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Halting Taxpayer Subsidy of Partisan Advocacy

by Marshall J. Breger

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The problem of government intervention in the democratic process is a complex issue in political theory. Long a hardy perennial for political science courses, it became a serious issue only in the last forty years with the rise of the welfare state. Indeed, the interpenetration of the public and private sectors in this century has led to increased difficulty in assessing the proper limits of public subsidy for partisan advocacy.

This issue is not merely the stuff of intellectual debate. Through its grant and contract activity the federal government indirectly pays millions of dollars for political advocacy by both business and non-profit groups. For example, Community Services Administration (CSA) grantees have prepared sample letters for constituents to oppose Administration budget proposals, have urged readers of a grantee magazine to write their Congressmen to oppose curtailment of the food stamp program, and have circulated memos urging Congressmen to support continuance of the Health Planning Program.[1] Over $42,000 of Family Planning Grant money under Title X of the Public Service Act has been used to pay dues to organizations that lobby on a regular basis.[2] The Organization of Chinese American Women, using funds provided under the Womens Educational Equity Act, brought at least 20 chapter representatives to a national conference in Washington whose printed schedule included how-to lectures on political action and planned visits to Capitol Hill for meetings with legislators.[3] Los Angeles CETA workers circulated political petitions

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1. See, U.S. Department of Justice, Office of Legal Counsel Memorandum, Re: Questions Concerning Lobbying by Federal Grantees, July 1, 1981.

2. Report of the Comptroller General, *Restriction on Abortion and Lobbying Activities in Family Planning Programs Need Clarification*, HRD 82-106 at p. 25 (September 24, 1982). Grantees provided free space to lobbying organizations and paid the salaries of persons engaged in a grassroots write-in campaign to Congress. In fairness, the GAO suggested that existing guidelines in this area were unclear.

3. See Organization of Chinese American Women, National Conference Schedule, June 19-20, 1983.

for candidates and walked precincts on behalf of Jimmy Carter, all on government-paid time.[4]

The situation is similar with defense contracts. In a recent audit of Lockheed C-5A aircraft expenditures, the General Accounting Office found that "because of the commingling of improper lobbying activities with legitimate contract work and the inability of the current system to enforce rigid distinctions," it was unable to determine the specific amount of employee time improperly used.[5] However, over $496,000 was spent by Lockheed on this lobbying effort, not counting $265,190 on commercial advertisements, and Lockheed claimed government reimbursement for $287,000 or almost 50 percent of these costs.[6] In the past the federal government has picked up the costs of memberships in the Bethesda Country Club and the Washington Golf and Country Club for Washington representatives of defense contractors as well as the cost of goosehunts in rural Maryland for company employees and "unidentified" guests—all to assist company lobbying efforts.[7]

The Reagan Administration has attempted to cut back on these subsidies with varying degrees of success. The Office of Personnel Management (OPM) has tried to restrict advocacy groups from participating in the Combined Federal Campaign (the government's United Way program).[8] Both the Congress and the Legal Services Corporation have sought to limit lobbying with public funds by legal services attorneys.[9]

Perhaps the most controversial of these efforts, however, was the Office of Management and Budget effort in January 1983 to revise Circular A-122 (Cost Principles for Non-Profit Organiza-

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4. Robert Welkes and Claire Spiegel, "Politicking: Another Murky Area for TELACU" (The East Los Angeles Community Union), *Los Angeles Times*, March 28, 1982 at p. 3.

5. Testimony of Joseph R. Wright, Jr., Deputy Director of the Office of Management and Budget, before the House Committee on Government Operations, March 1, 1983, p. 4.

6. Charles Mohr, "Pentagon Accused by GAO of Illegal Lobbying," *New York Times*, October 1, 1982, p. 23.

7. Florence Graves, "The High and the Mighty," *Common Cause*, August 1981, pp. 17-18 (citing from Defense Department audits).

8. These efforts, however, have been stymied by court decisions requiring an open door to advocacy groups who wish to participate in the Campaign. *NAACP Legal Defense and Education Fund Inc. v. Donald J. Devine*, CA 83-0928 (D.C.D.C., July 15, 1983), on appeal CA 83-1822 (D.C. Cir. 1983).

9. See GAO Report B-201928, March 5, 1981; B-202787, December 29, 1981; G.O. Comp. Gen. 423 (1981). The issue of lobbying in legal services is reviewed in Marshall Breger, "Legal Aid to the Poor: A Conceptual Analysis," 60 *North Carolina Law Review*, pp. 281, 308-313 (1982). The most recent disclosures may be found in Comp. Gen. B-210338/B-202116 (1983).

tions) designed to limit government subsidy of lobbying and political advocacy by recipients of federal grants and contracts.[10] Similar revisions were proposed to existing lobbying regulations that govern civilian and defense contractors. These proposed rule changes came under intense criticism from both non-profits and the business community. In February, the OMB announced it was considering major changes in the proposed regulations. By March, OMB had retreated further, admitting that the first draft was dead. Lobbyists of both the "left" and the "right" had coalesced to protect their fiscal interests.

In early November, OMB released a "second" draft of its proposed revisions.[11] While both drafts sought the same end—the termination of government subsidy of partisan advocacy—each used a different approach toward reaching this elusive goal.

OMB's First Draft

The OMB first draft would have prohibited employees of federal grant or contract recipients from engaging in political advocacy and charging any part of their salary or supporting costs against their federal grant or contract. Employees of companies or of non-profit organizations receiving government grants or contracts could not accept any salary reimbursement from the government if they engaged in any advocacy at all. If more than 5 percent of the office space of a recipient of government funds were used for advocacy, none of the costs of that space would be reimbursable. No capital equipment, such as photocopiers, could be used for advocacy purposes if partially paid for with federal funds.

Further, OMB's first draft used an expansive definition of political advocacy which ranged far beyond the traditional definition—influencing campaigns and referenda—to encompass communicating with any member or employee of a legislative body, supporting political action committees and trade associations that have "political advocacy as a substantial political purpose," filing amicus curiae briefs, and efforts to influence governmental decisions by influencing the opinions of the general public. The regulation applied to political advocacy aimed at state and local issues as well.[12]

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10. 48 Fed. Reg. 3348 (Jan. 24, 1983).

11. 48 Fed. Reg. 50860 (Nov. 3, 1983).

12. It should be stressed that the first draft's restrictions did not affect grantees who conduct "technical or scholarly studies," file comments on proposed agency rules or are subpoenaed to testify before legislative committees. 48 Fed. Reg. 3348-51 (1983).

OMB's Second Draft

In early November, OMB issued the second draft of its proposed A-122 revisions. This second draft differed from the first in three respects. Most important, the second draft reaches only to the government funds used by grant or contract recipients. Unlike the first draft, a grant or contract recipient can use private funds for lobbying and still receive federal funds for other permissible programs.

It retreated from its expansive definition of lobbying as an effort to influence the opinions of the general public *per se*, proposing a more limited definion which omits restrictions on lobbying at the local level, communications with government officials on matters other than legislation, litigation on behalf of others and payment of dues to associations which engage in substantial amounts of lobbying. While it is likely that this narrower definition will make it more difficult to police the improper use of government funds, the new definitions will bring the regulation closer to the core understanding of lobbying—efforts to directly influence legislative decision-making or to get others to do so. To that extent, the decision to allow recipients of federal grants or contracts to delegate their lobbying to a trade association and have Uncle Sam pay for such economies of scale is a clear deviation from principle and must be understood as such.

Further, the November draft requires that grant or contract recipients facilitate government audit procedures by certifying the accuracy of their cost breakdowns. These record-keeping requirements increase the likelihood of recipient self-scrutiny and help ensure that fiscal sleight-of-hand is not used to hide federal subsidy of lobbying activities.

The Classical Model

The government subsidizes communication in a variety of ways: It funds schools, colleges, public broadcasting, and innumerable other enterprises that directly or indirectly shape political values and public opinion. Some government subsidies are so indirect as to lack even a patina of state control. The funding of parks, for example, may provide a public forum for speakers. Still, one would rarely associate the views articulated in the speakers' corner at London's Hyde Park with those of the British government. On the other hand, much indirect subsidy of speech contains the possibility or perception of government imprimatur. This is true even when government does not itself engage in speech but subsidizes the private speech of others.

The unstated problem with all government subsidy of partisan advocacy is its effect on the marketplace of ideas. In the classical

model, ideologies of various stripes compete for public allegiance, and interest groups compete in a pluralist hurly-burly for legislative support. In both contexts, the state stays outside the battle. Only after democratic processes articulate the popular will on a particular issue should the state act to implement that decision. The reality, of course, is far more complex. Often the state independently affects political choices made by citizens. "The actions of government define expectations, confer legitimacy, establish a status quo, and thus necessarily shape the nature and distribution of interests and attitudes in society itself. The state shapes society almost as much as society shapes the state."[13] The autonomy of the state as a social interest group raises serious problems for those concerned with individual liberty. The implications of government's proper role in the marketplace of ideas remains to be adequately explored.[14]

There are at least two responses to the classical model. First, that the model is irrelevant as chimerical and not reflective of reality; and second, that the classical model should be rejected because it is not merely legitimate but even desirable for government to attempt to influence the minds of citizens. Though neither response can be rejected out of hand, both fail to capture important issues raised by government intervention in the political arena.

The contention that the classical model flies in the face of reality reflects the information explosion of the electronic revolution. Some argue that the state can control man's private being, restricting his mind to "approved" ideas only.[15] The possibility of such manipulation might make efforts to maintain government neutrality a fanciful exercise.

There is no doubt that the possibility of government influence on political debate is rife. After all, the federal government is one of the nation's ten largest advertisers.[16] The danger from technol-

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13. Lawrence Tribe, "The Puzzling Persistence of Process-Based Constitutional Themes," 89 *Yale Law Journal* pp. 1063, 1078 (1980).

14. An ambitious effort at developing a theory of government intervention can be found in Mark G. Yudof, *When Government Speaks: Politics, Law and Government Expression in America* (Berkeley: University of California Press, 1983).

15. Indeed, as Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace & Jovanovich, 1973), pp. 308-314; and Laslek Kolokowski, "Totalitarianism and the Lie," *Commentary*, May 1983, pp. 33-38, have pointed out, this loss of the private realm is a necessary predicate of totalitarianism.

16. The problem in other countries may be worse. The Canadian government is the largest advertiser in Canada, promoting such controversial issues as constitutional reform and the nationalization of industy. See Patty Berkowitz,

ogy, however, is a sign that we must redouble our efforts to preserve government neutrality in a democratic polity rather than succumb to the blandishments of this species of technological determination.

The harder problem, however, is the normative one. Democracy, as the philosophers have suggested, is not the natural condition of mankind. With Montesquieu, one might well argue that it is the general responsibility of the state to educate its citizens to republican virtue.[17] Indeed, in conditions of wartime, survival dictates that the state nurture patriotism. Even in peacetime the presidency, as Teddy Roosevelt taught, is a bully pulpit.

These examples, however, largely reflect situations where the community holds common normative values and political goals. When pluralistic divergence is the norm, the state should limit overtly political speech to procedural pronouncements, e.g., urging citizens to exercise their right to vote. Partisanship on substantive issues, e.g., suggesting the Democratic or Republican lever is clearly not an appropriate governmental function. The educative function of the state does not extend to political agitation over matters not grounded in prior legislative agreement or an overreaching normative consensus. For the state to actively promote public acceptance of existing civil rights laws is one matter; for it to provide subventions for private groups to promote constitutional amendments such as the Equal Rights Amendment is quite another.[18]

Some Relevant Legal Principles

Numerous statutes, federal regulations, and legal opinions already restrict lobbying with federally appropriated funds. However, these statutes have rarely been enforced and, through desuetude, they have lost considerable force on the conduct of recipients of federal grants and contracts. To the extent to which

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"Government is Top Advertiser in Canada, Angering Its Critics," *Wall Street Journal*, March 4, 1982, p. 31.

17. Montesquieu, *The Spirit of the Laws*, Book 4, Chapter 5, "Of Education in a Republican Government" (Edinburgh: A. Donaldson, 1768).

18. State and local agencies have spent public funds to promote passage of the Equal Rights Amendment. See, *Mulqueeny v. National Commission on the Observance of Int'l Women's Year*, 549 F.2d 1115 (7th Cir. 1977) (dismissed for lack of standing). In other situations, state funds have been used by California's Department of Parks and Recreation for writing, printing and distributing materials supporting a state bond issue. *See, Stanson v. Mott*, 551 F.2d 1 (D.Col. 1976). The Denver School Board has used public funds and provided school telephone lines seeking to defeat a proposed amendment to the Colorado State Constitution limiting the spending power of public bodies. *See, Mountain States Legal Foundation v. Denver School District*, 459 F.Supp. 357 (D. Colo. 1978).

the OMB revisions limit lobbying, as opposed to other forms of political advocacy, the regulations merely restate existing law. Enforcement of these laws by the Justice Department and by agencies that dispense grants and contracts would go far to meet those concerns that gave rise to the OMB proposal.

The most direct prohibition on the use of federally appropriated funds to lobby Congress is 18 USC 1913, which makes it a criminal act for federal officials to spend appropriated funds to encourage grassroots lobbying.[19] Communications to Congress through "proper official channels are exempted." Indeed, case law has encouraged such "executive lobbying" on the view that sound administration requires that executive agencies be able "to express views to Congress, to make suggestions, to request needed legislation, to draft proposed bills or amendments, and so on."[20] Thus, the practice of executive lobbying has been institutionalized in the congressional liaison offices of federal agencies.

Many specific statutes forbid lobbying by the recipients of grants and contracts. As but one example, a 1979 rider to the then Health, Education, and Welfare appropriations bill effectively precluded the payment of expenses incurred by grantees for any activity designed to influence legislation pending before Congress.[21] Many claim that this rider has been systematically vio-

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19. The text to 18 USC §1913 reads: "No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to members of Congress, on the request of any member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business."
"Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined no more than $500 or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment."

20. Hearings before the House Select Committee on Lobbying Activities, *Legislative Activities of Executive Agents*; 81st Congress, 2nd Sess. at 2 (1950), see also *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47 (1950).

21. The rider derives from a provision that first appeared in the FY 1979 appropriation for the Departments of Labor, Health, Education and Welfare, and related Agencies. See Pub.L. No. 95-480, S 407, 92 Stat. 1589. The provision has since been carried forward in successive public laws and resolutions applicable to those agencies. *See, e.g.*, Pub.L. No. 96-536 (H.J. Res. 644) 94 Stat.

lated with impunity by grantees, and indeed, the Community Services Agency in its own interpretation of the rider sought to severely narrow its reach.[22]

Claims that the proposed regulations are unconstitutional in that they censor free speech[23] are ill-founded. The Administration merely intends to end taxpayer subsidy of political speech. Recipients of grants and contracts would remain free to engage in political advocacy on any side of an issue should they choose to bear the expense—like anyone else.

From the constitutional perspective, the only open question is whether the federal government may prohibit advocacy by an employee if any portion of an employee's salary is financed by federal grants. The question raised is whether the threat that the government would deny a grant would "chill" political expression during time not paid for by federal grants. The argument tracks the "unconstitutional conditions" doctrine, contending that "even though a person has no 'right' to a valuable government benefit, and even though the government may deny him the benefit for any number of reasons," it may not deny him the benefit "on a basis that infringes on his constitutionally protected interests—especially his interest in freedom of speech."[24] The idea is that denying grantees reimbursement for the cost of nonpolitical activities when their lobbying activities are paid for entirely with private funds is a disproportionately broad reduction of free speech rights to meet legitimate government interests.

The Hatch Act addresses this question directly, stating that "no officer or employee in the executive branch of the federal government, or any agency or department thereof, should take any ac-

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3166 as amended by Act of June 5, 1981 (H.R. 2512), 127 Cong. Rec. S5796-S5807. The language of the rider is as follows: "No part of any appropriation contained in this Act shall be used, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, radio, television, or film presentation designed to support or defeat legislation pending before the Congress itself. No part of any appropriation contained in this Act shall be used to pay the salary or expenses of any grant or contract recipient or agent acting for such recipient to engage in any activity designed to influence legislation or appropriations pending before the Congress."

In its present form, the rider applies by its terms to all appropriations made or continued by the relevant Act, including appropriations for the Departments of Labor, Health and Human Services, Education, and the Community Services Administration, among others.

22. U.S. Department of Justice, Office of Legal Counsel, Memorandum Re: Anti-Lobbying Restrictions Applicable to Community Services, June 17, 1981.

23. "Regulatory Report—Lobbyists Unite to Lobby Against OMB's Proposed Curbs on Lobbying," *National Journal*, February 19, 1983, p. 371.

24. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

tive part in political management or in political campaigns." The restriction has been extended to an "officer or employee of any state or local agency whose principal employment is in connection with any activity which is financed in whole or in part"[25] by federal grants. Under the Hatch Act the federal government can require, as a condition of employment, that employees not engage in political advocacy both during and after work hours. In this regard, the significant difference between the Hatch Act and the OMB regulations is that the regulations reach private sector employees paid under federal grants and contracts in addition to full-time federal, state, and local employees. It is doubtful whether that distinction reaches constitutional dimensions.

In contrast, government subsidy of partisan advocacy raises its own First Amendment problems. Why should taxpayers underwrite lobbying for ideological causes or values of which they disapprove? Recent court cases clearly pose the issue. For instance, in *Galda v. Bloustein*,[26] a lawsuit involving Rutgers University, a U.S. Court of Appeals invalidated a "negative checkoff" contribution to the Ralph Nader-sponsored Public Interest Research Group that had been levied on state university students. The student association had required all students to contribute to the Rutgers PIRG as part of an activity fee. Those not wishing to contribute personally had to request a refund. The Court ruled that the state could not compel students, finding that a person is not required "to contribute the support of an ideological cause he may oppose." The case expanded on an earlier Supreme Court ruling that a state could not require public schoolteachers to pay that portion of their union dues that would be used for partisan political purposes. The OMB regulations extend the principle that taxpayers cannot be forced to subsidize political advocacy to recipients of all federal grants and contracts.[27]

Further, the use of federal funds to promote private political agendas injures the free functioning of the electoral process. Allowing private persons to use government money to disseminate propaganda in favor of any cause or candidate gives the appearance of an official imprimatur for particular ideological viewpoints, opening the dike to government manipulation of public opinion. Such activity cannot be defended if the state directly pays for advocacy, and its propriety is at best problematic if the

25. This extension has been upheld in *Oklahoma v. Civil Service*, 330 U.S. 127, 132 (1947).

26. *Galda v. Bloustein*, 686 F.2d. 159 (3rd Cir. 1982).

27. Some commentators have suggested that OMB lacks statutory authority to issue such regulations. Although I believe this position to be incorrect I do not deal with it here.

state supports the bulk of a grantee's service activities. Government responsibility for the use of government money does not end when funds are drawn down from the Treasury to pay a grant or contract.

Indeed, significant fairness, if not first amendment, problems exist with government-sponsored advocacy: The government should not take sides between political factions by subsidizing some and ignoring others. When this occurs, the government discriminates between political opinions, placing a monetary imprimatur on those groups whose politics it favors and withdrawing such approval from others. Such patronage discrimination on political grounds has long been a hallmark of government subsidy of political advocacy. This is dangerous stuff not only on free speech grounds. Clear fairness problems are raised as well. Except insofar as it may be necessary to execute its public purposes, the state may not, under classical theory, discriminate between factions. Neutrality is a command of fairness, and unless we propose to provide government funding to promote every ragtag political opinion (a proposition unworkable in both theory and practice), a studious neutrality is required.

Obviously the government has the right—if not the duty—to disseminate its views on matters of public policy, whether such views are controversial[28] or not. Often government must lead the citizenry, coalescing the popular will. The problem is where to draw the line. Delegating policy advocacy to private groups through the grant-making process, however, does not reach the hard issue—when can the state stand up for positions it believes that the polity ought to adopt? Delegation leaves the decision of which policy position to adopt to the grantees themselves, thus compounding the fairness problem. Indeed, the delegation of advocacy to private groups precludes advocacy groups from claiming the one justification for advocacy that might legitimate government subsidy—a legislative determination to engage in such advocacy. Lacking the imprimatur of democratic consent, government subsidy of private advocacy can be seen for what it is—the public patronage of selected political beliefs. That these advocacy subsidies are rarely made openly but are often disguised through grants and contracts for legitimate public functions merely underscores the dangers inherent in a system of expansive government subsidy.

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28. *Joyner v. Whiting* 477 F.2d 456, 461 (4th Cir. 1973) (government "may spend money to publish the positions they take on controversial subjects"); *see also, Arrington v. Taylor*, 380 F.Supp. 1348, 1364 (M.D.N.C. 1974), GAO Opinion B130981-014. (September 10, 1976).

Approaches to Implementing the Classical Model

Though a substantial consensus may exist behind the neutrality principle, implementing that principle in the federal grant and contract process is extraordinarily difficult. The proposed solutions are constantly attacked as both over and under inclusive. The three general approaches that have been proposed to implement the neutrality principle, the trigger approach, the allocation approach, and the taint approach, each attacks the problem from a different perspective. The "first" and "second" OMB drafts reflect and draw upon these different approaches.

The Trigger Approach

The trigger approach would allow the recipient of a federal grant or contract to engage in a specified *de minimis* amount of lobbying with private (or, in some instances, public) funds before any restrictions would apply. The Tax Reform Act of 1976[29] takes this position, providing a formula under which tax-exempt organizations can spend a certain percentage of their operating expenses on lobbying and still maintain their tax-exempt status. That figure, called the lobbying non-taxable amount, is determined on a sliding scale, ranging from 20 percent of the first $500,000 in exempt purpose expenditures to 5 percent of expenditures over $1.5 million—not to exceed a total of $1 million.[30]

The value of a trigger formula is that it insulates subsidy restrictions from those hard cases that create both administrative nightmares and inequitable applications. The use of a trigger formula recognizes the need for some *de minimis* exception so that employees who lobby only one day a year are not precluded from reimbursement and so that federal funds are not withdrawn because a Xerox machine is used for occasional political activity. By allowing 5 percent of office space to be used for political advocacy without precluding government reimbursement for the remainder of the rent, the OMB first draft implicitly accepted (if only in part) the value of the trigger analysis in regulating subsidies for political advocacy.[31] The November OMB proposals take a narrower approach. While they preclude the use of any federal funds for lobbying purposes the November draft uses a 25 percent trigger before

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29. Pub.L. No. 94-455, 90 Stat. 1814 (1976).

30. For grassroots lobbying the total is 25 percent of the organization's lobbying non-taxable amount. *See* 26 U.S.C. §4911(c)(4)(1983); *See* generally, *Tax Reform Act of 1976*.

31. Similarly, the proposed OMB regulations requirement that a trade organization not spend more than $100,000 a year "in connection with political advocacy" before grant or contract preclusion recognizes the need for a trigger formula. 48 Fed.Reg., at p. 3350.

requiring employees to provide extensive paperwork and documentation of their lobbying activities. It must be underscored, however, that the November OMB trigger goes to paperwork requirements. It does not treat the practical problem of precluding *de minimus* lobbying from any reimbursement claim. Both drafts, however, clearly reject the trigger approach as insufficiently principled. The first draft chose instead a variant of the taint approach while the November draft opted for the overarching perspective of the allocation approach.

The Taint Approach

Recognition that the wall of separation between lobbying and nonlobbying activity is often porous has led many conservatives to urge use of a taint approach, arguing that an organization that engages in any advocacy whatsoever should be barred from receiving government funds. Responding to this concern, the OMB's first draft determined that federal funds should not be used to pay the salary of any lobbyist or finance any capital equipment used for political advocacy—even when the advocacy is paid with private monies. This argument is based on the argument that service functions ineluctably take on an advocacy coloration when undertaken by an advocacy organization. For example, the National Organization for Women and the Environmental Defense Fund, both perceived as advocacy organizations, would find it difficult to run programs in home economics or deforestation without injecting their particular political beliefs into the program. In contrast, should the Boy Scouts or the Red Cross engage in a small amount of advocacy, neither actual separation nor perceptual problems are likely. Once one recognizes that groups that engage in substantial amounts of advocacy have structural conflicts of interest in providing service, the problem, if not the solution, is clearer.[32]

The taint approach alone, however, creates its own problems. Grant and contract recipients' operational flexibility is limited. A strict wall of separation would mean hiring new employees for lobbying even if for only one or two days a year. Similarly, duplicative capital equipment would have to be purchased.

The Allocation Approach

Under the allocation approach a group would distinguish between its lobbying and its nonlobbying activities and charge only the latter against government grants and contracts. From the theoretical perspective of the classical model, the virtue of an allocation

32. Indeed, in the world of scholarship, we often distinguish between advocacy scholarship and academic scholarship, recognizing that the latter is usually more scrupulous in its use of sources and in its interpretation of texts.

approach is clear: Government grants do not pay for advocacy, and what a person does on his own time is his own business. The percentage of employee time used for advocacy cannot be charged against a federal grant. Similarly, the capital overhead and operating expenses of capital equipment, such as computers and photocopiers, would be allocated between advocacy and nonadvocacy efforts.[33]

The allocation approach has its own problems, however. Groups can allocate overhead expenses between advocacy and nonadvocacy activities to maximize their federal subsidies. It is difficult to ensure that accurate time records are kept and the proportion of time used in advocacy must often be approximated. Bookkeeping problems can prove enormous. The complex enforcement problems may well suggest why the OMB first shied away from the allocation approach.

Indeed, there is an artificial element in the attempt to allocate between advocacy and nonadvocacy work time. Employees find it difficult to separate work assignments. A manager of a defense plant, for instance, cannot drop his occupational role whenever he lobbies Congress. Nor can a priest easily jettison his spiritual role when he lobbies on federal nuclear policy. When lobbying efforts are more than *de minimis*, it is difficult for such persons to disentangle advocacy from other activities. Many commentators, therefore, believe that the inability to disentangle advocacy from service functions make the allocation approach conceptually unsound.

In many instances, for example, the use of federal grant or contract money by the private sector for advocacy may imply governmental support or authorization. In such circumstances, the public sector participation in private lobbying can be so pervasive that the government will, of necessity, be identified with lobbying efforts. Thus, when a joint DOE/industry research project used private funds to publish material promoting the nuclear industry, the Comptroller General required that a disclaimer of government approval be permanently displayed. The rationale: The public will tend to identify this information with the government and view it as bearing the government's seal of approval.[34]

33. In theory capital equipment purchased on a federal grant, such as a duplicating machine, could not be used years later for advocacy purposes without a "re-capture" provision. The auditing problems would be a nightmare. I am grateful to Roger Pilon for this and other insights.

34. See the Report of the Comptroller General, *Problems With Publications Related to the Clinch River Breeder Reactor Project*, Rep. No. B-130961 at p. 2 (January 6, 1978). The Comptroller went on succinctly to make the fairness argument finding that the Department of Energy "should exercise some responsibility. . .for seeing to it that the public and its elected officials receive balanced and objective information."

The problem is not merely one of public perception. Advocacy organizations are infused with the spirit of the cause they endorse—as they should be. It is naturally difficult for such groups to disentangle themselves from advocacy when providing service. Service actually provided by an advocacy group like People United to Serve Humanity will naturally be infused with an ideological perspective. But when the distance between service and advocacy disappears, the service function becomes inextricably tainted.

Some Implementation Problems

While the November draft has clearly reduced the implementation problems faced by recipients, there can be little doubt that the proposed regulations will cause dislocations for many businesses and non-profits. But can those dislocations be minimized without diluting the regulations' purpose? Many complaints can be resolved through accounting procedures that separate advocacy from business activity. Implementation problems concerning cost-plus defense contracts and standard procurement contracts, however, might require slightly amended regulations for the Department of Defense, the National Aeronautics and Space Administration, and the General Services Administration. But there can be no principled rationale by which employees who administer a corporate political action committee should have their salaries charged against the government. Nor should trade association dues be used to pay for lobbying that a corporation could not engage in under a federal grant or contract.

Intelligent partisan advocacy regulations must distinguish between the different kinds of contractual relationships between government and business. These relationships fall in a continuum. At one end are business suppliers who sell to the government fungible commodities, such as potatoes or pencils, at rates set by competitive bid. The government is only one of a large number of buyers, and in such a case, it is correct to say that the product is not priced specifically for government procurement. Thus, if the vendor wants to include lobbying expenses in his bid, that is his own business. A competing vendor could exclude such expenses from his bid thereby underbidding the first vendor. The market, then, would take care of the entire problem. The government would take the lowest bid for an item, and the successful vendor could use the proceeds for plant expansion or political lobbying, as he wishes.

This model works only where there is a free market in operation. It fails to reflect those cases at the other end of the continuum, when the government is the sole purchaser of a commodity (tanks, for example), or when a single vendor is the sole supplier (sophisticated computer software, for instance). Whether the government

uses a cost-plus or a fixed-fee contract, the tank is being priced specifically for government purchase. In that situation, if the government pays for lobbying, it is directly supporting political advocacy.

Indeed, government accounting principles may go too far by disallowing from reimbursement all advertising or product marketing costs. Any disallowance of advertising costs should distinguish between the cost of attracting customers and the cost of selling ideas or products. Marketing should not be counted as advocacy, even when it is an effort to sell products to government agencies or employees.

Few would argue that the state should pay for private groups to directly lobby legislators and government officials. The concern that government not aid a particular side in an election campaign "through contributions, endorsements, publicity, or similar activity" ruffles the feathers of none but the self-interested. Much of the work of the Federal Election Commission, after all, is devoted to ensuring that government funding of national campaigns does not degenerate into government manipulation of election results. Indeed, it is to this concern that the Hatch Act speaks.

Where the consensus unravels is in the proper treatment of grassroots advocacy, and it is here that OMB's first draft grasped both the political and the constitutional nettles. In denominating any attempts "to influence government decisions through an effort to affect the opinions of the general public or any segment thereof" as political advocacy, the OMB first draft moved against the most politically troublesome political activity by subsidized nonprofits—the use of tax money to stir up populist opposition to Congress and Congressmen. Such "grassroots" advocacy efforts border on the organizing of political constituencies. They reflect the underlying tactical reason why so many conservatives wish to "defund" the left.

Simultaneously, the restriction on grass-roots lobbying strikes perilously close to restricting the promulgation of information and ideas—enterprises that government should be loath to regulate. Ideas, of course, have consequences, as do empirical data. Drawing a line between the promulgation of ideas designed to contribute to public debate and those designed "to influence governmental decisions"[35] is exceedingly difficult. Indeed, the OMB first draft recognized this problem by excluding from its definition of advocacy the dissemination of "the results of non-partisan analysis, study or research,"[36] the distribution of which is not pri-

35. 48 Fed. Reg., at 3350 (1983).
36. *Ibid.*

marily designed to influence the outcome of any election or governmental decision. Intent in this context becomes a gossamer thread, dependent upon subjective as well as objective judgments.

Recognizing these dangers, the OMB November draft attempts to avoid this problem by restricting its grassroots lobbying prohibition to the preparation, distribution or use of publicity or propaganda to influence legislation, thus limiting the restriction to efforts to affect public action not public opinion. As the November draft eschews any effort to restrict participation in the war of ideas, some of the most problematic portions of the first draft are effaced.

Some commentators have urged that government restriction of advocacy subsidies be limited to tax-exempt non-profits. Tax-exempt non-profits, they argue should be given the choice of refraining from advocacy or losing their tax-exempt status. The Internal Revenue Service, however, does not agree that this Hobson's choice is necessary. In many respects, the level of lobbying allowed under the Revenue Act is far more generous to businesses and non-profit groups than the November OMB draft. Deductions are allowed for both grassroots lobbying[37] and direct lobbying, although the limits on grassroots expenditures are more stringent. The conceptual problem is whether the same rules that apply to deductibility of business expenses (under section 162 of the Internal Revenue Code) should apply to government cost payments through grants or contracts. Although tax deductions, like grants or contracts, are an indirect form of subsidy, the issues involved in reform of the tax code are markedly different.

Conclusion

While the taint approach used in the OMB first draft was conceptually satisfying in that it precluded any commingling of advocacy and service activity, the shift to an allocation approach was necessary for the second draft to receive serious political consideration. Any allocation methodology, however, must develop strict accounting procedures to ensure that partisan advocacy is not paid for by direct subsidy nor absorbed by overhead claims. The certification process is designed to assist in ensuring such compliance.

37. Grassroots lobbying is defined as attempting to influence legislation through appeals to the general public or any segment thereof. Direct lobbying encompasses direct communication with "any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of legislation." for the IRS definition see, 26 USC §4911(d)(1)(A) and (B); 26 USC §170; 26 USC 501(c)(3) and (h).

Any allocation approach must be coupled with some trigger mechanism in order to remove any possibility that such regulations would become an administrative nightmare for non-profits and businesses. The November OMB draft uses a 25 percent trigger before requiring employees to provide extensive paperwork and documentation of their lobbying activities would halt the "parade of horribles" exhibited by the opponents of OMB's regulatory scheme. While this common sense approach would not ensure complete government neutrality in the political arena, it would go far toward reducing the ill-effects of government subsidy. The virtues of the classical model ought not to be so easily abjured.

This said, however, we must recognize that any practical solution to the issues of principle raised by government subsidy of partisan advocacy is a second-best response. In a perfect world, advocacy would be merely incidental to the services that government purchases. If advocacy is more than incidental, government ought not get involved. And if even strict allocation techniques fail to disentangle advocacy from service, government ought to withdraw.

It must be stressed that the advocacy problem cannot be effaced by the suggestion that government grants or contracts to private groups differ from advocacy by the state as the private recipient "launders" the government subsidy transforming it into private advocacy. True, National Endowment for the Humanities grants to novelists or poets need not imply government approval of their creative work product. Such legerdemain will not hold, however, for the subsidy of political speech.

The fundamental problem with all government speech cases is the same: Can government subsidized speech be reconciled with the demands of fairness without proffering that speech to all and sundry? In lawyer's talk, the question posed is whether the government funded enterprise takes on characteristics of a "public forum." If so, selectivity in the realm of ideas borders dangerously on government censorship. One solution to this fairness problem is to adopt a strategy of indiscriminate support for advocacy efforts. Indeed, in the paradigm "free speech" example of persons seeking to hold a rally in Lincoln Park this solution would be constitutionally required. In contrast, OMB has chosen to implement fairness by recourse to a studied neutrality in the realm of political ideas, forbidding subsidy to any advocacy efforts.

Neutrality, of course, need not suggest conformity. Even under the OMB regulations, a "thousand flowers" can flourish in the democratic state. Such advocacy efforts would be strengthened by

their independence. Weaned from the crutch of government subsidy they would prosper to the extent to which set down roots within the body politic. Under the classical model, then, the state will not pay for the nurturing of advocates in political wars. Whether this strategy will successfully avoid the twin sirens of intellectual selectivity and ideological profligacy remains to be seen.

26 The Heritage Lectures

The federal government subsidizes communication in a variety of ways: It funds schools, colleges, public broadcasting, and innumerable other enterprises that directly or indirectly shape political values and public opinion. Through its grant and contract activity, however, it also pays millions of dollars to business and non-profit groups for political advocacy. For example, some grantees have prepared sample letters for constituents to use in opposing Administration budget proposals. Others have circulated political petitions and walked precincts for a presidential candidate on government-paid time.

In this *Heritage Lecture,* Visiting Fellow Marshall Breger discusses the increased difficulty in assessing the proper limits of public subsidy for partisan advocacy. He analyzes two recent attempts by the Office of Management and Budget to toughen regulations limiting political activity by recipients of federal grants and contracts. OMB's November 1983 revision, Breger concludes, is a reasonable solution to a complex problem: Grant or contract recipients could use private funds for lobbying and still receive federal funds for other permissible activity. Once weaned from the crutch of government subsidy and forced to develop their membership base, says Breger, advocacy efforts across the political spectrum would prosper.

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