solely on the congressional codes of ethics to curtail lobbying abuses lies in the manner by which the codes are enforced. The new codes will be enforced by the committees in each chamber; their effectiveness thus depends upon the committees' willingness to investigate allegations of misconduct of their peers and to utilize appropriate sanctions (*e.g.*, expulsion, censure, or denial of seniority).

29. *See* note 27 *supra*.

30. The chairman of the California agency charged with the administration of the law observes:

> The whole way of doing business has changed. The day of lubricating friendships between legislators and lobbyists is over. The wining and dining, the stocked liquor cabinets and suits of clothes and junkets paid for by lobbyists have stopped. We've really opened up and equalized the system so that every interest gets a fair shake.

Pierce, *Tough Lobbying Law a Model for Nation*, Pitt. Post Gazette, Nov. 27, 1975, at 14, col. 1.

31. *See* KEEFE & OGUL, *supra* note 2, at 325, in which the authors point out that:

> Direct political action in the shape of political funds and assistance in campaigns may be held out to legislators by interest groups with sufficient financial or manpower resources. Since parties or candidates rarely judge their campaign larders to be adequate, they find it difficult to ignore an open treasury or a group of volunteer workers. . . . Because these possibilities for campaign support are generally available, to be tapped by the candidate whose voting record and outlook meet the proper tests of orthodoxy, legislators must give careful thought to the claims of groups whose wherewithal may prove useful at election time.

voters,[32] a commitment to provide volunteer campaign work, or similar legitimate pressures to influence their position on certain legislation, it will not be without knowledge of the public's ability to hold them accountable for such action.

Requiring the disclosure of expenditures made by lobbying organizations and other related details may not seem to be an effective means of checking lobbying activity, but such minimal disclosure requirements will provide information necessary at least to infer the identity of the party seeking to influence legislation, the objective of such efforts, and the extent of the activities designed to achieve the objective. Proposals that would require logging of contacts by either the legislator or the lobbyist do not seem advisable or practical. The sheer volume of information that logging would generate would obscure public interest. It would drastically increase the cost of disclosure, curtail the flow of information to Congress, and pose problems to those who seek to interpret such data meaningfully.

In summary, lobbying disclosure legislation should not seek to prohibit or curtail the activities of lobbyists. It should, however, end the secrecy in which lobbying is often cloaked and which breeds cynicism and suspicion—if not outright corruption—of government. The public is entitled to know the source and scope of the major private influences that are brought to bear on congressional decisions.

Senators Kennedy, Clark, and Stafford put the need for lobbying disclosure legislation in perspective:

> In recent years, Congress has taken important strides toward reforming government and restoring the confidence of the people in the institu-

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See Cohen, *Public Financing*, 43 VITAL SPEECHES 692 (Sept. 1, 1977). Expounding on the pervasiveness of this legitimate lobbying technique, David Cohen, President of Common Cause, said that in the last election year (1976) special interest groups contributed a record $22.6 million to candidates for Congress, the amount being nearly double that given two years earlier. Cohen proclaimed that "[o]bviously this money is given to buy influence." *Id.*

Illustrations demonstrating a quid pro quo attitude on the part of special interest groups are seemingly endless.

> For example, one of the most far-reaching considerations before this Congress will be the passage—or rejection—of some form of national health insurance. Little wonder that a large part of the AMA's nearly two million in [campaign] contributions last year was aimed at 29 out of the 37 members of the House Ways and Means Committee—members of both parties. Naturally the fate of national health insurance will be decided in the Ways and Means Committee.
>
> Nor is it strange that the dairy groups targeted $205,000 of their 1976 gifts to members of the House Agricultural Committee, which has jurisdiction over dairy price supports.

Id. at 692-93.

32. *See* RIPLEY, *supra* note 23, at 210.

tions of our democracy. . . . Public financing has ended the corruption and the appearance of corruption of large special interest money in Presidential election campaigns; a major reform bill now on the Senate calendar will do the same for Senate and House elections. Both the Senate and House have adopted strict new codes of ethics, and have reorganized their archaic committee systems to deal more effectively with modern issues. In these and other ways, Congress has established a significant record of worthwhile reforms in many different areas.

But so far, lobbying reform has been the missing link. It is perhaps the most important remaining item on the unfinished agenda of government reform.[33]

II. THE 1946 FEDERAL REGULATION OF LOBBYING ACT

A. *Structural Analysis and Judicially Imposed Limitations*

Efforts to pass comprehensive legislation to regulate lobbying began in 1935 and 1936[34] and resulted in the Federal Regulation of Lobbying Act of 1946 (the Act).[35] There was little debate on the provisions of the Act,[36] and it has not been amended since its passage. The 1946 Act was not intended to regulate lobbying practices, as its title implies, but was aimed at requiring the disclosure of lobbyists' identity and lobbying expenditures.[37]

By imposing three requirements on lobbyists—registration,[38] reporting,[39] and recordkeeping[40]—and providing for publication of this information in the *Congressional Record*,[41] Congress intended to

33. JOINT STATEMENT, *supra* note 8, at 4-5.

34. For a discussion of early congressional efforts to regulate or investigate lobbying, see KEEFE & OGUL, *supra* note 2, at 385-86; CONGRESSIONAL QUARTERLY, THE WASHINGTON LOBBY 21-24 (2d ed. 1974).

35. 2 U.S.C. §§ 261-270 (1970).

36. The Federal Regulation of Lobbying Act was enacted as title III of the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (codified in scattered sections of 2 U.S.C.). The lobbying provisions might have been defeated had they not been included in the larger bill. At the time, attention was focused on the provisions affecting congressional reorganization, which may explain the absence of any serious challenge to the lobbying regulations. KEEFE & OGUL, *supra* note 2, at 386.

37. COMPTROLLER GENERAL OF THE UNITED STATES, THE FEDERAL REGULATION OF LOBBYING ACT—DIFFICULTIES IN ENFORCEMENT AND ADMINISTRATION 2 (1975) [hereinafter cited as GAO REPORT], *reprinted in Public Disclosure of Lobbying Act: Hearings on H.R. 15 Before the Subcomm. on Administrative Law and Governmental Relations*, 94th Cong., 1st Sess. 870 (1975) [hereinafter cited as *1975 House Hearings*].

38. Federal Regulation of Lobbying Act § 308(a), 2 U.S.C. § 267(a) (1970).

39. *Id.* § 305, 2 U.S.C. § 264.

40. *Id.* § 303, 2 U.S.C. § 262.

41. *Id.* § 308(b), 2 U.S.C. § 267(b).

make lobbying open to public scrutiny.[42] After initially registering with the Clerk of the House and the Secretary of the Senate under the Act, the lobbyist must file with those officials quarterly reports,[43] detailing contributions received and expenditures made during the preceding quarter pertaining to lobbying activities,[44] including the recipients and purposes of the expenditures[45] and the legislation that was the subject of the lobbying activities.[46] A joint compilation is made by the heads of the congressional houses and subsequently published in the *Congressional Record*.

Although the Act initially appeared to provide for wide ranging disclosure, the Supreme Court severely limited its scope, shortly after its passage. In *United States v. Harriss*[47] the Act was held to be constitutional[48] but its provisions were interpreted to cover only a portion of lobbying activities. The *Harriss* decision limited the Act in four ways. First, it construed the Act to apply only to those individuals or groups who contribute or make expenditures for the "principal purpose" of influencing legislation, thereby eliminating those who nevertheless engage in meaningful lobbying efforts.[49] Second, the decision required that "direct communications" with members of Con-

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42. KEEFE & OGUL, *supra* note 2, at 346.
43. Federal Regulation of Lobbying Act § 308(a), 2 U.S.C. § 267(a).
44. *Id.*
45. *Id.*
46. *Id.*
47. 347 U.S. 612 (1954).
48. The constitutionality of the the Act was earlier upheld in United States v. Slaughter, 89 F. Supp. 205 (D.D.C. 1950). The court in *Slaughter* also construed section 308 of the Act, 2 U.S.C. § 267 (1970), which exempts from coverage persons appearing at congressional hearings, to encompass the defendant's activities. Although the defendant did not participate personally in the hearings, he had helped prepare witnesses for congressional appearances.

Two years before *Harriss*, a federal district court found the Act so vague as to constitute a denial of due process. The decision was vacated on a technicality by the Supreme Court without an opinion on the merits. National Ass'n of Mfrs. v. McGrath, 103 F. Supp. 510 (D.D.C.), *vacated as moot*, 344 U.S. 804 (1952). For a concise summary of the cases brought under the Act, see CONGRESSIONAL QUARTERLY, THE WASHINGTON LOBBY 25 (2d ed. 1974).

49. 347 U.S. at 621-23. Section 307 of the Act, 2 U.S.C. § 266 (1970), states that only those persons who by themselves or through any agent or employee or other persons "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 passage or defeat of any legislation by Congress must register (emphasis supplied). In construing this language, the Court distinguished contributions intended "in substantial part to be used to influence legislation" from contributions with only an "incidental" purpose of influencing legislation. This distinction has failed to serve as a practical guide in determining under what circumstances the Act applies. *See 1975 House Hearings*, *supra* note 37, at 870.

gress be made before the provisions of the Act apply.[50] Therefore, all lobbying contacts made with congressional staff members and aides are excluded.[51] Third, the Court held that only lobbying activities that are substantially directed toward influencing legislation are covered by the Act, thereby excluding grassroots lobbying from the Act.[52] Fourth, the decision limited the required disclosure of lobbying activities to only those lobbyists who personally participate in the solicitation, acceptance, or receipt of contributions for lobbying purposes.[53]

B. *Failure of the Act*

The Act is undermined by ambiguities and loopholes, and its continued usefulness as a provision for regulating lobbying is questionable.[54] Without substantial reworking, the raw data reported in the *Congressional Record* provides no useful information. Even the *Congressional Quarterly*, which once published lobbyist lists, no longer publishes such information due to problems of evaluating the material fairly.[55] Such evidence indicates that the Act fails to fulfill its basic function of disclosure.[56]

Anticipating reform legislation, Senator Abraham Ribicoff requested

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50. 347 U.S. at 620. This limitation imposed by *Harriss* was prefigured by an earlier decision of the Court which held that lobbying in the Act meant only those "representations made directly to the Congress, its members, or its committees." United States v. Rumely, 345 U.S. 41, 47 (1953). *See* notes 203-10 & accompanying text *infra*.

51. *See* 347 U.S. at 621-23.

52. *Id.* at 622.

53. *Id.* at 619. This interpretation exempts from the coverage of the 1946 Act the activities of all lobbyists who do not personally participate in fund raising, or whose activities are financed by earned income or business profits.

54. KEEFE & OGUL, *supra* note 2, at 346. To date, there has been only one successful prosecution under the Act. In United States v. Neff, No. 768-56 (D.D.C. Dec. 14, 1956), two defendants were convicted for improperly reporting senatorial campaign contributions designed to influence natural gas legislation. Bribery charges were dropped and the defendants were fined $2,500 each and given a one-year suspended sentence.

55. *1975 House Hearings*, *supra* note 37, at 594 (prepared statement of Rep. Tom Railsback).

56. *See* KEEFE & OGUL, *supra* note 2, at 347. The authors list five reasons why control through publicity has not proven effective. First, lodging financial and other data with the Clerk of the House and reproducing it in the *Congressional Record* offers no assurance that publicity will attend the revelations. Second, the data collected are simply filed, not analyzed. Third, no agency was given the task of policing the Act for compliance and no specific appropriations have been authorized for its enforcement. Fourth, individuals who lobby government agencies are not required to register. Fifth, the most important and useful information is not collected, such as the number of members who belong to the organization and the manner in which the organization's decisions on legislation are taken.

in 1974 that the Government Accounting Office (GAO) evaluate the 1946 Act with a view toward future legislation to improve lobbying regulation.[57] The GAO report concentrated on evaluating the powers given to the Clerk of the House, Secretary of the Senate, and the Justice Department to administer the Act. Since the rights and obligations of the administrators were not defined adequately,[58] the GAO concluded that the Act was "ineffective."[59] The report additionally criticized the inadequate definition of a direct contact with a congressional member,[60] the inadequate definition of lobbying expenditures which must be reported,[61] and the vagueness of the principal purpose requirement,[62] which resulted in the failure of many lobbyists to regis-

57. Letter from Senator Abraham Ribicoff to Elmer B. Staats, Comptroller General (Aug. 14, 1974), *reprinted in 1975 House Hearings*, *supra* note 37, at 699. The GAO was asked to determine and evaluate the filing, reporting, and enforcement practices under the Act. *Id.*

58. *See* Testimony of Patricia Wald, Assistant Attorney General, Office of Legislative Affairs, Before the Senate Governmental Affairs Comm. (Aug. 2, 1977) [hereinafter cited as Justice Report] which summarizes this problem:

> [T]he 1946 Act does not provide the Clerk of the House or the Secretary of the Senate with any authority to audit lobbying reports which must be filed with them, or to refer suspected violations to the Department of Justice. This omission has not resulted in detection of violations in a systematic manner, but rather on the basis of information provided by lobbyists with opposing interests, journalists, and, from time to time, by other Members of Congress. More effective enforcement provisions are necessary.

Id.

59. GAO REPORT, *supra* note 37, at 2, *reprinted in 1975 House Hearings*, *supra* note 37, at 692. Upon completion of the study, the Deputy Comptroller General of the GAO stated, "We believe that the present law should be changed; either that or you might as well take the 1946 law off the books." *1975 Senate Hearings*, *supra* note 1, at 169.

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60. *See* GAO REPORT, *supra* note 37, at 2, *reprinted in Hearings on H.R. 15*, *supra* note 37, at 692; United States v. Slaughter, 89 F. Supp. 205 (D.D.C. 1950). The 1946 law does not set forth precisely what kinds of contacts constitute lobbying. The law specifically exempts testimony before a congressional committee in section 308(a), 2 U.S.C. § 267(a) (1970). In *Slaughter*, a federal district court held that this exemption also applied to those helping to prepare such testimony. A new loophole was thus created which permitted lobbyists to claim as a defense to nonregistration that their activities were aimed at preparing testimony for witnesses, and that they were not attempting to influence directly the passage or defeat of the legislation. *See* CONGRESSIONAL QUARTERLY, THE WASHINGTON LOBBY 24-25 (2d ed. 1974).

61. This uncertainty has permitted each reporting group or person to determine individually what constitutes lobbying expenses. Common Cause, a large lobbying organization, reports expenses such as salaries, overhead costs, newsletter costs, and printing, mailing, and telephone expenditures. Other reporting lobbyists include only the cost of their time actually spent in direct communication with members of Congress. Other lobby-related expenditures are not reported, even though they are essential to the overall lobbying effort. CONGRESSIONAL QUARTERLY, THE WASHINGTON LOBBY 42-43 (2d ed. 1974); *1975 House Hearings*, *supra* note 37, at 816.

62. *See* note 49 & accompanying text *supra*.

ter on the grounds that lobbying was not their principal purpose.[63]

Large discrepancies exist between lobbyists' activities to influence legislation and activities actually reported under the Act. Some organizations register in accordance with the Act but report no or few expenses. Other organizations fail to register at all,[64] and still others are not even required to report their lobbying activities.

For example, in 1974, the American Trial Lawyers Association lobbied vigorously against no-fault auto insurance. To influence Congress, an arrangement for mailgrams opposing the legislation was used whereby Association members called Western Union and sent mailgrams in the names of friends and associates. For each name given to Western Union, ten messages were sent to Congress. The result was a deluge of messages to key congressional offices protesting no-fault insurance, all of which were apparently sent by concerned constituents. In one case, an Association member was responsible for sending 3,100 mailgrams. Despite the significant influence the arrangement may have had on no-fault legislation, the American Trial Lawyers Association was not—nor was it required to be—registered under the Act[65] for the simple reason that lobbying is not the Association's principal purpose.

A similar example of large-scale lobbying activity not covered by the 1946 Act occurred recently when one of the nation's largest utility holding companies, the American Electric Power Company (AEP), conducted a massive advertising campaign to promote increased development of coal reserves. AEP owns or leases much of the coal reserves of the United States. The advertising campaign consisted of thirty-six advertisements in 260 national and local publications, and cost AEP approximately $3.6 million. Most of the advertisements were aimed at convincing the public that coal is the answer to the

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63. GAO REPORT, *supra* note 37, at 2, *reprinted in 1975 House Hearings*, *supra* note 37, at 692. *See* National Ass'n of Mfrs. v. McGrath, 103 F. Supp. 510 (D.D.C.), *vacated as moot*, 344 U.S. 804 (1952); CONGRESSIONAL QUARTERLY, THE WASHINGTON LOBBY 23 (2d ed. 1974). *See also* Justice Report, *supra* note 58. The Department of Justice listed one other serious inadequacy of the Act, *i.e.*, that it provides only for criminal sanctions against violations of the statute. Criminal prosecutions are too severe a penalty in cases of unintentional breach and the Department is reluctant to bring action in these cases.

64. *See* STAFF OF THE SENATE COMM. ON GOVERNMENT OPERATIONS, 94TH CONG., 2D SESS., REPORT ON LOBBY DISCLOSURE ACT OF 1976 at 6-7 (Comm. Print 1976) [hereinafter cited as SENATE COMMITTEE REPORT]. The Committee cited testimony "that only 2,000, or 20 percent to 40 percent, of the 5,000 to 10,000 persons who should register as lobbyists actually do so under the present law."

65. *1975 House Hearings*, *supra* note 37, at 744-45 (statement of Fred Wertheimer, Common Cause).

energy crisis; some of them, however, specifically called for legislative change. Like the American Trial Lawyers Association, AEP is not registered under the present lobby law, since lobbying is not its principal purpose.[66] Even if the Act required that the AEP register, these expenditures would not have to be reported as they were spent for indirect lobbying activities not covered by the Act. Both of these examples illustrate the Act's failure to achieve its objectives of disclosing significant lobbying activities.

The ineffectiveness of the current legislation is further indicated by its failure to cover executive branch lobbying. For example, drug manufacturers lobbied the Department of Health, Education and Welfare (HEW) to reject a plan that would have restricted prescriptions under Medicare and Medicaid to the lowest priced drugs having the required therapeutic benefits, thereby saving taxpayers an estimated $90 million annually. The manufacturers solicited pharmacists and doctors to oppose the plan. One manufacturer had two hundred of its salesmen obtain letters of opposition from five druggists each. These letters were then presented by the company's president to the Secretary of HEW "as evidence of the opinion of the nation's pharmacists." Neither the manufacturer, the company's president, nor anyone else representing the firm was registered as a lobbyist,[67] nor were they required to register under the Act.

Undeniably, the present lobbying act has not achieved the objective that it was designed to accomplish, that of bringing congressional lobbying into public view. Whether it can do so in the future is doubtful, given the Act's inherent lack of definition, narrowness of scope, and the limitations imposed by the courts. If lobbying is to be disclosed effectively, it must be through a law more precisely drafted and more expansive in scope. In 1976, Congress attempted to fill this need. Both houses passed separate lobbying registration bills providing for relatively stringent disclosure of the practice, but opponents in the Senate were able to use procedural means to block final action,[68] and time ran out before a conference could be held to rec-

66. *Id.* at 745.

67. *Id.*

68. The Senate bill, S. 2477, 94th Cong., 2d Sess., 122 CONG. REC. S9365 (daily ed. June 15, 1976), was passed in June 1976. The House bill, H.R. 15, 94th Cong., 2d Sess., 122 CONG. REC. H11416 (daily ed. Sept. 28, 1976) was passed in September 1976, and was sent to the Senate a few days before the end of the session. Abraham Ribicoff, sponsor of the Senate lobbying registration bill, hoped to expedite reconciliation of the House and Senate bills by eliminating the normal House-Senate conference. He sought unanimous consent to bring the House bill directly to the Senate floor, but one senator objected, thereby denying the unanimity required. *See* Gordon, *The Sad Saga of Lobby*

oncile the Senate and House bills. Thus, although neither bill became law, it is nearly certain that similar lobbying disclosure legislation will be passed in the near future.[69]

III. Proposed Lobbying Legislation

The two 1976 bills have been used as prototypes by the 95th Congress. Debates, challenges, and hearings have centered around the provisions contained in the two bills. The only major innovation in this area has been a bill introduced by Senators Kennedy, Clark, and Stafford. It is a compromise version that attempts to build on the 1976 Senate and House debates and bills. Since the House and Senate committees that have jurisdiction over lobbying legislation have not yet approved any final draft proposals, attention must be focused on the bills that were approved by the same committee one year earlier and passed by each respective house of Congress. The two bills thus represent the implied limits that final legislation will take.

The approach toward disclosure of lobbying information taken by the House and Senate in each of the 1976 bills[70] and subsequent drafts[71] is similar in that the legislation does not seek to proscribe conduct, but rather requires full disclosure of lobbying activities de-

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Reform, Wash. Post, Nov. 21, 1976, § B, at 2, col. 2; Lyons, *Last-Minute Senate Move Kills Lobby Control Bill*, Wash. Post, Oct. 1, 1976, § C, at 4, col. 5; Smith, *Time Runs Out for Lobby Revision Bill*, 34 Cong. Q. 2683 (Oct. 2, 1976).

69. After the Senate failed to consent unanimously to a discussion of H.R. 15, Senator Ribicoff promised to reintroduce lobbying disclosure legislation in the 95th Congress. 122 Cong. Rec. S17304-05 (daily ed. Sept. 30, 1976). President Carter has indicated that legislation providing for registration and disclosure by lobbyists is one of his priorities. *See* Cross, *Carter Aide Lists Domestic Priorities*, 35 Cong. Q. 8586 (Jan. 15, 1977). In the 95th Congress one bill has been introduced into the Senate by Senators Kennedy, Clark, and Stafford, S. 1785, 95th Cong., 1st Sess., 123 Cong. Rec. S11108 (daily ed. June 29, 1977). Fifteen bills have been introduced in the House that would replace the 1946 Act with new lobbying disclosure requirements. *See* note 15 *supra*. Four days of hearings on the bills were held in April 1977. H.R. 1180, 95th Cong., 1st Sess., 123 Cong. Rec. H211 (daily ed. Jan. 6, 1977), duplicates H.R. 15 as passed by the 94th Congress and is currently the principal vehicle for discussion by the House Committee on the Judiciary. Hager, *House Resumes Work on Lobby Disclosure Bill*, 35 Cong. Q. 745 (Apr. 23, 1977).

70. H.R. 15, 94th Cong., 2d Sess., 122 Cong. Rec. H11394, H11399-416 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess., 122 Cong. Rec. S9365-69 (daily ed. June 15, 1976). H.R. 15 as passed by the 94th Congress recently has been introduced as H.R. 1180, 95th Cong., 1st Sess., 123 Cong. Rec. H211 (daily ed. Jan. 6, 1977).

71. *E.g.*, H.R. 557, 95th Cong., 1st Sess., 123 Cong. Rec. H196 (daily ed. Jan. 6, 1977). H.R. 766, *id.* at H201; H.R. 1035, *id.* at H208; H.R. 1180, *id.* at H211. Staff of Senate Comm. on Government Affairs, 95th Cong., 1st Sess., Proposed Draft of Lobbying Legislation (Apr. 13, 1977); S. 1785, 95th Cong., 1st Sess., 123 Cong. Rec. S11108 (daily ed. June 29, 1977).

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signed to influence congressional decisions.[72] If enacted into law, either bill would have remedied major deficiencies of the 1946 Act.[73]

Both the Senate and House bills included provisions requiring lobbyists to register with the General Accounting Office soon after they engaged in lobbying activities.[74] Thereafter, lobbying organizations subject to the act were to have registered and filed quarterly reports with the Comptroller General,[75] disclosing the major issues that they had attempted to influence.[76] Information regarding the lobbying organizations' sources of income,[77] contributors, expenditures,[78] and their lobbying employees, officers, and directors[79] was to have been disclosed. Reporting organizations were required to disclose gifts made to federal officers or employees[80] and to itemize certain types of dinners and receptions held for members of Congress, their staffs, and some officials in the executive branch.[81]

72. Each bill would also have affected certain aspects of executive branch lobbying.

73. *See* notes 49-53 & accompanying text *supra*.

74. H.R. 15, 94th Cong., 2d Sess. § 4(a), 122 CONG. REC. H11406 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess. § 4(a), 122 CONG. REC. S9365-66 (daily ed. June 15, 1976).

75. H.R. 15, 94th Cong., 2d Sess. §§ 4, 6, 122 CONG. REC. H11406-07 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess. §§ 4, 6, 122 CONG. REC. S9365-67 (daily ed. June 15, 1976).

76. H.R. 15, 94th Cong., 2d Sess. § 6(b)(5), 122 CONG. REC. H11407 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess. § 6(b)(1), 122 CONG. REC. S9366 (daily ed. June 1976).

77. H.R. 15, 94th Cong., 2d Sess. § 6(b)(8), 122 CONG. REC. H11407 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess. § 4(a)(3), 122 CONG. REC. S9366 (daily ed. June 15, 1976). Both bills required organizations to disclose not only the identity of individuals and organizations that provide $2,500 or more a year to the lobbying organization, but also the specific amount of income provided. These two provisions were added to each bill on the House and Senate floors. Both replaced provisions that required disclosure of contributions only if those gifts constituted a certain percentage of the lobbying organization's budget. Requiring disclosure after giving a specified dollar amount is easier to administer and investigate than a percentage test; it allows the contributor to give up to the specified amount without disclosure of identity; and it treats all lobbying organizations equally regardless of the size of their budgets.

78. H.R. 15, 94th Cong., 2d Sess. § 6(b)(2), 122 CONG. REC. H11407 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess. § 6(c)(4), 122 CONG. REC. S9366 (daily ed. June 15, 1976).

79. H.R. 15, 94th Cong., 2d Sess. § 6(b)(4), 122 CONG. REC. H11407 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess. § 6(b)(3), 122 CONG. REC. S9366 (daily ed. June 15, 1976).

80. H.R. 15, 94th Cong., 2d Sess. § 6(b)(2), 122 CONG. REC. H11407 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess. § 7, 122 CONG. REC. S9367 (daily ed. June 15, 1976).

81. H.R. 15, 94th Cong., 2d Sess. § 6(b)(3), 122 CONG. REC. H11407 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess. § 7(d), 122 CONG. REC. S9367 (daily ed. June 15, 1976).

Under both H.R. 15 and S. 2477, the Comptroller General was responsible for investigating alleged violations of the act and seeking voluntary compliance with its provisions.[82] The authority to bring civil or criminal charges was vested in the Attorney General.[83] The Comptroller General could have set specific registration and reporting guidelines for organizations, thus preventing the under-reporting situation that exists under the 1946 Act.[84] Each bill specifically defined lobbying organizations and activities subject to its provisions.[85] Although the bills differed in the definition of a "lobbyist," either bill would have alleviated the uncertainty created by the vagueness of the 1946 Act.[86]

The main differences between the House and Senate bills were the criteria for determining which groups had to register as lobbyists, and the extent and complexity of the disclosure requirements. Because their definitions of a "lobbyist" organization differed, the bills conflicted as to what organizations would trigger the registration and reporting requirements. The Senate prescribed a three-fold test for classification as a lobbyist.[87] An organization qualified if, in any quarterly period, it (1) spent $250 or more to hire outside agents to lobby;[88] (2) instructed its own employees to make twelve or more oral contacts with Congressmen, their staffs, or other appropriate employ-

82. H.R. 15, 94th Cong., 2d Sess. § 10(a)-(b), 122 CONG. REC. H11414 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess. § 11(a)-(b), 122 CONG. REC. S9368 (daily ed. June 15, 1976).

83. H.R. 15, 94th Cong., 2d Sess. § 10(c)-(d), 122 CONG. REC. H11414 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess. § 11(d), 122 CONG. REC. S9368 (daily ed. June 15, 1976). Under the Senate bill, the Comptroller General is authorized to bring a civil enforcement action if the Attorney General has failed to bring a civil or criminal enforcement action within 60 days of the Comptroller General's referral. *Id.* § 12(c). *See* Justice Report, *supra* note 58. The Department of Justice is strongly opposed to this provision as it "invades the Attorney General's traditional control of government litigation," and would create "potential conflict with the Attorney General's responsibilities." Furthermore the 60 day time limitation for action by the Department was considered "frankly unrealistic." *Id.*

84. H.R. 15, 94th Cong., 2d Sess. § 8(a)(7), 122 CONG. REC. H11414 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess. § 9(8), 122 CONG. REC. S9367 (daily ed. June 15, 1976). *See* note 61 & accompanying text *supra*.

85. H.R. 15, 94th Cong., 2d Sess. § 3(a), 122 CONG. REC. H11403 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess. § 3, 122 CONG. REC. S9365 (daily ed. June 15, 1977).

86. *See* notes 49-53 & accompanying text *supra*.

87. S. 2477, 94th Cong., 2d Sess. § 3(a), 122 CONG. REC. S9365 (daily ed. June 15, 1976).

88. *Id.* The monetary amount does not include the cost of personal travel expenses for retained lobbyists.

ees;[89] or (3) spent $5,000 or more to urge others to lobby.[90]

A "lobbying communication" was defined in S. 2477 as any attempt to influence Congress,[91] or to influence an executive branch official to influence Congress,[92] or to influence the executive branch in urging action or inaction on any federal contract, award, or benefit of $1 million or more.[93] A "lobbying solicitation" was defined as any attempt to influence an issue before Congress or the executive branch by urging, requesting, or requiring others to communicate.[94]

These definitions of "lobbying communication" and "lobbying solicitation" specifically excluded communications or solicitations made by individuals acting on their own behalf,[95] a request for information regarding the status of a legislative issue,[96] testimony before a committee or office of Congress that is included in the public record,[97] a communication or solicitation made by an employee or officer of the legislative or executive branches, and state and local governments when acting in an official capacity.[98] Also exempt under the Senate bill were communications or solicitations made by or on behalf of political parties and candidates for federal, state, or local office,[99] communications made by a constituent to the representatives or senators of the home state,[100] and communications or solicitations made through books, newspapers, and other print or broadcast media.[101] The latter exclusion did not extend to paid advertisements or to publications of voluntary membership organizations.[102] Thus,

89. *Id.* § 3(a)(2).
90. *Id.* § 3(a)(3).
91. *Id.* § 3(e)(1).
92. *Id.* § 3(e)(2).
93. *Id.* § 3(e)(3).
94. *Id.* § 3(f).
95. *Id.* § 3(g)(1). The Senate bill, however, required information on any chief executive officer or principal operating officer working for the organization, whether or not the individual was reimbursed for his activities, if he engaged in 25 or more lobbying communications. *Id.* § 6(c)(3), 122 CONG. REC. at S9366. Thus, volunteer lobbyists such as Ralph Nader would be covered. Under the paid-employee-only language of the House bill, the various organizations for which Ralph Nader works would not have to report his activities. H.R. 15, 94th Cong., 2d Sess. § 3(a)(2), 122 CONG. REC. H11403 (daily ed. Sept. 28, 1976).
96. S. 2477, 94th Cong., 2d Sess. § 3(g)(2), 122 CONG. REC. S9365 (daily ed. June 15, 1976).
97. *Id.* § 3(g)(3).
98. *Id.* § 3(g)(4)-(5).
99. *Id.* § 3(g)(7)-(8).
100. *Id.* § 3(a)(2).
101. *Id.* § 3(g)(6).
102. *Id.*

the range of communications that were covered was narrow and was limited to communications in which the government had a direct and important interest, thereby eliminating potential constitutional challenges to the legislation.

The 1976 House legislation set forth two tests for lobbying organizations that were generally less inclusive than the Senate criteria. A group was required to register and file reports as a lobbyist if it spent more than $1,250 per quarter for outside lobbying agents[103] or had a paid employee who devoted twenty percent or more of his time to lobbying efforts.[104] Most of the exemptions contained in the bill paralleled those of S. 2477.[105]

The bill introduced in the Senate of the 95th Congress by Senators Kennedy, Clark, and Stafford classifies an organization as a lobbyist using a two-tiered approach.[106] Compliance with abbreviated registration and reporting requirements is mandated for all organizations that make more than fifteen direct oral lobbying communications in any quarterly filing period.[107] Organizations that lobby more extensively are classified as second-tier organizations. Thus, if a group spends more than $1,250 per quarter for outside lobbying agents,[108] or retains employees who spend at least twenty-four hours per quarter making oral or written communications to Congress on behalf of the organization,[109] or spends over $5,000 per quarter to encourage

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103. H.R. 15, 94th Cong., 2d Sess. § 3(a)(1), 122 CONG. REC. H11403 (daily ed. Sept. 28, 1976).

104. *Id.* § 3(a)(2).

105. *E.g.*, H.R. 15, 94th Cong., 2d Sess. § 3(b)(3), 122 CONG. REC. H11403 (daily ed. Sept. 28, 1976) (lobbying activities of individuals); *id.* § 3(b)(1) (lobbying activities part of public record); *id.* § 2(8), 122 CONG. REC. at H11394 (official communications made by any federal, state, or local government unit; lobbying by political parties); *id.* § 3(b)(5), 122 CONG. REC. at H11403 (contacts made to congressmen of the lobbyist's home-state district); *id.* § 3(b)(2), 122 CONG. REC. at H11403 (written or broadcast media coverage if not paid for by the lobbying organization). The provision of the House bill exempting lobbying by individuals was a significant alteration of H.R. 15 which, as first introduced, encompassed virtually anyone who had communication with the government in an attempt to influence the "policymaking process." The House Judiciary Committee believed that individuals acting in that capacity should not be required to register, regardless of the amount spent on lobbying efforts. In the Committee's view, individuals are constitutionally entitled to communicate with the government free of any restraint whatsoever. HOUSE COMMITTEE REPORT, *supra* note 27, at 22.

106. S. 1785, 95th Cong., 1st Sess. § 4(a)-(b), 123 CONG. REC. S11108 (daily ed. June 29, 1977). The bill was modeled after Staff of the Senate Comm. on Government Affairs, 95th Cong., 1st Sess., Draft of Proposed Lobbying Legislation § 4(a)-(b) (Apr. 13, 1977), *supra* notes 15 & 69.

107. *Id.* § 4(a).

108. *Id.* § 4(b)(1).

109. *Id.* § 4(b)(2).

others to lobby—i.e., lobbying solicitations,[110] the organization is subjected to more extensive reporting requirements.[111]

This two-tiered approach is a complementary melding of the 1976 House and Senate provisions, using the Senate "contacts" test for the first tier and the House "paid employee" test for the second tier as the criteria by which legislative coverage is determined.[112] The goal of this compromise legislation is to preserve the key reporting and disclosure requirements for congressional and executive lobbying activities of S. 2477, while avoiding the imposition of burdensome provisions on organizations that are not intensive lobbyists.[113] Although this compromise may ease passage of the legislation, the two-tiered approach has been criticized for being too complicated and overly comprehensive in extending even limited disclosure requirements to all lobbying organizations that make more than fifteen direct oral lobbying communications in any reporting quarter.[114] Thus, this oral "contacts" test would lead to the registration of countless individuals and organizations never previously registered. Any corporate executive or labor official, for example, who made as many as fifteen telephone calls in a quarter to members of Congress for the purpose of influencing legislation would force his organization to register as a lobbying organization.

The Senate has consistently drafted legislation that requires lobbying disclosure based on the number of contacts between organizations and members of Congress, their staffs, or executive level employees. The House has instead focused on the amount expended for outside lobbyists or the proportion of a paid employee's time spent on lobbying activities. The difference is crucial, since volunteer associations

110. *Id.* § 4(b)(3).

111. *Id.* §§ 5(c), 7.

112. *See* Justice Report, *supra* note 58. In general, the Department of Justice approves of such a "dual threshold test [as a] reasonable approach toward the goal of assuring that regular extensive and well-financed lobbying will be the subject of detailed public disclosure, without placing impossible paperwork burdens on more amateurish or less organized and well-funded organizations." *Id.* In regard to the three threshold tests in S. 1785 that apply to direct lobbying activities, the Department finds their use acceptable, but would like to see each threshold raised.

113. JOINT STATEMENT, *supra* note 8, at 3.

114. S. 1785, 95th Cong., 1st Sess. § 4(a), 123 CONG. REC. S11108 (daily ed. June 29, 1977). The Senate bill, S. 1785, is basically the same as the draft proposal referred to by the press as the "consensus" proposal. Representatives of Public Citizen Congress Watch have stated that coverage of volunteer activities by this proposed legislation "could have a major chilling effect on the exercise by some people of their right to petition the government." [1977] 1 LOBBYING REP. (PLUS PUBLICATIONS) No. 2, at 4. The same sentiment was expressed by representatives of the Sierra Club, the League of Women Voters and the AFL-CIO. *Id.*

and other small citizen groups that operate on a limited budget would more likely be excluded under criteria proposed by the House than under a Senate "contacts" test.[115] The broad coverage that a "contacts" test would provide is opposed by public interest groups, which fear that if small groups are forced to report and register on the basis of a small number of direct contacts, they will be less likely to express their concerns to Congress in this manner. The result would be a decline in functional democracy.[116]

The variance between the two triggering approaches also necessitates consideration of the purpose of lobbying disclosure legislation. If the purpose is only to reveal large sums paid to influence legislation, then a bill such as H.R. 15, aimed at disclosure of professionally paid lobbying activity, is sufficiently comprehensive. If, however, the purpose is to expose all pressures exerted to influence legislators, regardless of whether the lobbying agents are paid, a form of the Senate "contacts" test is mandated. Accordingly, the two-tier test appears to be a reasonable approach because it assures that regular, extensive, and well financed lobbying will be subject to detailed public disclosure, without placing impossible paperwork burdens on nonprofessional and ad hoc organizations.

A second significant difference between the House and Senate definitions of lobbyist organizations is the treatment of lobbying solicitation expenditures. A number of lobbying organizations spend their resources on efforts to encourage others to contact their elected federal representatives. Under H.R. 15, such activities by themselves would not subject an organization to disclosure requirements no matter how much was spent encouraging others to lobby. Solicitation expenditures would have to be disclosed only if the organization was covered by the legislation due to its direct lobbying activities.[117] Conversely, S. 2477 reflected a determination that these activities, in and of themselves, significantly influence the legislative process. Accordingly, disclosure was required if the amount spent on lobbying solicitations was $5,000 or more per quarter.[118] If the ultimate gain

115. Thus, volunteer organizations and small citizens' groups that do not have one paid employee spending at least 20% of his time on lobbying and do not expend $1,250 per quarter for outside lobbying personnel, would not be covered by the House legislation, regardless of the number of contacts made with Congressmen, their staffs, or executive level employees.

116. *See* note 114 *supra*.

117. H.R. 15, 94th Cong., 2d Sess. § 6(b)(6), 122 CONG. REC. H11407 (daily ed. Sept. 28, 1976).

118. S. 2477, 94th Cong., 2d Sess. § 3(a)(3), 122 CONG. REC. S9365 (daily ed. June 15, 1976).

derived from disclosure is to be a complete picture of the forces exerted to affect governmental decisions, then solicitation activities should be included as an element that triggers disclosure requirements.

Another major area in which the House and Senate legislation disagreed was the extent of the reporting requirements to be imposed on lobbyists—the extent to which the information is meaningful and therefore should be disclosed, versus the point at which the disclosure requirements are simply burdensome to the reporting organization without any corresponding benefit to Congress, executive officials, or the public. While both H.R. 15 and S. 2477 required disclosure of the same type of information,[119] H.R. 15 generally required less voluminous recordkeeping. The Senate required that reported information be organized around each issue on which an organization made one or more lobbying contacts during a quarter.[120] H.R. 15 simply called for an overall report on lobbying activities[121] followed by a listing of the primary issues on which the organization spent most of its time.[122] The information required by the Senate bill would thus have disclosed total resources spent on influencing each particular issue. Such recordkeeping requirements, however, would entail greatly increased costs to the lobbying organization and have been criticized as overly complex.[123]

Reporting requirements in the area of indirect lobbying activities also varied between the House and Senate legislation. Under H.R. 15, a basic description of any solicitation initiated or paid for by the lobbying organization was to be disclosed,[124] while the Senate bill required more detailed information regarding lobbying solicitations.[125]

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119. *See* notes 65-69 *supra*.

120. S. 2477, 94th Cong., 2d Sess. § 6(b)(1)-(3), 122 CONG. REC. S9366 (daily ed. June 15, 1976).

121. H.R. 15, 94th Cong., 2d Sess. § 6(b)(2)-(4), 122 CONG. REC. H11107 (daily ed. Sept. 28, 1976).

122. *Id.* § 6(b)(5).

123. As one lobbyist stated, "We [various business organizations] favor full disclosure with a minimum of bookkeeping. . . . We are worried about having to account for every nickel and dime that goes into preparing a communication. We'd rather give the Comptroller General the communication and tell him who it went to." Hager, *Success Eludes Groups Seeking Mutually Acceptable Lobbying Disclosure Bill*, 35 CONG. Q. 745 (Apr. 23, 1977).

124. H.R. 15, 94th Cong., 2d Sess. § 6(b)(6), 122 CONG. REC. H11407 (daily ed. Sept. 28, 1976). Reporting requirements in the area of indirect lobbying, however, are triggered only if the organization is covered by the bill due to its direct lobbying activities. *See* notes 117-18 & accompanying text *supra*.

125. The 1976 Senate legislation required the following information to be included in the lobbying organization's quarterly report: (1) information on the size and nature of

The Senate approach would have provided the most accurate information and would have made disclosure meaningful. It is not enough to know, as under the House approach, that A.T. & T. tried to influence twenty pieces of legislation during one Congressional session. Rather, the important information for disclosure purposes is how much money was spent trying to influence each bill, what results the organization was seeking in regard to each bill, who their lobbyists were on each bill, and what grassroots lobbying activities were conducted on each bill.

Lobbying of the executive branch is not covered by the 1946 Act, and drafters of the 1976 lobbying legislation purposefully limited coverage in this area in the belief that should legislation aimed at disclosure of congressional lobbying efforts be successful, comprehensive legislation dealing with executive branch lobbying could be drafted in the future.[126] Although neither bill required disclosure of all lobbying contacts made with the executive branch nor logging of those contacts by the recipient,[127] both H.R. 15 and S. 2477 touched certain aspects of executive branch lobbying. Under H.R. 15, organizations with employees paid to influence the disposition of any issue before Congress by lobbying executive branch officials in executive

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the solicitation; (2) the number of employees or affiliates solicited; (3) geographic distribution of the solicitations in certain cases; (4) the cost of the solicitation, if in excess of $7,500; and (5) the extent to which the affiliates in turn solicited others. S. 2477, 94th Cong., 2d Sess. § 6(d)(1)-(5), 122 CONG. REC. S9366-67 (daily ed. June 15, 1976).

126. Interview with Jim Davidson, Legal Advisor to the Senate Government Operations Committee, in Washington, D.C. (Nov. 12, 1976). Extending lobbying legislation to cover attempts to influence the executive branch with regard to matters other than pending legislation, such as rulemaking or ratemaking, would raise significantly different issues than coverage of congressional lobbying, and would necessitate consideration of the extent to which lobbying should be encouraged in this area. The sheer number of executive branch employees that might be covered indicates the problems such legislation would present.

127. An amendment to S. 2477, introduced by Senator Kennedy, would have established uniform procedures for recording and disclosing all lobbying contacts with high-level officials in executive departments and regulatory agencies by the lobbyist making the contact. The amendment was defeated on the Senate floor. 122 CONG. REC. S9278-81 (daily ed. June 14, 1976). *See* note 25 & accompanying text *supra*.

Even more unpopular was § 7 of H.R. 15 as originally introduced, which would have required officials and employees of the executive branch in grades GS-15 or above, those in the executive pay schedule, and any other employee designated "as being responsible for making or recommending decisions affecting the policymaking process" to prepare a record of all written and oral communications received from outside parties concerning policy decisions. The reporting burden would thus have been placed on the government officials contacted by lobbyists. In response to a Judiciary Committee questionnaire regarding H.R. 15, executive agencies indicated overwhelmingly that such a requirement would result in an administrative nightmare. HOUSE COMMITTEE REPORT, *supra* note 27, at 29-72. During the Judiciary Committee mark-up, § 7 was deleted.

levels I-IV[128] were required to disclose the dollar amount spent for such lobbying[129] as well as the subject matter of the lobbying effort.[130] Conversely, the level of the executive branch employee contacted was unimportant under the Senate approach; only the subject matter of the lobbying effort triggered coverage.[131] Senate disclosure requirements extended only to lobbying efforts aimed at influencing the award of major contracts or other government benefits in excess of one million dollars.[132]

The Department of Justice was not opposed to coverage of some aspects of executive branch lobbying.[133] Contractors who supply products to the government believed, however, that the proposed requirements of the Senate approach were unduly burdensome, since the nature of their work necessitates extensive contacts with government officials. Proponents stressed the need for limited disclosure of executive branch lobbying activities, at least in the government contract or grant area where there is the greatest opportunity for monetary reward to the lobbying organization, and hence the greatest impetus to engage in extensive lobbying efforts.[134] Since comprehensive

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128. For a listing of such employees, see 5 U.S.C. §§ 5312-5316 (1970). According to 1976 Civil Service Commission figures, there are 374 federal officers in executive levels I-V. Hager, *House Resumes Work on Lobby Disclosure*, 35 CONG. Q. 683, 684 (Apr. 9, 1977).

129. H.R. 15, 94th Cong., 2d Sess. § 6(b)(2), 122 CONG. REC. H11407 (daily ed. Sept. 28, 1976). This provision is also included in several bills introduced in the 95th Congress. *See, e.g.*, H.R. 1180, 95th Cong., 1st Sess. § 6(b)(2) (1977); H.R. 5795, 95th Cong., 1st Sess. § 6(b)(2) (1977).

130. H.R. 15, 94th Cong., 2d Sess. § 6(b)(5), 122 CONG. REC. H11407 (daily ed. Sept. 28, 1976).

131. S. 2477, 94th Cong., 2d Sess. § 3(e)(3), 122 CONG. REC. S9365 (daily ed. June 15, 1976).

132. *Id.*

133. *See* Justice Report, *supra* note 58. "The Department of Justice favors the reporting of Executive Branch lobbying that relates to pending legislative matters," *i.e.*, the type of coverage included in H.R. 15. The Department would require coverage of lobbying communications made to executive branch officials only if those communications were for the purpose of "influenc[ing] the content or disposition of any *pending* bill, resolution, treaty, hearing, report, investigation, or pending future nomination." *Id.* Thus, under the Department's view, communicating with executive officials on *proposed* legislation should not trigger coverage. Likewise the Department of Justice would advocate coverage of only communications made with executive level appointees not including GS appointees or military officers.

The Department further agrees with the Senate's approach of requiring disclosure of lobbying activities: "We agree that it is appropriate to require some type of reporting by organizations on their efforts to influence the award of substantial government contracts." *Id.* They would, however, alter the S. 2477 provisions recommending an increase of the threshold to contracts of ten million or more and excluding anything other than government contracts from coverage.

134. A representative of Common Cause stated, "Executive branch lobbying has al-

disclosure legislation of executive branch lobbying has not yet gained serious support, the inclusion in disclosure legislation of lobbying of executive branch employees in circumstances involving government contracts or pending legislation would serve a useful stopgap function.

Not surprisingly, most lobbyists preferred H.R. 15[135] since it would have excluded organizations whose lobbying activities consisted solely of solicitation efforts and organizations lobbying through volunteers. In addition, it contained less detailed registration and reporting requirements for organizations conducting direct lobbying activities.

Despite the differences reflected in the 1976 legislation, it is expected that a comprehensive lobbying bill will emerge from the 95th Congress.[136] Debate will likely focus on issues such as whether lobbying solicitations alone should trigger registration requirements or should even be reported by an otherwise qualifying lobbying organization, and whether the appropriate test for coverage of an organization conducting its own lobbying activities should be based on the number of oral contacts made to federal personnel or whether the test should be based on a percentage of a paid employee's time or a specific hour limit that a paid employee spends on lobbying activities. The answers to questions regarding the extent to which contributors should be identified, coverage of executive branch lobbying, and extensive itemization of costs and information for each issue lobbied will determine how complete a picture of lobbying activity can be expected. Regardless of how the issues are resolved, however, several

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ways been the total nonpublic part of the lobbying process and we believe that at a minimum there should be clear coverage when people are lobbying the executive branch for large sums of money." *1977 House Hearings*, *supra* note 13, at 152 (statement of Fred Wertheimer).

135. Smith, *House Judiciary Slowly Finishing Its Version of Lobby Registration Bill*, 34 CONG. Q. 2119 (Aug. 7, 1976); Public Citizen Congress Watch, Key Issues in Proposals for Reform of Lobbying Disclosure Requirements (1976). Almost every lobbying group was opposed to the passage of S. 2477 during the summer of 1976. Opponents included the AFL-CIO, Ralph Nader's Congress Watch, the National Association of Manufacturers, the Sierra Club, the American Civil Liberties Union, the Chamber of Commerce of the United States, the League of Women Voters, and the U.S. Catholic Conference. Witt, *Senate Passes New Lobbying Disclosure Law*, 34 CONG. Q. 1575 (June 19, 1976). The only exception was Common Cause. Letter from Common Cause to Steering Committee Coordinators (July 1, 1976) and enclosure materials: Questions and Answers About Lobby Disclosure.

136. As one recent newspaper article stated, "The issues involved in rewriting the 30-year old ineffective lobbying law are so sensitive and controversial, constitutionally and politically, that only one thing appears certain as the process begins: Congress will pass a new law within the next year or so." Weaver, *Congress Wrestles With Problems of Writing an Effective Lobby Law*, N.Y. Times, June 6, 1977, § C, at 20, col. 5.

court challenges to the constitutionality of lobbying disclosure legislation can be anticipated.[137]

A significant part of the debate as to the acceptability of the various provisions of the two 1976 lobbying disclosure bills and the Kennedy bill focused on possible constitutional challenges. Since the subject matter of the legislation touches upon the fundamental first amendment freedoms of the American people, the challenges must be examined carefully. Experience with the 1946 Act demonstrates that it is best to avoid possible constitutional challenges and not subject the legislation to restrictive interpretation by the Supreme Court.

These constitutional attacks by critics of lobbying disclosure legislation, however, are often overly broad and ignore current judicial decisions. The attackers speak of the importance of free speech in the history and development of American society, without coming to grips with the real constitutional problems. Lobbying, of course, is an activity that is protected by the first amendment. The right to petition Congress, however, does not import a corresponding right to do so in secret. Instead, the relevance of the first amendment protection is that Congressional regulation aimed at disclosure must vindicate compelling governmental interests and must not sweep too broadly.

VI. Constitutional Considerations

A. *First Amendment Protections*

Any legislation that requires the disclosure of lobbying activity must strike a balance between the Congressional and public need to know the extent of lobbying activities aimed at influencing governmental actions, and the right of various organizations to have free and unfettered communications with governmental officials.[138] Constitu-

137. In testimony before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary on April 6, 1977, Robert Keller, Deputy Comptroller General, stated that the GAO expects a period of extensive court challenges to any lobbying disclosure legislation. *1977 House Hearings*, *supra* note 13, at 115-127.

138. Younger v. Harris, 401 U.S. 36 (1971). In examining the constitutionality of legislation that restricts first amendment rights, the Court balances the relative interests at stake.

> Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so.

Id. at 51 (citations omitted).

tional restrictions on lobbying disclosure legislation are based on the first amendment's right to petition the government, freedom of speech, and right of association.[139]

Any doubt that compelled disclosure alone would trigger constitutional protections was set to rest by the Supreme Court in *Buckley v. Valeo*.[140] In *Buckley* the Court subjected the government's interest in disclosure of campaign contributions to a test of exacting scrutiny. It held that the encroachment on first amendment rights would be permitted only if the government's interest in disclosure was compelling and a relevant and substantial correlation existed between the governmental interest and the information required to be disclosed.[141]

Similarly, the Supreme Court in *United States v. Harriss*[142] required the government to demonstrate a compelling interest in requiring disclosure. The Court held that the state's interest in maintaining the integrity of the legislative process was sufficiently compelling to overcome first amendment objections and the disclosure of lobbying activities had a sufficient nexus with this compelling governmental interest.[143]

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139. The first two rights are explicitly guaranteed by the first amendment: "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I. The right of association has been read into the first amendment through judicial interpretation. *See* Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

140. 424 U.S. 1 (1976). The Supreme Court upheld provisions of the Federal Election Campaign Act regarding disclosure of contribution sources. Specifically the Court held that compelled disclosure of campaign contributions in excess of $10 for political committees and $100 for individuals was constitutional. In so holding the Court noted that "we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64 (citations omitted).

141. The Court spelled out the constitutional requirements necessary to uphold disclosure legislation:

> We have long recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest . . . . [We] have required that the subordinating interests of the States must survive exacting scrutiny. We have also insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed.

Id. at 64 (citations and footnotes omitted). *See also* Grayned v. City of Rockford, 408 U.S. 104 (1972); Adderley v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 559 (1965).

142. 347 U.S. 612 (1954).

143. *Id.* at 625.

Other courts have recognized the constitutionality of state legislation concerning lobbying disclosure.[144] In *Fitz v. Gorton*[145] the appellants contended that the state's lobbying registration and reporting requirements violated their right to petition the government. The Supreme Court of Washington held that the role of the lobbyist was protected by the first amendment,[146] but it did not consider the state lobbying registration law an impermissible restriction of first amendment rights.[147]

1. *The compelling state interest—an initial question*

The Supreme Court in the *Harriss* decision regarded the governmental interest in preserving the integrity of the lawmaking process, by eliminating secrecy in and exposing influences upon the legislative process, as a valid justification for the regulation of lobbying.[148] The

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144. Lewis v. Baxley, 368 F. Supp. 763 (M.D. Ala. 1973); Moffett v. Killian, 360 F. Supp. 228 (D. Conn. 1973); Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911, *appeal dismissed*, 417 U.S. 902 (1974); Young Americans For Freedom, Inc. v. Gorton, 83 Wash. 2d 728, 522 P.2d 189 (1974); Campbell v. Commonwealth, 229 Ky. 264, 17 S.W.2d 227 (1929).

145. 83 Wash. 2d 275, 517 P.2d 911, *appeal dismissed*, 417 U.S. 902 (1974).

146. The Washington court stated:

> We take special and emphatic notice of the fact that lobbyists perform important and constructive functions in communicating the wishes of the interests they represent to the appropriate organs of government. In our opinion, the role of the lobbyist in openly and appropriately communicating with government in regard to legislation and other related functions of government is clearly assured and protected by the First Amendment right to petition government.

Id. at 306, 517 P.2d at 929.

147. The function of the sections in dispute was not to restrict or prohibit protected communications between the lobbyist and government. The effect of the disclosure requirements was only to require one who received compensation and/or expended funds in lobbying to register and report the nature and extent of the lobbying activities. *Id.* at 306, 517 P.2d at 929.

148. The Court stated:

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to prevent.

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

Another judge expressed the same context this way:

> Informed as to the identity of the principal of a lobbyist, the members of the legislature, other public officials and also the public may more accurately evaluate the pressures to which public officials are subjected. Forewarned of the principals behind proposed legislation, the legislator and others may appropriately evaluate

Court perceived the informational value of lobbying disclosure as a sufficiently compelling consideration to allow some infringement of first amendment protections. Undoubtedly there continues to be a strong congressional need for such data, for the information is necessary for a proper separation of constituents' interests from special interests.

In *Buckley v. Valeo*,[149] the Supreme Court upheld the disclosure provisions of the Federal Election Campaign Act (FECA), finding three categories of governmental interests that were sufficiently compelling to counterbalance the possible chilling effect on first amendment rights.[150] First, by alerting voters to the interests to which a candidate is most likely to respond, disclosure "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches."[151] Second, by exposing large expenditures to the light of publicity,[152] disclosure requirements deter actual corruption and avoid the appearance of corruption. Finally, the recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the Act.[153]

Although the Court in its discussion refers to the compelled disclosure of campaign contributions, the reasoning can be extended to the area of disclosure of lobbying activities and money expended in furtherance thereof. Lobbying disclosure will inform voters as to the sources and magnitude of pressures being applied to governmental officials in order to affect govermental action. This information, when coupled with the legislator's voting record, will provide insight as to the interests the official is representing. In theory, disclosure will encourage public officials to resist undue or unethical lobbying efforts

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the "sales pitch" of some lobbyists who claim to espouse the public weal, but in reality, represent purely private or special interests.

Fritz v. Corton, 83 Wash. 2d 275, 309, 517 P.2d 911, 931, *appeal dismissed*, 417 U.S. 902 (1974).

149. 424 U.S. 1, 66-68 (1976).

150. [C]ompelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. But we have acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the "free functioning of our national institutions" is involved.

The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude. They fall into three categories.

Id. at 66 (citations omitted).

151. *Id.*

152. *Id.* at 67. Exposure may discourage the use of money for improper purposes both before and after an election. A public armed with information is better able to detect special favors.

153. *Id.* at 67-68.

because the public, armed with new information, will be able to vote more effectively.[154]

2. *A balancing test*

Once it is determined that the governmental interest protected by the legislation is compelling, rather than merely legitimate, the next question is whether that interest outweighs the infringement on first amendment freedoms of speech, expression, association, and petition. The Supreme Court has been particularly protective of first amendment rights,[155] although such protections are not absolute.[156]

Prior to deciding the ultimate question of the constitutionality of compelled disclosure of campaign contributions, the Court in *Buckley v. Valeo* examined the weight of the burden placed upon first amendment rights.[157] The Court noted that the disclosure requirements were generally considered the least onerous alternative.[158] The next problem was posed by the case of *NAACP v. Alabama ex rel.*

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154. Perhaps Associate Justice Finley's description best summarizes this last justification for lobbying disclosure legislation:

> *The electorate, we believe, has the right to know of the sources and magnitude of financial and persuasional influences upon government.* The voting public should be able to evaluate the performance of their elected officials in terms of representation of the electors' interest in contradistinction to those interests represented by lobbyists. Public information and the disclosure required . . . of lobbyists and their employers may provide the electorate with a heretofore unavailable perspective regarding the role that money and financial influence play in government decision making and other functions performed by public officials.

Fritz v. Gorton, 83 Wash. 2d 275, 309, 517 P.2d 911, 931, *appeal dismissed*, 417 U.S. 902 (1974) (emphasis added).

155. *See* Buckley v. Valeo, 424 U.S. 1, 14 (1976) in which the Court stated that "[t]he First Amendment affords the broadest protection to . . . political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"

156. Civil Service Comm'n v. Letter Carriers, 413 U.S. 548, 568 (1973); Koningsberg v. State Bar, 368 U.S. 36, 49 (1961); Breard v. Alexandria, 341 U.S. 622, 642 (1951).

Professor Monaghan in his testimony before the Senate Government Operations Committee stated that lobbying is indispensible to the workings of our representative government and such activity should be protected by the first amendment. He further stated: "This does not mean, however, that the lobbying process is not subject to disclosure regulation. Quite to the contrary; given the capacity of lobbyists to affect the legislative process some disclosure is necessary in order 'to maintain the integrity of a basic governmental process.'" *1975 Senate Hearings, supra* note 1, at 491.

157. 424 U.S. 1, 68 (1976).

158. *Id.* The Court stated clearly, "disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." It was noted that one alternative method would have been less restrictive, but at the expense of being less effective. *Id.* at 68 n.82.

Patterson,[159] the landmark decision that first enunciated the first amendment right of association.[160] The Supreme Court struck down an Alabama law requiring publication of NAACP local membership roles based upon uncontroverted showing that disclosure would expose members to economic reprisal, loss of employment, threat of physical coercion, and other methods of public hostility.[161] The state's interest in the publication was not sufficient to overcome the infringement of constitutional rights.[162] The Supreme Court in *Buckley* held that while the same strict test should be applied, the holding in *Alabama* was inapposite to campaign contribution disclosure because no similar injury resulted in the *Buckley* situation.[163]

Lobbying disclosure legislation is much more akin to campaign disclosure legislation than it is to the disclosure of a controversial organization's membership rolls. Here, the state's interest in preserving the integrity of the political process is more compelling than it was in *Alabama* and the burden of disclosure is much lighter; therefore *Alabama* is not controlling.

Lobbying registration may have a "chilling" effect on the exercise of first amendment rights; organizations may feel constrained to limit contact with government officials for a number of reasons such as

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159. 357 U.S. 449 (1958). The Supreme Court overturned a state court contempt citation against the NAACP for that organization's failure to disclose its local membership list.

160. Recognizing that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association" and that, based upon the first amendment rights of freedom of speech, petition, and assembly, the Constitution guarantees the "freedom to engage in association for the advancement of beliefs and ideas," the Court noted the chilling effect that certain state actions, such as requiring the disclosure of membership lists, may have upon the exercise of those rights. *Id.* at 460-61.

161. *Id.* at 462.

162. *Id.* at 465.

163. 424 U.S. 1, 70 (1976). The Court described any injury as being "highly speculative." Professor Monaghan predicted this outcome one year earlier. In his testimony at the Senate hearings he said:

> I do not see that the privacy claim in this area [freedom of political association] is substantial at least in the general application of the bill; in any event that right is not absolute and must yield where, as here, there is a compelling governmental interest in the disclosure.

1975 Senate Hearings, *supra* note 1, at 491.

It should be noted that the Court in *Buckley* did state that the "balance" may be tipped in favor of non-disclosure of contributors of a group when such group can show that disclosure would result in harassment or threats of reprisal to contributors such that first amendment rights of association and expression would be seriously infringed by the disclosures. 424 U.S. 1, 71. *See* Constitutionality of Disclosure Requirements Involving Lobbying Organizations, 123 CONG. REC. S14281-84 (daily ed. Sept. 7, 1977) [hereinafter cited as Report of the American Law Division of the Library of Congress].

lack of ability, resources, or willingness to complete the tremendous volume of paperwork involved in registration and reporting, or fear of disclosing the required information. The Court in *Buckley* found a similar chill in campaign disclosure legislation, where fears of reprisal might deter contributions to minor, often controversial, parties.[164] The ultimate consequence of public financing disclosure could be a "reduction in the free circulation of ideas both within and without the political arena."[165] Still, the Court did not find this burden to be so great as to require constitutional invalidation of the disclosure legislation.[166] The burden of lobbying disclosure is no more weighty than that of public financing disclosure. Both types of disclosure may chill constitutional rights, but both are also supported by equally strong governmental interests.

B. *Constitutionality of Specific Provisions*

Once the governmental interest in lobbying activities is adjudged greater than the burden on first amendment rights, then some nexus must be proven to exist between each disclosure requirement and the "evil"—lack of knowledge concerning lobbying activities to influence Congress[167]—to be abated.[168] More specifically, the lobby information demanded by the government must bear "a sufficient relationship to a substantial governmental interest."[169]

1. *Identification of contributors*

Both the Senate and House lobbying disclosure bills required a qualifying lobbying organization to disclose the identities of con-

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164. The Court was aware of the damage done by disclosure to the associational interests of minor parties, emphasizing that in some instances fears of reprisals might deter contributions to the point that the movement could not survive. But, because the record evidence describing the damages actually done was at best comprised of the testimony of minor-party officials concerning the refusal of one or two people to contribute, the Court declined to declare the provisions unconstitutional. 424 U.S. at 71-72 (1976).

165. *Id.* at 71.

166. *Id.* at 72. "On this record, the substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged." *Id.*

167. SENATE COMMITTEE REPORT, *supra* note 64, at 1-3.

168. Buckley v. Valeo, 424 U.S. 1, 64 (1976).

169. *Id.* at 80. The Court rephrases this standard differently throughout the opinion, *i.e.*, "the disclosure requirement [must be] narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Id.* at 81.

Professor Monaghan stated the principle in yet another way, "any congressional regulation aimed at disclosure must be to vindicate compelling governmental interests and must not sweep too broadly." *1975 Senate Hearings*, *supra* note 1, at 491.

tributors who gave $2,500 or more to the organization during a certain period if either all or part of this amount had been expended for lobbying activities.[170] Although a contributor identification provision significantly enhances the effectiveness of a lobby disclosure bill,[171] such a provision might also excessively impede the free exercise of first amendment rights.[172]

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170. S. 2477, 94th Cong., 2d Sess. § 4(a)(3), 122 CONG. REC. S9366 (daily ed. June 15, 1976); H.R. 15, 94th Cong., 2d Sess. § 6(a)(8)(A)(B), 122 CONG. REC. H11407 (daily ed. Sept. 28, 1976).

Section 4(a)(3) of S. 2477 required the registering lobbying organization to include in its initial registration:

> [A]n identification of each organization from which the lobbyist received income during such period including the amount of income provided by the organization where the income was expended in whole or in part for lobbying if the amount of income received from the organization was $2,500 or more in amount or value during such period; and an identification of each individual from whom the lobbyist received income during such period including the amount of income provided by the individual where the income was expended in whole or in part for lobbying if the total amount of income received from the individual and his immediate family was $2,500 or more in amount or value during such period.

Id.

The House bill, H.R. 15, while not requiring a lobbying organization to disclose its contributors upon registration, did direct a registered organization to provide this information in its quarterly report. Section 6(a)(8)(A)-(B) declared that the required report shall contain:

> (8) an identification of—
>
> (A) each organization from which the reporting organization received income during such period, including the amount of income provided by the organization, where the income was expended in whole or in part to engage in activities described in section 3(a), if the amount of income received from the organization has totaled $2,500 or more in amount or value during the calendar year; and
>
> (B) each individual from whom the reporting organization received income during such period, including the amount of income provided by the individual, where the income was expended in whole or in part to engage in activities described in section 3(a), if the amount of income received from the individual and his immediate family has totaled $2,500 or more in amount or value during the calendar year.

Id.

171. Representative Railsback, sponsor of the successfully amended contributor reporting provision within the House bill, stated, "The purpose of this disclosure section is to identify all individuals who make sizable dollar contributions to influence public policy." 122 CONG. REC. H11408 (1976). A contributor identification requirement, then, would greatly further the overall objective of a lobby disclosure bill: "to inform the general public, including members of Congress, of the nature and scope of activities which constitute and characterize the bulk of lobbying campaigns." HOUSE COMMITTEE REPORT, *supra* note 27, at 8.

172. Indeed, one bar association has gone so far as to say:

> Compelled disclosure is likely to have an inhibiting effect on the efforts of those who expound unpopular views and seek to communicate those views to Congress. Promotion of free expression of unpopular views is so basic to our democratic system and has been so influential in shaping government policy over the long run

To be constitutional under the Supreme Court's standard, the contributor identification provision must have a sufficient nexus with a "substantial governmental interest."[173] The government's purported interest in lobbying disclosure is "to provide the Congress, the executive branch, and all members of the public with a fuller understanding of the nature and source of [lobbying] activities."[174] The contributor disclosure requirement is necessary if not essential to this governmental interest since without knowledge of the identities of a lobbying organization's contributors, Congress and the electorate cannot be fully informed as to whose interests the organization is espousing.

In *United States v. Harriss*,[175] the Supreme Court upheld[176] a stringent contributor disclosure provision in the Federal Regulation of Lobbying Act of 1946.[177] This provision required the disclosure of the name and address of each person who made a contribution of $500 or more per quarter to a lobbying organization.[178] The Court recognized the substantiality of the government's interest in direct lobbying disclosure[179] and regarded contributor identification disclosure as a

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that it is important that there be no identification of contributors.
The Comm. on Administrative Law and the Comm. on Fed. Legislation of the Association of the Bar of the City of New York, Lobbying Disclosure Act of 1976, at 12 (May 28, 1976) (emphasis added).

During the 1975 House hearings on H.R. 15, Congress Watch and Public Citizen, two organizations founded by Ralph Nader, voiced their opposition to the contributor disclosure requirement as applied to certain organizations. *1975 House Hearings*, *supra* note 37, at 819. The two groups maintained that organizations that worked "in the public interest and not for the personal financial betterment of a limited constituency" should not have to disclose the names of those who contributed to their organization. The asserted rationale for this argument was that once the identities of these contributors was disclosed, the contributors might be harassed or intimidated especially if the organization they were financially assisting promoted "unpopular causes." Ultimately, therefore, public participation in current affairs would be reduced. *Id.*

The Department of Justice summarized the rights that are potentially violated by a contributor identification provision: "the right of individuals to remain anonymous in their political associations, and to support political causes without fear of ostracism which might result from mandatory public disclosure of their support." Justice Report, *supra* note 58.

173. *See* note 169 & accompanying text *supra*.

174. S. 2477, 94th Cong., 2d Sess. § 2(a)(2), 122 CONG. REC. S9365 (daily ed. June 15, 1976).

175. 347 U.S. 612 (1954).

176. *Id.* at 624-26.

177. 2 U.S.C. §§ 261-270 (1970).

178. Federal Regulation of Lobbying Act of 1946, § 305(a)(1), 2 U.S.C. § 264(a)(1) (1977).

179. The Court specifically called attention to the Congress and its need to accurately weigh the voluminous influences exerted on them by lobbying groups. United States v. Harriss, 347 U.S. 621, 625 (1954).

necessary means to the achievement of this substantial interest.[180] *Harriss* provides little support, however, for requiring disclosure of contributions to organizations that merely engage in general advocacy and public debate and do not engage in direct communications with Members of Congress.

In *Burroughs & Cannon v. United States*,[181] the Supreme Court sustained[182] the constitutionality of the Federal Corrupt Practices Act of 1925,[183] which required the "public disclosure of political contributions, together with the names of contributors and other details."[184] Although the specific purpose served by disclosure of campaign contributors is different from the stated objective behind the disclosure of contributors to lobbying organizations, the Court in *Harriss* found the overall congressional purposes reflected in both the Federal Corrupt Practices Act and the Federal Regulation of Lobbying Act to be "similar."[185] The degree to which the disclosure of campaign contributors is in fact similar to the disclosure of lobbying contributors is highly relevant to the issue of the constitutionality of lobbying contributor disclosure under the first amendment, especially in light of the Supreme Court's holding in *Buckley v. Valeo*[186] that the disclosure of the names and addresses of campaign contributors "directly serve[s] substantial governmental interests."[187] Since the disclosure requirements for lobbying organization's contributors serve many of the same governmental interests recognized as "substantial" by the Court in *Buckley*,[188] it is likely that the contributor identification provisions for organization that engage in direct or indirect lobbying

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180. The Court stated:

> [Congress] wants only to know who is being hired, *who is putting up the money, and how much* . . . .
>
> Under these circumstances, 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. And here Congress has used that power in a manner restricted to its appropriate end.

347 U.S. at 625-26 (emphasis added).

181. 290 U.S. 534 (1934).

182. *Id.* at 548.

183. Ch. 368, tit. III, 43 Stat. 1070 (codified in scattered sections of 2, 18 U.S.C.) (repealed 1972).

184. Burroughs & Cannon v. United States, 290 U.S. 534, 548 (1934).

185. United States v. Harriss, 347 U.S. 612, 625 (1954). The Court stated that this "similar purpose" manifested by Congress in enacting the two statutes was "to maintain the integrity of a basic governmental process." *Id.* (citing Burroughs & Cannon v. United States, 290 U.S. 534, 545 (1934)).

186. 424 U.S. 1 (1976).

187. *Id.* at 68.

188. *See* text accompanying notes 149-53 *supra*.

would satisfy the second part of the constitutionality test requiring "a sufficient relationship to a substantial government interest."[189]

2. *Indirect lobbying*

A key difference between the two lobbying disclosure bills was their coverage of indirect lobbying activities or "lobbying solicitations."[190] S. 2477 used lobbying solicitations as one of the thresholds triggering coverage under the bill.[191] Under the Senate bill, therefore, organizations that never directly contacted congressmen or their staffs but urged others to do so would have qualified as a covered lobbying organization if they had spent $5,000 or more per quarter in soliciting others to directly lobby.[192]

The House bill initially covered only those lobbying organizations that engaged in direct lobbying.[193] Once an organization qualified as a covered lobbyist, however, the bill required that the organization describe lobbying solicitations that were made or paid for by the organization.[194]

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189. *See* note 305 & accompanying text *supra*.

190. *See* note 16 *supra* & text accompanying notes 116-17 *supra*.

191. S. 2477, 94th Cong., 2d Sess. § 3(a)(3), 122 CONG. REC. S9365 (daily ed. June 15, 1976).

192. *Id.* The Department of Justice strongly opposes the use of lobbying solicitations as an independent threshold test. Instead, it approves of H.R. 15's approach which requires disclosure of solicitation activities only if the organizations already qualify under a direct lobbying threshold test. "We are acutely concerned about the effect on First Amendment rights of regulated groups whose *sole* function is to urge others to exercise their rights to petition Congress." *Id.* The Department's objection rests on the assumption that these indirect lobbying organizations do not "significant[ly] threat[en] the integrity of the [political] process." Justice Report, *supra* note 58. *But see* JOINT STATEMENT, *supra* note 8, at 2 which states that indirect lobbying does affect significantly the political process; "[S]ome of the most widespread and effective lobbying campaigns are [indirect lobbying campaigns] . . . [that use] computerized direct mailings, newspaper advertisements, radio or TV broadcasts, or other modern techniques of mass communication." *See, e.g.*, the activities of the "New Right" which has three hundred people at a Falls Church, Virginia office crank out one hundred million letters in a normal year and two hundred million letters in an election year to five million conservatives whose names are on computer tapes. The organization claims that these grassroots activities are very successful in changing congressmen's voting patterns. When "mail is running 10 to 1, 100 to 1, against busing, abortion, gay rights," congressmen feel pressured to vote conservatively out of fear for their re-election. TIME, Oct. 3, 1977, at 24.

193. H.R. 15, 94th Cong., 2d Sess. § 3(a), 122 CONG. REC. H11403 (daily ed. Sept. 28, 1976).

194. *Id.* § 6(b)(6) at H11407. The lobbying organization was required to provide this description only "where such solicitations reached or could be reasonably expected to reach, in identical or similar forms, five hundred or more persons, or twenty-five or more officers or directors, one hundred or more employees, or twelve or more affiliates of such organization." *Id.*

Notwithstanding the difference in the threshold coverage requirements, both the Senate and House bills required some type of disclosure of indirect lobbying activities—a factor that has evoked negative responses from various citizen's groups.[195] One spokesman from the American Civil Liberties Union said, "The regulation of lobbying solicitations would have the effect of bringing virtually all activity designed to promote a given public policy viewpoint—all information dissemination, all expression of opinion, all attempts at persuasion—within the purview of a lobbying disclosure statute."[196]

Certainly any lobbying disclosure provision that required qualifying organizations to report such generalized activities would be held unconstitutional since it would no longer bear a "sufficient relationship" to the government's interest in having information on the activities constituting "the *bulk* of lobbying campaigns while still preserving the rights of citizens to petition their government."[197] By requiring disclosure of lobbying solicitations only where such solicitations involved "urging, requesting or requiring" one or more persons to influence a covered federal employee on a specific issue,[198] both lobbying bills protected first amendment rights. The decision as to the types of activities that constituted "urging" under the proposed act, was given to the Comptroller General who had the authority to render advisory opinions concerning the applicability of the provisions to a given set of facts.[199] Also, in both bills certain activities, which might otherwise have fallen within the express terms of the legisla-

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195. *See, e.g.*, PUBLIC CITIZEN CONGRESS WATCH, KEY ISSUES IN PROPOSALS FOR REFORM OF LOBBYING DISCLOSURE REQUIREMENTS § 5 (1977) (pamphlet on file at headquarters of Public Citizen Congress Watch, Washington, D.C.) [hereinafter cited as PUBLIC CITIZEN CONGRESS WATCH]. In § 5, entitled "No public purpose is served by requiring an organization to disclose information about its communications to its members or to the general public," Public Citizen Congress Watch spoke out against congressional regulation of indirect lobbying. The organization argued that "[b]y placing such burdens on the distribution of information about the legislative process, the Congress [would be] making it more difficult for the people to find out about the workings of their government." *Id.*

196. D. Landau, Memorandum in Support of [ACLU's] Proposed "Public Disclosure of Lobbying Act" at 5 (Feb. 7, 1977), *reprinted in 1977 House Hearings*, *supra* note 13, at 159 [hereinafter cited as ACLU memorandum].

197. HOUSE COMMITTEE REPORT, *supra* note 27, at 8-9 (emphasis added).

198. H.R. 15, 94th Cong., 2d Sess. § 2(10), 122 CONG. REC. H11394 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess. § 3(f), 122 CONG. REC. S9365 (daily ed. June 15, 1976).

199. H.R. 15, 94th Cong., 2d Sess. § 9(a), 122 CONG. REC. H11414 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess. § 10(a), 122 CONG. REC. S9367 (daily ed. June 15, 1976).

tion, were specifically exempted from coverage.[200] Since these exemptions were extensive in scope, they should silence any broad assertions concerning the unlimited number of activities that would be covered under the Lobbying Disclosure Act.[201]

Despite the many built-in limitations on coverage of lobbying solicitations, there is still some valid concern as to the constitutionality of requiring indirect lobbying disclosure.[202] This concern stems from past Supreme Court decisions interpreting campaign and lobbying disclosure laws. In *United States v. Rumely*,[203] the Court considered whether Congress had the power to pass a resolution[204] authorizing a House committee to investigate lobbying activities. Since Congress did not define the phrase "lobbying activities" used in the resolution, the Court[205] avoided a decision on the constitutionality of the statutory provision by defining "lobbying" in its "commonly accepted sense," that is, "representations made directly to the Congress, its members, or its committees."[206] The Court rationalized this limitation on the grounds that lobbying does not extend to attempts "to saturate the thinking of the community" or all activities intended to "influence, encourage, promote or retard legislation."[207]

The following year, the Supreme Court in *Harriss*[208] once again limited the definition of "lobbying" in construing the 1946 Federal Regulation of Lobbying Act.[209] Citing *Rumely*, the Supreme Court

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200. H.R. 15, 94th Cong., 2d Sess. § 3(b), 122 CONG. REC. H11403 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess. § 3(g), 122 CONG. REC. S9365 (daily ed. June 15, 1976). *See* notes 95-102 & accompanying text *supra*.

201. For example, H.R. 15 explicitly exempted coverage under the Act of

> a communication or solicitation made through a speech or address, through a newspaper, book, periodical, or magazine published for distribution to the general public, or through a radio or television broadcast, or through a regular publication of a voluntary membership organization published in substantial part for purposes unrelated to [lobbying activities].

H.R. 15, 94th Cong., 2d Sess. § 3(b)(2), 122 CONG. REC. H11403-04 (daily ed. Sept. 28, 1976).

202. *See 1977 House Hearings*, *supra* note 13, at 160-62.

203. 345 U.S. 41 (1953).

204. H. Res. 298, 81st Cong., 1st Sess., 95 CONG. REC. 11385 (1949). This resolution gave the committee the authority to "conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation." *Id.*

205. United States v. Rumely, 345 U.S. 41, 43 (1953).

206. *Id.* at 45, 47.

207. *Id.* at 47.

208. 347 U.S. 612 (1954).

209. 2 U.S.C. §§ 261-270 (1970).

stated that the Act reached only " 'lobbying in its commonly accepted sense'—to *direct communication* with members of Congress on pending or proposed federal legislation."[210] The Court's construction of the Act might seem to rule out the constitutionality of lobbying solicitation disclosure. The Court in *Harriss* went on, however, to explain what it meant by direct lobbying: "direct pressures, exerted by the lobbyists themselves or through their hirelings or *through an artificially stimulated letter campaign*."[211]

The Court, therefore, included within its definition of direct lobbying, certain solicitations of others to lobby but rejected, as it did in *Rumely*, the inclusion of generalized efforts "to saturate the thinking of a community."[212] Under this interpretation of *Harriss*, the required disclosure of lobbying solicitations—at least those solicitations aimed at creating an "artificially stimulated letter campaign,"[213]—would be constitutional. Moreover, it is argued that the Supreme Court in *Harriss* never reached the question of whether disclosure of solicitation activities contravenes the first amendment.[214] The Court merely bestowed its definition to the term "lobbying" as used in the 1946 Act, thus avoiding the question of whether compelled disclosure of indirect lobbying was constitutional. Under either analysis, the *Harriss* decision cannot be construed as precedent prohibiting the disclosure of indirect lobbying activities.[215]

Some commentators interpret the Court's decision in *Buckley* on indirect campaign contributions[216] as determinative of the issue of constitutionality of disclosure by groups of their indirect lobbying efforts.[217] In *Buckley*, the Court limited disclosure requirements to information that falls within "the core area sought to be addressed by Congress" and is of valuable "informational interest."[218]

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210. United States v. Harriss, 347 U.S. 612, 620 (1954) (emphasis added).

211. *Id.* (emphasis added). The author of the *Harriss* opinion, Chief Justice Warren, referred to the Act's separability clause in stating that Congress would have intended that this "narrower basis" stand, even though the Court struck down the Act's broader application covering "organizations seeking to propagandize the general public." *Id.* at 621.

212. United States v. Rumely, 345 U.S. 41, 47 (1953).

213. United States v. Harriss, 347 U.S. 612, 620 (1954).

214. Justice Report, *supra* note 56.

215. *Id.* The Department of Justice feels "that required disclosure of 'lobbying solicitations' not only is constitutional but practically indispensable to an effective [lobbying] bill." The Department opposes, however, using solicitations as an independent threshold test. *See* note 192 *supra*.

216. 424 U.S. 1 (1976).

217. ACLU Memorandum, *supra* note 196, at 7, *reprinted in 1977 House Hearings*, *supra* note 13, at 161.

218. 424 U.S. at 79, 81.

Congress, through inclusion of indirect solicit
of disclosure expenditures of its proposed legis.
purpose of the proposed legislation in providing the
ernment officials with a full picture of the lobbying
covered organization.[219] It follows that disclosure of solicit
has valuable informational interest and therefore meets the
criteria.

The Court of Appeals' ruling in *Buckley* raises another facet r
evant to the constitutionality of disclosure of indirect lobbying efforts.[220] The Court of Appeals declared one section of the FECA[221] unconstitutional.[222] This part of the ruling was not appealed to the Supreme Court. In discussion of section 437(a) of the FECA, the Court of Appeals found that the wording of the statute, which required disclosure from groups expending funds "for the purpose of influencing the outcome of an election" or publishing material "designed to influence individuals to cast their votes for or against" particular candidates,[223] was so broad that the statute could encompass "groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance."[224] Accordingly, the first amendment concern raised by the court was the protection of discussion of issues that maintain general, at-large importance.[225] The solicitation provisions of the lobbying disclosure bills can be distinguished from the non-partisan activities covered by section 437(a) of the FECA, however, because disclosure is only required of organizations whose activities are calculated to cause or prevent the enactment of legislation.[226]

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219. *See* note 148 & accompanying text *supra*.

220. Buckley v. Valeo, 519 F.2d 817 (D.C. Cir. 1975), *affirmed in part rev'd in part*, 424 U.S. 1 (1976). The court found § 437(a) unconstitutional on the basis of its potential breadth in this context but refused to declare the crucial terms vague or overbroad in and of themselves. Consequently, the language may find constitutional support in a subsequent interpretation based upon different circumstances.

221. Federal Election Campaign Act, § 308, 2 U.S.C. § 437(a) (Supp. V 1975).

222. 519 F.2d 817, 878.

223. *Id.* at 870.

224. *Id. See* Report of the American Law Division of the Library of Congress, *supra* note 163.

225. 519 F.2d at 873. The court said:

> [I]ssue discussions unwedded to the cause of a particular candidate hardly threaten the purity of elections. Moreover, and very importantly, such discussions are vital and indispensable to a free society and an informed electorate. Thus the interest of a group engaging in a nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes.

Id.

226. H.R. 15, 94th Cong., 2d Sess. § 2(10), 122 CONG. REC. H11394 (daily ed. Sept. 28, 1976); S. 2477, 94th Cong., 2d Sess. § 3(f), 122 CONG. REC. S9365 (daily ed. June 15, 1976).

Still the task of differentiating between purely informational activities and activities that urge public lobbying are formidable. Since the determination of section 437(a)'s unconstitutionality was not appealed, the holding does not bind the Supreme Court in subsequent decisions. Certainly, the language of the Court of Appeals, decision in *Buckley* casts a cloud over the constitutionality of the solicitation disclosure provisions. Thorough consideration of the divergent contexts of lobbying solicitations and section 437(a)'s campaign funding disclosure requirements, however, indicates that an unconstitutional outcome is not mandated.[227]

3. *The use of threshold tests to determine whether registration is required*

Four threshold tests were exhibited in the 1976 House and Senate bills that determined who should and should not be covered by disclosure provisions. First, the Senate developed a "direct contacts" threshold test where disclosure would be required once an organization made twelve oral congressional contacts in one quarterly filing period through its paid officers, directors, or employees.[228] Second, a "monetary" threshold test, which required filing by an organization once it paid more than $1,250[229] or $250[230] for outside lobbyists in any quarterly filing period, appeared in both bills. A third threshold test was the House "percent" test for organizations that had at least one paid officer, director, or employee who devoted twenty percent of his time in any quarterly filing period lobbying Congress.[231] The fourth threshold test was the Senate's "solicitations" test where dis-

227. *Id.* Lobbying solicitation disclosure requirements are not intended to reach activities concerning all issue discussion, public persuasions, or general advocacy, but instead are intended to reach only expenditures for communications which expressly urge, request, or advocate that one communicate with a Member of Congress to support or oppose a specifically identified issue or piece of legislation.

228. The Department of Justice has determined that direct contacts as a threshold test is a "reliable indicia of the extent of active lobbying carried on by the organization," and therefore probably constitutional. Justice Report, *supra* note 58. The Department, however, would like to have the number of direct contacts threshold raised to somewhere between 25-50 contacts per quarter, thus ensuring that small and sporadic lobbying groups would not be discouraged from making communications with Congress because of the reporting requirements.

229. H.R. 15, 94th Cong., 2d Sess. § 3(a)(1), 122 CONG. REC. H11403 (daily ed. Sept. 28, 1976).

230. S. 2477, 94th Cong., 2d Sess. § 3(a)(1), 122 CONG. REC. S9365 (daily ed. June 15, 1976).

231. H.R. 15, 94th Cong., 2d Sess. § 3(a)(2), 122 CONG. REC. H11403 (daily ed. Sept. 28, 1976).

closure was mandated if an organization's indirect lobbying expenditures exceeded $5,000 in any quarter.[232]

While the direct contacts test, the monetary test, the percentage test, and the solicitations test all constitute reliable indicia of the extent of active lobbying carried on by an organization, the low threshold levels have been constitutionally challenged because they impose too great a burden on small organizations that engage in ad hoc lobbying activities.[233]

The Supreme Court in *Buckley* dismissed a similar constitutional challenge.[234] There the appellants claimed that the recordkeeping and reporting provisions of the FECA lacked a substantial nexus with the asserted governmental interests by reason of the low threshold coverage.[235] Under the FECA, political committees had to maintain records with the names and addresses of all contributors giving in excess of $10,[236] and if the aggregate amount exceeded $100, the

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232. S. 2477, 94th Cong., 2d Sess. § 3(a)(3), 122 CONG. REC. S9365 (daily ed. June 15, 1976).

233. *See* ACLU Memorandum, *supra* note 196, at 9-11, *reprinted in 1977 House Hearings*, *supra* note 13, at 162, which details the basis of the ACLU's position on threshold levels:

> These thresholds would force registration and reporting requirements upon small local organizations with small budgets and already overburdened staffs, as well as large, loosely organized national grassroots organizations. For these organizations, compliance would be so burdensome that many would be deterred from lobbying at all.
>
> For example, each registered organization would have to file quarterly reports including information on approximately 25 separate items. Moreover, every registered organization would have to maintain extensive records and institute intricate accounting and internal reporting procedures in order to prove compliance. The need to centralize record keeping, to log contacts with Congress as required in the Senate bill, and to track lobbying solicitations as they filter through the grassroots organizational structure, will be too intimidating and too costly for many organizations. The threat of criminal sanctions is even more intimidating, especially to small or inexperienced citizens venturing into lobbying.
>
> Under H.R. 15 any organization which employs one person who spends 20% of his or her time lobbying triggers the bills requirements. Organizations of all sizes are covered. . . .
>
> . . . .
>
> S. 2477 utilizes a threshold of 12 contacts with Members of Congress or their staffs. This test is extremely low. Almost all of the Committees of Congress have more than 12 members. If an organization desires to contact only one committee regarding a single piece of legislation or a single issue, it would have to first devise an elaborate reporting and recordkeeping scheme to comply with the Senate bill's provisions which are far more complex and burdensome than those in H.R. 15.

Id.

234. 424 U.S. 1, 82 (1976).

235. *Id.*

236. Federal Election Campaign Act, 2 U.S.C. § 432(e)(2) (Supp. V 1975).

recorded information had to include the individual's occupation and place of business.[237] Although upholding the constitutionality of the low thresholds, the Court admitted minimum triggering amounts might prove detrimental to participation in the political process by certain individuals.[238] Nevertheless, the Court found the amounts designated were not entirely without rationality.[239] The Court's use of a rational basis test in its examination of FECA threshold amounts is an important precedent for an examination of other threshold amounts. Under the rational basis test the reasonableness of the means are presumed and the legislation will be struck down only if it can be shown that Congress acted irrationally. Closer scrutiny, however, reveals a material difference between FECA and lobbying threshold tests that might alter the latter's standard of judicial review. In *Buckley*, the Court remarked that although the required reporting of such small monetary amounts is constitutionally permissible, public disclosure of that information may infringe first amendment rights; unfortunately the Court did not resolve this issue.[240] Thus, a stricter standard of judicial review might be invoked for lobbying threshold levels because the information would be subject to disclosure. Under such a standard Congress would be required to adopt sufficiently high threshold levels for lobby reform legislation,[241] covering only those lobbying organizations that commit significant resources to influencing legislation.

Senator Kennedy's dual threshold legislation presents an alternative by which reporting requirements would differ according to the extensiveness of lobbying by a particular group.[242] This tiered approach would allow organizations that do relatively little lobbying but who trigger the lower threshold test to furnish minimal information. As the lobbying activities increase and the higher threshold is passed, the reporting requirements would increase commensurately. This

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237. *Id.* § 434(b)(2) (Supp. V 1975).

238. The Court stated that:

> These strict requirements may well discourage participation by some citizens in the political process, a result that Congress hardly could have intended. . . . But we cannot require Congress to establish that it has chosen the highest reasonable threshold. The line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion.

424 U.S. at 83.

239. *Id.*

240. *Id.* at 84.

241. The Department of Justice, although finding the three direct lobbying threshold tests "acceptable," encouraged drafters of legislation to raise the specific quantum amounts above levels found in the 1976 bills. Justice Report, *supra* note 58.

242. This approach is taken in the 1977 Senate bill S. 1785, *supra* notes 15 & 69.

would assure that extensive and well financed lobbying would be publicly disclosed. This dual threshold test, if it contains high threshold levels, is a reasonable approach for Congress to employ.

VI. Conclusion

Lobbying disclosure will not solve all of the lobbying profession's ills brought to light by recent Washington scandals. Disclosure alone will not tell the voter exactly what made his Congressman vote a certain way on a particular bill. It will only inform the voter as to what organizations worked for and against the legislation and the amounts spent exerting this influence. Still, this is a beginning.

Lobby reform advocates believe that once the true source and strength of various lobbying efforts is known and made public, Congressmen and other affected federal employees will feel compelled to examine their own decisions more carefully. It is also anticipated that interest in public interest groups' efforts will increase when the public realizes the extent and subject matter of special interest lobbying activities. Since lobbying efforts will be made public, each registering organization will no doubt exercise self-restraint in some of the fringe areas of legitimate lobbying activities. Furthermore, reform legislation will eliminate the ability of organizations to deceive the electorate and Congressmen by hiding their purpose behind a facade.

Lobbying activities cannot and should not be forbidden if first amendment protections are to remain viable. Power and influence will always wield support in Congress. So it should be in a democracy. But likewise, these activities should no longer be sheltered in a cloak of constitutional secrecy.

Barbara Bado

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Constitutional issues raised by placing litigation info w/ FEC

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Lobby Act Interpreted

Because it came into effect relatively recently and is far-reaching, Michigan's lobbyist registration (Public Act 472 of 1978) law gives rise to a number of questions concerning its applicability to activities customarily engaged in by attorneys in the course of representing or advising their clients. In an effort to clarify some of these situations, State Senator John F. Kelly recently asked the Secretary of State, whose department administers the Act, for an interpretive statement addressing certain specific hypothetical situations.

Following is the reply of Phillip T. Frangos, Director of the Office of Hearings and Legislation, Michigan Department of State.

August 25, 1984

Dear Senator Kelly:

This is in response to your request for an interpretive statement regarding the applicability of the lobby act (the "Act"), 1978 PA 472, to a number of hypothetical situations involving attorneys.

Before addressing your individual inquiries, it is noted that your hypotheticals, one way or another, all seem to relate to the "practice of law" and the impact of the Act upon those who engage in the law business in Michigan. That being the case, a few initial comments are in order concerning the extent to which the Act was designed to govern the practice of law.

The Act, in its title, affords significant guidance with regard to the legislative intent and purpose on this point. The title indicates that the Act is designed to regulate lobbying activities, lobbyists, and lobbyist agents and to require registration and reporting from lobbyists and their agents. No mention is made of attorneys or the regulation of their law practices. Moreover, the body of the Act makes no mention of lawyers, attorneys, legal counsel, or the practice of law. There is an indication in section 2(1) of the Act (MCL 4.412) that activities which occur in the context of quasi-judicial determinations do not fall within the Act's purview, but this is the only instance where the Legislature may have had lawyers specifically in mind. From all this, there appears a legislative intent to refrain from regulating attorneys per se and a corresponding intent to treat attorneys on the same footing as other citizens engaged in lobbying.

This conclusion is buttressed by the recent decision of the Michigan Court of Appeals in *Pletz* v *Secretary of State*, 125 Mich App 335 (1983). In holding that the Act does not violate the title-body, one-object doctrine of the state constitution (Const 1963, art 4, §24), the Court held:

> **"Likewise, we do not find that the act attempts to regulate the practice of law. The act treats attorneys who lobby in an identical manner as non-lawyers, except the act, in §2(1), specifically does not govern attorneys' communications with officials in administrative agencies. Attorneys whose activities relate to the practice of law, for example involvement in a quasi-judicial determination (administrative law), do not fall under the ambit of the act." 125 Mich** App 335, 348

During the proceedings which led to the issuance of the Court of Appeals decision, the Secretary of State was called upon to explain how he intended to interpret and enforce the Act. With regard to the practice of law question, Secretary of State Austin submitted an affidavit which indicated in relevant part that:

> **"I interpret the 1978 lobbying law as follows, and will administer, and enforce this law consistent with these interpretations:**
>
> * * *
>
> **"5. The 1978 Lobbying Law does not intrude into the 'practice of law' or to 'engage in the law business,' for which a person must be regularly licensed and authorized to practice law in Michigan."**

As you may know, following the submission of the above-described affidavit, certain practitioners concluded that a broad exclusion or "exemption by interpretation" for attorneys had been added to the Act by the Secretary of State. In the interests of clarity, it must be indicated that that was neither the intent nor the case. The Secretary of State has an ongoing obligation to interpret all laws under his enforcement jurisdiction in a constitutional manner. During the litigation, the Secretary of State recognized the potential for debate with regard to activities commonly viewed within the traditional concept of the practice of law on the one hand and the emerging legal concept of "lobbying" under the Act on the other. Thus, through the affidavit, there was official acknowledgement of those situations where a person might be engaged in an activity which only a lawyer could perform and was therefore outside the scope of the Act, but which might otherwise be considered lobbying. It is expected that such situations will be few in number. However, as is noted later in this document, your inquiry does touch upon certain of these circumstances.

Your hypotheticals and questions are set out and answered below.

1. *An attorney conducts legal research and prepares a memorandum of law and legal opinion for his or her client for the purpose of attaching the memorandum to a letter from the client, a trade union executive, to a legislator opposing action on legislation. Clearly the*

lawyer's activities involved providing analysis in connection with a communication with a public official that would not have been incurred but for the activity of communicating directly. The question is whether the expenditure for the lawyer's efforts must be reported as a lobbying expenditure, and if so, whether the lawyer, having received more than $250, must register as a lobbyist agent notwithstanding that the lawyer did not engage in the direct communication personally?

In order to answer your initial inquiry, certain statutory and other definitions pertaining to the meaning of the term "lobbying expenditure" must be noted. The term "lobbying" is defined in section 5(2) of the Act (MCL 4.415) as ". . . communicating directly with . . . an official in the legislative branch of state government for the purpose of influencing legislative . . . action." Section 5(3) of the Act (MCL 4.415) indicates in relevant part that "influencing" connotes ". . . opposing . . . by any means, including the providing of or use of information, statistics, studies, or analysis." Section 3(2) of the Act (MCL 4.413) states that "expenditure" includes "compensation for labor." Further, rule 1(1)(d)(iv) of the administrative rules promulgated to implement the Act (1981 AACS, R 4.411) indicates that "expenditures for lobbying" include an "expenditure for providing or using information, statistics, studies, or analysis in communicating directly with an official that would not have been incurred but for the activity of communicating directly."

In your hypothetical, you state that an attorney has conducted legal research and has prepared a "memorandum of law and legal opinion" which will be conveyed to a legislator by a trade union executive and you ask whether the payment for this effort must be reported as a lobbying expenditure. Based on the definitions just set forth, it would appear that the payment for the "memorandum" is in fact a lobbying expenditure since the memorandum was prepared to be a part of the executive's direct communication. Section 8(1) of the Act (MCL 4.418) requires the filing of periodic reports which disclose by category all expenditures made or incurred by a lobbyist or lobbyist agent. Thus, the expenditure must be reported, but it is reportable by the person who made it, not the person who received the payment. It is the payor executive who reports the expenditure. The lawyer reports nothing.

You also ask whether the lawyer is required to register under the Act by virtue of having received more than $250.00. That query is answered in the negative. Sections 5(5) and 7(2) of the Act (MCL 4.415 and 4.417) require lobbyist agent registration only when an agent has received $250.00 or more in any 12-month period for lobbying, as opposed to assisting lobbying. As noted above, lobbying entails direct communication with a public official. The lawyer need not register because he or she is not communicating directly. That is, the attorney did not mail the memorandum to the legislator. To the contrary, the lawyer provided the document only to the union official. What happens from that point relative to use and reporting is up to the union executive. In this case then, because there has been no direct attorney/legislator contact, there is no requirement for the lawyer to register.

2. *In connection with rules proposed by a state agency pursuant to the Administrative Procedures Act ('APA'), a lawyer prepares an analysis of the rules and gives his or her legal opinion as to whether the rules are consistent with the underlying statute, constitutional requirements and other legal requirements. The lawyer's document outlines the legal problems facing persons required to comply with the rules. The analysis is prepared for the dual purpose of advising the lawyer's client and preparing the lawyer to attend a public hearing on the proposed rules. At the request of the lawyer's client, the lawyer attends the public hearing on the proposed rules, and as an attorney for the client, presents the views of the organization as the legal advocate of the client. Because the client is not trained in law, the client has asked the licensed attorney to represent the views of the client with respect to both legal issues and policy issues involved in consideration of the rules. Assuming the legal fees exceed $250, must the lawyer register as a lobbyist agent and, if so, what aspects of the lawyer's services must be reported?*

At the outset, the facts of your hypothetical must be expanded somewhat in order to answer it properly. Under the definitions provided in the Act, it must be recalled that there can be no lobbying unless there is direct communication with an official in the legislative or executive branch of state government. Thus, if no public official is on the panel holding the public hearing, there is no direct communication with a public official and consequently there can be no lobbying. In many and perhaps most state departments, public hearings concerning proposed rules are conducted by civil servants rather than by public officials. Representation of a client's views to civil servants will not give rise to any obligation on the part of lawyers to register or report under the Act.

Assuming the panel does include at least one public official, the attorney, when addressing the entire panel relative to both policy and legal issues, is definitely lobbying since at that point in time he or she is attempting to influence administrative action. Section 2(1) of the Act (MCL 4.412) indicates that administrative action means, among other things, "the proposal, drafting, development, consideration, amendment, enactment or defeat of a . . . rule by an executive agency or an official in the executive branch of state government." The fees received for participation at the rules hearing count toward the attorney's $250.00 lobbyist agent threshold. Once the threshold is passed, the attorney is under an obligation to register as a lobbyist agent and to report compensation or reimbursement received for lobbying, money spent on food and beverage for public officials, etc.

Preparation of an analysis of the rules may or may not be lobbying depending on several factors. Again, if there will be no direct communication because no public official is on the panel, this preparation cannot be lobbying. Assuming there is a potential for lobbying (for example, the hearing is before the Natural Resources Commission), then the purpose of preparing the analysis is important. If the client has not decided whether to lobby for or against the rules prior to requesting the legal analysis, the analysis is being prepared for purposes other than lobbying, for instance, to assist the client in deciding whether to lobby. In other words, preparation of the legal analysis may not meet the "but for" test mentioned in question 1. The legal fee for the analysis would not be reported by the client or the lawyer. If, after

reading the legal analysis, the client decides to oppose or support the rules and mails or gives the analysis to a public official who will decide whether to change or approve the rules, the cost of retyping or copying the analysis (including the wages of the typist or copy machine operator) are expenditures for lobbying which must be reported by the client. The legal fees are still not reportable.

On the other hand, assume the client reads the proposed rules, decides they are unacceptable and should be opposed, engages the attorney to analyze the rules "for the dual purpose of advising the lawyer's client and preparing the lawyer to attend the public hearing on the rules," and has the attorney attend the public hearing and directly communicate with a public official. This example meets the "but for" test. The attorney's fee for the analysis is an expenditure for lobbying by the client (the lobbyist) and compensation received for lobbying by the attorney (the lobbyist agent). The client must report this fee. If the attorney has not previously registered as a lobbyist agent, the attorney must now register because the fee is in excess of $250.00.

3. *The Department of Social Services denies a medicaid payment to an indigent hospital patient. An attorney is retained by the family of the indigent patient who calls the Department Director and asks her to intervene in the matter and to reverse the decision of Department employees. In preparation for contacting the Director, the lawyer spends two hours, for which he charges the family of the patient $130 per hour, reviewing medicaid rules and statutes relative to the power of the Director of Social Services to intervene. Over a three-week period, the attorney spends two hours discussing the matter with the Director of Social Services. Must the lawyer register as a lobbyist agent on behalf of the family of the indigent patient and must the family members paying for the lawyer's services register as lobbyists?*

Section 5(2) of the Act (MCL 4.415) includes within the definition of lobbying all direct communications with an official in the executive branch of state government intended to influence "administrative action." Administrative action is a term defined in section 2(1) of the Act (MCL 4.415) as follows:

> **"(1) 'Administrative action' means the proposal, drafting, development, consideration, amendment, enactment of a nonministerial action or rule by an executive agency or an official in the executive branch of state government."**

The section goes on to state that administrative actions do not include quasi-judicial determinations authorized by law.

In order to fully understand the meaning of the term administrative action, it is necessary to review at least one additional definition found in the Act. Section 6(3) of the Act (MCL 4.416) indicates that:

> **"(3) 'Nonministerial action' means an action other than an action which a person performs in a prescribed manner under prescribed circumstances in obedience to the mandate of legal authority, without the exercise of personal judgment regarding whether to take the action."**

By reading these definitions together, it becomes apparent that the types of executive actions which may be influenced by reportable lobbying are activities such as policy making and programmatic administrative decisions not mandated by law, whereas attempting to influence other activities which may be described as ministerial in nature will not give rise to reporting obligations under the Act.

In your hypothetical number 3, you indicated firstly, that the Department of Social Services (DSS) denied a medicaid payment to an indigent hospital patient and secondly, that an attorney requested the DSS director to intervene. Thus, your initial inquiry is whether such intervention constitutes administrative action.

On that point, section 105 of the Social Welfare Act (MCL 400.105) provides as follows:

> **"The state department (of social services) shall establish and administer a program for medical assistance for the medically indigent under title XIX of the federal social security act, as amended, and shall be responsible for determining eligibility under this act."**

This section, on its face, requires DSS (and its director) to do a prescribed activity (make eligibility determinations) in a prescribed manner (under title XIX of the federal social security act) under prescribed circumstances (of medical indigency) without the exercise of personal judgment (i.e. the law must be followed). That being the case, the attorney in your hypothetical was actually attempting to influence the performance of a ministerial duty, rather than an administrative action, and therefore neither the lawyer nor the family members need register under the Act.

Now, the Secretary of State recognizes that it is the proper function of the Director of Social Services, and in some instances the Attorney General, to interpret, administer, and enforce the social welfare laws of Michigan. Those individuals, rather than this agency, have the expertise and experience to do so. It is possible that one or both of them might have a different view from the one stated above and to the contrary conclude that the attorney in question was in fact attempting to influence discretionary matters. In that event, the "attorney" exemption noted in section 2(1) of the Act becomes relevant.

Section 2(1) indicates, among other things, that whenever an attorney attempts to affect a "quasi-judicial determination as authorized by law," the attorney is not influencing administrative action, nor is the attorney lobbying. As noted by the Court of Appeals in *Pletz*:

> **"The design of this exemption is to remove from the act's coverage communications made and activities undertaken by attorneys during the course of contested administrative matters." 125 Mich App 351**

The Court also stated:

> **"We consider that the exemption removes contested matters before administrative officers, such as referees, hearing officers and commissioners, from the scope of the lobby law." 125 Mich App 352**

Under the facts of your hypothetical, it would seem that if the "indigent hospital patient" in actuality had a grievance requiring resolution by DSS, the quasi-judicial process could have been instituted and the quasi-judicial exemption invoked. Section 9 of the Social Welfare Act (MCL 400.9) specifically allows individuals who are dissatisfied with the amount of their federally-funded assistance to institute contested case proceedings.

Moreover, under this set of circumstances, the appeal need not necessarily be resolved by means of an administrative hearing. Section 78 of the APA (MCL 24.278) provides for the disposition of contested cases by stipulation, agreed settlement, consent order, or other mutually acceptable methods. Thus, the attorney could conduct negotiations with the DSS Director without the necessity of registering under the Act.

Finally, it is noted that in your hypothetical, the attorney in question was hired to act as the legal representative of the indigent hospital patient. In that regard, the attorney conducted two hours of legal research at a cost of $260.00 and performed two hours of negotiations for a total billing of $520.00. An unstated but implied question from your correspondence is whether this activity constitutes the "practice of law" and if so, whether the fees received by the attorney must still be reported either by the lawyer or the indigent's family.

Michigan courts have long grappled with the meaning of the concept of "practice of law" and have met with only limited success. In fact, in *State Bar* v *Cramer*, 399 Mich 116 (1976), the Supreme Court said:

> **"We are still of the mind that any attempt to formulate a lasting, all encompassing definition of 'practice of law' is doomed to failure 'for the reason that under our system of jurisprudence such practice must necessarily change with the everchanging business and social order'."** ***Cramer*****, 399 Mich at 133**

However, the fact that one all-encompassing definition may remain an ever elusive goal does not necessarily mean that a working definition is unobtainable for Lobby Act purposes. Indeed, the State Bar has already issued an Informal Ethics Opinion (CI-985, December 31, 1983) concerning some of the interrelationships between the Act and the practice of law. Among other things, this opinion indicates that it would be unethical for a law firm "to employ a non-lawyer to do that which has been called 'lobbying' for the law firm's clients."

Although this issue is relatively new to Michigan, the matter of the interworking of a lobby law and the practice of law has been addressed in other jurisdictions. In the case of *Baron* v *City of Los Angeles*, 469 P2d 353 (1970), a California Court reasoned that while in a pragmatic sense the practice of law encompasses all of the activities performed by attorneys in a representative capacity (including legislative advocacy), for lobby law purposes the practice of law occurs only if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind. The Court went on to hold that the lobbying ordinance under discussion did not apply to attorneys when:

> **" . . . 'acting on behalf of others in the performance of a duty or service, which duty or service lawfully can be performed for such other only by an attorney licensed to practice law in the State of California'." 469 P2d at 358**

The Court went on to state:

> **"For illustrative purposes, we indicate that an attorney representing a client before a city board or commission which is holding a hearing to reach a quasi-judicial decision on a matter involving factual and legal questions need not register under the ordinance; on the other hand, an attorney authorized by a client to appear at hearings considering local legislation in order to argue for or against the adoption of that legislation would be within the legitimate thrust of the (lobbyist) ordinance." 469 P2d at 359**

The rule set out in the *Baron* case would seem appropriate for implementation in the context of Michigan's Lobby Act. That is to say, where an attorney is engaged in an activity which only an attorney licensed in Michigan can perform, then the Act will not require the attorney to register with regard to that activity.

At the risk of invading the province of the Michigan State Bar and recognizing fully that it is the proper function of the State Bar to make determinations as to what does and does not constitute the unauthorized practice of law, it would appear that the attorney in hypothetical 3, who was attempting to safeguard the legal rights of an individual, was engaged in the practice of law such that neither the attorney nor the family is required to register or report under the Act.

4. *An indigent patient in a nursing home has been subjected to possible abuse and mistreatment. The family of the patient hires an attorney to attempt to correct the situation. In investigating the matter, the attorney discovers that the problem may be caused by the failure of the Department of Public Health to properly regulate the facility and that there might be possible corrupt conduct between the nursing home administrator and a Department official. The attorney meets with the patient and the patient's family in a confidential meeting pursuant to the attorney/client privilege. The attorney agrees to meet with the Director of Public Health and urge the Director to conduct an investigation and agrees not to reveal the name of the patient or the family paying for the attorney because of the fear for the personal safety of the patient. The lawyer is paid more than $1,000 for communicating directly with the Director of Public Health and the unclassified deputies in the Department urging an investigation. In addition, the lawyer talks with an unclassified member of the Governor's staff and with the Attorney General to urge action to prevent the corrupt conduct in the department. Must the family register as a lobbyist and list the lawyer as having received fees for lobbying?*

In order to respond to your fourth hypothetical, it is once again necessary to refer to the definitions found in the Act concerning administrative action. Those definitions clearly indicate that whenever an individual communicates with a public official to affect a ministerial action, as opposed to an administrative action, there will be no lobbying as that term is used in the Act.

Your hypothetical states that the attorney in question is paid more than $1,000 for communicating directly with the director of the Department of Public Health (DPH) and certain unclassified deputies urging an investigation. If conducting an investigation is an administrative action, then of course there may be reason to believe that reportable lobbying is taking place. However, although it is generally acknowledged that administrators with law enforcement responsibilities have discretion to decide whether or not to institute investigations, your hypothetical seems to suggest that the basic "problem may be caused by the failure of DPH to properly regulate the facility . . . ." That is, although the attorney is on one level requesting an investigation, he

or she really seems to be asking DPH to properly enforce the law.

There is recent case law in Michigan which tends to suggest that law enforcement officials, executives, and administrators do not have the discretion to refrain from enforcing valid laws. For example, in *Young v City of Ann Arbor*, 119 Mich App 512 (1982), the Court of Appeals ruled:

> **"As chief of police this defendant was responsible for overseeing and enforcing all policies and practices in the Ann Arbor (Police Station jail) facility. His testimony at trial indicated that he did not require his staff to enforce the pertinent department (of Corrections) regulations. Since we find that the Ann Arbor facility was required to follow the department's rules, it was incumbent upon defendant Krasny to enforce the regulations. This was a ministerial duty of his office . . . . " 119 Mich App at 519**

In your hypothetical, the attorney is really doing no more than asking the DPH director to properly enforce the law. Since the proper enforcement of law is a ministerial act or duty, the attorney in question has not engaged in lobbying. Thus, the family need not register as a lobbyist.

In inquiry 4, you also indicated that the attorney spoke with the Attorney General (AG) and with an unclassified member of the Governor's staff to urge action to prevent corrupt practices in DPH. However, while you specifically mentioned that the lawyer was paid to contact DPH staff, you did not assert any payment to the attorney for contacting the AG and the Governor's representative.

Section 5(5) of the Act (MCL 4.415) provides that a lobbyist agent means a person who receives compensation in excess of $250 in any 12-month period for lobbying. Under your scenario, the attorney did not receive any compensation to contact the AG and the Governor's office. It is noted that attorneys licensed to practice in Michigan are "officers of the court." Thus, the lawyer's voluntary action in communicating with the above-named public officials does not give rise to reporting obligations under the Act.

5. *In 1982, the Michigan Legislature passed a law to encourage alien, i.e. non-United States, insurance companies to be licensed in the State of Michigan as an economic development and job creation program. In-house counsel and a Michigan attorney representing a French insurance company meet with the Insurance Commissioner to discuss procedures for handling an application to be licensed under the new law. In addition, the lawyers, as counsel for the French company, meet with the Director of the Department of Commerce and with unclassified members of the Governor's staff, to discuss possible state programs which would provide economic incentives to the foreign company locating its U.S. subsidiary to the State of Michigan. Both the in-house counsel and the Michigan attorney are paid in excess of $1,000 for the meetings with public officials during a one-week visit to Michigan. Must the French in-house counsel register within three days as a lobbyist agent for the French company? Must the Michigan attorney register within three days of the visit as a lobbyist agent or may he or she wait until three days after receiving the fees for the legal services before registering as a lobbyist agent of the French company?*

In hypothetical number 5, you have posited that a Michigan attorney and out-of-state counsel for a French corporation meet with the Insurance Commissioner "to discuss procedures for handling an application to be licensed" in Michigan as an insurance company and you also hypothesize that both lawyers meet with unclassified officials in both the Commerce Department and the Governor's Office "to discuss possible state programs which would provide economic incentives to the foreign company" to locate in Michigan.

Again, section 2(1) of the Act (MCL 4.412) indicates that lobbying occurs vis a vis the executive branch only when an individual is attempting to influence some form of administrative action. Under the facts of the hypothetical under discussion, the two attorneys are merely asking for information about, and are discussing, state programs. There is no attempt to influence administrative action. Consequently, there is no lobbying and no need for either attorney to register or report his or her activities.

6. *A citizen wakes up one morning to find a bulldozer outside his house. The bulldozer operator indicates that he has been directed by the Michigan Department of Transportation to remove the house for a new freeway which will come through the site. The citizen calls his attorney, and asks the attorney to stop the destruction of the citizen's house. The attorney calls the Director of the Michigan Department of Transportation who says that there is nothing that he can do since the matter has been determined by the Transportation Commission. The attorney then spends the weekend contacting several of the Commissioners of the Michigan Transportation Commission in an effort to stop the destruction of the house. While it turns out that the department made a mistake, the attorney is too late and the house is destroyed. The citizen pays his attorney $1,200 for his efforts. Is the attorney required to register as a lobbyist agent of the citizen within three days of receiving his fee?*

Under the facts postulated in hypothetical 6, the attorney is not required to register as a lobbyist agent. This conclusion is mandated by the fact that the attorney in question was retained to act on the homeowner's behalf to deal with a legal problem, namely, the pending destruction of the owner's house. Obviously, only an attorney licensed to practice in Michigan can represent the aggrieved citizen relative to the legal rights which were at issue. The fact that the lawyer chose to approach administrators rather than pursue some specific legal remedy, e.g. obtaining an injunction, does not change the nature of the attorney/client relationship. The attorney, of course, may have been guilty of using an improper (as well as ineffective) strategy, but the exercise of professional judgment in the election of remedies does not determine whether or not a relationship falls within the "practice of law" for purposes of the Act.

Inasmuch as your inquiry was presented as a series of "hypotheticals," this response is informational only and does not constitute a declaratory ruling.

Very truly yours,
Phillip T. Frangos
Director
Office of Hearings and Legislation

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COMMENTS

PRESERVING THE INTEGRITY OF GOVERNMENT DECISION MAKING: PROPOSED REMEDIES FOR LOBBYIST MISCONDUCT

INTRODUCTION

Perjury and bribery by lobbyists have made recent headlines.[1] For example, Michael Deaver was convicted of lying to a grand jury about his lobbying[2] and Judy Augenstein was charged with—but recently acquitted of—attempting to bribe a legislator.[3] Because government officials depend on lobbyists for the information they use in making decisions;[4] and because Michigan has no legislation to protect itself from lobbyists who might lie to its officials; these events are cause for great concern about the decision making that takes place in Lansing.

This Comment argues that since lobbyists provide government officials with essential information gathering services,[5] the State of Michigan must regulate lobbyists to ensure that: (1) lobbyists do not intentionally misrepresent material facts to government officials, and that (2) those who lobby on behalf of others demonstrate the propensity to do so in a fair, honest, and open manner. Each of these two issues is dealt with in a separate section of this Comment. In analyzing each issue, the state's interest in honest lobbying is examined and other jurisdictions are surveyed to provide an understanding of how they protect these interests. A statute is proposed which, if enacted, would protect the state's interest. The constitutional constraints upon legislating to protect the interest are analyzed and the proposed statute's compliance with constitu-

1. *See infra* notes 50 & 51.
2. *See infra* note 50.
3. *See infra* note 51.
4. *See Note, Federal Lobbying Disclosure Reform Legislation*, 17 HARV. J. ON LEGIS. 296, 297 (1980).
5. *See id.*

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tional requirements is demonstrated. Finally, each section of the Comment concludes with a request that the State of Michigan enact the proposed legislation.

I. Regulating the Fraudulent Misrepresentation of Material Facts to Government Officials

A. *Overview: Government Dependence on Lobbyists*

Lobbyists perform valuable services for legislators and members of executive agencies.[6] They help legislators and administrators to assess the impact of particular proposals.[7] Further, lobbyists provide an important information service to government decision makers by researching complex new areas of proposed legislation, issuing condensed legislative summaries, providing specialized information, and advising legislators and administrators on the meaning and impact of legislation.[8] Because lobbyists provide decision makers with much-needed information, legislators and agency personnel have become dependent upon lobbyists.[9] As such, the quality of government decision making cannot exceed the quality of information gathered and presented to government officials by lobbyists.

B. *State Interest in Prohibiting Intentional Misrepresentation of Material Facts to Government Decision Makers*

Deception as to material facts may frustrate and distort the government's attempts to carry out its governmental functions.[10] However, when the legislature and the executive make decisions based on incorrect information, these decisions may not be attacked because of their inaccurate foundations. This is true even when the false information was provided by an interested party, who intended to deceive the government, and to profit from doing so.[11] In other words, the full force and effect of a statute is not diminished because its enactment was induced by false representations.[12] Even if a majority of the legislature was bribed, this would not in any way effect the validity of acts passed by the legislature.[13] As a result, the State of Michigan can pass neither statute

6. *See id.* at 296-97.
7. *See id.*
8. *See id.* at 297.
9. *See infra* note 52 (quote of Frank Kelly).
10. *See* Ogden v. United States, 303 F.2d 724, 742 (9th Cir. 1962).
11. *See* United States v. Des Moines Navig'n & Ry. Co., 142 U.S. 510, 544 (1892). *See also* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 131 (1810).
12. *See Des Moines*, 142 U.S. at 544.
13. *See* 4 J. Wigmore, Evidence § 1350, at 815. (Chadbourn rev. 1972).

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16. *See* 18 U.S.
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23. *See infra* n

nor constitutional provision to defeat the conclusive presumption that the legislature acts with full knowledge and in good faith.[14] Because the people cannot void governmental action undertaken in reliance upon fraudulently presented misinformation, the only remedies available for this type of fraud are penalties aimed at the fraudfeasor.

C. Regulation, by Other Jurisdictions, of Intentional Misrepresentation of Material Facts to Government Decision Makers

Even though Michigan has no legislation prohibiting the intentional transmission of misinformation about material facts to government officials, fifteen states[15] and the federal government[16] have enacted such legislation. The federal act[17] provides for a maximum sentence of five years imprisonment and a $10,000 fine for intentionally deceiving any department or agency of the United States as to a material fact.[18] This federal statute protects governmental functions from being frustrated and distorted through deception.[19] It also covers all materially false statements made to any branch of government,[20] including unsworn oral statements.[21] Moreover, the statute has been found to be both clear and definite enough to not be void for vagueness.[22]

Michigan has the opportunity to join those states that have recognized their dependence on the quality of information lobbyists provide their government officials.[23] In enacting legislation to prohibit the intentional provision of false facts to government decision makers, Michigan will be saying "Yes" to the legions of lobbyists on whom it relies to serve the public by providing government with information of the highest caliber. At the same time, Michi-

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14. *See Des Moines*, 142 U.S. at 544.

15. *See* ALA. CODE §§ 36-25-26,-27 (1975 & Supp. 1988); ALASKA STAT. §§ 24.45.121(a), .151(a) (1985); ARIZ. REV. STAT. ANN. § 41-1235 (1985); CAL. GOV'T CODE § 86205 (West 1987); IDAHO CODE §§ 67-6621(b)(2), 6625(b) (1980); MONT. CODE ANN. §§ 5-7-102(7), -103, -105, -302 (1987); NEB. REV. STAT. § 49-1491 (1988); NEV. REV. STAT. §§ 218.942, .944 (1987); N.J. STAT. § 52:13C-31 (1986); OKLA. STAT. tit. 74, §§ 4233, 34 (Supp. 1988); OR. REV. STAT. §§ 171.756(4), .755(1)(a) (1987); TENN. CODE ANN. §§ 3-6-108(b), -110 (1985); TEX. GOV'T CODE ANN. §§ 305.021, .031 (Vernon 1988); UTAH CODE ANN. §§ 36-11-5, -7(1) (1988); WASH. REV. CODE § 42.17.230(2)(b) (1988).

16. *See* 18 U.S.C. § 1001 (1982).

17. *See id.*

18. *See id.*

19. *See* source cited *supra* note 10.

20. *See* United States v. Fern, 696 F.2d 1269, 1273 (11th Cir. 1983).

21. *See* United States v. Des Jardins, 772 F.2d 678, 680 (9th Cir. 1985).

22. *See* United States v. Gilliland, 312 U.S. 86, 91-92 (1941); United States v. Moller-Butcher, 560 F. Supp. 550, 554-55 (D. Mass. 1983).

23. *See infra* note 83.

gan will be saying "No" to those few who might be tempted to deceive government for their own ends.

D. Statute Proposed to Protect Michigan's Government Officials from Deceptive Lobbying

A statute which has been enacted in Texas,[24] and which would enable Michigan to recognize the important role that lobbyists play in government decision making, is:

> A person, for the purpose of influencing legislation or administrative action may not (1) knowingly or willfully make a false statement or misrepresentation of the facts to a member of the legislative or executive branch; or (2) cause a copy of a document the person knows to contain a false statement to be received by a member of the legislative or executive branch without notifying the member in writing of the truth.[25]

An appropriate penalty for the above offense may be found in the federal statute[26] prohibiting that same conduct towards members of government agencies. That penalty is a fine of not more than $10,000, or imprisonment for not more than five years, or both a fine and imprisonment as previously stated.[27]

E. Equal Protection Constraints on State Regulation of Deceptive Lobbying

Of the sixteen jurisdictions[28] which prohibit the intentional provision of factual misinformation to government officials, ten limit the prohibition to lobbyists.[29] In contrast, the remaining six jurisdictions[30] seem to recognize that government functions can be frustrated and disrupted by deception, regardless of whether the government is deceived by someone who is required to register as a lobbyist, or by someone who is not currently required to register. As Michigan law stands today, no one who expends less than $250 per year on lobbying is required to register under Michigan's Lobbyist Registration Act.[31] Because false statements or representations of fact to government officials can disrupt government

24. *See* TEX. GOV'T CODE ANN. § 305.021 (Vernon 1988).
25. *Id.*
26. *See* source cited *supra* note 16.
27. *See id.*
28. *See* sources cited *supra* notes 15 & 16.
29. The ten jurisdictions are: Alaska, California, Idaho, Montana, Nebraska, Nevada, Oklahoma, Oregon, Tennessee, and Washington.
30. The six jurisdictions are: Alabama, Arizona, New Jersey, Texas, Utah, and the federal government.
31. *See* MICH. COMP. LAWS ANN. § 4.415(4)(b) (West 1991) (MICH. STAT. ANN. § 4.1704(5)(4)(b)(Callaghan 1985)).

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whether they are made by persons who are, or are not, required to register under the act,[32] the proposed statute would apply to lobbyists and to nonlobbyists alike.[33]

F. *Summary of Section I*

The State of Michigan has an interest in carrying out its governmental functions free from the frustration and distortion which might result from being deceived regarding the facts its officials use in reaching decisions. The state can further this interest by prohibiting the intentional transmission, to government officials, of false information about material facts. By adopting the legislation proposed in this section of the Comment,[34] Michigan can protect the quality of its governmental decision making. *As Michigan law currently stands, government officials can be lied to with impunity!*

II. Regulating Lobbyist Conduct

Although legislation prohibiting the intentional presentation of factual misinformation to government officials would further the government's interest in protecting the integrity of government decision making, such legislation would not further the government's interest in avoiding the appearance of being corrupted and captured by lobbyists.[35] The second section of this Comment argues that Michigan should adopt legislation requiring those who lobby on behalf of others, to be of good moral character.

A. *Overview: Government Regulation of Those Who Present Information to Government Decision Makers*

Both attorneys and lobbyists provide government officials with information. But, Michigan attorneys[36] are held to high standards of professional conduct,[37] while Michigan lobbyists are subject to no such requirements.[38] This section of the Comment argues that

32. *See* source cited *supra* note 10, at 742.
33. *See supra* text accompanying note 26.
34. *See id.*
35. *See* sources cited *infra* note 48. *See also infra* note 52.
36. In Michigan, the term "attorney" may only be used by those admitted to the practice of law in the state of Michigan. *See* MICH. COMP. LAWS § 600.901 (1979) (MICH. STAT. ANN. § 27A.901 (Callaghan 1986)). *See also infra* note 54.
37. *See id.* § 600.910 (MICH. STAT. ANN. § 27A.910). *See also* MICH. R. PROF. COND. Rule 1.0 comment (1988) (Preamble: A Lawyer's Responsibilities).
38. *See* MICH. COMP. LAWS ANN. §§ 4.411-.431 (West 1981 & Supp. 1988) (MICH. STAT. ANN. §§ 4.1704(1)-(21) (Callaghan 1985 & Supp. 1988-89)). "The Act treats attorneys who lobby in an identical manner as non-lawyers, except the Act, in § 2(1), specifically does not govern attorneys' communications with officials in administrative agencies. Attorneys whose

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those who lobby[39] on behalf of others, should be held to standards of professional conduct similar to those imposed on attorneys.

This section first explains why holding lobbyists to high standards of professional conduct will further a state interest.[40] Then, current regulation of attorney conduct[41] is considered and is contrasted to current regulation of lobbyists.[42] After surveying lobbyist conduct regulation in other jurisdictions, the section focuses on a statute[43] which has survived intense judicial review,[44] and which imposes high professional standards on lobbyists.[45] Next, the section proposes a statute which, if enacted, would hold lobbyists to standards of professional conduct similar to those imposed on attorneys. The section then proceeds to explore the first amendment right to petition,[46] the limits it places on regulating lobbyist conduct,[47] and how the proposed statute complies with constitutional requirements. The Comment concludes by recommending legislation (1) to discipline those who fraudulently deceive government officials on factual matters, and (2) to hold lobbyists to standards of professional conduct similar to those imposed on attorneys.

B. *State Interest in Regulating Lobbyist Conduct*

The United States Supreme Court has recognized that government has a substantial interest in "deter[ing] actual corruption and avoid[ing] the appearance of corruption" in government.[48] Moreover, it has observed that the people of this nation hold lobbyists in great disrepute.[49] Since these observations were made,

activities relate to the practice of law, . . . do not fall under the ambit of the Act." Pletz v. Secretary of State, 125 Mich. App. 335, 348, 336 N.W.2d 789, 796 (1983).

39. Neither "lobby" nor "lobbyist" is a term with a universally accepted definition. The statute regulating lobbyists must be consulted for the operative definition in each jurisdiction. For the purposes of this Comment, the author defines lobbying to be: all activities undertaken to either promote or oppose legislation before the legislature, or official action by any public official. *See infra* text accompanying notes 92 & 93.

40. *See infra* note 107.

41. *See* sources cited *infra* notes 54-59 and accompanying text.

42. *See* sources cited *supra* note 38.

43. MONT. CODE ANN. §§ 5-7-101 to -305 (1987).

44. *See* Montana Auto. Ass'n v. Greely, 632 P.2d 300 (Mont. 1981).

45. *See* MONT. CODE ANN. §§ 5-7-101, -302 (1987).

46. "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I. *See also* MICH. CONST. of 1963, art. I, § 3 (state constitutional provision guaranteeing the right to petition).

47. Although it is incompatible with the first amendment right of free speech to require a person to register before making a public speech, regulating lobbyists and requiring them to register does not run afoul of first amendment freedoms. *See* United States v. Harriss, 347 U.S. 612, 625-26 (1954); Thomas v. Collins, 323 U.S. 516, 539-43, *reh'g denied*, 323 U.S. 819 (1945).

48. Buckley v. Valeo, 424 U.S. 1, 66-67 (1976). *See also* sources cited *infra* note 53.

49. *See* Meese v. Keene, 481 U.S. 465, 485 n.19 (1987).

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scandals involving corrupt lobbying have occurred in both our national government[50] and our state government.[51] These lobbying scandals have further eroded public confidence in government.[52] By prohibiting corrupt lobbying practices, Michigan will further its interest in detering actual corruption and avoiding the appearance of corruption in state government.[53]

C. *Current Michigan Regulation of Attorneys and Lobbyists*

In Michigan, applicants may be admitted to the practice of law[54] only if they demonstrate that they are of good moral character.[55] Once admitted, attorneys are held to a very high standard of conduct.[56] Attorneys who fail to live up to these lofty standards may be punished by disbarment or suspension.[57] If serious enough, a breach may constitute contempt[58] of court punishable by fine, imprisonment, or both.[59]

Unlike attorneys, Michigan lobbyists are not required to be of good moral character,[60] nor may their lobbying privileges be sus-

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50. *See* 10 Legal Times, Dec. 21, 1987, at 10, col. 1 ("Deaver, the first person convicted after a trial by an independent counsel appointed under the ethics act, was charged with lying to a federal grand jury and to a congressional subcommittee about his lobbying contacts.").

51. *See* Lansing State Journal, June 26, 1988, at 1A, 4A col. 1 ("[Lobbyist Judy] Augenstein is accused of offering State Rep. Ed Gleas, R-Manistee, $2,500 to drop support for a ban on radar detectors. . . . A judge ruled June 2 that Augenstein must stand trial, probably in the fall."); Lansing State Journal, June 26, 1988, at 1A, 2A col. 1 ("A jury found lobbyist Judy Augenstein not guilty Friday of bribing a state representative more than two years ago."); People v. Augenstein, No. 88-57397FH (54 A Cir. Ct. July 7, 1989).

52. *See id.* ("Lobbying has become a hot subject under the [Lansing] Capitol dome. With the bribery trial of lobbyist Judy Augenstein looming this fall, Michigan's lobbying corps finds itself in the light of public scrutiny."). *See also id.* at 1A, col. 1 ("'I think half a dozen lobbyists have absolute control over the Legislature far more than the governor or the political parties.'") (quoting Frank Kelly, Attorney General of Michigan).

53. *See Advisory Opinion on Constitutionality of 1975 P.A. 227, (Questions 2-10)*, 396 Mich. 465, 489, 513, 242 N.W.2d 3, 12, 23 (1976); Pletz v. Secretary of State, 125 Mich. App. 335, 356, 336 N.W.2d 789, 800, *leave for appeal denied*, 417 Mich. 1110.20 (1983).

54. Practice of law: "The rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent." BLACK'S LAW DICTIONARY 1055 (5th ed. 1979). *See* MICH. COMP. LAWS § 600.916 (1979) (MICH. STAT. ANN. § 27A.916 (Callaghan 1986)).

55. Good moral character is the propensity of the license applicant "to serve the public in the licensed area in a fair, honest, and open manner." MICH. COMP. LAWS ANN. § 338.41 (West 1976 & Supp. 1988) (MICH. STAT. ANN. § 18.1208(1) (Callaghan 1986)). *See* MICH. COMP. LAWS § 600.934(1)-(2) (1979) (MICH. STAT. ANN. § 27A.934(1)-(2) (Callaghan 1986)).

56. *See* MICH. R. PROF. COND. comment (1988) (Preamble: A Lawyer's Responsibilities).

57. MICH. COMP. LAWS § 600.910 (1979) (MICH. STAT. ANN. § 27A.910 (Callaghan 1986)); MICH. R. PROF. COND. Rule 1.0(b) (1988).

58. MICH. COMP. LAWS ANN. § 600.1701 (West 1981 & Supp. 1988) (MICH. STAT. ANN. § 27A.1701 (Callaghan 1986 & Supp. 1988-89)).

59. *Id.*

60. *See* sources cited *supra* note 38.

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pended or revoked.[61] The only requirements imposed on lobbyists are that they register,[62] report expenditures,[63] maintain records,[64] refrain from giving gifts to those they lobby,[65] and that they not accept compensation contingent upon successful lobbying efforts.[66] *Lobbyists are not required to impart truthful information to those they lobby.* Elevating the professional conduct standards of lobbyists to those of attorneys requires legislation which would permit the state to suspend and revoke lobbying privileges.

D. *First Amendment Constraints on State Regulation of Lobbyists*

The proposed statute does not impose a good moral character requirement on lobbyists who are representing their own interests. Imposing such a requirement would infringe upon the citizenry's first amendment[67] right to petition the government for redress of grievances.[68] Understanding how the state can regulate the practice of law enlightens us as to how the state can regulate lobbying, since the right to petition extends to administrative agencies and to each branch of the government.[69] Lobbying is a form of petitioning administrative agencies, the executive, and the legislature;[70] the practice of law involves petitioning the judicial branch.[71]

The right to petition includes the right to appear in court and to prosecute or defend a suit in one's own name.[72] It also includes

61. *See id.*

62. MICH. COMP. LAWS §§ 4.417(1)-(2) (1979) (MICH. STAT. ANN §§ 4.1704(7)(1)-(2) (Callaghan 1985)).

63. MICH. COMP. LAWS ANN. § 4.418 (West 1981 & Supp. 1988) (MICH. STAT. ANN. § 4.1704(8) (Callaghan 1985 & Supp. 1988-89)).

64. MICH. COMP. LAWS § 4.419 (1979) (MICH. STAT. ANN. § 4.1704(9) (Callaghan 1985)).

65. MICH. COMP. LAWS § 4.421(2) (1979) (MICH. STAT. ANN. § 4.1704(11)(2) (Callaghan 1985)).

66. *Id.* at § 4.421(1), (MICH. STAT. ANN. at § 4.1704(11)(1)). *See also infra* note 106.

67. Lobbying regulations do not impinge upon the first amendment right of free speech, but may impinge on the right to petition. This is because lobbying regulations affect communications with the government, not communications with the people. *See* Thomas v. Collins, 323 U.S. 516, 530, *reh'g denied*, 323 U.S. 819 (1945) (the rights of free speech, free press, to assemble, and to petition are not identical rights). *See also id.* at 532 (free speech protects the right to discuss and inform the *people* on issues); California Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (the right of petition protects the right of individuals to address their *government*). *But see generally* sources cited *supra* note 9 (regulating lobbyist conduct in the manner suggested by this Comment passes constitutional muster even when subjected to first amendment strict scrutiny review).

68. *See* sources cited *supra* note 46.

69. California Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

70. *See Advisory Opinion on Constitutionality of 1975 P.A. 227 (Questions 2-10)*, 398 Mich. 465, 513, 242 N.W.2d 3, 22-23 (1976).

71. *See* State *ex rel.* Reed v. Schwab, 287 Or. 411, 417-18, 600 P.2d 387, 391 (1979), *cert. denied*, 444 U.S. 1088, *reh'g denied*, 445 U.S. 955 (1980).

72. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 829-30 (1824). *See* 28

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the right to argue one's own case before an appellate court.[73] However, the right to petition does not include the right to have an unlicensed layman represent one in court proceedings,[74] nor does the right permit an unlicensed layman to demand to represent other litigants.[75] For, even though the federal courts recognize an unlicensed person's right to litigate *pro se*,[76] they do not recognize that an unlicensed person has a right to litigate on behalf of another.[77]

Therefore, while "no law consistent with the first amendment could limit to licensed professionals the right to petition the government for redress of grievances,"[78] the government can license those who petition the judicial branch on behalf of others.[79] As such, the right to petition is an individual right which does not entitle one to present grievances on behalf of others.[80] Thus, the proposed statute does not tread upon first amendment rights, because the statute only requires good moral character of those who

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U.S.C. § 1654 (1982) (federal codification of right to litigate *pro se*). *See also* MICH. CONST. of 1963, art. I, § 13 (state constitutional provision guaranteeing right to litigate *pro se*).

73. *Schwab*, 287 Or. at 418, 600 P.2d at 391.

74. "[T]he Constitution of the United States, in particular the First and Sixth Amendments, does not grant to the Plaintiffs the right to have an unlicensed layman represent them in Court proceedings." Turner v. American Bar Ass'n, 407 F. Supp. 451, 478 (N.D. Tex.; W.D. Pa., N.D. Ind., D. Minn., S.D. Ala., and W.D. Wis. 1975), *aff'd sub nom.* Taylor v. Montgomery, 539 F.2d 715 (7th Cir. 1976), *aff'd sub nom.* Pilla v. American Bar Ass'n, 542 F.2d 56 (8th Cir. 1976). Although district court opinions generally have no precedential value outside of the district, this case carries more weight. The trial judge was chosen by the Chief Justice of the U.S. Supreme Court and the Chief Judge of the fifth circuit because the claims disqualified almost all of the federal judiciary. The decision was to have *stare decisis* precedential value throughout the federal court system. *Id.* at 456-57, 483.

75. "[U]nlicensed laymen cannot under the [first and sixth amendments to the] Constitution demand the right to represent other litigants." *Turner*, 407 F. Supp. at 478.

76. *Pro se*: "For himself; in his own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court." BLACK'S LAW DICTIONARY 1099 (5th ed. 1979). *See* case cited *supra* note 72.

77. *See supra* note 75.

78. State *ex rel.* Reed v. Schwab, 287 Or. 411, 418, 600 P.2d 387, 391 (1979), *cert. denied*, 444 U.S. 1088, *reh'g denied*, 445 U.S. 955 (1980).

79. *See* Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957). *See also* Sperry v. Florida, 373 U.S. 379, 382-83 (1963).

80. Two federal district courts have held that to bar a person from lobbying is an unconstitutional infringement on the right of petition. In each case, the bar was held to infringe upon the individual lobbyist's right to petition. Neither decision involved a bar solely on lobbying on behalf of others. Both decisions were reviewed by the United States Supreme Court. The first case was vacated by the Court for failure to properly join a government official. National Ass'n of Mfrs. v. McGrath, 103 F. Supp. 510 (D.D.C.), *vacated as moot*, 344 U.S. 804, *reh'g denied*, 344 U.S. 867 (1952). The second case was reversed on other grounds: the Court expressly refused to reach the petition issue. United States v. Harriss, 109 F. Supp. 641 (D.D.C. 1953), *rev'd*, 347 U.S. 612, 627 (1954). *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW §§ 10.2 at 315, 16.53-16.54 (3rd ed. 1986). *But cf.* Organizational "lobbying is protected by the First Amendment . . . ." Regan v. Taxation With Representation of Washington, 461 U.S. 540, 552 (1983) (Blackmun, J., concurring).

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lobby on behalf of others.

E. Lobbyist Conduct Regulation in Other Jurisdictions

The federal government[81] and all but three states[82] regulate lobbying. While fifteen[83] of these states prohibit lobbyists from knowingly deceiving officials regarding issues of fact, only Indiana,[84] Nebraska,[85] and Montana[86] have statutes which contain good conduct requirements. Montana is the only state which holds lobbyists to high standards of professional conduct[87] and provides for revocation of lobbying privileges[88] if those requirements are not met.[89]

Montana's lobbyist licensing act[90] requires that all lobbyists be adult citizens of good moral character.[91] Furthermore, the act defines lobbying to include promoting or opposing "legislation before the legislature"[92] and "official action by any public official."[93] Finally, the act provides civil[94] and criminal[95] penalties, as well as for suspension[96] or revocation[97] of the licenses of those who "engage in or directly or indirectly authorize unprofessional conduct."[98] These professional conduct and revocation provisions have survived intense judicial scrutiny.[99] Because the act does not regulate individual citizens acting solely on their own behalf,[100] the statute does not conflict with the first amendment right to petition.[101]

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81. *See* 2 U.S.C. §§ 261-70 (1982).
82. The three states are: Delaware, Iowa, and West Virginia.
83. The fifteen states are: Alabama, Alaska, Arizona, California, Idaho, Montana, Nebraska, Nevada, New Jersey, Oklahoma, Oregon, Tennessee, Texas, Utah, and Washington.
84. *See* IND. CODE § 2-7-5-8 (Supp. 1981).
85. *See* NEB. REV. STAT. § 49-1492 (reissue 1984).
86. *See* MONT. CODE ANN. §§ 5-7-102(7), 5-7-302 (1987).
87. *Id.* at § 5-7-305(2).
88. *Id.*
89. *Id.* at §§ 5-7-102(7), 5-7-301(1), 5-7-302, and 5-7-305(2).
90. *Id.* at §§ 5-7-101 to 5-7-305.
91. *Id.* at § 5-7-103.
92. *Id.* at § 5-7-102(4)(a).
93. *Id.* at § 5-7-102(4)(b).
94. *Id.* at § 5-7-305(2).
95. *See Id.* at § 5-7-305(1).
96. *Id.* at § 5-7-305(2).
97. *Id.*
98. *Id.* at § 5-7-302.
99. *See* Montana Auto. Ass'n v. Greely, 632 P.2d 300 (Mont. 1981). *But see generally id.* at 308 (provision prohibiting contingent compensation struck down as overbroad on both first amendment and separate state grounds).
100. MONT. CODE ANN. § 5-7-102(5)(b)(i) (1987).
101. *See id.* at § 5-7-101(2). *See also supra* note 80 and accompanying text.

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F. Statute Proposed to Regulate the Conduct of Michigan Lobbyists

Michigan has a good moral character statute,[102] which is employed to regulate the conduct of members of selected state occupations.[103] As a result, Michigan does not need to enact a statute specifying prohibited lobbyist activities, rather it can regulate lobbyist conduct by imposing a good moral character requirement on lobbyists. It may do so by amending the Lobbyist Registration Act to state:

(1) No person may register to lobby on behalf of another unless the registrant is of good moral character.

(2) No person may lobby on behalf of another unless the lobbyist is of good moral character.

CONCLUSION

By adopting the legislation proposed in the first section of this Comment, Michigan can further its interest in protecting the quality and integrity of government decision making. However, in the final analysis, the State of Michigan also has a compelling interest in "deter[ing] actual corruption and avoid[ing] the appearance of corruption" in government.[104] The state can further this interest by holding those who lobby on behalf of others to standards of professional conduct similar to those to which it holds attorneys.

By adopting legislation requiring lobbyists to be of good moral character,[105] Michigan can protect[106] its government officials, and the public, from corrupt lobbyists.[107] The Legislature already re-

102. MICH. COMP. LAWS ANN. § 338.41 (West 1976 & Supp. 1988) (MICH. STAT. ANN. § 18.1208(1) (Callaghan 1986)).

103. *See infra* note 108.

104. *See* sources cited *supra* notes 48 and 53.

105. *See supra* note 55.

106. Michigan's current prohibition on contingent compensation of lobbyists might be rendered unconstitutional by the adoption of lobbyist conduct regulations similar to Montana's. When a state is able to protect itself from the potential evils of contingent lobbying, a statute which prohibits noncorrupt contingent lobbying may be struck down as overbroad. *See supra* note 99. *See also* source cited *supra* note 66.

107. Because regulation of lobbying on behalf of others does not impinge upon the exercise of any fundamental right, a statute regulating such lobbying is valid as long as the statute could rationally further a legitimate state interest. *See* Regan v. Taxation With Representation of Washington, 461 U.S. 540, 547 (1983) ("Generally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose. Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech, or employ a suspect classification, such as race."). *See also* Montana Auto. Ass'n v. Greely, 632 P.2d 300, 303 (Mont. 1981) ("Whether enacted by the legislature or created by the people through initiative, all statutes carry with them a presumption of constitutionality." (relying on State v. Erickson, 75 Mont. 429, 435, 244 P. 287, 290 (1926)); "When a statute is challenged as being unconstitutional, the challenger must show that it does in fact infringe upon a right guaranteed by the Constitution." (relying on

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quires good moral character of attorneys, barbers, manicurists, horologists, dead stock (animal) haulers, and of the practitioners of many other occupations.[108] In stark contrast, the Legislature has apparently determined that neither the people of Michigan nor their officials need to be served fairly, honestly, and openly[109] by lobbyists. Of course, the Legislature has made this same choice respecting some other Michigan occupations. *As Michigan law currently stands*, excepting disclosure obligations,[110] *there are no material differences in registration requirements for lobbyists* — [111] those who feed information to legislators — [112] *and* licensure requirements *for those who feed garbage to swine!*[113]

GLENN P. HOGAN

NAACP v. Alabama, 357 U.S. 449 (1958)).

108. The Legislature has imposed good moral character requirements on attorneys and on the practitioners of these other occupations: architect, barber, chiropractor, collection agency manager, cosmetologist, dead stock (animal) hauler, doctor of medicine, electrologist, licensed professional engineer, registered forester, hearing aid dealer, hearing aid salesperson, hearing aid trainee, horologist (watchmaker and repairer), horology apprentice, landscape architect, manicurist, medical training student (postgraduate), practical nurse, registered nurse, school nurse, optometrist, osteopathic physician, pharmacist, physical therapist, physician's assistant, podiatrist, private detective (or private investigator), employment agent, psychologist, residential builder, residential maintenance and alteration contractor, sanitarian and veterinarian. *See e.g.*, MICHIGAN EMPLOYMENT SEC. COMM'N OCCUPATIONAL RESEARCH SECTION, MICHIGAN LICENSED OCCUPATIONS (1986).

109. *See supra* note 55. *See also supra* text accompanying note 60.

110. *See* sources cited *supra* notes 62 & 63 and accompanying text.

111. The only requirement to lobby in Michigan is registration with the Secretary of State. The registrant must disclose the persons the lobbyist employs to lobby in Michigan and also disclose persons who compensate or reimburse the lobbyist. *See* sources cited *supra* note 38.

112. *See* MICH. COMP. LAWS ANN. § 4.415(2)-(4) (West 1981 & Supp. 1988) (MICH. STAT. ANN. § 4.1704(5)(2)-(4) (Callaghan 1986 & Supp. 1988-89)).

113. The only requirement to feed garbage to swine in Michigan is registration with the director of the Michigan Department of Agriculture. *See* MICH. COMP. LAWS § 287.401(c), 287.402(a) (1979) (MICH. STAT. ANN. § 12.483(1)(c), 12.483(2)(a) (Callaghan 1981)).

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THE CATHOLIC UNIVERSITY OF AMERICA
Washington, D.C. 20064

SPECIAL REPORT

Developing Legislative Testimony

INTRODUCTION

Political influence and power an be seen as growing out of the bility to deliver any one of hree commodities: money, votes, r information.1/ The capability o provide money is channeled hrough political action commitees or other political contribuion mechanisms. The delivery of ampaign volunteers and voters epends on an organization's abilty to mobilize its membership and onstituency. Advocacy, agency, nd professional organizations in he social service field have not raditionally been strong in deliering money and votes, although ome improvement in this area is ccurring as social service professionals become more politically sophisticated.

The third "commodity" that leads to political influence is information. While money and votes, relating as they do to a politician's self-preservation, can earn ongoing access and influence (if not necessarily agreement) on a wide range of issues, the influence earned by information is more focused and limited, generally applying only to a specific political or legislative issue. Nonetheless, information is a powerful tool for shaping public policy. Legislators and their staffs have a real need for accurate data and expert analysis of the issues on which they must base decisions. Experts, providers, and consumers of services are valuable information resources for politicians. Through the effective and timely presentation of information, interested persons and groups can have a substantial impact on the course and content of legislation.

"Political influence and power can be seen as growing out of the ability to deliver...money, votes or information."

Influencing legislation through information occurs through both "informal" and "formal" interventions, with the major "formal" mode being the presentation of testimony at legislative hearings. The development of testimony will be the primary focus of this article.

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CHOOSING AN INTERVENTION

Through whatever monitoring process you may use, during the course of a legislative session you will identify certain legislative issues in your area of concern. In this section I will, first, list some of the factors to consider in deciding whether and how to take action on a particular issue. Second, I will briefly mention the types of "informal" interventions available. Finally, I will discuss the different "formats" for presenting formal testimony on an issue.

FACTORS TO CONSIDER IN DECIDING ON AN INTERVENTION:

- IMPORTANCE OF THE ISSUE TO YOU, YOUR ORGANIZATION, AND YOUR CONSTITUENCY

How central is this particular legislative issue to you and your organization's mission? Is it integrally connected to your social function, or is it relatively peripheral? To what extent will your clientele or constituency be affected by legislation on this topic?

- TIME AVAILABLE TO PREPARE AND TIMING OF LEGISLATIVE PROCESS

When will the legislative body (committee, legislature, etc.) actually take up this issue? Based on that information, how much time and staff resources can you devote to preparing to present information on this matter?

- WHAT WILL OTHERS DO?

Is it likely that other organizations or individuals will present information on this issue, covering basically the same ground you would cover? If so, it may be possible for you to "sign on" to their statement, or otherwise endorse their position without developing your own testimony. On the other hand, if you don't come forward on this issue, will certain important points go unsaid?

"The extent of your real contribution on an issue is often a useful guide in determining the best format for your involvement."

- WHAT HAVE YOU TO OFFER ON THIS ISSUE?

The extent of your real contribution on an issue is often a useful guide in determining the best format for your involvement. If you would be providing generalized support or criticism of a legislative proposal, a lesser level of involvement is called for than if you have specific arguments and data to augment your position. If you have detailed data, analysis, or major alternatives to put forward on a topic, then more extensive types of involvement are called for.

At Metro D.C. National Association of Social Workers we have tried to move away from simply "expressing concern" on various legislative issues, to focus more on presenting arguments supported by data and analysis. I have found that legislators and their staffs consider "information rich" presentations to be both more useful to them in formulating policy, and more credible as substantiated expert opinion.

- VISIBILITY

The above notwithstanding, sometimes it's wise to present

estimony just to keep yourself in he public eye. As a part of uilding recognition for your organization you need to be "visile." Staying visible sometimes eans presenting testimony on reltively "peripheral" issues, ssues not necessarily central to he primary thrust of your organiation. To a certain extent, you ay want to testify on "side ssues" to get your group known as politically active organization. hen it comes time to lobby for an mportant issue, it may help if he legislative community already as some familiarity with you.

"[S]ometimes it's wise to present testimony just to keep yourself in the public eye."

You may also want to be "visble" on an issue as a way of aserting your involvement in a subect area that is important to ou, but on which you haven't the esources to develop a major tatement. At Metro D.C. NASW, or example, we have presented airly brief testimony at several udget and block grant hearings. acking the resources to undertake ajor budgetary analysis, we've onetheless managed to establish ur presence in these areas.

LINKAGES: HELPING YOUR RIENDS

Preparing testimony can be an pportunity to inaugurate or ceent alliances with other agencies nd organizations. If an issue is f minor importance to you, but is trongly supported or opposed by n ally (or potential ally), it ay be worthwhile to actively come forward to support your ally's

"Another factor...is the personality, predisposition, and political orientation of the legislators and staff people who will be reviewing an issue."

position. In most cases, the group you're supporting on an issue can provide you with the background information you will need to prepare a statement. The exchange of political favors among groups with mutual or complementary interests is a basic part of the political process, and will pay off when you need support for your key issue someday.

- LEGISLATOR AND STAFF INCLINATIONS

Another factor to keep in mind is the personality, predisposition, and political orientation of the legislators and staff people who will be reviewing an issue. Legislators and staff people specialize, becoming well-versed in a few subject areas. They have relatively little expertise in most areas. On any legislative issue, then, most legislators will rely on briefings from staff, or on the views of those legislators who specialize in that subject area, in forming their opinions. The importance of legislative staffs is usually underestimated, but they are particularly important when information is a group's main currency for influence. It is the staff's job to draft legislation, set up hearings, brief legislators on issues, and write summary reports on legislative matters. Knowing the idiosyncrasies and political leanings of the key legislators and key staff people on an issue can give you im-

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TYPES OF LEGISLATIVE INTERVENTION

- INFORMAL INTERVENTIONS

Informal interventions tend to fall at both ends of the spectrum: situations where one is very peripherally involved, and situations where one is very centrally involved as a political actor. In the "peripheral" category come letters to legislators, sent at the behest of allies, or as part of a widespread campaign in which you are a minor part. Also "peripheral" are those cases in which you call a legislative staff person to inquire about a legislative proposal, but take no action. Such calls not only get you the information you seek, they also keep you visible -- even if your group takes no action, you at least knew the proposal was there. But "peripheral" interventions are by definition not very important, and shouldn't be your main form of legislative activity.

The situations where you are most centrally involved are, typically, those where you are the prime mover behind proposed legislation. If your organization is leading the fight for a particular bill, then you will want to meet early on with key legislators and staff, to educate them on the issue, to solicit their support for your proposed legislation, and to locate a legislator willing to sponsor your bill. Such an endeavor will require substantial amounts of staff time, and will probably be a major focus of your group's activity for a period of several years. Another type of "central" involvement occurs when you want to block legislation that is still in the talking stage. If you've heard that a particular proposal is making the rounds, and you are sufficiently concerned about its potential adverse impact, you may want to arrange meetings with legislators and staff to discuss your concerns, before anyone introduces legislation. Such a meeting may be most effective when you are accompanied by representatives from allied organizations, thus presenting a broad front of opposition early on.

"Formal' intervention . . . refers to presenting testimony at legislative hearings, or . . . formal statements to be included in hearing records."

- FORMAL INTERVENTIONS

"Formal" intervention, as I am using the term in this article, refers to presenting testimony at legislative hearings, or to presenting formal statements to be included in hearing records. Legislative hearings are the public's opportunity to "have its say" on legislative proposals, and this can sometimes be a procedural formality. In most cases, however, hearings are a real opportunity for legislators to receive needed information and comment on proposed laws. I have frequently seen comments put forward at public hearings have a major impact in re-shaping, or blocking passage of, a particular bill. Expert, "information-rich" testi-

mony is the most likely to have this effect.

There are four basic formats for presenting information at hearings:

1) Oral Testimony Presented At Hearings, Followed By a Written Statement Later.

If you learn about hearings on an issue on short notice, you may only have time to reshuffle your schedule and get there, speaking from notes and promising the legislators that you will submit a written statement later. However, coming to a hearing to speak without accompanying written testimony smacks of being unprepared, and it would be unadvisable to do this on an issue where you were very involved. In situations where your testimony is more supportive or general, however, it will sometimes be better to present oral testimony without a written copy than to not show up at all. Providing a follow-up written copy--based on your notes--allows for an accurate record of your comments to be placed in the hearing record and summarized in the legislative committee's report.

2) Oral Testimony Presented Without Follow-Up Written Statement.

This is only acceptable at hearings that are pretty much pro forma (e.g. at the confirmation hearings of an appointee who's certain to be approved). In almost any other circumstance, if you testify, you should submit a written version of your statement as well.

3) Oral And Written Testimony Presented Together At Hearings.

This is the standard way to present testimony, appropriate for most situations. In this format, you write up your testimony, and then go in and read it aloud at the hearing. If your written testimony takes longer to read than your allotted time to speak, read highlights or summaries of your written statement. (Incidentally, when you sign up with the legislative staff to present testimony at a hearing, be sure to ask how long you will have to speak. Plan to stick to this limit; most legislatures abide firmly by their time limits, and you don't want to be cut off before your conclusion.) After you present your prepared testimony, legislators may ask you questions. Questions are most likely if your organization is centrally involved in the issue, or if your testimony is particularly substantial.

If you choose this format for intervention, bring sufficient copies of your written testimony so that each legislator and staff person present can have a copy. I think it's also a good idea to bring extra copies to share with others attending the hearing--press, representatives of other groups who are testifying, etc. They are all interested in this issue, too, and you advance your message by spreading it among these people. Depending on the newsworthiness of the issue and of your contribution, you may want to send out press releases, hold a news conference, etc. in conjunction with your testimony.

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"Hello

"Written statements can usually be submitted for a specified period after the actual hearing date."

4) Written statement submitted for the hearing record.

In most legislative hearings, interested parties have the option of submitting a written statement in lieu of presenting oral testimony at the hearing itself. The written statement is included in the hearing record, and may be discussed in a summary report prepared by legislative staff. Written statements can usually be submitted for a specified time period after the actual hearing date. In some cases, time pressures will require you to choose this format to make your views known. As a rule, however, I don't recommend it. If you are going to go to the trouble of developing a statement on an issue, you may as well get the extra impact and visibility to be gained by actually showing up at hearings to present it.

WRITING TESTIMONY: A FORMULA

In this section, I will present a "formula" for writing effective testimony and similar issue statements. The formula may not be ideal for all situations, but I hope it will help readers who are new to legislative activity.

Basically, the formula consists of four paragraphs:

- Paragraph One is: "Hello, I am/We are ..."
- Paragraph Two is "I/We believe ..."
- Paragraph Three is "Why ..."
- Paragraph Four is "Therefore, I/We Believe ..."

In practice, of course, any or all of these "paragraphs" may take up several paragraphs or even many pages. Structurally, however, testimony can be prepared by thinking of it as consisting of these four paragraphs.

- Paragraph one:

In paragraph one, you want to identify yourself and your organization, and to establish three things: 1) your credentials as an expert in the field under discussion; 2) if appropriate, your organization's political clout via the inferred ability to deliver votes; and 3) you and your organization's relevance and importance to the issue at hand.

Begin by introducing and identifying yourself and your group. Then, to establish your expertise, mention any distinctive educational attainments ("I did my doctoral dissertation on this subject"), cite publications written or advisory positions you hold, or simply note your extensive experience ("I've worked in this area for twelve years.")

Your ability to bring in votes may be implied if you can mention the size of your organization's membership or clientele. If it is large, or if it is known that your constituency has been politically active in the past,

"Begin by introducing and identifying yourself and your group."

:he reference to your numbers will serve its purpose.

Your relevance to the issue it hand is simply a matter of clarifying how you are connected to an issue. If you or your group is centrally involved, this is easily said ("we are the primary agency providing this service in city X serving over 1,500 families in the last year"). If you are involved as an advocate/expert, reference should be made to your constituency ("our organization is a consortium of agencies, universities, and professionals in the field"). If you are more peripherally involved in the issue --perhaps you are testifying as a favor to an ally--you may cite your general mission as being relevant ("we are concerned with this issue as it impacts the health of children").

All of paragraph one should usually fit in one or two actual paragraphs. Below is an example of a "paragraph one" in two paragraphs from NASW testimony on a "Death With Dignity" bill in the D.C. Council.

> I am Mila Tecala, a clinical social worker, specializing in work with the dying and their families. I have worked in the field of death and dying for thirteen years. I presently maintain a private practice in the District, and serve as a consultant to the Hospice Institute in New Haven, Connecticut, Hospice Care of D.C., the Northern Virginia Hospice, and to the National Cancer Institute.
>
> I serve also on the Board of Directors of the National Association of Social Workers, Metropolitan Washington D.C. Chapter. Our professional association represents more than 2,300 social workers, more than half of whom live or work in the District. Many social workers - in hospitals and hospices, in nursing homes and mental health clinics and in other community and private settings -- work closely with the dying and their families.2/

- Paragraph Two

In one or two paragraphs, establish in "paragraph two" the main point of your testimony. State your main belief and any major corollary points. If you will have lengthy or complex background to report in the body of your testimony, it may be helpful to give a "preview" of what's to follow (the preview could say, "we will discuss ----, then review ----, and then show how doing ---- would lead to ----."). An example of a brief "paragraph two," from a statement on proposed amendments to a mental health confidentiality law:

> In our opinion, the proposed changes would vitiate the essential confidentiality needed to

> render effective mental health care. By striking the requirement for "independent review," the proposed amendments make the insurance carriers the proprietors of sensitive and detailed, personally identifiable mental health information, beyond what is needed to simply handle claims.3/

- PARAGRAPH THREE

This is where you develop your idea, bring forward supporting arguments, data, background information, illustrations from cases and anecdotes, etc. All the "why" for your main point goes in paragraph three.

There are, incidentally, varying opinions on the wisdom of using anecdotes and case examples in testimony. Some people believe that legislators hear too much of these and that it turns them off, while others find it an effective way to illustrate the consequences of public policy. My advice is to study your key legislators, try to learn what kinds of information they respond to, and then focus your "paragraph three" supporting arguments in that direction. Anecdotes, if clearly relevant and not over-used, will be helpful with some legislators.

I am not including an example of a "paragraph three," since here form is far less important than content. In situations where you are testifying for visibility's sake, or on "general principle," or in support of an ally, your paragraph three is likely to be short -- perhaps one, two, or three actual paragraphs of fact analysis. When you are more heavily invested in an issue, your "paragraph three" may run on for many pages, with various appendices added for legislators and their staffs to review.

"[S]tudy your key legislators, try to learn what kinds of information they respond to, and then focus your... supporting paragraph in that direction."

- PARAGRAPH FOUR

This is your summary. Here you restate your main point, make reference to the evidence or arguments you have presented, and restate your or your organization's connection to the issue. Clearly state your position on the legislation in question (support, oppose, favor amendments, etc.). If you have presented substantial arguments or controversial testimony, indicate that you are available to provide further information if requested. "Paragraph four" should be a brief summary of your overall presentation, and should normally run one or two actual paragraphs.

An example of a paragraph four", from NASW testimony supporting the licensure of nurse-midwives:

> Social workers, as health care professionals, work closely with nurse-midwives and other professions in maternity health care settings.

We believe that the licensing of certified nurse-midwives is a practical means to expand the health care resources available in the District. This expansion of qualified health care personnel will lead to improved services to pregnant women and their families, and will favorably impact the infant mortality rate in the District. The National Association of Social Workers, Metropolitan Washington, D.C. Chapter, strongly supports the passage of Bill 40132.4/

"Information can be a useful commodity in helping to shape legislation and public policy."

SUMMARY

Information can be a useful commodity in helping to shape legislation and public policy. A variety of factors need to be assessed when considering legislative activity, so that the appropriate level of intervention is chosen. Using a "formula" for writing testimony may help that task go more easily, especially for those starting out as legislative activists. Key elements of testimony are: Whom I Am, What I Believe, Why, and a Summary of main points.

FOOTNOTES

1. From a talk by Mark Battle, ACSW, at March, 1983 Metro D.C. NASW Conference.

2. From Metro D.C. NASW testimony before the D.C. Council, May 28, 1981.

3. From a joint statement, signed by 11 professional and community groups, to a D.C. Council Committee Chair, November 20, 1981. Language written by Metro D.C. NASW, from an original draft by George McMahon, M.D.

4. From Metro D.C. NASW testimony before the D.C. Council, July, 1982.

Acknowledgments: I would like to acknowledge Cynthia Roberson, ACSW, who has been influential in helping me develop the "formula" for testimony. (However, all responsibility for the contents of this article is mine).

ABOUT THE AUTHOR

For the last two years Michael Abrahams has been the legislative staff person for the Metropolitan Washington, D.C. Chapter of the National Association of Social Workers, a professional organization in the social work field. In this capacity he has prepared and presented testimony before the District of Columbia Council, which functions as the state legislature of the District of Columbia. This article was adapted from a workshop he gave in March, 1983.

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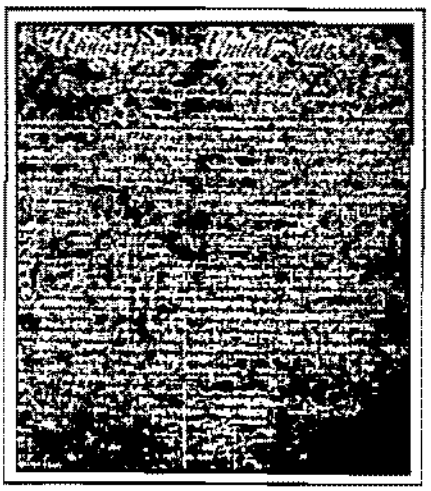

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McFADDEN

# of Gifts to Public Officials

Public attention has recently turned toward the receipt of gifts by public officers and elected officials at every level of government. Media reports, anecdotal stories, even a Leon County grand jury presentment have fired the public imagination to conceive of a state government where bribes thinly disguised as "gifts" are bestowed by lobbyists upon the state's policymakers. The public has demanded greater restrictions upon "gifts" and increased accountability from its leaders.

Responding to the public's wishes, the legislature, in the 1990 Special "A" Session and in the 1991 regular session, in partnership with Governors Martinez and Chiles, enacted a wide-ranging series of reforms severely limiting gifts and increasing accountability of the state's highest officials to the state's voters. This package imposes upon reporting specified state and local employees a disclosure requirement separate and additional to the annual statement of financial interests found in F.S. §112.3144 (1989) and F.S. §112.3145 (Supp. 1990).

Three pieces of legislation[1] in particular have significantly increased the prohibitions on accepting gifts by public officers, increased the power of the Florida Commission on Ethics, and greatly expanded disclosure requirements with which public officers—and in some cases, private individuals—must comply. This article summarizes and briefly discusses the new prohibitions on accepting gifts and disclosure requirements applicable to government officials.[2]

Applicability

The new gift disclosure laws apply to a broad range of state officers and employees. Specifically, persons subject to these laws are reporting individuals as defined in F.S. §112.3148(2)(d) (1991), and procurement employees as defined in F.S. §112.3148(2)(e) (1991).

A "reporting individual" is one subject to full or limited financial disclosure pursuant to art. II, §8 of the Florida Constitution, and F.S. §112.3145 (1991). Reporting individuals include, but are not limited to, elected constitutional officers, appointed members of state boards, appointed secretaries, assistant or deputy secretaries, executive directors, assistant or deputy executive directors, of each state department, commission, board, or council, and division directors, assistant or deputy division directors, bureau chiefs and assistant bureau chiefs of any state division or bureau, assistant state attorneys, and assistant public defenders.[3]

Local officers and specified local employees defined in F.S. §112.3145(1)(a) (1991) are also subject to the new gift disclosure laws. These include, but are not limited to, elected local officers, appointed members of boards, or commissions, such as expressway authorities or transportation authorities established by general law.[4] Mayors, county and city managers, county or municipal attorneys, county or municipal chief building inspectors, water resources coordinators, and chief pollution or environmental control officers are just a few of the nonelected local officers subject to the new gift disclosure laws.[5]

A "procurement employee" is defined as any employee of an officer, department, board, commission, or council of the executive or judicial branch of state government who participates through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering advice, investigation, or auditing, or in any other advisory capacity in the procurement of contractual services or commodities as defined in F.S. §287.012 (1991), if the cost of such services or commodities exceeds $1,000 in any year.[6] As used in this article, "reporting individual" includes "procurement employee."

Definitions

The term "gift," for purposes of ethics in government and financial disclosure, is defined thus: "[T]hat which is accepted by a donee or by another on the donee's behalf, or that which is paid or given to another for or on behalf of a donee, directly or indirectly, or in trust for his benefit or by any other means, for which equal or greater consideration is not given . . . ."[7]

The definition continues with some examples of gifts, *e.g.*, the use of tangible or intangible personal property, professional services, other personal services for which a fee is normally charged, etc. Included also is "any other similar service or thing having an attributable value not already provided for in this section."[8]

Excluded from the definition of "gift" are inter alia, salaries, commissions, expenses, services, fees and gifts associated primarily with the donee's business or employment,[8] campaign-related or political contributions reported pursuant to F.S. Ch. 106,[10] honoraria or honoraria-related expenses,[11] awards, plaques, certificates, or the like, honorary memberships in service or fraternal organizations, and food or beverage which can be consumed at a single sitting.[12]

F.S. §112.3149 (1991)[13] defines and regulates payment of honoraria to reporting individuals. "Honorarium" is defined in essence as the payment of consideration to or on a reporting individual's behalf, for a speech, oral presentation, writing (other than a book for publication), etc., which is not connected to the reporting individual's normal employment outside his or her public employment.[14]

Although nowhere defined per se, "prohibited donor" is a useful term to describe an individual or entity prohibited from being solicited for gifts and/or honoraria by, or from giving gifts and/or honoraria to, a reporting individual. A "prohibited donor" includes a "lobbyist" as defined in F.S. §112.3148(2)(b) (1991) (for gift purposes) and F.S. §112.3149(1)(d)(1991)(for honoraria purposes) who, in this context, lobbies the reporting individual's agency;[15] the partner, firm, employer, or principal of a lobbyist;[16] and a political committee or committee of continuous existence as defined in F.S. §106.011 (1991).[17] These definitions also govern honoraria.

"Honorarium" does not include expenses such as transportation, room and board, for an honorarium event

An entity of the legislative or judicial branch, a department or a commission of the executive branch, a county, municipality, airport authority, school board, or a direct-support organization specifically authorized by law to support a governmental entity is not a prohibited donor as to gifts over $100 if a public purpose can be shown for the gift.[18]

Prohibitions

A reporting individual is barred from soliciting a prohibited donor for any gift, food, or beverage if such gift is to be for the benefit of the reporting individual, his immediate family, or another reporting individual.[19] A reporting individual is likewise barred from knowingly accepting, directly or indirectly, a gift worth more than $100 from a prohibited donor.[20]

A reporting individual may accept gifts in excess of $100 from nonprohibited donors, subject to the disclosure requirements discussed below. In addition, a reporting individual may accept from a prohibited donor a gift in excess of $100 on behalf of a charitable organization or governmental entity.[21] In this event, however, the reporting individual may not maintain custody of the gift longer than reasonably necessary to transfer the gift to the charitable organization or governmental entity.[22]

A reporting individual is barred from soliciting an honorarium related to his public duties.[23] A reporting individual is barred from knowingly accepting an honorarium from a prohibited donor.[24] A prohibited donor is barred from giving an honorarium to a reporting individual.[25]

"Honorarium" does not include expenses such as transportation, room, and board, for an honorarium event.[26] A prohibited donor may pay a reporting individual or his spouse reasonable expenses to an honorarium event, as discussed below.

Disclosure and Valuation

Reporting individuals now face increased gift disclosure requirements. For the first time, nongovernmental

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individuals who are prohibited donors also must comply with gift disclosure requirements. The new statutes now impose a quarterly disclosure requirement.

A prohibited donor must disclose all gifts to a reporting individual in excess of $25 but less than $100 (gifts over $100, of course, are prohibited).[27] The prohibited donor must file a report on the last day of each calendar quarter, for the preceding quarter.[28] The report must contain a description of each gift made, its monetary value, the name and address of the donor, the name and address of the recipient, and the date the gift was given.[29] The report must be filed with the secretary of state, except when the reporting individual is in the legislative branch, in which case the report must be filed with the Joint Legislative Management Committee.[30] In addition, the donor must notify the reporting individual that the gift will be disclosed in this report.[31] This section does not apply to gifts from government entities, gifts over $100 (which are prohibited), or to gifts accepted on behalf of a governmental entity or charitable organization.[32]

Although barred from payment of honoraria, prohibited donors may pay expenses for honorarium events. Such expenses include the payment of actual and reasonable transportation, lodging, food, and beverage expenses for a reporting individual and spouse.[33] If payment of these expenses is made to a reporting individual, then the prohibited donor must send the reporting individual a statement setting forth the name and address of the person paying the expenses, a description of the expenses paid each day, and the total value of expenses paid for the honorarium event not later than 60 days after the honorarium event.[34]

Reporting individuals must file a disclosure statement with the secretary of state listing every gift valued at over $100 the reporting individual has received during the preceding calendar quarter.[35] The statement is due on the last day of each calendar quarter and covers the previous calendar quarter.[36]

This statement shall include a description of each gift, the name and address of the donor, and the dates when each gift was given, and a copy of any receipt provided by a donor establishing the value of a gift.[37] In addition, the disclosure statement may include an explanation by the reporting individual of the difference (if any) between the value of the gift shown on the gift receipt and the declared value of the gift.[38] This statement must be sworn to by the reporting individual filing it.[39] A reporting individual who does not receive any gifts in excess of $100 during a calendar quarter is not required to file a disclosure statement for that quarter.[40]

Exempt from this requirement are gifts from relatives,[41] prohibited gifts, and gifts from a governmental entity or a direct support organization specifically authorized by law to support a governmental entity.[42]

Reporting individuals must report, no later than July 1 of each year, all gifts which they have received in excess of $100 from governmental entities or direct support organizations specifically authorized by law to support a government entity.[43] The disclosure statement shall provide the identity of

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the donors, description of the gift, the date or dates on which the gift was given, a copy of any receipt provided by the donor, and the value of the total gifts for the calendar year in question.[44] As with quarterly disclosures, reporting individuals are permitted to explain the difference between the value shown on the gift receipt and the value declared on the disclosure statement.[45]

A reporting individual must disclose by July 1 each year all honorarium event-related expenses paid by a prohibited donor.[46] This disclosure must include name, address, and affiliation of the person paying the honorarium expenses, the amount of the expenses, a description of the expenses paid, the date of the honorarium event, and a copy of each statement received by the reporting individual from the expense provider pursuant to F.S. §112.3149(5) (1991).[47] There is no requirement to disclose honorarium expenses paid by a nonprohibited donor.

F.S. §112.3148(7)(1991) provides criteria for valuing gifts. In general, the value of a gift must be its actual cost to the donor.[48] For services, the gift must be valued at the reasonable and customary charge for such services in the community where the service(s) was (were) performed.[49]

Penalties range from reprimands to civil fines not to exceed $5,000, to salary forfeitures and loss of position through impeachment or dismissal

Any consideration paid by the reporting individual to the donor is deducted from the value of the gift.[50] If the actual value of a gift cannot be determined among multiple participants at a gift event, the gift value is determined by prorating the total costs equally among invited persons, whether reporting individuals or not.[51]

Transportation must be valued on a round-trip basis unless one-way transportation is provided.[52] Round-trip transportation is considered a single gift.[53] Transportation provided in a private conveyance (*e.g.*, private plane) shall be given the same value as transportation provided in a comparable commercial conveyance.[54]

Lodging provided on consecutive days is considered a single gift for valuation.[55] Lodging in a private residence is valued at the per diem lodging rate provided in F.S. §112.061(6)(a)1 (1991), less the meal allowance rate set forth in F.S. §112.061(6)(b)(1991).[56]

Food and beverages not exempted under F.S. §112.312(12)(b)6 and consumed in a single calendar day are considered a single gift. The value of such a gift is the value of all the food and beverages provided that day.[57]

Membership dues paid during a 12-month period are a single gift.[58] Entrance fees, admission fees, or tickets are valued at their face value, or on a daily or per event basis, whichever is greater.[59]

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Penalties

Reporting individuals and lobbyists who violate these prohibitions face a wide range of civil penalties. Such penalties range from reprimands to civil fines not to exceed $5,000, to salary forfeitures and loss of position through impeachment or dismissal.[60] Impeached officials forfeit all retirement benefits from public retirement systems except for their contributions as of the date of termination.[61]

Prohibited donors not regulated by F.S. §11.045 who violate gift and honorarium prohibitions are subject to civil fines not to exceed $5,000.[62] They may also be prohibited from lobbying or employing a lobbyist before the agency or reporting individual to whom (or with whom) they violated these prohibitions.[63] Prohibited donors regulated by F.S. §11.045 who violate gift or honorarium provisions are subject to penalties imposed by the chamber of the legislature whose member was the recipient of the prohibited gift or honorarium.[64] That chamber may impose a fine not to exceed $5,000 upon the prohibited donor.[65]

The Commission on Ethics has jurisdiction to investigate and resolve complaints against reporting individuals alleging violation of gift and honorarium prohibitions.[66] The attorney general is authorized to enforce penalty determinations by the commission.[67] State attorneys and other authorized agencies have jurisdiction to initiate actions to impose or collect fines against prohibited donors not regulated by F.S. §11.045.[68]

Considerations for Resolving Doubtful Situations

Legislators do enjoy one advantage over other reporting individuals. If a legislator has a question about the applicability of the gift law or the honorarium law to a specific factual situation, he or she may request an advisory opinion from the general counsel of the house of which the legislator is a member.[69] The general counsel must issue the advisory opinion within 10 days of the request, and the legislator may reasonably rely on that opinion.[70]

Nonlegislators, however, are not similarly provided for in this statute, although both legislators and nonlegislators may obtain binding opinions from the Commission on Ethics. Reporting individuals may not always have the time to obtain such opinion, however. The author, therefore, offers three considerations for the doubtful situation.

First, if a potentially prohibited donor offers a gift which could be worth over $100, the reporting individual should decline to accept the gift. It is better to decline a potentially prohibited gift than to accept a gift which subsequently is found to have been prohibited.

Second, if a gift valued at over $100 is proffered by a nonprohibited donor, the reporting individual should document a reasonable investigation demonstrating that the person offering the gift is not a prohibited donor. Suggested documentation might include the would-be donor's absence from the current "Lobbying in Florida"; identification of the would-be donor's business partners, associates, and agents; and even the business or occupation of the would-be donor. Copies of the docu-

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mentation could be attached to the reporting individual's gift disclosure.

Third, a reporting individual should resolve questions about disclosure in favor of disclosure. Disclosure by itself, of course, will not cure the acceptance of prohibited gifts. On the other hand, doubts may legitimately arise over whether a particular permitted gift is subject to disclosure requirements. In these instances, a reporting individual should err in favor of disclosure.

Discussion and Conclusion

Responding to the public, the legislature has enacted standards governing the giving and acceptance of gifts by public officers and employees. Some ambiguities exist, of course, which will be resolved only through experience and, perhaps, more legislation. For example, reasonable people might disagree over whether gifts accepted by a reporting individual in his or her official capacity (*e.g.*, a mayor accepting a gift on behalf of constituents) are subject to disclosure, or even what defines a single sitting or event for food consumption.

But despite their ambiguities, the new gift regulations do set clear standards of conduct to guide public officials. Those determined to break the law will always find a way to do so. The overwhelming majority of Florida's public officers and employees, however, will do their best to comply with these standards. They and the public now share a common understanding of permitted and prohibited conduct. It is now for the public itself to decide whether its servants have complied with these standards.□

[1] Fla. Laws Ch. 90-502; Fla. Laws Ch.91-85; and Fla. Laws Ch. 91-292.

[2] The author recognizes that ambiguities inhere to these measures, which may be resolved only with the passage of time. In addition, this article does not address lobbyist registration requirements or the enhanced powers of the Ethics Commission.

[3] Fla. Stat. §112.3145(1)(b)1(1991).

[4] Fla. Stat. §112.3145(1)(a)2(1991).

[5] Fla. Stat. §112.3145(1)(a)3 (1991); Fla. Stat. §112.3148(2)(d) (1991).

[6] Fla. Stat. §§112.3148(2)(c) and 112.3149(1)(c)(1991).

[7] Fla. Stat. §112.312(12)(a) (1991); originally Fla. Stat. §112.312(9)(a), in Fla. Laws §2, Ch. 90-502, but renumbered in H417 (1991 Regular Session).

[8] Fla. Stat. §112.312(12)(a)14(1991).

[9] Fla. Stat. §112.312(12)(b)1 (1991). As written, this provision covers both private and public employment. Excluding gifts related to a reporting individual's public employment from the definition of gift in this statute, however, defeats the legislature's purpose in enacting this law. Regulating gifts incident to public employment is the very reason for these measures. A strict and literal interpretation of this provision creates an unreasonable result, and should, therefore, be avoided by construing courts. *See* City of Boca Raton v. Gidman, 440 So.2d 1277, 1281 (Fla. 1983); Sharer v. Hotel Corporation of America, 144 So.2d 813, 817 (Fla. 1962). This provision should be construed to encompass primarily a reporting individual's *private* employment.

[10] Fla. Stat. §112.3148(12)(b)2(1991). Also excluded are volunteer services and contributions from political parties.

[11] Fla. Stat. §112.3149(12)(b)3(1991).

[12] Fla. Stat. §112.3148(12)(b)4-6(1991).

[13] Originally Fla. Laws 9, Ch. 90-502.

[14] Fla. Stat. §112.3149(1)(a) (1991).

[15] Fla. Stat. §§112.3148(2)(b) and 112.3149(1)(d)(1991), define "lobbyist" as: "[A]ny natural person who, for compensation, seeks, or sought during the preceding 12 months, to influence the governmental decisionmaking of a reporting individual or procurement employee or his agency or seeks, or sought during the preceding 12 months, to encourage the passage, defeat, or modification of any proposal or recommendation by the reporting individual or procurement employee or his agency. With respect to an agency that has established, by rule, ordinance, or law, a registration or other designation process for persons seeking to influence decisionmaking or to encourage the passage, defeat, or modification of any proposal or recommendation by such agency or an employee or official of the agency, the term "lobbyist" includes only a person who is required to be registered or otherwise designated as a lobbyist in accordance with such rule, ordinance, or law or who was during the preceding 12 months required to be registered or otherwise designated as a lobbyist in accordance with such rule, ordinance, or law."

[16] Fla. Stat. §112.3148(3)-(5) (1991).

[17] Fla. Stat. §112.3148(5) (1991).

[18] Fla. Stat. §112.3148(6) (1991).

[19] Fla. Stat. §112.3148(3) (1991).

[20] Fla. Stat. §112.3148(4) (1991).

[21] Fla. Stat. §§112.3148(4) and (5) (1991).

[22] Fla. Stat. §112.3148(4) (1991).

[23] Fla. Stat. §112.3149(2) (1991).

[24] Fla. Stat. §112.3149(3) (1991).

[25] Fla. Stat. §112.3149(4) (1991).

[26] Fla. Stat. §112.3149(1)(a) (1991).

[27] Fla. Stat. §112.3148(5)(b) (1991); Fla. Laws §8, Ch. 90-502, as amended by S1042, 1991 Regular Session.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Fla. Stat. §112.3149(1)(a)(1991).

[34] Fla. Stat. §112.3149(5) (1991).

[35] Fla. Stat. §112.3148(8)(a) (1991).

[36] *Id.*

[37] Fla. Stat. §112.3148(8)(b) (1991).

[38] Fla. Stat. §112.3148(8)(c) (1991).

[39] Fla. Stat. §§112.3148(8)(c) and 112.3148(8)(d) (1991).

[40] Fla. Stat. §112.3148(8)(e) (1991).

[41] Fla. Stat. §112.3148(8)(a)1 (1991).

[42] Fla. Stat. §112.3148(6)(a)3 (1991).

[43] Fla. Stat. §112.3148(6)(d) (1991).

[44] *Id.*

[45] Fla. Stat. §112.3148(6)(d) (1991).

[46] Fla. Stat. §112.3149(6) (1991).

[47] *Id.*

[48] Fla. Stat. §112.3148(7)(a) (1991).

[49] *Id.*

[50] Fla. Stat. §112.3148(7)(b) (1991).

[51] Fla. Stat. §112.3148(7)(c) (1991).

[52] Fla. Stat. §112.3148(7)(d) (1991).

[53] *Id.*

[54] *Id.*

[55] Fla. Stat. §112.3148(7)(e) (1991).

[56] *Id.* This works out to $29 per day in 1991 dollars.

[57] Fla. Stat. §112.3148(7)(f) (1991).

[58] Fla. Stat. §112.3148(7)(g) (1991).

[59] Fla. Stat. §112.3148(7)(h) (1991).

[60] Fla. Stat. §112.317 (1991).

[61] Fla. Stat. §112.3173(3) (1991).

[62] Fla. Stat. §§112.3148(9) and 112.3149(7) (1991).

[63] *Id.*

[64] Fla. Stat. §11.045(6) (1991).

[65] *Id.*

[66] Fla. Stat. §112.322 (1991).

[67] *Id.*

[68] Fla. Stat. §§112.3148(9) and 112.3149(7) (1991).

[69] Fla. Stat. §§112.3148(10) (1991) and 112.3149(8) (1991).

[70] *Id.*

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