8-1973

Conflict of interest: some selected legislative responses at the national and state levels

Berndt Harry Bohm

Follow this and additional works at: http://scholarship.richmond.edu/masters-theses

Recommended Citation
CONFLICT OF INTEREST: SOME SELECTED LEGISLATIVE
RESPONSES AT THE NATIONAL AND
STATE LEVELS

BY
BERNDT HARRY BOHM

A THESIS
SUBMITTED TO THE GRADUATE FACULTY
OF THE UNIVERSITY OF RICHMOND
IN CANDIDACY
FOR THE DEGREE OF
MASTER OF ARTS IN POLITICAL SCIENCE

August 1973
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preface</td>
<td>v</td>
</tr>
<tr>
<td>Chapter I: Introduction</td>
<td>1</td>
</tr>
<tr>
<td>A. Standards of Behavior</td>
<td></td>
</tr>
<tr>
<td>B. Legislative Responses</td>
<td></td>
</tr>
<tr>
<td>C. Thesis</td>
<td></td>
</tr>
<tr>
<td>D. Approach</td>
<td></td>
</tr>
<tr>
<td>Chapter II: Survey of Legislation</td>
<td>16</td>
</tr>
<tr>
<td>A. Span and Scope</td>
<td></td>
</tr>
<tr>
<td>1. Federal Legislation</td>
<td></td>
</tr>
<tr>
<td>2. State Legislation</td>
<td></td>
</tr>
<tr>
<td>B. General Legislative Approaches</td>
<td></td>
</tr>
<tr>
<td>1. Influence-peddling</td>
<td></td>
</tr>
<tr>
<td>2. Appearances before State Agencies</td>
<td></td>
</tr>
<tr>
<td>C. Selected State Examples</td>
<td></td>
</tr>
<tr>
<td>1. New York</td>
<td></td>
</tr>
<tr>
<td>2. Texas</td>
<td></td>
</tr>
<tr>
<td>3. New Jersey</td>
<td></td>
</tr>
<tr>
<td>4. Minnesota</td>
<td></td>
</tr>
<tr>
<td>Chapter III: Legislators/Legislative Employees</td>
<td>37</td>
</tr>
<tr>
<td>A. Federal Legislators</td>
<td></td>
</tr>
<tr>
<td>B. State Legislators</td>
<td></td>
</tr>
</tbody>
</table>

iii
Chapter IV: Personal Interest

A. Overt Situations
B. Less Apparent Situations
C. Selected State Examples
   1. New York
   2. Texas
   3. New Jersey
   4. Minnesota

Chapter V: Evaluation

A. Federal Legislation
B. State Legislation

Bibliography

Vita
Preface

Finding solutions to conflict of interest situations is a never ending task. The basic difficulty revolves around the fact that each situation is somewhat different from another. What may be statutory relief for one situation may not be relief for another. This paper attempts to examine the possibility of statutory relief and presents certain selected examples of federal and state level legislation in the conflict of interest area. We begin with a general analysis of "gray-zone" conflict of interest and conclude with an evaluation of certain federal and state responses to conflict of interest situations.

Recognizing that it would be much too involved to present all federal conflict of interest legislation and also a state-by-state analysis, I have chosen to select certain key federal legislation and certain example states whose conflict of interest legislation has been used as a model by other states. The selected states, New York, Texas, New Jersey and Minnesota are considered by various studies in the conflict area to have the most complete statutory relief for conflict of interest situations. The selected states
also were chosen because of their geographic location and because each of them has a somewhat similar approach to conflict of interest. I attempt to categorize different kinds of conflict situations and proceed to present some selected legislation and proposed legislation that is used to remedy these situations at both the national and state levels of government. Research success has been somewhat elusive in the sense that there are no clearly stated responses to "gray-zone" conflict situations. However, we have discovered that the conflict situations, once defined, can be dealt with in various ways and can be remedied in most cases through statutory or non-statutory relief.

Preparing this paper has been a long and arduous task. Much has been written and said about conflict of interest. Through it all I have somehow maintained a sincere interest in the subject matter. I would like to express my thanks to all those who have helped me with this project. Only their generous assistance made this project possible. A special thanks goes to Professor Arthur Gunlicks for inspiring and sustaining my interest in the conflict of interest area.
CHAPTER I

INTRODUCTION

A. Standards of Behavior

The question of what constitutes appropriate behavior for government officials has long been of great interest to lawyers, persons in government, and political scientists. The essential issue is that of ascertaining what is the "good behavior" that is expected of public servants and, in addition, what are appropriate standards that can be used to evaluate the performance of a public official in a situation involving a conflict of interest.

Conflict of interest has been defined in many ways. The United States Supreme Court defines conflict of interest or corruption in the following way. "Conflict of interest involves an act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others."1 Black's Law Dictionary con-

---

tains a similar but somewhat briefer definition. Black states that conflict of interest is an act done with an intent to give some advantage inconsistent with official duty and the rights of others. These definitions serve as a basis for this discussion. However, we must recognize that there are various shades of conflict of interest to which we now turn our attention.

What is the problem of conflict of interest as it affects government? It embraces the behavior of public officials and the concept of the "public interest." It is concerned with whether official behavior is consistent with the public interest. It asks the question: "Is an official's conduct of his job in accordance with the broad interest of the public or is he subject to influences in his decision-making that move him from an impartial stance?" This paper's focus is the often-cited "gray zone." That is the zone lying between behavior that is "clean as a hound's tooth" and behavior that is obviously improper and illegal, involving such things as bribery, embezzlement, fraud and


theft. In recent years the "gray zone" has been defined over and over again, and the collective view holds it to be a situation in which a public servant finds himself in a position where his personal or private interests clash with his public duties and responsibilities. It encompasses a vast span of activities where influence-peddling, gift-giving, arrangements, promises, and friendships are perhaps the most common that come to the public's attention. The problem of dealing with conflict of interest develops in attempting to catalogue such "gray zone" activities as "proper" or "improper" either generically or in individual situations. In some cases the final deciding factor may become the conscience of the decision-maker or the general public.

The standard upon which judgments are made is a fundamental presumption of democratic and responsible government. The concept of democratic and responsible government presupposes that persons dealing with government be treated equally; that all possess, in theory at least, equal access to government; that all are afforded equal hearings, and that all receive decisions by government based solely upon "the merits" of a particular case. Or, simply, government is not expected to show favoritism in treating its citizens.

---


There are few persons willing to disagree with such a theory in the abstract.

The shortcomings of this ideal are apparent in the real world where all too many persons angle for "connections" in government or brag of them, or labor assiduously to evade taxes and subsequently boast of their success, or generally endeavor to circumvent as much of the law as possible. It will contribute nothing new to review such situations here, for despite them, the standard remains. It is the formal expectation that citizens have for government behavior and, especially, it is the standard that elected and appointed public servants maintain in their respective public employ with which we are concerned.6

That this standard breaks down on occasion is also easily demonstrable. No problem is posed when the breakdown concerns the obviously illegal "black zone." Then the final arbiter becomes a court which, guided by statutory definitions, weighs the evidence and determines whether in fact charges of embezzlement or theft or outright bribery are supportable, and if so, determines the punishment for the offender according to statutory provisions.

The issue of conflict of interest, however, usually involves episodes in which there are no clear statutory

reference to these situations, or if some reference is found there is such vagueness of language employed as to render a statute virtually useless in aiding a court's judgment process.  

This resultant situation of "indefiniteness" due to statutory omission or generality is not the sole factor complicating the area of conflict of interest. There are many other factors which comprise the complex environment in which remedies to conflicts of interest are sought. One of the most important of these is the way in which the game of politics is played. The functioning of the American political party system includes as basic components the phenomena of patronage, campaign contributions, comprise and the political price of compromise, as well as the building of bases of support among various organized groups in society. All of these have become integral parts of our party system, essential to the operation of successful party organizations.  

Many of the situations forming phases of the conflict of interest problem arise from these facets of party activity. While their role in American politics is not often questioned, the growth of "conflict situations" from them presents the difficulty of drawing the line between practices that are acceptable and those that are not. The line itself must be

---


placed where it may afford some remedy to a collapse of public morality without being destructive to the system itself.

B. Legislative Responses

Conflict of interest as a problem for which solutions are sought embraces other factors. Policies designated to deal with conflict of interest must be appropriate not only to the American political tradition but also to the American constitutional and legal tradition. As many able writers point out, solutions must be abreast of American social and ethical standards if they are to be successful.\(^9\) The comparative inaction of legislative bodies in dealing with the problem is partially attributable to these difficulties. In this respect the facets of conflict of interest are quite confusing. For example, it is apparent that the nature of the problem is essentially different for executive and legislative officials. Most of the former are full-time career public servants who are already subject to numerous legal strictures because of their public employment. But this group can perhaps be described as being aware of certain limitations upon their behavior when undertaking such employment. It is the problem of election which stimulates the need for campaign contributions, patronage, and promises

---

designed to achieve significant group support. The possibility of an end to political careers forces the issue of the availability of outside sources of income to meet that eventuality. Finally, the enormous cost involved in electioneering and in merely maintaining one's legislative duties with one's required attention to the constituency makes legislative salaries far from adequate. Apart from career personnel in executive agencies, there is the problem of high appointive officials. One of the problems is the need to attract, and retain, proven executive talent for comparatively brief periods of time from the business world. Those who serve government in this way do so with the intent of returning eventually to their non-governmental positions. Thus, the impact of conflict legislation upon this particular group in executive agencies must be weighed carefully.

Another factor responsible for a cautious approach to the problem is the impact of conflict legislation upon the social group of government employees and officials. If behavior limitations are legislated and prescribed, the

10 Ibid., 42.

11 Bertel M. Sparks, "Conflict of whose interest?" [Commenting on criticism of the appointment of successful businessmen to public office, United States.] Freeman, Nov. 1971, 685.

12 Douglas, Ethics in Government, 43.

13 Ibid., 46.
question of their conformity to the general behavior pattern of the group develops. If proposed limitations when strictly enforced are harsh and impracticable, then we may encounter the phenomenon of having them ignored in practice.

Problems of constitutionality are also encountered in attempts to legislate remedies. Constitutional questions develop from the devotion of American government on all levels to the principle of "separation of powers." It is generally recognized that the facets of conflicts of interest vary among the three branches of government and that the legal remedies available to meet them differ in the case of each branch. It is also widely conceded that the problem must be approached and defined in separate and distinct frames of reference. Thus we employ within the framework of this paper reference to the following categories of persons who are publicly employed:

1. Elected National Legislative (ENL)
2. Elected National Executive (ENE)
3. Appointed National Legislative (ANL)
4. Appointed National Executive (ANE)
5. Appointed National Judicial (ANJ)
6. Elected State Legislative (ESL)
7. Elected State Executive (ESE)
8. Elected State Judicial (ESJ)
9. Appointed State Legislative (ASL)
10. Appointed State Executive (ASE)
11. Appointed State Judicial (ASJ)

Throughout this paper we will deal with the above distinct categories and the context of the presentation should clarify the use of the appropriate category.

Enforcement schemes must of necessity be distinct for each branch.\(^{14}\) It is interesting, as well, to observe that post World War II studies and legislation on the subject have confined their focus almost solely to the executive and legislative branches of government and have not sought to pursue the problem among the judiciary.\(^{15}\) This omission however should be rectified with the influx of studies on the United States Supreme Court appointment process.

There is also abundant legislation dealing with actions which may influence the decisions of juries and judges,\(^ {16}\) most of which is strictly construed and swiftly enforced.\(^ {17}\) In dealing with executive officials and legislators, it is conceded that barring the regulation of behavior


\(^{16}\) James Montgomery, "A Question of Ethics: Federal Judge Presides over a case related to his own fortune," (Judge Frank Gray Jr. in the Whale Inc. bankruptcy proceedings before the U.S. District Court, Nashville, Tenn.) Wall Street Journal, 176, 1, October 20, 1970.

\(^{17}\) Gairol Gigliott, Toward the Danger Mark: Administration
by criminal statutes one branch of government cannot bring sanctions against persons involved in conflict situations in another branch.\textsuperscript{18} In practice, this means that except for criminal prosecutions the sanctions applicable to executive personnel are going to be quite different from those applicable to legislative personnel.

An integral part of the entire problem of governmental behavior is the environment of double standards of morality in which government officials and employees serve. The public outrage toward certain activities of government employees is obviously not directed at identical behavior on the part of officials and employees of various business corporations in the country. Gift-giving, the use of influence, and lavish entertaining are all part of contemporary business techniques. It is obvious that what is tolerated in private business is not tolerated in government by the public. There are those who deduce that the existence of such a double standard precludes any real solution to the conflicts problem.\textsuperscript{19} They suggest that the prevalent standards of business will undermine those that are sought for government. This double standard may place public employees at disadvantageous positions in society, but there is apparently no alternative if respect for governmental impartiality is to be retained.

\textsuperscript{18} Douglas, \textit{Ethics in Government}, 51.

C. Thesis

It is in the context of such diverse and competing factors that consideration of "what has been done about conflict of interest" is undertaken. The complexity of the problem precludes the enactment of sweeping legislation as an effective remedy because of uncertainty about the impact on some of the related factors discussed above. Thus, a sort of situational approach to the entire problem has evolved. Much progress has been made in attempts to define a potential, if not real, conflict of personal and public interests. Not all such definitions are satisfactory, but it has been discovered that it is only in the consideration of concrete situations that the problem acquires reality.\(^\text{20}\)

One recent focus in the State of Virginia on this problem area concerned the question of whether or not state judges could hold directorship positions in local banking institutions.\(^\text{21}\) A most valuable study of a similar problem was made in 1951 by a subcommittee of the United States Senate Committee on Labor and Public Welfare.\(^\text{22}\) The Study by this

\(^{20}\) Ibid., 668.

\(^{21}\) Richmond Times-Dispatch, Jan. 19, 1972.

subcommittee, chaired by Senator Paul Douglas of Illinois, is noteworthy because of its thoroughness and for the recommendations which it submitted. Although none of the recommendations was enacted, they remain important to legislators as the basis for continuing national and state proposals that are offered to meet the problem. Since the conclusion of the work of the Douglas subcommittee, many more investigations have been undertaken by congressional committees in attempts either to cope with the general problem of conflict of interest as it affects the federal government or to explore the details of single incidents as they have come to light. 23

The Douglas study resulted in the introduction of legislative proposals—none of which was enacted—embodying its recommendations and of other proposals which offered a variety of responses to the situations which were exposed. Investigations conducted since that time have also brought forth numerous federal bills tackling the conflict problem. 24

Despite the concentration of public attention on the problem as it affects the federal government, 25 conflicts of interest have also been of concern in recent years to some


25 Watzman, Conflict of Interest, 79.
state governments that have undertaken studies in this area. New York, Texas, New Mexico, New Jersey and Minnesota conducted inquiries into the problem and its ramifications and attempted to develop solutions appropriate to their own situations. 26 It is only in New York and Texas, however, that such studies culminated in legislation. 27 In Georgia, on the other hand, broad legislation dealing with conflicts of interest and including forceful penalties for violations was enacted without the benefit of a prior study. 28

D. Approach

Evidence deduced from studies and proposals indicates that two general avenues of approach are available in bringing forth conflict policy. The first, and oldest, is the definition of a conflict situation in a criminal statute with provision for appropriate sanctions of imprisonment or fine, or both. There is no desire to embrace within a concept of criminality activities which may appear evil on the surface but involve no real misconduct. The result is that existing criminal statutes dealing with conflict situations either are applicable to clearly repugnant behavior or are

26 Eisenberg, "Conflict of Interest," 670.


28 Ibid., 246.
phrased so generally as to exclude a host of activities that form the real core of the problem. Thus, most statutes have been found inadequate as guides to evaluating current situations and have led to another approach to conflict circumstances.

The promulgation of codes of ethics as guides to governmental behavior has occurred at both the federal and the fifty state level to meet this inadequacy. A code of ethics is perhaps best defined as a statement of behavior for government officials and employees. The code may be embraced in a statute or merely in departmental regulations or in a legislative resolution. It serves the purpose of clearly stating to public officials and to the public what is acceptable behavior. A code may carry with it sanctions, although the sanctions are seldom criminal. Dismissal from office is a common sanction (mainly for ANL, ANE, ASL and ASE job categories) associated with codes of ethics. Implicit in the promulgation of a code of ethics, however, is the notion that each situation in the future will be evaluated on its particular merits. This process, to be workable, requires some sort of enforcement system that permits investigation into the details of each situation that arises.

29 Report on Federal Conflict of Interest Legislation, pts. I-II.

30 Douglas, Ethics in Government, 7. (These codes include guidelines for executive, legislative, judicial and administrative personnel.)

31 George A. Graham, Morality in American Politics
The nature of conflict of interest difficulties can only be appreciated in the situations themselves which are of concern to the public today. Most of the situations are common to all levels of government although their implications may be quite different on each level. Existing legislation and legislative proposals demonstrate a great deal of similarity in the areas of concern. But they also reveal differences in the particular situations that receive great stress and in construing activities as criminal that are felt to be improper. Often the differences in emphasis derive from particular circumstances that have proved a problem of a particular level of government or stimulated general concern as a result of scandal. In any case, treatment of conflicts of interest by the federal government and certain states in statutes and proposals reveals several broad areas of common concern.

(NY: Random House, 1952), 32.

32Eisenberg, “Conflict of Interest,” 669.
CHAPTER II
SURVEY OF LEGISLATION
A. Span and Scope

The principal, and perhaps basic, situation of conflict of interest is the acceptance of compensation from private sources for direct government-related services. This practice, bribery, is reflected in the notion that "a man cannot serve two masters at the same time." Thus a public official is not to accept additional compensation for the performance of his public duties from an interested party, or generally to "sell" his influence to persons who hope to profit in some measure through it. Nor is he expected to profit himself from his official acts or from his official position. Much conflict of interest legislation or proposed legislation centers about this problem with the situations that must be dealt with generally varying in the directness of the situation's existence. But, as will be demonstrated below, it is quite difficult to legislate in such a way as to meet all of the varying forms and implications which develop in the area.

We can refer to the activities encompassed as the problem of the use of influence and position in general. Most of the situations in this area of influence and position
are difficult to define explicitly. The key assumption behind them is that public officials by the power or prestige of their office or the friendships that they cultivate are able to exert considerable direct influence on governmental decisions. This influence can be manifested in many ways ranging from acceptance of another salary to the use of personal contacts to affect a favorable decision by another public official in return for compensation or compensation in kind. It also includes the influence-effect that exists when public officials act directly as representatives of a party in a case or hearing before governmental agencies.  

Two general approaches to the above type of conflict situation are apparent. One deals in general terms with the use of influence and the other seeks to treat the influence that potentially exists when direct representation occurs. The two classes of situations are considered together because the latter kinds of situations are perhaps both the most direct and indirect examples of the use of influence; that is, direct in the sense of clear participation in a case and indirect in the precise manner by which influence is exerted.  

---


1. Federal Legislation

A prohibition of fairly direct situations of this kind has long been a part of a federal law. Section 281 of Title 18 of the United States Code originated in 1864, and since that time it has been amended to either include certain additional officers or to exempt retired military officers from certain provisions. This statute prohibits Congressmen, department heads, or other United States officers and employees from "directly or indirectly" receiving or agreeing to receive "any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, . . . before any department, or agency. . . ." 3 The sanctions provided for violations are a fine of not more than $10,000 or imprisonment for up to two years, or both, as well as incapacity to hold federal offices in the future. Court cases arising under section 281 have given broad scope to these prohibitions. The purpose has been viewed as banning "bribery in its open or subtle form" 4 and such practices as are inconsistent with an official's loyalty to the "best interest of the government to which the employee owes his first and highest obligation." 5 In addition, the wrong done

---


the public by high executive or legislative officials who would try to unduly employ their power and prestige to secure favorable governmental action has been noted.6

The statute is applicable only to services of executive (AME) or independent agencies and not to those of the court (AMJ) or Congress (ANL), a feature which some persons view as a shortcoming.7 Much criticism has been directed at inadequacies in section 281, especially in the numerous exceptions to its provisions and in a lack of clarity as to just what services are included.8

Federal interest in amplification of the statutes dealing with influence wielding has not resulted in significant additional legislation despite almost innumerable proposals. The Douglas staff report embraced a good number of these and urged that section 281 be amended to prohibit payment of compensation for influence in addition to the receipt of such compensation.9 The report further recommends that section 281 be made applicable to Congress and the

---

6United States v. Resisley, 35F.Supp.102,103(D.N.J., 1940)

7Douglas, Ethics in Government, 63.


9Report on Ethical Standards in Government, 43.
courts. In addition, clarification was proposed so that numerous circumstances where compensation is due persons for services performed prior to government employment and where federal employees aid other federal employees in proceedings before governmental agencies (i.e., civil service) can be removed from coverage. Another proposal was for a clarification of the present exceptions to section 201 as it affects retired officers of the armed forces. Other legislative proposals offered independently of the 1958 study have generally sought to accomplish the same ends. Either they were proposed more narrowly in individual bills or would be accomplished as part of far broader bills that endeavor to enlarge the coverage of the present statutes by defining other conflict situations. The lack of legislative action is testimony to the difficulty of defining such situations satisfactorily.

Another federal statute in this area that causes fewer difficulties and criticism prohibits a government official or employee from receiving any salary in connection with his public duties from any source other than the federal government or state or local governments. The prohibition upon such payments is equally applicable to the government

10 Ibid., 46.

11 Ibid., 47.

12 Eisenberg, "Conflict of Interest," 671. See also Congressional Quarterly Almanac, 69.
employees receiving such salary and to persons or corporations making the contributions. Violations bring penalties of fines of not more than $1,000 or imprisonment of not more than six months, or both.\textsuperscript{13} This section is so clearly phrased that few problems develop in relation to it.\textsuperscript{14} It is to state level questions of potential conflict of interest that attention is now directed.

2. State Legislation

Action by state governments in this area of prohibiting influence-wielding for compensation or prohibiting the prosecution of claims against the state is comparatively rare.\textsuperscript{15} In the latter category, this is largely attributable to that feature of state government wherein many positions are obviously not, nor intended to be, full-time positions.\textsuperscript{16} Furthermore, the salaries paid such officials also indicate that something less than full-time service is expected.\textsuperscript{17} Add to this the generally heavy preponderance of lawyers holding

\begin{itemize}
\item \textsuperscript{13} Report on Ethical Standards in Government, 51.
\item \textsuperscript{14} Eisenberg, "Conflict of Interest," 672.
\item \textsuperscript{15} Ibid., 673.
\item \textsuperscript{16} Klonoski, ed., The Politics of Local Justice, 59. See also, Watzman, Conflict of Interest; Politics and the Money Game, 118.
\item \textsuperscript{17} Bureau of Census, Local and State Government Finances in Selected Areas and Large Counties, 1964-1970 (Washington: Bureau of Census, 1971), 3. The salary breakdown for positions with which this paper is concerned indicates the salary is not sufficient as a sole yearly income.
\end{itemize}
high state political office, and the difficulty of prohibiting important phases of a private law practice maintained by public officials can be appreciated.\(^1\) This situation, too, has its impact upon how one might interpret a prohibition upon influence-wielding when, for example, a state legislator is retained as attorney in a hearing before a public agency.

3. General Legislative Approaches

1. Influence-peddling

Georgia, the only state which has adopted very stringent prohibitions on the question of seeking influence, did not cover the various other kinds of conflict questions. Instead, Georgia dealt with many variations of influence-seeking and wielding in a relatively specific statute with heavy criminal sanctions available. Relevant portions of the strict, lengthy statute demonstrate the Georgia approach. For example, the law provides that:

Whoever, being an officer, ... asks, or accepts, or receives, any money, or any check, order, contract, ... for the payment of money, or for the delivery or conveyance of anything of value, with the intent of procuring or attempting to procure the passage or defeat the passage of any legislation by the General Assembly, ... shall be guilty of a felony, ... .

Whoever, being an officer, employee, ... accepts money, or anything of value, ... shall be guilty of a felony, ... .

---

\(^1\) Alex Weingrod, "Patrons, Patronage, and Political Parties," *Comparative Studies in Society and History*, (July, 1968), 486.
Whoever promises, offers, or gives any money or anything of value, . . . shall be guilty of a felony, . . .

Whoever, being an officer or employee of, . . . or person acting for the state, . . . asks, accepts, or receives any money, . . . shall be guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for not less than one year nor more than 20 years.19

The sections of the Georgia statute quoted above strike at influence-peddling by explicitly prohibiting several manifestations of it. Thus seeking to influence the legislature for compensation is banned and the prohibition is so phrased as to embrace solicitation, acceptance, and receipt of composition, which in turn is expanded to include almost as many possible forms of direct and indirect compensation as are conceivable. Most important, the statute seeks to strike at both ends of the "influence process" by banning both the person offering inducements of various kinds and the official who would accept such inducements.20 These sections are applicable to all officials of the state with the exception of members of the Georgia General Assembly and officers of the judiciary. But both of these exceptions to the section quoted above are covered by additional sections which prohibit both the offering and acceptance of inducements by these

19 Ga. Laws 1959, c.24, Sec., 1,3,18,19.

officials. This is clearly provided for in individual sections, each of which deals either with the offering of such inducements or the acceptance of them by, first, the members of the General Assembly and then judicial officers.\textsuperscript{21}

The harshness of the Georgia Statute on influence-peddling is fairly clear. The sanctions are formidable, perhaps too much so. The coverage embraces all branches of government and both sides of the influence process, and the intention is apparently to include all forms of compensation by specifying checks, orders, guarantees, security, etc. It may be argued that Georgia's action is commendable, but there is much difficulty in the enforcement of the statutes and in merely determining the existence of the various forms of compensation. For example, the problem of determining if "intent to influence" remains.\textsuperscript{22} Naturally, too, there must be willingness on the part of responsible officials to investigate and prosecute violations if the statute is to be meaningful.

The primary characteristic of Georgia's conflict of interest legislation adopted in 1959 is the wide scope of the act. It embraces, in addition to the provisions quoted above, activities which are not usually considered to be part of the conflict area—the gray zone—but rather belong in the black

\textsuperscript{21}Ga. Laws 1959, c.24, Sec., 7,11,12.

\textsuperscript{22}Eisenberg, "Conflict of Interest," 675.
zone of clearly and obviously improper activities. Georgia
treats embezzlement, theft, extortion, misuse of public
funds, kickbacks, perjury, and some aspects of bribery in
the same broad statute in which less clear situations are
met. 23

2. Appearances Before State Agencies

New York's approach to the general problem of influence
and pressing claims against the state differs markedly from
Georgia's. New York's statutes, enacted in 1954, employ a
separate technique for dealing with each of these problem
areas. First, the concept of pressing claims against the
state is broadened to include "appearances before state agen-
cies." 24 This enlarges the scope of the prohibition so that
licensing boards, regulatory agencies, franchise-extending
departments, etc., are covered. 25 In view of the incidence
of conflict allegations in cases before such agencies of both
the federal government and states, a wider coverage is cer-
tainly appropriate. 26 Thus New York prohibits executive
officials and employees as well as legislators and legislative
employees from receiving or entering into an agreement "ex-
press or implied" for contingent fees for services to be

23 Ga. Laws 1959, c.24, Sec. 21.
24 N. Y. Public Officers Law, Sec., 73, Par., 4.
25 George A. Graham, Morality in American Politics,
26 Ibid., 99.
rendered relative to "any case, proceeding, applications, or other matter before any state agency." It is especially important to note that it is only when contingent fees are involved that a state official is barred from appearing before virtually all state agencies. Otherwise it is not deemed improper for such officers to make appearances. The limitation of the prohibition to "contingent fee" cases is a realistic approach which acknowledges the existence of dual roles for many state officials, particularly legislators. It seeks to deal with a troublesome area without impeding unnecessarily non-governmental activities of state officials. Violation of this provision is a misdemeanor.

C. Selected State Examples

1. New York

As for the general problem of seeking or exerting influence, New York has chosen to legislate prohibitions without

27 New York Public Officers Law, Sec., 73, Par., 2.
28 Ibid.
criminal sanctions. They are embraced in a statutory code of ethics containing several relevant provisions on the subject in its statements of standards of behavior for government employees. Activities prohibited include acceptance of "other employment which will impair his independence of judgment in the exercise of his official duties," and using or attempting to use one's "official position to secure privileges or exemptions for himself or others." These provisions are applicable to officers and employees of state agencies, legislators, and legislative employees. In addition, the code strikes at the influence problem by declaring that a public official should not conduct himself so as to "give reasonable basis for the impression that any person can improperly influence him...." Furthermore, a state official "should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust." The statute describing these standards provides no sanctions for their violation. One statute of the conflicts package of laws in 1954 empowered the attorney general to establish an advisory committee on ethical standards to conduct investigations and make recommendations concerning alleged violations.

31 New York Public Officers Law, Sec., 74, Par., 3.
32 Ibid.
33 Ibid.
34 Ibid.
35 New York Executive Law, Sec., 74.
Implicit in the New York code is the idea that the findings and recommendations of that committee and the Attorney General be forwarded to the state agency possessing disciplinary authority over the individual or individuals concerned in reported violations.\textsuperscript{36} Thus appropriate disciplinary action emanates from the employing agency. Such discipline would include suspension or removal.

By couching its consideration of the influence problem in general terms, New York acknowledges the difficulty of clearly defining what is proper or improper in the individual situations as they occur. The investigation is to be accomplished by an outside objective body.\textsuperscript{37} It may be argued, however, that such a general statement of improper behavior is meaningless in practice—that it is so general as to forbid nothing specific. This may be so, but it does serve to clearly indicate to the employee or official and to the public that such a general standard of conduct is expected and that when violations occur, they will be investigated and some disciplinary steps taken. It offers the public assurance of an investigation into allegations of impropriety and the official or employee the assurance that each case will be dealt with individually. There are no restrictions which confine

\textsuperscript{36}Ibid.

\textsuperscript{37}Ibid.
the determination of improper activities to specified characteristics nor is it possible to embrace peculiarity of appearance within the notion of impropriety. 38

2. Texas

Texas endeavored to treat the general problem of influence in its conflicts legislation but omitted any direct reference to the prosecution of claims against the state or appearances before state agencies. The Texas legislation promulgates a code of ethics without criminal sanctions. 39 Provisions relevant to influence affect officers, employees of state agencies, legislators, and legislative employees. Such a person is prohibited from accepting gifts, favors, or services "that might reasonably tend to influence him in the discharge of his official duties," 40 using an official position to secure special privileges or exemptions "except as may be otherwise provided by law," accepting other employment that "might impair his independence of judgment in the performance of his public duties," or accepting additional compensation for his services for the state. 41 Texas provides that violations of any of the prescribed standards of conduct

38 Eisenberg, "Conflict of Interest," 679.
40 Ibid., Par., 2.
41 Eisenberg, "Conflict of Interest," 682.
constitute grounds for expulsion, removal from office, or discharge. However, there is no enforcement mechanism created for the Texas code. The principal advantage to be cited for the code is that it does describe a statement of standards. Determination of infractions, however, will still require much thought and probably involve great controversy. What is employment that can impair independence of judgment? What does "reasonably tend to influence" mean? The specific problem is that these determinations will be made ad hoc as situations arise by any or all of a number of power centers. Such is the case generally today and the Texas code of ethics really will not afford much assurance to the public that a determination will be made or to an employee that a really innocent circumstance will be fully and impartially explored.

3. New Jersey

New Jersey, in its comprehensive study of conflicts of interest, sought to deal with both the problem of appearances before state agencies and the use of influence generally. Because of activities that stimulated the study, New Jersey was particularly concerned with condemnation proceedings. One of the principal recommendations of the New Jersey Legislative Commission on Conflicts of Interest was a statutory

42 Ibid., 683.
prohibition upon receiving, directly or indirectly, compensation for services rendered in connection with either condemnation negotiations or in proceedings before a condemnation commission. 43 This ban was to apply to state officers, employees, appointees, and members of the legislature. In addition, it was proposed that this same group of persons could not, for compensation, "personally appear as an expert witness before" any of the eighteen enumerated state agencies. 44 These agencies included the Department of Public Utilities, Division of Alcoholic Beverage Control, Division of Motor Vehicles, Division of Tax Appeals, State Parole Board, and the Wage and Hour Bureau. 45 It was further recommended that those guilty of violating either of these proposals would be punished by fines up to $3,000 or a maximum of two years in prison. 46 The obvious characteristic of these recommendations is their broad scope. Prohibiting not merely contingent fee appearances, but all compensated appearances before the enumerated state agencies and in condemnation proceedings they would have had a tremendous impact upon a "lawyer-heavy" legislature and upon lawyer holding less than full-time positions throughout state government. 47 They do,

44 Ibid., 27.
46 Ibid., 34.
however, illustrate too vigorous an approach to the conflicts problem. Although commendable as an attempt to shut all doors to the most critical conflict situations, such proposals must be viewed as both impracticable and inappropriate. Recognition of the facts of state government brings to the front the central theme that many state officials do not hold full-time positions nor in most cases is there need for them to do so. Certainly, state and local legislators are expected to be only part-time policy-makers, and the use of numerous part-time commissioners and board members by states and localities is well known. To limit the private activities of these officials would cripple a good part of state government.

In contrast to the harsh specific prohibitions discussed above, the New Jersey group recommended a more temperate approach to the influence-wielding problem. Many of its proposals in this area were based upon the New York

48Ibid., 99.

49See Chapter II, footnote 17.

50The reader should take note of the work load situation. In Virginia legislators at both the state and local level are for the most part part-time policy-makers. In several other states and at the federal level conflict of interest legislation applies to the full-time legislator. In this paper we have chosen to use examples of conflict legislation without regard to the part-time or full-time status of the legislator.

51On the other hand the hiring of more full-time professionals would cause enormous salary expenditures. Waltzman, Conflict of Interests: Politics and the Money Game, 182.
statutes. Under the threat of criminal sanctions, agency personnel are prohibited from receiving compensation, directly or indirectly, for services rendered or to be rendered in any matter which is before that agency. A statutory code of ethics was proposed as the principal means to cope with this problem, supplemented by departmental codes to deal with the peculiarities of the problem in each state and local agency. This code prohibits state and local agency employees from use of official position to secure advantages, and from accepting other employment, or gifts "that might reasonably tend to influence" the making of decisions. Two other provisions of the New Jersey code are of interest in this regard. They are:

No State officer, employee or appointee should engage in a course of conduct which might create a reasonable impression among the public that he is likely to be engaged in acts that are in violation of his trust.

Rules of conduct adopted pursuant to these principles should recognize, . . . that citizens who serve in government cannot and should not be expected to be without personal interest . . .; that citizens who are government officials and employees have a right to private interest of personal, financial and economic nature; that standards of conduct should separate those conflicts of interest which are unavoidable in a free society from those conflicts of interest which are substantial and material, or which bring the government into disrepute.

---

52 Eisenberg, "Conflict of Interest," 685.

53 Report, N.J., 98.

54 N. J. Laws 1960, Par., 3.
These sections provide an admirable statement of principles which should guide any endeavor to effect remedies. That they provide no definitive assistance to the judgment process in individual situations is apparent. But they can provide adequate standards by which an investigating body may be guided in its exploration of a case before it. An enforcement mechanism almost identical to that of New York was proposed for the code.

4. Minnesota

Minnesota undertook a study of conflict of interest through a Governor's Committee on Ethics in Government. This Committee's recommendations on appearances before state and local agencies and on influence generally were made in the form of a broad code of ethics which was later enacted by the legislature. The committee, however, did not recommend any specific sanctions to accompany its code. It did urge that the code be enacted "with appropriate sanctions" but it did not try to offer any guidance as to what sanctions were appropriate for certain activities. The committee's report declared: "A variety of methods and approaches will probably be needed. Enforcement by criminal process and punishment should be the very last resort but it should be available."

55Report, Minnesota Governor's Committee on Ethics in Government (St. Paul: State Print Shop, 1959).
56Minn. Laws (1961), Section 16, Par. 14.
57Report, Minn., 20.
58Ibid., 31.
The Minnesota code would bar the use of position to achieve "special privileges" and the receipt of gifts or gratuities from sources other than the state in connection with public duties. It also would prohibit a public official from having any interest or obligations, or engaging in business or transactions or professional activity "which is in conflict with the proper discharge of his duties in the public interest."59 The code includes the mandate that:

The head of each state agency should publish for the guidance of its officers and employees a code of public service ethics appropriate to the specific needs of each such agency.60

With these provisions, the committee tries to deal with the general problem of influence and conduct.

The problem of appearances before state agencies is approached with more precision. Two outright prohibitions were urged. The first would bar both legislators and agency employees from acting as agent or attorney in the prosecution of claims other than the performance of his official duties.61 The second prohibition is similar to that encountered in New Jersey, but with an impact solely upon legislators. This proposal was:

No legislator should accept any employment or retainer for appearances before any state board or agency. Inquiry for information on behalf of a constituent may with propriety be

59 Ibid., 33.
61 Ibid., Par., 19.
made, but no fee, gift or favor should be accepted therefore, either directly or indirectly. 62

The only comment that can be made about these proposals is that the first group should encounter little criticism, but the second is perhaps more vulnerable than the similar New Jersey proposition. In addition the fact that appearances before state agencies constitute an almost inseparable phase of other state officials from the prohibition strikes an observer as truly discriminating against the legislator. The limitation upon prosecution of claims against the state would not have the impact that the prohibition against appearances before state agencies constitute an almost inseparable phase of the private law practices of many legislators, the omission of other state officials from the prohibition strikes an observer as truly discriminating against the legislator. The limitation upon prosecution of claims against the state would not have the impact that the prohibition against appearances before state agencies would have.63 The latter would be perhaps too disruptive of private activities (which are probably most often legitimate) and inimical to adequate legislative recruitment.64

62 Ibid., Par., 20.
63 Report, Minn., 132.
64 Eisenberg, "Conflict of Interest," 639.
CHAPTER III

LEGISLATORS/LEGISLATIVE EMPLOYEES

The first area of conflict situations that will be discussed is that which develops with regard to legislators and legislative employees particularly. Although some of the situations mentioned above affect legislators and legislative employees, there are many others in which they may be involved under a far different set of circumstances than those in which executive agency officials find themselves. Generally, dealing with all aspects of the legislative side of conflicts of interest requires separate techniques as a result of the principle of separation of powers. Criminal statutes, if employed, can embrace legislators as well as other government personnel. But no other sanction short of criminal prosecution can be invoked against legislators by any means or agency other than the legislative body. Legislatures possess clear authority to make rules governing their

1 The term "legislative employees" refers to those persons directly accountable to the legislator who at times act in the name or in place of the legislator, e.g., Staff Assistants.

2 Eisenberg, "Conflict of Interest," 699.
membership. No one can threaten a legislator with dismissal from office except the legislature itself. Criminal statutes are difficult to employ when dealing with legislators because it is extremely hard to differentiate between activities that are an appropriate phase of a legislator's job and those which go beyond acceptable conduct and cause personal gain. Often the distinction is merely one of emphasis. This problem is particularly acute in the area of the use of influence. For example, as essential phase of a legislator's role is to represent his constituency and to oblige his constituents. He must often contact an executive agency on behalf of a decision, or cut through red tape in order to expedite the handling of a particular matter. The demand for such action by a legislator is great. Yet, it can be appreciated that any of these acts if pushed with sufficient emphasis or threats could constitute the use of influence to obtain favorable or unequal treatment by a government agency. To further complicate the matter, a request for information by a key legislator could, without intention on his part, be converted into favorable treatment by a sensitive government agency.

---

3 Ibid., 699. An exception of course is the recall procedure which is possible in some states. Weingrod, "Patrons, Patronage," 400.

4 Weingrod, "Patrons, Patronage," 492.

5 Braibantic, "Reflections on Bureaucratic Corruption," 108.

6 McKitrick, "The Study of Corruption," 239.
Other related factors include the need for private income and assets for legislators and the implications of their private activities to their public duties, particularly in the case of lawyers. The legal profession is constantly involved with some phase of government and the saturation of the lawyer-legislator in elected state bodies is replete with the potential use of influence.\(^7\) The critical problem develops in effecting a reconciliation of private legal practices and the public interest.

A. Federal Legislators

An essential difference must be stressed between the Congressman and the state legislator. Congressmen are perhaps capable of treatment as full-time public officials;\(^8\) state legislators, except in a few cases, are not. Therefore, it is only recently that interest in curbing the private activities of state legislators has had serious reception.\(^9\) The degree of limitations placed on state legislators, it would appear, would have to be less than those available for Congressmen. But in terms of conflict legislation there are fewer restrictions on the behavior and activities of Congressmen than on state legislators in states that have acted on the problem.\(^10\)

\(^7\)Weingrod, "Patrons, Patronage," 496.

\(^8\)Congressional Quarterly Almanac, 72.

\(^9\)Brailbantic, "Reflections on Bureaucratic Corruption,"

\(^10\)Sparks, "Conflict of Whose Interest," 689.
The action, taken or recommended formally, to be examined in this area is that which seeks to meet the conflict problem in the legislative branch apart from the general treatment of conflicts of interest among agency personnel. Most such action occurs in the promulgation of codes of ethics for legislators and legislative employees. Such codes seek to deal with the difficult, undefinable aspects of conflict of interest.\(^\text{11}\)

Congressmen are subject to relatively few limitations upon their personal activities and interests. They are prohibited from practicing before the United States Court of Claims but otherwise remain rather unrestricted in their private activities.\(^\text{12}\) After long pressure the Congress did approve a concurrent resolution that set forth a "Code of Ethics for Government Service."\(^\text{13}\) Intended to be applicable to "any person in Government Service," the code might be interpreted as well to convey the sense of Congress relative to the behavior of its own membership. The code contains extremely general statements of standards of behavior. It calls for loyalty to country and "highest moral principles" above all other loyalties, and dedication to the constitution and the laws of the United States.\(^\text{14}\) It declares that public officials and employees should "give a full day's labor for

\(^{11}\)Ibid., 66.


\(^{13}\)H.R. Con. Res. 175, 85th Cong. 2nd Sess. (1958).

\(^{14}\)41 U.S.C., Sec., 126 (1959).
a full day's pay" and seek to accomplish their tasks effi-
ciently and economically. Our concern is for provisions more
directly related to situations of conflict of interest, how-
ever. In this regard the code declares that a person in
government service should not "... discriminate unfairly by
the dispensing of special favors or privileges to anyone,
whether for remuneration or not; and never accept, for himself
or his family, favors or benefits under circumstances which
might be construed by reasonable persons as influencing the
performance of his governmental duties.  

In addition pri-
vate premises are not to be made that are binding upon the
duties of office. Also he should "engage in no business with
the government, either directly or indirectly, which is in-
consistent with the conscientious performance of his govern-
mental duties." Confidential information is not to be used
"as a means for making private profit." A public servant
should, as well, "expose corruption wherever discovered."

The concurrent resolution embracing this code of
ethics does not have the force of law and hence is of no legal
value relative to the executive branch. It merely states the

15 Ibid., Par., 2.
16 Ibid., Par., 4.
17 Ibid.
18 Ibid., Par., 7.
view of Congress on the subject. It might be employed by Congress itself as a guide to the behavior of its members or employees, should Congress choose to exercise it. It can perhaps act as the standard by which Congress could censure its members or discipline its employees. But there is no compulsion for them to so employ it.\textsuperscript{19} While it could employ the code on an ad hoc basis Congress might have embraced its rules in some form and provided a means of enforcement.\textsuperscript{20} Of course, this was not done, and the real impact of the code is slight indeed.\textsuperscript{21} It contains no provision for enforcement and no direct statement of its applicability to Congress itself or any implication toward the states.\textsuperscript{22} Its mere adoption, however, could be of significance, since previous efforts to secure any other action by Congress on the subject failed.\textsuperscript{23}

B. State Legislators

New York recognized the need for distinct treatment of the legislative side of conflicts of interest, especially in

\textsuperscript{19}Ibid., Par., 10.

\textsuperscript{20}Potentially, of course, Congress does have such measures as Ethics Committees and Party Causes which have enforcement means.

\textsuperscript{21}Percy, "The Crisis of Public Trust," 34.

\textsuperscript{22}Recent non-statutory efforts at reform have included reports by various Nader Committees and by Common Cause.

\textsuperscript{23}Eisenberg, "Conflict of Interest," 672.
regard to enforcement of its code of ethics. At the same time that its conflicts statutes were adopted, each house of the New York legislature created a Committee on Ethics and Guidance. The committees were given the responsibility for receiving and investigating complaints and charges against legislators or legislative employees for violations of the New York code. Findings and recommendations were to be reported to the appropriate law-enforcement agency. The committees were also authorized to render advice, upon request, concerning possible violations of the code and to recommend amendments to the code or to existing law.

The New York system of handling the legislative problem provides a means whereby criteria for legislative behavior are available and enforcement may be accomplished while preserving the legislature's prerogatives over their members and employees. Ultimate responsibility still lies with the legislature itself, however, for the success of the system. But formally presented complaints will be rather difficult for the committees to ignore or rationalize away.

---


25 These committees are established annually by resolution of each house of the Legislature. For example, in 1967 the pertinent resolutions were S.R. 145 and A.R. 196.

26 Graham, Morality in American Politics, 112.
This New York system has served as a model for proposals put forth in New Jersey on this aspect of the problem.

The New Jersey report urged the adoption of a supplement to the rules of each legislative chamber. This supplement would embrace a code of ethics applicable to the membership and employees of each house. Among the proposed provisions of the code are prohibitions upon personal interest or activities in conflict with the "proper discharge" of duties in the "public interest," use of official position to secure "unwarranted" privileges, lobbying activities, receipt of gifts or favors that "might reasonably tend to influence" a legislator's behavior, and the disclosure or use of confidential information. For enforcement of the code of New Jersey Commission recommended the creation of standing committees in each house. The function of such committees would be approximately the same as those of the legislative committees in New York. The Commission's recommendation were not adopted by both houses of the New Jersey legislature at the time of their submission. In 1958 a code of ethics was


28 Ibid., 33.
added to the New Jersey General Assembly Code of Ethics and a legislative committee was established as an enforcement vehicle. 29

Minnesota, Texas, and Georgia did not provide or recommend separate codes of ethics or enforcement systems for legislators. In 1960, a code of legislative ethics was drafted by a New Mexico Legislative Council committee. 30 This code had the appearance of being a legislator's "pledge" of behavior. It was stated in very general terms that would be difficult to apply to concrete situations. A significant provision was for the filing of a statement of sources of compensation by legislators where it appeared that such sources were directly concerned in matters before the legislature. New Mexico also called for a legislator to pledge to vote to censure or expel a member who violated the standards. 31

A final comment about legislative conflict of interest must be made, for it concerns a precise area in which unanimous agreement exists. All reports and adopted codes include the prescription that legislators are not to vote upon

---

29 N.J. Laws, 1959, c. 94, Par., 6. At the 1958 session of the N.J. General Assembly, a resolution embodying such a supplement to the rules was adopted and a legislative committee was established. From 1959-1969, three cases were heard and dismissed because of insufficient evidence. John A. Gardner, The Politics of Corruption: Organized Crime in the American City (New York: Russell Sage Foundation, 1970), 236.


31 New Mexico Laws, 1961, c. 42, Par., 5.
matters in which they have a personal interest. Usually a statement of such interest is required to be made part of the legislative journal. 32 Such prohibition is not uncommon in the rules of legislative bodies and there is little disagreement to be found with its principle. 33


33 Eisenberg, "Conflict of Interest," 673.
CHAPTER IV
PERSONAL INTEREST

A second broad area of conflict of interest situations stems from the principle that public officials should not have a personal interest in the business transactions in which they are engaged for government, nor should they exploit their influence or acquaintances with persons who conduct such transactions so that businesses in which they have a personal interest are benefited. Persons who have interests in business activities subject to state regulation may similarly be in a position to profit from favorable treatment made possible either by their direct participation in the regulatory process or by their access to or influence with the actual regulators. This last situation is more subtle and difficult to treat than the more overt situations of negotiating with oneself. Making contract awards on behalf of government to one's own firm is commonly considered reproachable, as is perhaps regulating one's own business.¹

The difficulty in this area, however, lies in determining the extent of personal interest in such business enterprises that potentially would be harmful to the public interest.\textsuperscript{2} In contemporary society, personal interest in business enterprises, more often than not, consists of a partnership arrangement, ownership by a close relative, or ownership of stock in corporations. Stock ownership in particular has proven to be a confusing problem. One of the best examples of the dilemma that can arise was that presented by former Defense Secretary Charles E. Wilson and his huge stock holdings in General Motors Corporation.\textsuperscript{3} Although he disposed of the stock in this situation, the matter was far from being settled by following that precedent. The fear in the Wilson situation was that his position in the administrative hierarchy of a department with which his former company had so many business relations might affect the decisions of contract negotiators.\textsuperscript{4} Yet not all government officials own stock in the quantities that Secretary Wilson had nor do they have his background of corporate executive experience. But stock ownership is common in the United States today and it may be presumed that there are certain stocks which almost every person with an adequately

\textsuperscript{2}Ibid., 183.
\textsuperscript{3}Ibid., 195.
\textsuperscript{4}Ibid., 196.
diversified portfolio possesses. Therefore, the essential question becomes that of ascertaining how much stock ownership in any enterprise may jeopardize the public interest. Newly sworn in Supreme Court Justice Lewis Powell chose to divest himself of all his stock interests so as not to jeopardize the public interest. Another perplexing facet is how close a relative must the owner be for there to be grounds for suspecting that contract awards may be made on other than the merits of a case. Or, how are partnerships to be severed when one party temporarily enters government employment? And finally, and certainly not very much less important, what of relations that develop in the area one step removed from direct connection with government business or regulation? If personal interest is held by a public official in a firm which sells to another firm that is regulated by government or seeks government contracts, there may well be grounds for suspecting a conflict of interests, especially if the official has the responsibility for the regulation of the second firm or the award of contracts to it.

5Donald J. Kingsley, Representative Democracy (Cambridge: Harvard University Press, 1955), 211.

A. Overt Situations

Consideration of situations of this kind have occupied government in the United States and brought forth various remedies in law and in proposed laws. Criminal statutes exist to prohibit the most overt manifestations and codes of ethics have been employed or suggested to cover the other subtle forms. Attempts have been made to define personal interest that should be appropriately regulated. They have included the broad concept of "an interest," "controlling interest," and the definition of a certain percentage of stock ownership in any one corporation. A publicity device has also been used whereby the pertinent financial interests of certain officials would be declared and in most cases made available to the public. But no one remedy has been found satisfactory, although proposals on the subject are almost legion. The states, particularly, have enacted or proposed solutions that generally vary with the extent of the incidence of the problem in the state and the reception of responsible officials to the practicability of the various

---

7 Eisenberg, "Conflict of Interest," 669.
8 Braibanti, "Reflections on Bureaucratic Corruption," 106.
approaches to coping with all of these dilemmas. The only common method that is apparent in the code of ethics is to promulgate acceptable behavior in this area rather than to employ a series of criminal statutes to prohibit many specifically defined situations.  

There have been many proposals to establish a system of publicizing the personal financial interests of federal and state government officials through a reporting procedure with the information so fathered available for public inspection.  

No proposal of this sort has yet met with any success.  

Publicity as a solution recognizes the difficulty of defining proper and improper situations and seeks merely to collect relevant information and allow the public to be


12 Recently the organization, Common Cause has begun a campaign monitoring project which may be very similar to a program needed in the financial interest area. For a complete description see, The Common Cause Manual on Money and Politics (Washington D.C.: Common Cause, 1972).
the judge of what is proper in the particular instance. It also endeavors to place the public official in the position of deciding for himself what the effects of his known interests will be, and to make adjustments and bear responsibility accordingly. 13

B. Less Apparent Situations

The state of Georgia's approach to personal interest in business takes the form of criminal statutes that define unacceptable behavior for public officials. They describe both overt circumstances and less apparent but related situations. Many of the provisions are unique in comparison to the usual solutions and descriptions encountered elsewhere. All state officials and employees who receive some form of compensation from the state, including per diem fees, are prohibited from selling any goods or merchandise to the state or any state agency on behalf of themselves or any business entity. 14 It is not completely clear whether this prohibition is merely applicable to the direct act of selling to the state by such a person of the same business entity who sells to the state. This would appear to be the case, in which event only the direct participation of state officials in such transactions is barred, and then only if the official

---


acts as salesman. The provision apparently would not apply to officials transacting business for the state with representatives of a firm in which the official had a private interest. Georgia also prohibits the making of false statements by either state officials or sellers to the state relative to material, labor, or costs, and also bans false representations concerning material, labor, or costs with intent to defraud the state. In addition, Georgia declares that contracts or conspiracies in restraint of trade or of "free and open competition" in transactions with the state are illegal. Violations of any of these sections are considered as felonies punishable, upon conviction (as other violations cited above), by imprisonment from one to twenty years. It should be pointed out that the somewhat peculiar orientation of Georgia's treatment of contracts is attributable to alleged scandals in that state in this area which precipitated the interest in conflicts laws in the first place. No legislation was enacted to meet other ramifications of the problem.

15 Eisenberg, "Conflict of Interest," 696.
C. Selected State Examples

1. New York

New York's action in the area of private business interests and potential conflicts of interest that develop therefrom reveals a concern with broader and more subtle ramifications of the problem. Generally, New York deals with the problem in its code of ethics, but criminal sanctions are also employed to meet a variety of the circumstances in this area. New York requires competitive bidding before contracts exceeding twenty-five dollars can be awarded to firms in which state officials have ten percent or more interest in stock. The requirement is set forth as follows:

No officer or employee of a state agency, member of the legislature, . . . shall sell any goods or services having a value in excess of twenty-five dollars to any state agency unless pursuant to an award or contract set after public notice and competitive bidding.19

Violations of this provision are to be treated as misdemeanors.20 There are two significant aspects of this New York law. The first is the prescription that ownership of ten percent or more of the stock in a corporation constitutes sufficient interest to create a potential conflict of interest situation requiring statutory attention. There have been other proposals to define personal interest as reflected in

19 N. Y. Public Officers Law, Sec., 73, Par., 3.
20 Ibid., Par., 8.
stock ownership for the purpose of determining when a potentiality of a conflict of interest exists. Some urge 20 percent of stock ownership as the critical point; others propose lesser percentage figures for this purpose. 21 New York's definition of 10 percent is one of the few percentage figures to achieve enactment. 22 The second aspect of the Empire State's efforts in this law is the requirement for competitive bidding which it establishes. By not providing an outright prohibition of business transactions with the state which infers that situations of this kind are fundamentally unsound for the public interest, it reflects only the potentiality of such a clash of interests. 23 Instead of prohibition, public competitive bidding is to be the means whereby equal treatment of all desirous sellers may be accomplished. Placing the amount of affected contracts at twenty-five dollars is further assurance of such equal treatment. 24 It should be noted that the requirement of bidding

21 Chicago, University Law School, "Conference on Conflict of Interest," February 20, 1961, Chicago, iii, 100, Series No. 15.

22 N. Y. Public Officers Law, Sec., 74, Par., 11.


24 Ibid., 134.
rather than prohibition is preferable to meet situations in which there may be only one known available supplier of a commodity or service. To ban transactions with firms in which a personal interest of a public official exists and which yet are often the sole suppliers in an area would be foolish. The New York approach on this point is one that could well provide a model for other states or governmental units interested in a possible answer to this phase of the conflicts problem.

The New York code of ethics contains several paragraphs dealing with contracts or interests in business transactions. There are generally phrased with much room for interpretation of the substance involved in each situation. They elaborate the principle that public officials should not have a private interest that might conflict with their public duties and responsibilities. The wording of these portions of the code of ethics has been closely followed by other states trying to solve the problem. It is useful to quote them here as they are representative of similar legislation and proposals in other states mentioned below.


26 Eisenberg, "Conflict of Interest," 696.

27 Scott, "Corruption," 72.
No officer, . . . member of the legislature . . . , should have any interest, . . . in any business or transaction . . . of any nature, which is in substantial conflict with the proper discharge of his duties. . . .

No officer, . . . should engage in any transaction as representative . . . of the state with any business entity in which he has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties.

An officer, . . . should abstain from making personal investment in enterprises which he has reason to believe may be directly involved in decisions to be made by him or which will otherwise create substantial conflict between his duty in the public interest and his private interest.

No officer or employee of a state agency employed on a full-time basis, . . . should sell goods or services to any company, firm, . . . which is licensed or whose rates are fixed by the state agency in which such officers or employees serves or is employed.28

Although these provisions appear rather general it is well to note that complaints of violations of them would be investigated through the New York enforcement system described earlier.29 Allegations of violations would have the pertinent facts elicited upon investigation and pitted against the general standards of the code. In this way, the compatibility of the circumstances of the alleged conflict situation and the

---

28 N. Y. Public Officers Law, Sec., 74.

29 Ibid., Sec., 73, Par., 8.
standards of the code would be established. The person involved would then be either disciplined or entirely cleared of the charge. 30

Another provision of the New York code of ethics pertains to the same problem of personal interest although somewhat merged with that of influence-wielding. It utilizes publicity of personal interest in businesses subject to state regulation. The code provides that state officials, legislators, and legislative employees who have a direct or indirect financial interest of at least $10,000 in "any activity which is subject to the jurisdiction of a regulatory agency" should file written statements of such interest with the Secretary of State. 31 Such statements would be open to public inspection. Although the publicity approach is briefly discussed earlier in relation to the federal government, it is appropriate to explore some of the perplexing facets about it at this point since New York employs it. The efficacy of publicity as a remedy to conflict situations is thought to lie in the deterrent effect that filing statements of financial interest in various activities and having them available to the public has upon the behavior of persons who might be tempted to seek favorable treatment. It is thought that

30 Scott, "Corruption," 72.

31 N. Y. Public Officers Law, Sec., 74, Par., 4.
affected persons would hesitate to influence action if the public could so easily be provided with information as to the existence of financial interest.32 Perhaps in a sense it amounts to circumstantial evidence that could in certain circumstances prove exceedingly embarrassing during a political campaign or in the process of having a nomination to an appointment confirmed.

The idea of publicity, however, has received much criticism because it is felt that it constitutes an invasion of the privacy of public officials. This argument holds that public officials, like other individuals possess a right to privacy concerning their personal affairs and that to breach it in this matter may lead to further invasions in other areas.33

This must be recognized as a very serious criticism and it does pose a considerable dilemma. How much privacy should be curtailed in order to guard against the occurrence of a conflict of interest situation? It is an extremely difficult question to answer. Of course, there have been instances in which the private financial situations of public figures have been bared voluntarily, although usually in response to political allegations. In this respect, one need point only to the disclosure of the personal financial interests of presidential candidates in 1968 and 1972. But


33 Ibid., 52.
that affected political candidates already in the heat of
electioneering and not career or high-level officials who
might be less prone to make such disclosure. Certainly the
mass of citizens in the United States value the confidential
nature of their federal income tax returns. It is difficult
to conceive of much enthusiasm for having such data exposed.
There is certainly a price to be paid for political activity
insofar as privacy is concerned, but how great must this price
be? And what of the non-political career public servant?

2. Texas

The Texas code of ethics contains several provisions
dealing with transactions of the state.\(^34\) It approaches the
problem by making its prohibitions applicable to firms in
which state officials or legislators have a "controlling
interest." The code declares that an official or employee
of a state agency is not to transact business in his official
capacity with business entities in which he is an officer,
agent, member, or in which he owns a controlling interest.
Similarly such an official and the firms in which he has an
interest are not to sell goods or services to firms or cor-
porations which are either licensed or regulated by the state
agency in which such official is employed.\(^35\) Publicity is

\(^34\) Texas Laws, 1957, c.100, Sec., 3, Par., 4.

\(^35\) Ibid., Par., 5.
also employed in the cases of state agency personnel or legislators who are members, officers, agents or who have a controlling interest in business entities subject to the jurisdiction of a state regulatory agency. In this situation, such a person is to "file a sworn statement with the Secretary of State disclosing such interest." There is the seemingly elastic provision in the Texas code which also declares that an officer or employee of a state agency is not to make personal investments in any enterprise "which will create a substantial conflict between his private interests and the public interest." 

3. New Jersey

The New Jersey proposals contain two provisions to meet the situations under discussion here. The first would employ criminal sanctions to prohibit a state official from acting as agent of the state in transacting business with himself or "with a corporation, company, association or firm in the pecuniary profits of which he has an interest," except that "ownership or control of ten percent or less of the stock of a corporation shall not be deemed an interest within this section." This proposal is based upon the New York statutes and employs the same concept that 10 percent ownership of stock is sufficiently substantial to pose a potential conflict

---

36Ibid., Par., 6.  
37Ibid., Par., 8.  
38Report, N.J., 27.
of interest. The New Jersey report also follows the example of New York in imposing criminal sanctions upon state officials or firms in which they held such interest which "knowingly" enter contracts for over twenty-five dollars with the state unless such contracts were set after public notice and competitive bidding. The New Jersey code of ethics also contains the broad standard that a state officer, employee, or appointee should not engage in business transactions with any enterprise in which he has a direct or indirect financial interest that "might reasonably tend to conflict with the proper discharge of his official duties."

4. Minnesota

Minnesota follows the examples set by New York and Texas in its code of ethics with, however, its own particular modifications. An official of a state agency is not to transact business in his official capacity with any entity with which he has a personal interest. It is to be noted that this law does not define what constitutes an "interest."

39 See footnote number 22.
40 N. J. Laws, 1959, c.12, Sec., 36, Par., 2.
41 Ibid., Par., 4.
42 Minn. Laws, 1960, c.41, Sec., 2, Par., 6.
State officials and firms with which they are affiliated or in which they have a controlling interest (again undefined) are not to sell goods or services to business entities that are regulated by the state agency in which such official is employed. 43 A broad publicity system was also recommended by the Minnesota group. 44 This would have required legislators and legislative employees, agency officers and "such employees thereof as the agency head may by regulation provide" who are affiliated with or own an interest in business entities subject to state regulation to file a statement with the Secretary of State disclosing the interest or relationship involved. This statement, however, was to be confidential and available only to authorities having the power of removal of any public official and "to members of the legislature or any legislative committee which may be organized for the purpose of ascertaining a breach of this code. . . ." 45 It appears that keeping such information private is intended to reassure those who fear that the revelation of such information would be an invasion of privacy.

In this respect it is an interesting approach, although this proposal was defeated because there were numerous questions on the part of state legislators in regard to the

43 Ibid., Par., 7.

44 Report, Minn., 32. (A publicity system did not become part of Minn. Laws, 1960, c.41, "Public Officers.")

45 Minn. Laws, 1960, c.41, Sec., 2, Par., 11.
availability of such information to "members of the legislature."\textsuperscript{46} In view of the general confidential nature of the reporting procedure, it would be well to insure that such information is available only to a higher administrative authority or to the legislative committee concerned with breaches of the code. This would assure public officials that publicizing such information would occur only from inquiries into breaches of the code and not be motivated principally from mischief, which unfortunately is not inconceivable.\textsuperscript{47}

\textsuperscript{46} Appleby, \textit{Morality and Administration In Democratic Government}, 197.

\textsuperscript{47} Ibid., 199.
CHAPTER V

EVALUATION

Several conclusions concerning existing approaches to conflict of interest may be drawn from this selection of legislative solutions and proposed legislation at the national and state levels. The first is the complexity of the problem of defining conflict situations adequately to achieve protection for both the public and the public official. This has resulted in general descriptions of unacceptable behavior with the circumstances of individual violations to be investigated as they occur.\(^1\) Attempts have been made to define unacceptable behavior but they have not been successful for all situations.\(^2\) It would seem that such a general approach to conflict of interest solutions is best because statutory limitations cannot be drafted to cover every kind of conflict situation. The approach presently taken to remedy conflict situations involves designating the clearly undesirable situations as criminal and those difficult to define are

\(^1\)Eisenberg, "Conflict of Interest," 699.

\(^2\)Douglas, Ethics in Government, 96.
typically designated as improper and remedied through non-criminal code of ethics sanctions.

A. Federal Legislation

At the federal level of government conflict of interest statutes are fairly clear for such overt situations as theft, bribery, fraud and embezzlement. Sanctions for such violations include imprisonment or fines that may be as such as $10,000. However, these statutes apply primarily only to services of executive (AHE) or independent agencies and not to those of the courts (AHI) or Congress (ANL). Federal interest in amplification of the statutes dealing with the courts and Congress has not resulted in significant additional legislation despite almost innumerable proposals.

Up to now this writer has presented primarily material gathered from previous studies conducted in the conflict of interest area. Each of us has a different view of the effectiveness of conflict legislation. Each of us also has a different remedy for something that may be considered a conflict situation. My views are tempered by a thorough reading in the conflict area and should be considered as simply one perspective to some of the conflict responses.

4Congressional Quarterly Almanac, 71.
At the federal level of government this writer would suggest that the ingenuity of the public official has progressed beyond the statutory responses to conflict of interest situations. Most federal conflict of interest statutes are useful only to the limits of their purpose (i.e., everytime you write something on paper there are two ways to avoid it.) A clever federal official is quite easily able to circumvent the "spirit" of the conflict statute and still not go beyond the limits of what may be considered a breach of ethics.\(^5\)

To the degree that such a circumvention is possible it is necessary to revise or at least extend present conflict statutes.\(^6\)

Thus this author would suggest that Congress re-evaluate the present conflict statutes. Congress should try to remove the possibility of statutory circumvention through the enactment of a clearly stated conflict of interest statute. Such a statute could include some kind of public disclosure

\(^5\)The N.J. situation (Chapter III, footnote 29) suggests the possibility of such a circumvention also happening at the state level.

\(^6\)It would be a never ending task to discover the conviction rate for conflict situations that have come before judicial review at both the national and state levels of government. Most sources indicate that the present conviction rate is rather small. This would mean that the accused is either innocent or dismissed due to insufficient evidence for conviction. Millett, Government and Public Administration: The Quest for Responsible Government, 312.
clause whereby information would be made available to public representatives. It is hoped that such a conflict of interest statute would be reviewed periodically by Congress and would be changed as needed. There are no "perfect" solutions to conflict of interest. Hopefully a re-examination of present statutes and a periodic review of statutes will decrease the temptation to be involved in certain kinds of situations.

There seems to be a current trend to non-statutory responses to possible conflict situations. Such public interest groups as Ralph Nader committees and Common Cause attempt to present an economic profile of legislators at the national level of government. These profiles could serve as a basis for electoral decisions. However, these public interest groups have not yet undertaken a complete examination of appointed national and state administrators.

B. State Legislation

Although all fifty states have not been examined for this conflict of interest presentation some general conclusions can be made from the information presented. First, it

7See Chapter IV, Footnote 12. Other approaches such as public campaign financing have also been initiated. Watzman, Conflict of Interest, 176.

8This, of course, is the ultimate goal. It may however, be aided indirectly through editorial comment or interest group membership reaction.

9This author's home state of Virginia has had conflict proposals initiated in two separate sessions of the State General Assembly. See footnote 29, Chapter II.
has been suggested that New York's use of enforcement mechanisms is stimulating the establishment of bodies to investigate the circumstances of conflict situations in order to clearly indicate those which are harmful to the public without jeopardizing the reputations of persons inadvertently involved in allegations of conflict of interest. Most conflict studies recognize the need for separate treatment of legislators. This is manifested in the definition of conflict situations with some applicable to all public officials and others just applicable to agency personnel. New York indicates profitable direction by its use of separate legislative enforcement agencies.

Legislation outlining the use of "influence" by a legislator does not seem practicable. Codes of ethics are being used increasingly as tools to respond to particular situations as they develop. Publicity has similarly been explored as a tool for meeting this kind of problem. Investigative reporting by the news media seems to be increasing and more and more information is becoming available to the public. Institutionalized publicity devices could be greatly aided by publicity campaigns such as that waged by the Common Cause organization.


Finally, it is also clear that conflict of interest policy has mainly been initiated in response to specific conflict situations.\textsuperscript{12} Post facto laws typically deal only with "closing the barn door after the horse has run away." Studies in the conflict area indicate that this is the least effective way of dealing with conflict of interest policy.\textsuperscript{13} However, this seems to be the present course of the national government and the state governments.

\textsuperscript{12}Watzman, \textit{Conflict of Interest}, 168.

\textsuperscript{13}Percy, "The Crisis of Public Trust," 14.
BIBLIOGRAPHY

Articles


Chicago, Univ. Law School, "Conference on Conflict of Interest" February 20, 1961, Chicago, iii, 100 (Its Conference Series, No. 15).


Eisenberg, Ralph, "Conflict of Interest Situations and Remedies" Rutgers Law Review, 13, 1959.


Books


Documents


Draft Code of Legislative Ethics, New Mexico Legislative Committee., Santa Fe, 1967.

Newspapers


VITA

Berndt Harry Bohm was born in Uetersen, West Germany. At the age of six his parents immigrated to the United States. In 1970, he received a Bachelor of Arts Degree in Political Science and Speech from the University of Richmond. Presently he is an instructor in the Department of Speech and Dramatic Arts at the University of Richmond, Virginia.