4-2001

Congress and the Legislative Web of Trust

Alan L. Feld
Boston Univeristy School of Law

CONGRESS AND THE LEGISLATIVE WEB OF TRUST

ALAN L. FELD*

INTRODUCTION

Common perceptions of the legislative process as practiced in the United States Congress emphasize competition for advantage. News accounts deal with winning and losing in the legislative arena and the tactics by which adversaries prevail. The currently dominant academic paradigm, public choice theory, explains the actions of legislators as motivated by the need to maximize their individual utility,[1] especially their chances for reelection.[2] This implies a competitive process with the objective of securing advantage over potential opponents. Other theories, which find the prime sources of legislative activity in competing notions of the public interest or in the disparate interests and ideologies of constituents, emphasize the ways in which legislative processes create majority agreement out of divergent views.[3] Conflict resolution through compromise nevertheless seeks comparative advantage. The legislative process emphasizes struggle over cooperation and nonpartisan resolution of difference.

Yet the competition which results in legislation operates within a web of trust. Legislators necessarily rely on others within the legislative process in

* Professor of Law, Boston University School of Law.

[1] *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 17-30 (1962) (espousing a theory of collective choice based on individual utility).

[2] *See* MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 39 (1977) (arguing that congressional representatives calculate their activities to achieve their primary goal of reelection).

[3] *Compare* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12-27 (1991) (explaining legislative choices in terms of interest group theory), *with* ARTHUR MAASS, CONGRESS AND THE COMMON GOOD 18-19, 43-44 (1983) (explaining legislative choice in terms of public interest theory and criticizing interest group theory).

their pursuit of public and private objectives. No single legislator can enact legislation without the help of others. As a formal matter, the legislative process requires multiple levels of agreement. To become law a bill ordinarily must obtain the approval, by majority vote, of one or more subcommittees and committees of the House or the Senate; approval of the full House or Senate; approval, by a similar process, of the other legislative house; and approval by the President.[4] At each stage, a legislator seeking a particular result must obtain agreement from many other participants. Agreement may spring from a common desire to obtain the same result. Alternatively, it may involve an exchange: the second legislator's commitment to support the legislation for the first legislator's promise to support other legislation or to take other action. At other times, agreement results when a legislator needs the comfort of not standing out in recording a particular view and solicits the assurance from other legislators that they will vote the same way. As a general matter, each legislator relies on the promises and undertakings of others.

Legislators do not operate in an institutional vacuum. The institutions that frame their activities require mutual trust. As an example, consider congressional party organization. Aggregation through party organization enhances the power and effectiveness of the participants in achieving legislative results. A party caucus member in effect delegates a range of tasks and considerable discretion to the party leadership to establish legislative priorities. The member trusts the party leadership to achieve desired results even if the member does not agree fully with their decisions. The leaders in turn depend on the members to provide the necessary votes to carry their legislative program. Mutual benefit results, facilitated by trust. Trust of course has its limits and sometimes breaks down. Thus, on occasion, through some combination of personal ambition and dissatisfaction with existing hierarchical arrangements, members may "revolt" and seek to change the leadership or the rules under which it governs.

Perhaps more surprising, a similar dynamic of trust can operate across party lines. This occurs frequently in congressional committees. By their presence on the same committee, members evince an interest in a common subject; thus, for example, a member rarely serves on the Agriculture Committee without a farmer-based constituency.[5] Within the framework of the common interest defined by committee membership, exchanges dependent on trust allow legislators of different parties to work together to achieve specific goals. Legislation on controversial matters brought forward with bipartisan support, such as the McCain-Feingold campaign finance bill, provide evidence of cross-party cooperation.[6]

---

[4] *See* U.S. CONST., art. 1, § 7, cl. 2 (prescribing bicameral approval and presentment to the President).

[5] *See* MAASS, *supra* note 3, at 66 (explaining that members of Congress choose committee assignments according to their interests).

[6] *See Gephardt Questions Bush's Agenda*, AP ONLINE (Washington), Jan. 21, 2001,

The day-to-day operations of each legislative House reflect trusting relationships. The formal rules of each House specify procedures that can become cumbersome in practice. Each House routinely accomplishes some of its business through unanimous consent to suspend the rules. On occasion, however, the trusting relationship disappears and confrontation takes its place. This may occur, for instance, when a small group of legislators determines that it may obtain advantage by impeding the machinery of legislation.[7] The Senate filibuster provides an example.[8] Once a delaying tactic limited to matters of high priority to those who employed it, the filibuster now emerges more routinely.[9] Observers take as a given that Senate passage of controversial legislation generally requires sixty votes, the number needed to shut off debate, rather than fifty-one, a numerical majority.[10]

Trust also permeates legislators' relationships with non-elected participants in the legislative process. Each legislator supervises staff members who act for the legislator and whom the legislator must rely on to act in the legislator's interest. Staff deal regularly with the staff of other legislators, with the representatives of economic and social interests that have business before the Congress, and with representatives of the Executive branch. In these interactions staff often speak for the legislator and must transmit the legislator's views and commitments faithfully.

All of these interactions play crucial roles in the legislator's success, however measured. In all of them the legislator relies on other parties to provide information, to keep promises, or to take action consistent with the legislator's needs. Yet external methods of enforcement, sanctions for bad behavior, generally do not exist or exist only in weak forms. With rare exceptions, the legislator cannot avail herself of the textbook remedy for legal enforcement of promises—a lawsuit for breach of contract to obtain damages or specific performance. An effort to seek help from the courts may prove a political liability if it gives the member the appearance of political weakness.

---

available in 2001 WL 9870666 (quoting House Minority Leader Richard Gephardt for the proposition that the McCain-Feingold bill enjoys bipartisan support in both houses of Congress).

[7] *See, e.g.*, J. MCIVER WEATHERFORD, TRIBES ON THE HILL 230-33 (2d ed. 1985) (describing how Senator Helms brought the legislative process to a standstill when he offered an amendment to the act that created the Department of Education).

[8] Senate Rule XXII provides an elaborate process for cloture, or shutting off debate, which requires the votes of sixty Senators. *See* SENATE COMM. ON RULES AND ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at 15-17 (2000) (outlining the procedure for ending debate in the Senate).

[9] *See* WEATHERFORD, *supra* note 7, at 238-39 (explaining the origin and development of the use of the filibuster in the Senate).

[10] *See, e.g.*, Nick Anderson & Janet Hook, *Campaign Finance Reform Bill Gains Key Senate Supporter*, L.A. TIMES, Jan. 5, 2001, at A16 (reporting that Senator McCain was nearing the 60 required to ensure that his campaign finance reform bill reaches the Senate floor).

But even when a member could turn a lawsuit into a political asset, the courtroom outcome likely proved disappointing. Courts generally refused even to consider claims brought by legislators arising out of their interaction within Congress or with the Executive. They offered a variety of reasons: lack of ripeness,[11] lack of standing,[12] political question doctrine,[13] the exercise of equitable discretion,[14] and the inability to provide a judicially enforceable remedy.[15] The Supreme Court has now firmly shut off the avenue of judicial review, for lack of standing.[16] Even in the heyday of congressional lawsuits, however, plaintiffs likely came to the courthouse door with other ends in view: to create news and to publicize the real or fancied harm, not with any realistic hope of a judicial remedy.[17] Therefore, less formal sanctions must support the legislator's expectation of appropriate future performance. Inevitably, these

---

[11] *See* Goldwater v. Carter, 444 U.S. 996, 997 (1979) (Powell, J. concurring) (dismissing as not ripe a complaint filed by members of Congress alleging that the President had deprived them of their constitutional roles).

[12] American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303, 305 (D.C. Cir. 1982) (per curiam) (holding *inter alia* that a House member did not have standing as a legislator to challenge the legality of a proposed action by the Secretary of Housing and Urban Development); *but see* Kennedy v. Sampson, 511 F.2d 430, 432-33 (D.C. Cir. 1974) (deciding that a Senator had standing to seek a declaratory judgment that a bill became a law without the President's signature at the expiration of the ten-day period after presentation to him).

[13] *See* Goldwater, 444 U.S. at 1002 (Rehnquist J., concurring) (invoking the political question doctrine to support the dismissal of a complaint filed by members of Congress against the President).

[14] *See* Moore v. United States House of Representatives, 733 F.2d 946, 956 (D.C. Cir. 1984) (exercising discretion to deny a remedy to members of the House of Representatives that challenged the constitutionality of a revenue-raising bill that originated in the Senate). An influential commentator, Judge Carl McGowan, Chief Judge of the D.C. Circuit, endorsed this approach. *See* Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 244 (1981) (arguing that courts should not invoke justiciability grounds to dismiss lawsuits brought by legislators, but rather should hear the cases and use their traditional discretion to grant or withhold equitable relief to fashion the appropriate remedy).

[15] *See* Vander Jagt v. O'Neill, 699 F.2d 1166, 1168 (D.C. Cir. 1983) (invoking separation of powers concerns to deny relief to Republican House members alleging that the Democratic leadership had discriminated against them in allocating committee and subcommittee seats); Riegle v. Federal Open Mkt. Comm., 656 F.2d 873, 882 (D.C. Cir. 1981) (dismissing a case challenging the constitutionality of the procedures established by the Federal Reserve Bank on the ground that judicial action would improperly interfere with the legislative process).

[16] *See* Raines v. Byrd, 521 U.S. 811, 813 (1997) (holding that members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act).

[17] For example, the plaintiffs in *Vander Jagt v. O'Neill* may have filed their lawsuit to increase public awareness of the Democratic leadership's perceived abuse of its majority status.

expectations rely on trusting. Sometimes the trust is misplaced, but perhaps more surprising, often it is justified.

Trust in the legislative arena does not flow from altruism. It rests on two related foundations: personal interactions and rational incentives. Legislators must engage with each other over at least a two-year term and usually far longer. Their encounters reflect the dynamic of continuing players rather than one-time participants. Thus, failure to carry out commitments chills the possibility of future advantageous agreements with the aggrieved party. Moreover, the process of shared experience and personal interaction can create friendships that make the foundation for trust personal as well as professional. Further, each House of Congress has many of the characteristics of a small and closed society. A legislator who reneges on commitments outside the bounds permitted by that House's culture suffers a reputation loss that affects the ability to deal with other legislators not directly affected by the particular breach.

I. LEGISLATOR TO LEGISLATOR

Take a simple example of logrolling. Legislator *A* wants to include provision *X* in pending bill one. Legislator *B* wants to include provision *Y* in pending bill two. A classic example of trading votes would involve *B*'s promise to support inclusion of provision *X* in bill one in exchange for *A*'s promise to support inclusion of provision *Y* in bill two. But the two bills that will carry these provisions will not come before the House simultaneously. If bill one comes up for consideration first and *B* supports it with provision *X*, *B* bears the risk that *A* will renege and fail to support provision *Y* later when bill two comes to the House floor. *B* cannot cast *A*'s vote on *A*'s behalf or carry a formally binding proxy. *B*'s vote for *X* legislation rests on trust, on the expectation that *A* will perform as promised.

Legislative exchange between members appears in more complex forms as well. *B* may vote for *A*'s desired legislation without demanding a specific quid pro quo, but with the understanding that *A* will provide support in the future for as yet unspecified legislation of importance to *B*. *B* in effect creates a political credit with *A* on which *B* may draw in the future. By leaving open the exact form of *A*'s future performance, the parties create flexibility: *B* will determine when and for what purpose to draw down the credit with *A*. Further, this understanding between *A* and *B* rests on implicit conditions, as for example that *B* will not request an action that would embarrass *A* with *A*'s constituency. Within the accepted bounds, *A* generally will comply with *B*'s request for the reasons stated earlier.

A recent practice has created a new way for one legislator to obligate another to honor a future request for support. Individual legislators collect funds for their reelection campaigns. Often, the election does not deplete the fund, leaving a surplus. This may occur both because the member can raise exceptionally large sums in campaign contributions and because the member can avoid large election expenses, as when the member runs uncontested or

against a weak opponent. The member's unspent campaign funds may carry over to the next election cycle or the member may use some of it to support the candidacy of a fellow legislator.[18] The legislator who contributes to the campaign runs the risk of receiving nothing in return if the recipient loses the election. But if the recipient wins, both the contributor and recipient reasonably can expect the latter to express gratitude for the assistance in a tangible way when Congress next convenes. The expression may take the form of support for legislation, as in the earlier examples, or support for the contributor in seeking a leadership position with the party hierarchy.[19] In either event, the contributor trusts the recipient to repay the contribution in an appropriate manner.

II. THE EXECUTIVE BRANCH

As the Constitution describes the procedure for enacting a law, the President plays a limited role, approving or vetoing the legislation at the end of the process, with the possibility of Congressional override even if he exercises the veto.[20] In contrast, in the United Kingdom and similar parliamentary systems, bills originate with the Cabinet and carry a virtual guarantee of enactment into law.[21] The practice in the U.S. Congress falls between these poles. Most significant legislation originates in the Executive branch. Each House of Congress may make significant revisions or reject these proposals. Representatives of Executive branch departments participate informally at each stage of the legislative process. Inevitably, they negotiate with members as to the content of legislation and for support for the proposal.

A member may support a legislative initiative from the Executive branch for many different kinds of reasons. Occasionally, negotiations for support resemble those between legislators, although the President manifestly has a wider range of benefits to confer in exchange. Trust that the Executive will fulfill its promises facilitates the negotiations. By all accounts, mutual distrust between the Clinton Administration and Republican leaders in each House of Congress contributed to their legislative gridlock in the six years after 1994.[22]

---

[18] *See Morning Edition* (NPR radio broadcast, Dec. 11, 2000), *available in* 2000 WL 21482558 (quoting Representative Marge Roukema for the proposition that members with large "war chests" that do not have competitive primaries or general election campaigns often raise excess funds to donate to other members).

[19] *See id.* (noting that Representative Roukema "may be at a disadvantage" in her quest to become chair of the Banking Committee because she did not have excess funds to contribute to other members of the committee).

[20] *See* U.S. CONST. art. I, § 7, cl. 2 (prescribing the bicameralism and presentment process).

[21] *See* Philip Norton, *Public Legislation*, in PARLIAMENT AND PRESSURE POLITICS 180 (Michael Rush ed. 1990) (explaining that the Cabinet initiates legislation in Great Britain).

[22] *See, e.g.*, David Baumann, *A Lame Duck Ending*, 32 NAT'L J. 3483, 3483-84 (2000) (quoting President Clinton and several congressional Republican leaders on their mutual

The important role of trust and the effects of its absence appear starkly in the process of appointment of federal judges. The formal process requires appointment by the President with the advice and consent of the Senate.[23] The President and a majority of the Senate often belong to different political parties. Before the mid-1980s the political actors avoided through compromise the impasse that could arise from partisan difference. Frequently, a number of appointments came together as a package that satisfied the needs of both parties. Each side exercised its implicit veto—presidential failure to appoint or Senate failure to approve—with care. These institutional arrangements rested on trust: an expectation that the other side would behave in accordance with these norms.

This trust suffered severe damage in the defeat of Judge Robert Bork's nomination for the Supreme Court in 1987.[24] Democrats castigated Bork, a former academic and a judge on the District of Columbia Court of Appeals, as an ideologue. The attacks in the press became personal; one zealous magazine published a list of videotapes Bork had rented.[25] The Senate defeated the Bork nomination, but Republicans seethed. In turn, during the Clinton Administration they responded with unprecedented opposition to his judicial appointments. It remains to be seen whether nominations from the Bush Administration will engender the trust of Democrats in a closely divided Senate.[26]

III. STAFF

Each legislator hires a significant number of staff, on average 16.5 for each Representative and 42.7 for each Senator.[27] Staff functions range from the clerical to the highly discretionary. As examples of the latter, legislative aides master substantive areas for the member, advise the member on positions to take within those areas, and negotiate with aides for other members to obtain

---

distrust and recounting the resulting gridlock of the lame-duck period).

[23] *See* U.S. CONST., art. 2, § 2.

[24] See ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989), for a detailed account of the process.

[25] This episode served as the impetus for the Video Privacy Protection Act, colloquially known as the "Bork Bill." *See* PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW 10 (1996) (describing the publication of Judge Bork's video rentals).

[26] However, the nomination of former Senator John Ashcroft for Attorney General may provide an early indication. *See* Helen Dewar, *A Serious Breach in Bipartisanship; Democrats Fire a "Shot Across the Bow"*, WASH. POST. Feb. 2, 2001, at A6 ("By amassing 42 votes in opposition to the former Missouri senator, the Democrats sent the president a strong warning to expect far more trouble if he again turns to the Republican Party's right wing for other top appointments, most importantly for the Supreme Court.")

[27] *See* NORMAN J. ORNSTEIN ET AL., VITAL STATISTICS ON CONGRESS 1999-2000 129 (2000) (reporting that for 1999, the House of Representatives employed 7,216 personal staff and the Senate employed 4,272 personal staff).

support for legislative positions.[28] The member trusts all staff to maintain confidentiality and to refrain from compromising the member's interests. Aides who exercise discretionary authority on the member's behalf carry the additional obligation of any agent to act in the principal's best interests, and the member trusts them to do so. This trust rests in part on the member's power to fire staff for unsatisfactory performance. At the same time, the member may reward a loyal staff member by assisting that staff member in career advancement.

Similarly, congressional committees employ their own staff, some of whom perform sensitive tasks requiring the exercise of discretion. These staff work most closely with the chair and ranking minority members of the committee. They may negotiate legislative positions, supervise the drafting of legislation, and write committee reports. Again, their current position of authority depends on the chair's continuing approval, and the chair also may have influence over their career aspirations. For example, Justice Breyer's prior service with an influential Senate Committee helped him in securing his seat on the Supreme Court.[29] Thus, tangible rewards and sanctions support the chair's trust that the committee staff will act in the chair's best interest.

An oft-cited exchange on the floor of the Senate between Senators Armstrong and Dole in connection with major tax legislation in 1982 illuminates the role of highly placed committee staff.[30] Senator Armstrong

---

[28] *See* MICHAEL J. MALBIN, UNELECTED REPRESENTATIVES: CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENT 14-15 (1979) (discussing the role and influence of legislative aides); Muriel Morisey Spense, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 604-08 (1994) (describing the role of congressional staff).

[29] *See* SENATE COMM. ON THE JUDICIARY, NOMINATION OF STEPHEN G. BREYER TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, S. EXEC. REP. NO. 103-31, at 3 (1994), *reprinted in* 19 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1994, at 831, 833 (Roy M. Mersky et al. eds., 1996) (citing Justice Breyer's two years of service as chief counsel to the Senate Judiciary Committee as one of his qualifications and unanimously recommending his Supreme Court nomination).

[30] *See* 128 Cong. Rec. 16918-19 (1982). The exchange went as follows:

Mr. ARMSTRONG: My question, which may take him by surprise, is this: Is it the intention of the chairman that the Internal Revenue Service and the Tax Court and other courts take guidance as to the intention of Congress from the committee report which accompanies this bill?

Mr. DOLE: I would certainly hope so . . . .

Mr. ARMSTRONG: [W]ill the Senator tell me whether or not he wrote the committee report?

Mr. DOLE: No; the Senator from Kansas did not write the committee report.

Mr. ARMSTRONG: Did any Senator write the committee report? . . .

Mr. DOLE: I have to check.

Mr. ARMSTRONG: Does the Senator know of any Senator who wrote the committee

first asked Senator Dole, chair of the Committee on Finance, whether he had read the entire report. Senator Dole replied that he had not. Senator Armstrong then asked whether the Committee had voted on the report. Senator Dole replied that the Committee had not. Senator Armstrong pointed out that those who would have to construe the new provisions would rely on the committee report as an authoritative source of legislative intent; he then noted that the Senators on the committee had not written, voted on, or read the report, and the Senate could not amend the report when the legislation came up for a vote.[31] Committee staff had written the report.

Although Senator Armstrong sought to de-legitimize the committee report as a source for judicial construction of the statute, he understood that Senator Dole had acted appropriately and in accordance with customary Senate practice in offering the report to the Senate.[32] Senator Dole and the other Senators on the committee had confidence that the report accurately reflected the Senators' views in the drafting. The Committee members had discussed and decided on the major elements of the legislation, and staff would have sought approval from its members for any nuance within the report that favored a particular interest.

Yet reliance on staff may inhibit other trusting relationships. More tasks performed by staff means less direct contact between members. Furthermore, when legislators hash out an agreement about a complex piece of legislation through their staff, they miss the opportunity to develop the personal sense of mutual reliance that a face-to-face meeting fosters. Often, some substantive agreement disappears in the chain of communication as well, perhaps distorted by the less experienced understanding some staff bring to the process.

IV. LOBBYISTS

Members of Congress maintain a complex relationship with lobbyists, one that also involves a considerable measure of trust. For the purpose of this

---

report?

Mr. DOLE: I might be able to identify one, but I would have to search. I was here all during the time it was written, . . . and worked carefully with the staff as they worked. . . .

Mr. ARMSTRONG: [H]as the Senator from Kansas, the chairman of the Finance Committee, read the committee report in its entirety?

Mr. DOLE: I am working on it. It is not a bestseller, but I am working on it.

Mr. ARMSTRONG: [D]id members of the Finance Committee vote on the committee report?

Mr. DOLE: No.

[30] *See id.* at 16918-19 ("[S]ome courts have in fact relied upon committee report language as if it were a statute. . . . [T]his is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute.")

[32] *See id.* at 16918 (acknowledging that he was just putting remarks into the record and not filing an official objection to the committee report).

Article, a lobbyist is one whom clients pay to represent specific interests before Congress. Generally, those interests seek to enact legislation (or to prevent the enactment of legislation) that affects business or profits interests, such as the oil and gas industry, television broadcasters, or an airline pilots' union. Other organizations, whose missions address social issues such as drunk driving or abortion, also lobby Congress.

Lobbyists seek access to members to present their client's position and to obtain the member's support for that position.[33] They offer two major assets to a member to gain this access and support: information and money. First, lobbyists provide information by quickly educating a member on the substance of a client's particular issue. Lobbyists from different sides of a contentious question also educate the member for upcoming votes or other action. As a related function, lobbyists provide a form of communication among parties concerned with a particular issue. As an example, a member who seeks to convey a preference on an issue to a regulatory agency without doing so directly can disclose the preference to a lobbyist who, in turn, may repeat it when meeting with staff of the agency. In a similar manner, lobbyists can help the member to gauge the sentiment of other members on a particular matter. Members thus rely on the accuracy of the information and communications provided by lobbyists.

Second, lobbyists help provide money for the member's campaign fund. Both the lobbyist and the member commit a felony if the former pays the latter to vote in a particular way on a pending matter.[34] In some cases, however, a high correlation exists between contributions from a particular source and legislative action favorable to that source. Do lobbyists contribute to the campaign funds of members who support their clients' positions, or do members support the clients' positions because they have received campaign contributions? Each must leave the connection sufficiently vague and must trust the other to perform as expected.

Consider the simple arithmetic of financing a campaign for reelection. Suppose that a contested campaign for a House seat costs $1 million, a reasonable estimate.[35] If a member serving a two-year term begins raising the money at once, the member must raise an average of $1,370 every single day. A lobbyist who makes a contribution of $10,000 to the fund has performed a

---

[33] *See* Spense, *supra* note 28, at 604-09 (discussing the role of lobbyists in the legislative process).

[34] *See* 18 U.S.C. § 201 (1994) (imposing criminal liability on those who bribe a public officials and on any public official who accepts a bribe).

[35] During the 1998 election cycle, candidates for the House of Representatives spent an average of $547,635. *See* ORNSTEIN ET AL., *supra* note 27, at 80 (outlining the average expenditures for a congressional candidate). However, this estimate may now be on the conservative side. *See* Jean Merl, *Cost of Rogan-Schiff Battle for House Seat Topped $10 Million*, L.A. TIMES, Dec. 9, 2000, at B9 (reporting that former Representative James E. Rogan raised $6.4 million for his failed re-election bid in November 2000 and that successful Democratic challenger Adam Schiff raised $3.9 million for the campaign).

week's worth of fundraising for the member, a valuable service. Moreover, a substantial fund may appear as a formidable obstacle to a potential challenger, deterring would-be candidates from entering the fray. Thus, a lobbyist who helps to scare off opponents has provided value. The lobbyist and the member both know this and expect the member to respond cooperatively in the future.

In a few cases, generally those involving social rather than economic issues, lobbying organizations can reward a member with benefits that enhance the member's reputation and thereby improve the member's standing with constituents and colleagues. If, for example, the Consumers Union names a Senator as consumer advocate of the year, the organization extends part of its own prestige to that legislator. Presumably, the organization does so after the legislator has acted favorably on its legislative agenda and expects that the award will bind the Senator even more firmly to that agenda.

Neither the lobbyist nor the member can compel the other to perform as promised. But each can sanction the other in the future for failure to perform as promised. If the member reneges, the money stops. If the lobbyist reneges, the member may vote against the client's interest in the future. A lobbyist develops a reputation for veracity and reliability, and failure to perform as promised injures the lobbyist's ability to persuade other legislators to act favorably in the future.

CONCLUSION

Trust binds many disparate elements of the legislator's work in the Congress. It enables members to form coalitions with each other through party organization and through shared constituent interests. Other kinds of trusting relationships enable individual members to extend their reach through staff. Members' relationships with lobbyists, another set of long-term players in the legislative process, depend on mutual trust. For a contentious and partisan body, trust provides institutional glue. But trust has limits. A member rationally might conclude in a given instance that the benefits of breaking a trust exceed the costs. That member might individually benefit in that instance but does so at the expense of potential erosion of institutional reliance on trust in the future.

Finally, trust provides only one of the elements in the operation of Congress. Analysis of its effects provides no more complete picture of the Congress than a map of the Metro fully describes the District of Columbia. Congress remains a competitive institution. Yet trust contributes significantly to its operation.