LOBBYISTS BEFORE THE COURT

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Many persons and groups do not hesitate to use their influence to persuade agencies of government to make decisions which they like. Of course, if reasonably regulated and ethically done, this is not only proper but often desirable even if the parties have axes of their own to grind. Lobbying before Congress and the bureaucracy was never on such a widespread scale as in the period since the war. It has been a time of great public confusion on both national and international issues, and great economic and social values have been at stake. The astronomical federal budget and the post-war tensions in our foreign affairs have brought the lobbyists to Washington by the thousands. Vast sums and powerful organizations are behind them and whether they utilize mink coats and deep-freezers or employ more ethical methods, they are effective forces in molding our post-war nation.

The Supreme Court has not been immune. The lobbying device available for use before the Court is the brief amicus. When the nearly two hundred members of the Committee of Law Teachers Against Segregation in Legal Education filed their brief amicus curiae in the *Sweatt* case,[1] they were using their influence in an effort to obtain a decision to their liking. By the October, 1948 term amici briefs had become a genuine problem for the justices and their clerks. In that term there were 75 briefs filed in 57 cases. All but 14 were submitted with the consent of the parties and only 3 motions for leave to file were denied.

Even a cursory examination of these briefs indicates the time-wasting character of most of them. To be sure, a workmanlike brief such as that of the Committee of Law Teachers is a real help to the Court; but for the most part, briefs amici are repetitious at best and emotional explosions at worst. Indeed, the justices have, on occasion, been plagued with floods of post-card petitions and letters, visited by personal delegations and annoyed by alleged "briefs" submitted without pretense of party consent or motion for leave to file. The Daily Worker even went so far as to request its readers to file their personal

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1. Sweatt v. Painter, 339 U.S. 629 (1950).

"amicus briefs" in the *Dennis* case.[2] It looked as if the situation were out of hand and the Supreme Court on the way to a serious loss of dignity. More and more the Court was being treated as if it were a political-legislative body, amenable and responsive to mass pressures from any source. The final straw appears to have been the case of the "Hollywood Ten"[3] who declined to testify before the Un-American Activities Committee of the House. Some forty organizations got themselves "on record" on behalf of the defendants, including, among others, The American Civil Liberties Union, The Samuel Adams School of Social Studies, The National Union of Marine Cooks and Stewards, The Congress of American Women and the Conference of Studio Unions, The American Communications Association, The Methodist Federation for Social Action, The American Slav Congress, The American Jewish Congress, The National Council for the Arts, Sciences and Professions, The Progressive Party of America, and Alexander Meikeljohn et al. The American Writers Association filed on behalf of the United States. In addition, many other so-called briefs seem to have been submitted with complete indifference to the rule requiring consent of the parties or to the alternative practice of a petition for leave to file.[4]

It is not surprising that the justices came finally to the conclusion that, in most cases, the "friends" of the Court were more trouble than they were worth. In November 1949, a new rule concerning briefs amicus curiae was announced. Except for governmental units which can still file such briefs as a matter of right, consent of all parties must be obtained, or if not, a motion must precede the brief describing the applicant's interest in the case and showing that the brief will cover matter not presented, or inadequately presented by the parties.[5] Until

2. Dennis v. United States, 339 U.S. 162 (1950).

3. Lawson v. United States, 176 F.2d 49 (D.C. Cir. 1949), *cert. denied,* 339 U.S. 934, *rehearing denied,* 339 U.S. 972 (1950).

4. The most recent attempt to employ high pressure methods to influence the Court was the "brief" offered by the "National Committee to Secure Justice in the Rosenberg Case" which wanted to be a "friend" of the Court. It questioned whether the death sentence "may not have been unduly influenced by political prejudice and hysteria." It was claimed that some 50,000 persons signed the "petition" asking for a new trial. It might well be that the Supreme Court should have considered whether the death sentence had not been unduly influenced by "political prejudice and hysteria," but it is even clearer that the Court must consult its own collective conscience on such matters without reference to the number of persons who are willing to sign a petition.

5. U.S. Sup. Ct. Rule 27-9 (1950), 28 U.S.C. 1706 (Supp. 1952), amending the old rule, 28 U.S.C. 3187 (1946), effective Feb. 27, 1939. By its literal terms, the 1949 rule seems more liberal than the old one which flatly required consent of parties and made no provision for motion for leave. In practice, however, the requirement of consent was not followed and the Court actually granted motions for leave to file, as a routine matter, with rare exceptions.

the present term, just one amicus brief has been admitted on motion for leave to file.[6]

The experience of the American Jewish Congress which files briefs of genuine merit is illustrative of the effect of the new rule. The Congress, or more particularly its Commission on Law and Social Action, was very active in amicus argument prior to the rule change. In the 1947 and 1948 Terms, and early in the 1949 Term, it filed briefs in seven cases with consent of the parties: *Oyama v. California,*[7] *Bernstein v. Van Heyghen Frères Société Anonyme,*[8] *Bob-Lo Excursion Co. v. Michigan,*[9] *Shelley v. Kraemer,*[10] *Takahashi v. Fish and Game Commission,*[11] *Stainback v. Mo Hock Ke Lok Po,*[12] and *Lawson v. United States.*[13] In another case, *Illinois ex rel. McCollum v. Board of Education,*[14] the Congress drafted a brief which was filed on behalf of a number of Jewish organizations, and which Mr. Justice Frankfurter kept before him during oral argument and used extensively in a concurring opinion.[15] In addition, when consent of the parties was withheld, the Congress moved for, and was granted, leave to file in *Terminiello v. Chicago* [16] and sought the Court's permission to file in two others, *Sweatt v. Painter* [17] and *Henderson v. United States.*[18] The disposition of these motions requires explanation.

The *Sweatt* and *Henderson* cases came before the Court together with *McLaurin v. Oklahoma State Regents.*[19] In May, 1949, the Congress filed a brief in support of the petition for certiorari in the *Sweatt* case, the Court having already noted probable jurisdiction over the appeal in the *Henderson* case.[20] In October, the Congress filed its brief and a motion for leave to file in the *Henderson* case. On November 7, probable jurisdiction was noted in the *McLaurin* case,[21] and certiorari was granted in the *Sweatt* case.[22] The notation granting certiorari

6. Brief for the United States Lines in Warren v. United States, 340 U.S. 523 (1951). Amicus order, 71 Sup. Ct. 289 (1951).
7. 332 U.S. 633 (1948).
8. 332 U.S. 772 (1947).
9. 333 U.S. 28 (1948).
10. 334 U.S. 1 (1948).
11. 334 U.S. 410 (1948).
12. 336 U.S. 368 (1949).
13. 339 U.S. 934 (1950).
14. 333 U.S. 203 (1948).
15. *Id.* at 212.
16. 337 U.S. 1 (1949).
17. 339 U.S. 629 (1950).
18. 339 U.S. 816 (1950).
19. 339 U.S. 637 (1950).
20. 17 U.S.L. WEEK 3275 (1949).
21. 18 U.S.L. WEEK 3148 (1949).
22. 338 U.S. 865 (1949).

recited the filing of the amicus brief, but the Court never noted further action on the motion. The next week, November 14, the rule change was announced, and on January 9, 1950, the Court, consistent with its post-amendment practice, denied the motion for leave to file in the *Henderson* case.[23]

Mr. Joseph B. Robinson, Staff Counsel for the Congress, feels that this pre-amendment activity would have been far less successful under the present rule. "It is safe to say that we would not have filed our brief and motion in the *Henderson* case if the rule had been changed a month earlier. It is also likely that if the rule had been in effect two years earlier, the *Terminiello* and *Sweatt* motions would have been denied, and the consent which we obtained in the other seven cases would not have been so easily obtained." [24] Mr. Robinson may be too conservative; it is almost certain that consent could not have been obtained.

Since the adoption of the amendment, the American Jewish Congress has been able to obtain consent of the parties in two cases, in one of which, *Doremus v. Board of Education*,[25] a brief was filed. In one other case, *Briggs v. Elliott*,[26] involving a segregation issue, consent was denied by the attorney for the state of South Carolina, and the Congress believed it is hopeless to ask the Supreme Court to grant leave to file. "In other cases in which we might have filed amicus briefs, we have been deterred from taking any action by the unlikelihood of either obtaining consent or getting permission from the court." [27]

The American Jewish Congress' difficulties are those felt by all similar organizations. The American Civil Liberties Union, the National Lawyers' Guild and the American Jewish Committee, which among them filed a number of creditable briefs during the 1948 and 1949 Terms, have moved for leave to file in fewer than ten cases since then, and not a single motion has been granted. During the past term, the Court has finally granted one motion, that of the United States Lines in *Warren v. United States*.[28] The motion, which demonstrated

23. 18 U.S.L. WEEK 3207 (1950). At the same time the motion of Sam Hobbs for leave to appear and present oral argument as amicus curiae was granted. On Nov. 7, 1949 Sam Hobbs was granted leave to file a brief amicus curiae.

24. Letter from Mr. Robinson to Mr. Etherington, on file in the Yale Law Library.

25. 342 U.S. 429 (1952).

26. 342 U.S. 350 (1952).

27. Letter from Mr. Robinson. It should be added here that the Congress subsequently obtained consent to file in one of the other segregation cases, Brown v. Topeka, 344 U.S. 1 (1952).

In the Thompson Restaurant case [District of Columbia v. Thompson, 21 U.S.L. WEEK 4415 (U.S. June 8, 1953)], the corporation counsel consented to any and all groups which desired to file briefs amici, but counsel for Thompson consented only to a brief by a trade association which was favorable to its position.

28. See note 5 *supra*.

very direct interest on the part of the United States Lines,[29] appears to be the only motion for leave to file that has been successful in over two years.

The Court has thus gone from one extreme to the other in this matter. The new rule is much in disfavor with respectable organizations which have a legitimate interest in certain aspects of Supreme Court litigation. Indeed, it apparently does not sit well with some of the members of the Court itself. Justice Black has stated his dissatisfaction with the rule[30] and Justice Frankfurter has twice reprimanded the Solicitor General for refusing consent to the filing of amici briefs.[31] Justice Frankfurter's public letters to the Solicitor General suggest a wide diversity between the aim of the Court's Rule and its actual effects. "If all litigants," he says, "were to take the position of the Solicitor General, either no *amici* briefs (other than those that fall within the exceptions of Rule 27, 28 U.S.C.A.) would be allowed, or a fair sifting process for dealing with such applications would be nullified and an undue burden cast upon the Court. Neither alternative is conducive to the wise disposition of the Court's business. The practice of the Government amounts to an endeavor, I am bound to say, to transfer to the Court a responsibility that by the rule properly belongs to the Government."[32] If Justice Frankfurter has accurately stated the Court's intention with regard to its rule—to put the sifting process off onto the parties—it becomes clear that a new rule is needed. Despite the ambiguity in the present language of the rule, it most certainly provides for the granting of motions for leave to file by the *Court*. And it says nothing about *party responsibility*.

The amicus curiae has had a long and respected role in our own legal system and before that, in the Roman law. To be sure, participants are often a friend of one of the parties as well as the Court but the primary function of the amicus is to help the court arrive at a just

29. The brief was accepted Jan. 2, 1951. None had been accepted after motion and without consent since Nov. 14, 1949.

30. On Lee v. United States, 343 U.S. 924 (1952), motion for leave to file brief of Joseph Steinberg and Donald Steinberg denied.

31. On Lee v. United States, 343 U.S. 924 (1952); United States v. Lovknit Mfg. Co., 342 U.S. 915 (1952).

32. On Lee v. United States, 343 U.S. 924 (1952). The remainder of Mr. Justice Frankfurter's memorandum contains the following:

> "The rule governing the filing of *amici* briefs clearly implies that such briefs should be allowed to come before the Court not merely on the Court's exercise of judgment in each case. On the contrary, it presupposes that the Court may have the aid of such briefs if the parties consent. For the Solicitor General to withhold consent automatically in order to enable this Court to determine for itself the propriety of each application is to throw upon the Court a responsibility that the Court has put upon all litigants, including the Government, preserving to itself the right to accept an *amicus* brief in any case where it seems unreasonable for the litigants to have withheld consent."

decision. Admittedly, the Supreme Court has a problem on its hands with which it must come to grips. Briefs amici are often valuable. They may be particularly valuable in connection with petitions for certiorari where the Court has to make a preliminary decision on the importance of the issues raised. Its task is to devise some way to preserve the advantages of briefs amici without first having to examine all such briefs to select those of merit. It is the absence of such a rule that has led the Court to exclude practically all by-standers who wish to lend their aid in the interest of justice. There is nothing wrong with lobbying, as such, if everything is aboveboard and on a level of decency, morally and intellectually. The Court might well assume some responsibility in making important distinctions.