CONNECTICUT STATE ETHICS COMMISSION
30 TRINITY STREET
HARTFORD, CONNECTICUT 06115

ADVISORY OPINION NUMBER 79-17

Lobbying by a United States Senator

A United States Senator has sent to each member of the General Assembly a letter urging the member to support ratification of the proposed amendment to the United States Constitution which would give representation in the United States Congress to the District of Columbia. The Congress approved proposing the amendment in 1978. At the time the Senator sent his letter to members of the Connecticut legislature, a joint resolution to ratify the amendment was pending before them. The letter encloses a lengthy statement by the Senator presenting arguments in favor of the amendment, to which is appended a number of documents containing declarations and factual data which support ratification in general and the Senator's statement in particular. The letter and enclosures, totalling 43 pages, were sent under the Senator's frank. The costs of the packet , and who paid them, are unknown. The Senator who mailed the letter to the General Assembly members represents in Congress a state other than Connecticut. He is not an announced presidential candidate, but has substantial public support to be his party's nominee for the presidency. A State legislator, estimating that the cost of preparing and mailing the senator's packet exceeded three hundred dollars, has asked whether the Senator should have registered as a lobbyist under the Code of Ethics for Lobbyists, Chapter 10, Part II, General Statutes.

That Code includes in its definition of lobbying "communicating with any official ... in the legislative ... branch of government for the purpose of influencing any legislative ... action". Section 1-91(k), General Statutes. A member of the General Assembly is a "public official". Section 1-91(p), id. A "lobbyist" is a person "who in furtherance of lobbying makes expenditures ... and such ... expenditures are in excess of three hundred dollars in any calendar year ...." Section 1-91(l), id. (There are exceptions to the definition but none applies to the Senator. Legislation to exclude, from the definition of lobbyist, members of Congress acting within the scope of their office has been proposed but the General Assembly has not enacted it.) A lobbyist who spends over three hundred dollars in a calendar year for lobbying must register with the State Ethics Commission on or before January fifteenth or prior to the commencement of lobbying, whichever is later. Sections 1-94(b), 1-95(a), id.

At the outset, it appears that an inquiry into the Senator's actions is not prohibited by the Speech or Debate Clause, Art. I, Sec. 6, Cl. 1, United States Constitution. The packet was

delivered after the Congress had completed its Article V responsibilities of proposing the amendment. The packet's contents go far beyond a description of legislative acts which had been taken, or the provision of other information protected by the Speech or Debate Clause. They are not confined to speech or debate in either House of the Congress, to voting, or to other acts essential to legislating. Therefore, the letter and enclosures are not immune, under the Speech or Debate Clause, to questioning. Cf. Doe v. McMillan, 412 U.S. 306 (1973); United States v. Brewster, 408 U.S. 501 (1972); Gravel v. United States, 408 U.S. 606 (1972); Hutchinson v. Proxmire, 579 F. 2d. 1027 (1978); Schiaffo v. Helstoski, 492 F. 2d. 413 (1974); Hoellen v. Annunzio, 468 F. 2d 522 (1972), cert. denied, 412 U.S. 953 (1973).

The Senator's use of franked mail to transmit the packet to Connecticut legislators is significant. It indicates his opinion that the packet concerned the "conduct of the official business, activities, and duties of the Congress of the United States". See 39 U.S.C.A. 3210(a)(1). Section 3210 provides in pertinent part:

"Section 3210. Franked mail transmitted by the Vice President, Members of Congress, and congressional officials

"(a)(1) It is the policy of the Congress that the privilege of sending mail as franked mail shall be established under this section in order to assist and expedite the conduct of the official business, activities, and duties of the Congress of the United States.

"(2) It is the intent of the Congress that such official business, activities, and duties cover all matters which directly or indirectly pertain to the legislative process or to any congressional representative functions generally, or to the functioning, working, or operating of the Congress and the performance of official duties in connection therewith, and shall include, but not be limited to, the conveying of information to the public, and the requesting of the views of the public, or the views and information of other authority of government, as a guide or a means of assistance in the performance of those functions.

"(3) It is the intent of the Congress that mail matter which is frankable specifically includes, but is not limited to--

> "(A) mail matter to any person and to all agencies and officials of Federal, State, and local governments regarding programs, decisions, and other related matters of public concern or public service, including any matter relating to actions of a past or current Congress;
>
> "...
>
> "(E) mail matter directed by one Member of Congress to another Member of Congress or to representatives of the legislative bodies of State and local governments;

"...

"(4) It is the intent of the Congress that the franking privilege under this section shall not permit, and may not be used for, the transmission through the mails as franked mail, of matter which in its nature is purely personal to the sender or to any other person and is unrelated to the official business, activities, and duties of the public officials covered by subsection (b)(1) of this section.

"(5) It is the intent of the Congress that a Member of or Member-elect to Congress may not mail as franked mail--

"...

"(C) mail matter which specifically solicits political support for the sender or any other person or any political party, or a vote or financial assistance for any candidate for any public office; or

"...

"(c) Franked mail may be in any form appropriate for mail matter, including, but not limited to, correspondence, newsletters, questionnaires, recordings, facsimilies, reprints, and reproductions. Franked mail shall not include matter which is intended by Congress to be nonmailable as franked mail under subsection (a)(4) and (5) of this section.

"...

"(e) The frankability of mail matter shall be determined under the provisions of this section by the type and content of the mail sent, or to be sent. Notwithstanding any other provision of law, the cost of preparing or printing mail matter which is frankable under this section may be paid from any funds, including, but not limited to, funds collected by a candidate or a political committee required to file reports of receipts and expenditures under the Federal Election Campaign Act of 1971 (Public Law 92-225), or from voluntary newsletter funds, or from similar funds administered and controlled by a Member or by a committee organized to administer such funds...."

In the course of revealing its intent regarding the franking privilege, Congress described in section 3210, supra, some matters which involve the official duties of a Member of Congress and some which are purely personal to the sender. Subsections 39 U.S.C.A. 3210(a)(2) and (3)(A) state that a Senator's official business includes more than informing his own constituents; in proper cases he may send information to the "public" or to "any person". In particular, he can mail matter to "all ... officials of ... State ... governments regarding programs, decisions, and other related matters of public concern or public service, including any matter relating to actions of a past or current Congress" .... Further, mail matter which is frankable specifically includes "mail matter directed by one Member

of Congress to ... representatives of the legislative bodies of State ... governments". 39 U.S.C.A. 3210(a)(3)(E).

The Senator's use of his frank leads to the conclusion that he believed that sending the packet was included within his duties as a United States Senator. The material clearly fits within the type of matter declared by Congress to be frankable because it will "assist and expedite the conduct of the official business, activities, and duties of the Congress of the United States". Insofar as the State of Connecticut is concerned, however, sending the packet is also clearly "lobbying", as defined in section 1-91(k), General Statutes. Assuming for purposes of argument that the Senator spent three hundred dollars or more in the course of providing his packet to the members of the General Assembly, the question then becomes whether, when there is statutory support for the proposition that the Senator was carrying out his duties as a United States Senator in sending the packets to members of the General Assembly, he should have first registered with the State Ethics Commission because the purpose of the packet was to influence legislative action in Connecticut.

The question almost answers itself. "Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any state. Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle. Article VI. A corollary to this principle is that the activities of the Federal Goverment are free from regulation by any state. No other adjustment of competing enactments or legal principles is possible." Mayo v. United States, 319 U.S. 441, 445 (1943) (footnotes omitted). In 1819 the Supremacy Clause was given a literal interpretation in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Since then, federal instrumentalities and officers have had an inherent freedom from regulation or taxation by a state unless Congress has affirmatively declared them subject to regulation or taxation. Sperry v. State of Florida, 373 U.S 379 (1963); Leslie Miller, Inc. v. State of Arkansas, 352 U.S. 187 (1956); Mayo v. United States, supra; Johnson v. State of Maryland, 254 U.S. 51 (1920); M'Clung v. Silliman, 19 U.S.(6 Wheat.) 598 (1821). There has been no such declaration covering the Senator's activities.

The above decisions have not been based on any consideration of degree but upon the entire absence of power on the part of the states to interfere with proper governmental functions of the United States. It would be in contravention of the dual form of goverment if Connecticut could require a United States Senator to register, and to file periodic financial reports, before he could execute what seems to be part of his duties. The basis for the decision that such