Making Lobbyists Accountable:

Some Lessons from the U.S. Experience

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In 1946, after years of debate and numerous investigations into the alleged improprieties and illegalities of lobbyists, Congress passed a registration and reporting statute[1] that was to be the "beginning of a new era; Congress and the public, for the first time, were given the tools to learn the who, the how and the how much of pressure group operations."[2]

This expectation has not been realized. Forty years after enactment, the *Federal Regulation of Lobbying* Act has come to be viewed as little more than a cautionary symbol and can be ignored with virtual impunity. Review of the factors that underlie the Act's ineffectiveness may be instructive for other legislatures that contemplate the adoption of lobby disclosure measures.[3]

Lobbying in Washington Today

For better or worse, Washington lobbying is an integral part of the American political process. Corporations, trade associations, and other organizations with United States policy concerns – including local, state and foreign governments – have come to recognize that tracking the legislative process is impossible from outside Washington. Issues and strategies have become increasingly complex; legislative authority has become widely dispersed among a galaxy of committees and subcommittees with overlapping jurisdictions; and competition has intensified among opposing and like interests. In such an environment, the need for swift access to congressional decision-makers is a paramount concern. In the words of one Washington regular, "If you're not up here [on Capitol Hill] when they're making decisions, you're a dead duck."[4]

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Acknowledgement of the utility of a lobbying capabilit has resulted in a dramatic upsurge in the size and scope of Wash ington lobby activity. One measure of the perceived value of Washington presence is the growing number of out-of-town lav firms that have opened branches in Washington. In 1963, onl forty-five such firms had offices in Washington; over 250 main tain a permanent presence in the capital today. More associatioi headquarters now are located in Washington than in any othe American city. According to one study, forty per cent of thes organizations did not even exist before the 1960s.[5]

Some Problems with the Lobbying Act

Not all those who "lobby" in Washington in the broad sense of th term are registered as lobbyists under the 1946 Act. The Act neve was intended to cover contacts with officials in the executiv branch departments or at the regulatory agencies. Moreover, i the 1954 case of *U.S. v. Harriss*,[6] the Supreme Court construed th Act so narrowly in order to meet the constitutional requiremer of definiteness that many were removed from the statute's reach

As interpreted by the Court in *Harriss*, the Act require registration with the Clerk of the House of Representatives an Secretary of the Senate as well as the filing of quarterly activi reports if each of three tests is met:

1) the person in question – either by himself or through an agent or employee – solicits, collects or receives money or any other thing of value;
2) the "principal purpose" of either the person or the contribution is to aid in the passage or defeat of legislation by Congress; and
3) to accomplish this purpose, there is direct communication with a member of Congress.

These three prerequisites have not been uniformly inte preted. Nor have they been well-enforced. Among the ma problems in interpreting and administering the Act are: the u certain meaning of the "principal purpose" clause; language

the *Harriss* opinion that appears to exclude from the Act's coverage contacts between lobbyists and congressional staff; differing opinions on the extent to which the law covers "grass roots" lobbying efforts; the lack of timeliness of the reporting requirements; and the inadequate means and authority for enforcement.

Many companies and trade associations maintain that they are not required to register and file disclosure reports because lobbying is not their "principal purpose"; that is, the bulk of their activity is non-legislative. The history of the Act does indicate that it was not to apply to organizations "formed for other purposes whose efforts to influence legislation are merely incidental to the purposes for which formed."[7] However, the Supreme Court in *Harriss* attempted to clarify that the "principal purpose" language of the Act does not exclude "a contribution which in *substantial part* is to be used to influence legislation . . . or a person whose activities in *substantial part* are directed to influencing legislation. . . ."[8] According to the Court, if an organization were exempted because lobbying was only one of its main activities, "the Act would in large measure be reduced to a mere exhortation against abuse of the legislative process."[9]

But "substantial part" was not defined by the Court. In an effort to avoid the pitfalls of "principal purpose" vagueness, a number of tests have been suggested subsequently in proposed legislative revisions to the Act. For example, a bill approved by the Senate in 1976 declared that an organization would fall under the measure's coverage if: 1) it paid a "legislative agent" $250 or more to lobby in a quarterly period; 2) the organization's own staff made twelve or more "oral lobbying communications" in a quarter; or 3) the group spent $5000 or more on grass-roots solicitations during a quarter.[10]

Critics charged that the proposed thresholds were too low and would "capture" smaller groups, burdening them with record-keeping requirements and "chilling" their First Amendment rights of speech and petition. Others maintained that the notion of an "oral lobbying communications" test was onerous and difficult to monitor and enforce.

Similar tests in varying combinations have been proposed in other legislative vehicles. None of these has been able to describe a true picture of the lobbyist or lobbying. The lack of accepted criteria upon which to base a definition of "lobbyist" or "lobbying group" means that advocates of lobby disclosure are unable to specify in a universally satisfactory way the point at which a group is engaged in lobbying efforts to the extent that it should register.[11]

Another loophole in the Act derives from the Court's statement in *Harriss* that the statute should be construed to refer "only to 'lobbying in its commonly accepted sense' – to direct communication *with members of Congress* on pending or proposed federal legislation."[12] Under this interpretation, contacts with congressional staff do not require the completion of registration and disclosure reports.

Yet congressional staff has multiplied in both numbers and influence since 1946. In 1947, about 400 staff members were attached to House and Senate standing committees. By 1983, standing committee staff in both Houses totaled over 3,000.[13] Committee staff, legislative aides on personal staff, and support agency staff are extremely influential in shaping legislation and influencing legislative outcomes – by developing new issues and programs, drafting bills and amendments, initiating hearings, building coalitions for legislative support, and coordinating negotiations on proposed legislation. In short, key staff members often are regarded as surrogates for their House and Senate bosses and are frequent lobbying targets.[14]

It can be argued, therefore, that in this respect *Harriss* is no longer good law – that the influence of congressional staff in the legislative process has increased so dramatically since 1954, when *Harriss* was decided, that key staff members today are to be considered the equivalent of members of Congress for lobbying purposes. Indeed, in a recent case involving dissemination of the Pentagon Papers for private publication, the Supreme Court affirmed a lower court's view that for the purpose of construing the Speech and Debate Clause of the Constitution[15] a member of Congress and his aide are to be "treated as one."[16] In view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, "it is literally impossible . . .for Members of Congress to perform their legislative tasks without the help of aides and assistants. . . .[T]he day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos . . .[17]

While this certainly describes the important role of congressional staff in today's Congress, the Supreme Court has not yet had an opportunity to retract its restrictive interpretation of the 1946 Act in *Harriss*, nor has Congress enacted new lobby disclosure legislation. In consequence, the law is not conclusive on this point at present. Most in the United States continue to believe that communications with a member's staff are not within the scope of the Act and do not require registration.

The *Harriss* Case language on "direct communication with Members of Congress" also raises difficult questions with respect to disclosure for indirect lobbying activities. Although grass roots lobbying is not a new technique, its use in recent years has grown dramatically in quality and quantity. Advances in technology, such as computer software and high-speed laser printers, enable large-scale mailings to be distributed with ease and speed, while improvements in demographic and statistical analysis allow more sophisticated targeting and increase response rates.

In an ideal world, members of Congress would have ample time to read thoughtful, spontaneously written letters from constituents and accord greater weight to those communications. In fact, if responses on a given issue arrive in a congressional office in sufficient quantity they will be heeded even if they are part of an orchestrated campaign. Grass-roots techniques are particularly subject to abuse in that substantial resources may be expanded in a campaign without disclosure of the sponsor or ultimate source of the effort.

The *Harriss* opinion does state that in passing the Lobbying Act Congress intended disclosure of communications with Congress "exerted by the lobbyists themselves or through their hirelings *or through an artificially stimulated letter campaign.*"[18] However, the prevailing view is that a grass-roots program that induces *others* to contact members of Congress does not in itself constitute direct lobbying and is not covered by the 1946 Act. Although most recent legislative attempts to amend the Act have included provisions that would more expressly cover grass-roots solicitations, some argue that government regulation of such indirect efforts to influence the legislative process "would bring virtually all activity designed to promote a given public policy viewpoint" within statutory reach and would intercept legitimate activities heretofore protected by the First Amendment.[19]

Another common criticism of the Lobbying Act is that the scant information it requires is not provided within a meaningful time frame to those who might seek to use it. By the time the quarterly reports are filed and prepared for distribution by the Clerk of the House or Secretary of the Senate, the information may be as much as six months old. To be most useful to those with a stake in a legislative outcome, lobbying data would need to be

reported on a much more regular basis, so that immediate action on the information could be taken. For those with an interest in tax legislation, for example, it is of little consequence to discover six months after the fact that an opposing coalition spent more heavily than anticipated to influence a tax bill when it was before the Senate. By this time, it is too late for anything but historical analysis.

Finally, enforcement of the Act is nonexistent. Staff in the offices of the Clerk of the House and the Secretary of the Senate do review the reports to see that they are filed correctly, but neither office has authority to investigate potential violations nor to assure that report forms are received in timely fashion. Nor, since *Harriss*, has the Department of Justice initiated any attempts to enforce the Act through criminal prosecution. According to testimony of a Department representative before Congress in 1983, Justice's view is that the 1946 Act "is ineffective, inadequate and unenforceable."[20]

Conclusion

The inefficacy of the 1946 Act can be traced, in part, to its initial consideration by Congress. Despite decades of controversy about lobbying, the measure was only briefly the subject of debate in the House and Senate and was approved as part of a popular legislative reorganization plan without amendment.

The objectives of the Act thus never were made clear. Was the Act intended to deter alleged lobbying abuses? Or was it to provide some public accounting of lobbying activities? The American experience with the Act continues to reflect these ambiguities and has hindered efforts at reform. Until the basic questions of purpose and intent are clarified, the Act cannot be truly effective. In any event, other issues that relate to lobbying activity – in particular, campaign finance practices and the representation of foreign clients by former federal government officials – currently engage congressional and public interest.

Notes

[1]*Federal Regulation of Lobbying* Pub. Law 79-601; U.S.C. sec. 261-270. Note that other aspects of Washington representation are intended to be covered by other statutes, such as the *Foreign Agents Registration Act*, the *Ethics in Government Act*, and various laws that govern the raising and spending of money in federal elections.

[2]U.S. Congress, House Select Committee on Lobby Activities, *Report and Recommendation on Federal Lobbying Act* (H. Rep. No. 81-3239, 1951), p. 5.

[3]Although the subject of this article is the federal system, lobbying is as common at the state level. Indeed, the influence of lobbyists is at least as great in the fifty state capitals as in Washington.

[4]*New York Times*, "Fear and Shoe Leather Among the Lobbyists," July 31, 1986.

[5]U.S. Congress, Senate Committee on Governmental Affairs, *Oversight Hearings on the 1946 Federal Regulation of Lobbying Act* (S. Hrg. 98-625, 1983), p. 125.

[6]347 U.S. 612.

[7]U.S. Congress, Senate Special Committee on the Organization of Congress, *Report to Accompany S. 2177* (S. Rep. No. 79-1400, 1946), p. 27.

[8]347 U.S. at 622.

[9]*Id.* at 622-23.

[10]S. 2477, 94th Congress, 2d sess. (1976).

[11]U.S. Congress, Senate Committee on Governmental Affairs, *Congress and Pressure Groups: Lobbying in a Modern Democracy* (S. Print No. 99-161, 1986), p. 49.

[12]347 U.S. at 620; emphasis added.

[13]N.J. Ornstein et al., *Vital Statistics on Congress, 1984-1985 Edition* (1984), p. 124.

[14]See M.J. Malbin, "Delegation, Deliberation, and the New Role of Congressional Staff, " in T. Mann and N. Ornstein, eds., *The New Congress* (1981), pp. 134-177.

[15]Art. I, sec. 6, clause 1 of the Constitution states that members of Congress may not be questioned "in any other Place" for any speech or debate in either House. The purpose of the privilege is to protect members from threats of prosecution that would impinge upon the legislative process.

[16]*U.S. v. Doe*, 455 F. 2d 753, at 761 (1st Cir. 1972).

[17]*Gravel v. U.S.*, 408 U.S. 606, at 616-17 (1972).

[18]347 U.S. at 620; emphasis added.

[19]H. Eastman, "Lobbying: A Constitutionally Protected Right," in 1983 Oversight Hearings, *op. cit.* at note 5, pp. 455-459.

[20]1983 Oversight Hearings, *id.*, p. 190.