



*Theory and Practice in English Studies 4 (2005):
Proceedings from the Eighth Conference of British, American
and Canadian Studies. Brno: Masarykova univerzita*

Representativeness and Separation of Powers: Pork Barrel Legislation and Private Bills

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The rule of representation is unquestionably one of the foundations of legitimate government. That rule concerns such important, and at the same time, relatively not controversial activities as e.g. intervening with federal agencies on behalf of constituents. Except for this one, there are more complicated methods of representation. Pork barrel legislation and private bills mentioned in the title are among them. Enacting private legislation gives rise to many constitutional disputes, since it quite often implies delegation of congressional power to the executive and concerns performing judicial-like activities in legislature's hands. The analysis shows that direct patronage should be seen as a part of representation rule in legitimate government with its inherent advantages and disadvantages. Therefore, the rule of representation – even when being seen in conflict with the rule of separation of powers – is also to be treated as an indispensable part of contemporary theory of democracy.

*Representativeness is present if the main contending interests
are heard and weighted during the decision-making process.
Randall B. Ripley (1975: 272)*

*If men were angels, no government would be necessary.
Federalist No. 51*

The rule of representation is unquestionably one of the foundations of legitimate government. That rule laid the foundations of the United States, too.¹ The Founding Fathers said in the Declaration of Independence:

Governments are instituted among Men, deriving their just powers from the consent of the governed [...] whenever any Form of Government becomes destructive [...] it is the Right of the People to alter or abolish it, and to institute a new Government [...] organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Although the term: “representation” is not mentioned there directly, that rule governs the spirit of one of the most important documents in entire US history.² What is striking, the representation rule is not explicitly mentioned in the US Constitution either. The Framers decided to include only those provisions that may be called general³ and/or “technical.”⁴ So, what are the reasons to treat representation as a core question in the theory of democratic state? For what reasons is it worth further studying? How is the representation rule performed in everyday political practice? What are the peculiarities in the US version of it? And last but not least, what is the connection between representation rule and separation of powers rule?

The rule of representation concerns – generally speaking – the way representative performs his/her duties. Doctrine teaches we have two opposing stances: of an imperative and a free mandate. The former is performed when constituents’ instructions are *legally* binding for the representative. When he/she does not fulfill “clients’” expectations, they have the right to dismiss (remove) the representative during the term in office. An imperative mandate was partly performed e.g. in the 16th century Poland. The representatives to parliament were receiving some instructions to carry them out; in some of them legislators were authorized to represent constituents in a limited way (*limitata potestas*). Imperative mandate was typical for feudal states and those ruled by radical forces (e.g. the Paris Commune in 1871).

On the other hand, a free mandate is performed when the representative may oppose his constituents’ opinions and he/she cannot be removed from the office. Strictly speaking, in that case there is also a connection with “clients,” but that connection is more casual (loose) and has symbolic meaning for it is binding only *morally*, not legally. In contemporary states – on nation-wide level – the concept of a free mandate predominates. That idea was also adopted in the United States in the 18th century.

If we have already known that the representative cannot be removed from office during his service, does it mean he may perform his duties as he wishes? Obviously he does not. The main limitation is to have the next elections in prospect. Assuming I would like to be elected again, I do my best to represent my constituents’ interests (As a popular saying goes: *My first duty is to get re-elected*). But to be re-elected means to do what my electorate wishes. That process is rightly compared to the relations between a lawyer and a client.⁵ This analogy is also justified because of a prosaic reason: money. That will be explained further in details later on. To use a phrase coined for describing different phenomena, to be a successful representative is “to think like a lawyer and to act like a lobbyist” (Rubin 1993).

So, the representatives are made to represent their constituents and they often do this because of the power they have. That is the essence of direct patronage. It is based on many activities performed by the representatives in constituents’ best interest. Besides such important, and at the same time, relatively not controversial activities as intervening with federal agencies on behalf of constituents or getting an appointment for one of the constituents, there are more complicated methods of representation. Pork barrel legislation and private bills mentioned in the title are among them.

Pork barrel legislation is a very peculiar type of legislation. Much may be explained because of the name itself. Pork barrel

“came into use as a political term in the post-Civil War era. The term comes from the plantation practice of distributing rations of salt pork to slaves from wooden barrels.

When used to describe a bill, it implies that the legislation is loaded with special projects for members of Congress to distribute to their constituents back home at the cost of the federal taxpayer.” (www.congresslink.org/print_teaching_glossary.htm, retrieved May 7, 2004)

Among those “special projects” is: building airports, highways, buildings (such as post offices, schools, lighthouses), and even such specific purposes as equipping Alaska National Guard with Blackhawk helicopters in the 1984 pork barrel bill. What pork barrel legislation has in common is precise determining (specifying) sums and purposes for which the federal money is to be spent on. One of the peculiarities is the fact that when using a pork barrel bill, sponsors of specific provisions *must* support the entire bill. So, in practice it happens that politicians sitting at opposite ends of political spectrum vote together in favor for one act.⁶

Even more controversial manifestation of direct patronage is a private bill. Even trying to define its meaning is quite difficult. Sometimes it is even difficult to determine which bills are private and which are public (*Guide to the Congress of the United States* 1982: 351). Generally speaking, “private bills are used to address some particular problem which public laws either created or overlooked” (*Congressional Quarterly Guide to Congress* 1976: 299). Having said only that may induce a feeling that we deal with nothing more than only amending public laws, and therefore there would be useless to enter brand new notion. Because of that, the above definition needs to be completed with a reservation (qualification) that private bills regard specific individuals,⁷ whose name is usually included in the title of it. So private bills are probably best described when saying that they are introduced “for the relief of private parties, bills granting pensions, bills removing political disabilities, and bills for the survey of rivers and harbors” (28 Stat. 609 (1895), as amended, 44 U.S.C. 189 (1964)). Private legislation encompasses two main types of regulations: immigration/naturalization and claims.⁸

Approximately 30% of private laws concern immigration and naturalization issues (Lowi, Ginsberg 1990: 164). Generally speaking, private legislation serves as a way of granting an alien with permission to stay legally in the United States, even if the individual is not eligible according to general rules in public laws because of e.g. quota or visa policy restrictions.⁹ Because of some findings Congress feels it is desirable to suspend particular limitations.¹⁰

As for claims, succinctly put, private legislation provides monetary relief for individuals because of a need to refund

“injuries caused by government agents [...] but not covered by compensation provisions of any applicable laws, or in situation where money was honestly promised by a government agent but never paid.” (*Guide to the Congress of the United States* 1971: 303-4)

We may observe a decline in the number of private claims bills introduced into Congress: during 80th Congress more than 1,200 bills were introduced into the House, whereas during 101st Congress – only 96 (Hill and Williams 1993: 1012).¹¹

It is the right time to recall the question of money in private legislation. Sometimes the sum of money it regards is quite huge. In 1980, Congress voted for a private bill to pay \$625,000 to Private James R. Thornwell as a compensation for a U.S. Army experiment with using LSD.

It is easy to guess that potentially private legislation may be used as a tool in promoting extremely selfish (egoistic) interests and corruption. Indeed, it happens sometimes. It is worth recalling one of the most famous examples. In early 1980s, FBI agents posing as

Arab sheiks offered bribes up to \$50,000 to several members of the House of Representatives and one Senator (Harrison Williams, D-New Jersey) to introduce a private bill to permit rich Arabs to enter the United States. Seven members of Congress were convicted for bribery and conspiracy and were sent to jail. But practice says that such pathological activities are rather an exception than the rule.

The process for private bill becoming private law is similar to public measure. There are only two exceptions. The first is the institution of “objectors” in the House and Democratic and Republican Policy Committees in Senate. “Objectors” screen introduced bill for potential disapproval. The second exception is congressional possibility of referring bill’s provisions to the United States Claims Court for guidance.¹²

But even the meaning of those exceptions is quite limited. The former is performed in public legislation through “screening” bills but the details of that process are slightly different (it is rather a domain of committees’ business not individual representatives). The latter indeed does not take part in public bills since judicial review is *ex post facto* process in the United States. But again, in public legislation, the provisions need to be consistent with preceding law, otherwise the court may enter the scene. So in both types of legislation judiciary power is engaged. Is the collaboration performed without difficulties? What is the essence of that process? Is it really true that “private legislation is ‘inherently judicial’”? (*Private Bills in Congress* 1966: 1688). Here is the focal point of the issue: the question of separation of powers and – in that matter – performing judicial competencies through the legislative branch.

Although studies confirm that credit-claiming opportunities provided by private bill are devaluing (Hill and Williams 1993: 1008-1031), the question of danger caused by legislative usurpation of judicial power is still to be debated further. Obviously only courts may pronounce judgment of guilty, not Congress (Lieberman 1999: 2). Furthermore, it is generally accepted that the judicial branch has better instruments than the legislative branch to debate over specific facts of individual cases. On the other hand the rule of equity is called: public laws – for rather obvious reasons – “cannot cover all situations equitably.”¹³ Quite surprisingly, the Supreme Court in 1940 said that a private legislation is not an intrusion into the judicial power (*Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940)). That stance was questioned later on when the court decided that provisions of law might be applied to individuals only through judicial activities, not legislative ones (*United States v. Brown* 381 U.S. 461 (1965)). The Supreme Court reasoning was mainly based on the fact that judicial power is relatively free of political pressures and popular sentiments.¹⁴

But cooperation with the third branch of government - the executive - in the private legislation area also causes many troubles. Under some congressional regulations the executive is allowed to settle military claims under \$1,000 (Public Law 84-1028).¹⁵ When doing so, Congress delegates its inherent powers vested by the Constitution. The reason for that seems to be quite prosaic: the cost of private legislation became relatively high. Instead of introducing private measures, legislators prefer so-called ‘casework’ that is more valuable politically.¹⁶

What is the legal stand for private legislation then? Some supporters assert that the First Amendment is the least controversial delegation for a described activity.¹⁷ Furthermore, under article 1, section 8, clause 1, Congress has the power to pay the debts of the United States.¹⁸ Later on, the Supreme Court decided that these debts may be of “honorary” not necessarily legal character (*Pope v. United States* 323 U.S. 1 (1944)). Also, according to article 1, section 8, clause 4 of the US Constitution, Congress is empowered to pass naturalization laws. However, in practice these provisions seem to be not sufficient. The only institutionalized check on legislative activity is a possibility of using a presidential veto. Other way of limiting congressional activity would be a delegation of its inherent powers.

To conclude, private legislation is

“one of the easiest, cheapest, and most effective forms of patronage [...] it can be defined as an indispensable part of the process by which members of Congress seek to fulfil their role as representative.” (Lowi, Ginsberg 1990: 164-65)

Having said that, the odds are that direct patronage should be seen as a part of the representation rule in legitimate government with its inherent advantages and disadvantages. Therefore, the rule of representation, even when being seen in conflict with separation of powers rule, is also to be treated as an indispensable part of contemporary theory of democracy.

Endnotes

- ¹ See e.g. James Madison in Federalist No. 10: “A republic, by which I mean a government in which the scheme of representation takes place [...] promises the cure for which we are seeking”.
- ² For further readings on the Declaration of Independence see e.g. Dumbauld (1950).
- ³ E.g. Article 1, Section 2, Clause 1: “The House of Representatives shall be composed of members chosen every second year by the people of the several states” and section 3, clause 1: “The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years”. The latter provision was changed by Amendment XVII.
- ⁴ E.g. Article 1, Section 2, Clause 3: “Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers”.
- ⁵ Lowi, Ginsberg (1990): 158 and *Private Bills in Congress* (1966): 1703.
- ⁶ It happened in 1984 when conservative Senator Ted Stevens (R, Alaska) and liberal senator Ted Kennedy (D, Massachusetts) supported one of pork barrel bills (94-587).
- ⁷ Compare with Guide to the Congress of the United States, (1971): 329
- ⁸ The other bills - a group may be called: miscellanies – are omitted since there are relatively few such bills (e.g. private law 87-159).
- ⁹ Further reading in *Private Bills and the Immigration Law* (1956).
- ¹⁰ Among these reasons may be e.g. alien’s profession or being a military serviceman; see, respectively, private laws 87-242 and 87-101.
- ¹¹ There are four types of private claims bills: (1) overpayments by the government, (2) waivers of statutes of limitations, (3) waivers of *res judicata*, and (4) tort and contract claims. Further reading in *Private Bills in Congress* (1966): 1693-98.
- ¹² That practice may sometimes be constitutionally null and void; see *Glidden Co. v. Zdanok* 370 U.S. 530, 587 (1962). No matter the meaning of the exceptions, president is the last step in legislative process. On presidential vetoes of private bills see e.g. *Private Bills in Congress* (1966): 1701-03 and Berdahl (1937)
- ¹³ For reading on both stances see *Private Bills in Congress* (1966): 1684, 1686.
- ¹⁴ *United States v. Brown* 381 U.S. 445-46. Compare with an assumption that “political factors play a surprisingly small role in the enactment of private laws” in *Private Bills in Congress* (1966): 1693. Even because private bills are deliberated in details in the House Judiciary Committee, does not help much since that committee handles not every bill introduced. *Private Bills in Congress* (1966) note 24.
- ¹⁵ Other examples in Hill and Williams (1993): 1013-14.

- ¹⁶ “While the number of votes gained from a single act of constituency service is relatively small, the number of reelection votes that would be lost due to a fraudulent claim is potentially very high”. For argumentation see Hill and Williams (1993): 1021 and ff.
- ¹⁷ See e.g. Gellhorn and Lauer (1955): 125-43, *Guide to the Congress of the United States* (1982): 349-50 and Yacker (1979): 3-6.
- ¹⁸ To put it in other words, private legislation “correct injustice inflicted by the Federal government” (*Wall Street Journal*, April 14, 1967: 1) and therefore the US representatives may – end even *should* for their political sake – “address and correct wrongs” (Morehead 1986: 183).

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