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Conflict of Interest and Federal Service, by the Special Committee on the Conflict of Interest Laws of the Association of the Bar of the City of New York

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CONFLICT OF INTEREST AND FEDERAL SERVICE. The Association of the Bar of the City of New York, Special Committee on the Conflict of Interest Laws. Cambridge: Harvard University Press. 1960. Pp. xvi, 336. $5.50.

The Association of the Bar of the City of New York has long concerned itself with public problems, but to this reviewer its most significant and valuable public service in recent years has been the undertaking of a thorough-going study of the conflict of interest problem in the executive branch of the Federal Government. The results of that study, and a proposed program of corrective action, are the substance of this book.

The book concludes that the legal and administrative machinery of the Federal Government for dealing with conflicts of interest is obsolete, inadequate for the protection of the Government, and a deterrent to the recruitment and retention of executive and consultative talent. One who has pored and puzzled over the Federal conflict of interest statutes, studied countless internal legal memoranda on their application in specific cases, helped devise agency regulations to fill in glaring gaps, and observed agency recruitment efforts frustrated by these statutes, joins in this conclusion with a loud Amen.

There are seven Federal statutes primarily involved. Four of them arose during the scandal-ridden mid-1800's, born alike out of a primitive personnel system, inadequate disbursement procedures, and a low level of public morality. Three of the four center on compensated or uncompensated assistance to outsiders in their dealings with the government,[1] and one prohibits employees from dealing with business firms in which they have an economic interest.[2] Two later statutes restrain prosecution of claims against the Government by former employees for a period of two years after leaving office.[3] The remaining statute prohibits outside compensation for government work.[4] All but one of these statutes prescribe criminal penalties. They are overlapping, disjointed, and ambiguous, and over the years only a relatively few prosecutions have been brought. However unclear their terms, they are nonetheless expressions of Government policy, and the public servant —particularly the political appointee—is in a most vulnerable position if by any stretch of the imagination he can be said to be in a questionable posture vis-a-vis any one of these statutes. The deterrent effect on

1. 18 U.S.C. §§ 216, 281, 283 (1958).
2. 18 U.S.C. § 434 (1958).
3. 5 U.S.C. § 99 (1958); 18 U.S.C. 284 (1958).
4. 18 U.S.C. § 1914 (1958).

Government recruitment of able and experienced management and technical expertise is copiously illustrated throughout the book.

Take for example the practicing lawyer who is asked to enter on public service. The statute proscribing compensated services by government employees before an executive forum has been interpreted as violated if the governmental employee receives income, with knowledge of its source, arising from activities listed in the section but performed solely by his nongovernmental partners.[5] This means that a lawyer remaining in a partnership after accepting a Government post is subject to the statute both because of what he may do and because of what his partners may do. As a consequence he is usually forced to resign his partnership or impose on the firm the severe handicap (in these times) of staying out of legal matters involving the Government, such as tax, patent, or antitrust work. Further, because of the statutes prohibiting post-employment prosecution of claims against the United States for two years, he runs some risks if he rejoins the firm within two years after he leaves his Government post. The result is that lawyers with special experience or skill—often acquired on an earlier tour of duty with the Government—are often forced to refuse requests to serve the Government, for no reason other than the conflict of interest statutes, if they plan to return to their firms. And, for the same reasons, getting lawyers to perform intermittent consultant services is effectively blocked.[6]

The statute prohibiting outside compensation of Government employees is the other chief statutory deterrent to recruitment. For executives and experienced scientists, inadequate salary scales are among the major stumbling blocks. Many employers would be willing to grant a leave of absence to an employee who goes on a temporary Federal assignment, and supplement his government salary. This is prohibited, even though the employer has no dealings with the employee's agency. This most affects the "middle-rank" executives and scientists who have heavy continuing financial commitments in the form of house mortgages and school bills, and for whom a slash in salary is usually out of the question. In abnormal times—periods of national emergency—administration of governmental economic controls demands large numbers of people who are skilled and knowledgeable in all segments of industry, and many of them have been reluctant to cut themselves off their regular

5. See United States v. Quinn, 141 F. Supp. 622 (S.D.N.Y. 1956).
6. P. 162.

jobs and salaries.[7] Even where a reduction in income is acceptable, the outside compensation statute, strictly construed, could still mean that the employee could not continue to participate in the retirement, insurance and other security plans of his private employer.

During recent years the Government has come increasingly to rely extensively on experts and consultants who serve only temporarily or intermittently. They are often the only available source of the expertise and special experience the Government requires constantly today. Their major income, of course, continues to come from their private employers, yet under the conflict of interest statutes they are government employees, and the statute forbidding outside compensation of government employees, strictly construed, raises many problems.[8]

While the statutes have too restrictive an effect in some areas, they leave large gaps in others. Thus, the restrictions on post-employment activities apply only to prosecution against the Government of claims for money or property; today with the greatly expanded scope of Federal regulatory and other activities having an impact on industry and the public, prosecution of claims is only a small fraction of the post-employment opportunities that involve potential conflict situations. The law now prohibits an employee from transacting government business with *business* entities in which he has a pecuniary interest, but not with other entities, such as nonprofit institutions, in which he might have a substantial economic interest, or even with business entities in which his economic interest is real though less direct, as where the interest is owned by his wife or child, or where he has an understanding as to future employment. Nor do the statutes forbid him from accepting gifts or using his position to coerce favors.

Federal conflict of interest controls are probably associated most in the public mind with compulsory stock divestment, since Senate confirmation hearings often concentrate on this area of potential conflict. It may come as a surprise, therefore, that none of the statutes requires stock divestment in any situation.[9]

These deficiences have been exposed before, though no more effec-

7. The pros and cons of permitting salary supplementation from outside sources (the "WOC" employee) have been sharply debated for years. In general, Congress has granted statutory exemptions permitting use of WOC's only during periods of national emergency, and then under rigid controls. See pp. 57-59, 67-69.

8. See pp. 65-66.

9. Compulsory divestment may mean heavy economic loss, and to those who are owner-managers of closely held family corporations it may mean abandonment of a business career and an opportunity to pass the business on to their children; here again is another deterrent to effective recruitment of executives—even though the deterrent stems not from the statutes but from Congressional concern. See text *infra*.

tively than in this study. Here for the first time, however, is an extensive survey of the way in which the executive branch has supplemented the statutes by regulation, the techniques it has devised to enforce them through administrative action, and the results achieved. Two conclusions are reached: (1) Regardless of the administration in office, there has been no centralized executive leadership in devising an effective and comprehensive system for controlling conflicts of interest; and (2) the individual operating agencies have for the most part done something by way of issuing regulations but vary widely in their administration and enforcement.

Where regulations have been issued, they generally touch upon five basic kinds of potentially dangerous conduct by Government employees: (1) acceptance of gifts; (2) outside employment; (3) private financial interests; (4) use and disclosure of Government information; and (5) transaction of business with former employees. The agencies that have developed effective enforcement programs utilize a number of techniques designed to insure day-to-day compliance, such as specifically informing new employees of the conflict laws and regulations; prescribing procedures for review of outside employment; and requiring employees to report outside interests and to disqualify themselves from acting in situations that may have a conflict potential.[10] A significant conclusion of the study is that the administrative process, including comprehensive well-tailored regulations, imaginative compliance procedures, and flexible disciplinary penalties is far better adapted to deal with conflicts of interest than is reliance on the criminal law.

The role Congress has played in the development and refinement of regulations and standards of ethical conduct in the executive branch is also given comprehensive treatment—the development of stock divestment strictures by the Senate Armed Services Committee;[11] the exhaustive work of the Douglas Committee and the Celler Committee in the field of governmental ethics and conflicts of interest;[12] and the investigation of individuals and particular transactions in recent years, such as the Vaughn, Sherman Adams, Mack, and Dixon-Yates cases.

The study was completed before the Dixon-Yates case reached the Supreme Court. I suspect that somewhat more space and emphasis would have been devoted by the study group to the effect of tainted transactions upon private parties had last January's Supreme Court

10. See, *e.g.*, ATOMIC ENERGY COMMISSION, AEC MANUAL, ch. 4124, 4139.

11. Pp. 97-110.

12. Pp. 118-121. See, more recently, Subcommittee on National Policy Machinery, Senate Committee on Government Operations, *Organizing for National Security*, 87th Cong., 1st Sess. (1961).

decision been available. It is one of the rare landmarks in the case law interpreting the conflict statutes. Briefly, the Dixon-Yates group was suing the Government for the costs it had incurred under its contract—to the tune of several million dollars—before it was cancelled. Wenzell, an officer of First Boston, served as part-time consultant to the Bureau of the Budget, without compensation, during preliminary negotiations on the Dixon-Yates contract. First Boston was interested in financing the project, and in fact was later retained by Dixon-Yates. The Court held, three Justices dissenting,[13] that the statute forbidding a government agent from engaging in business transactions for the Government, if by virtue of his private interests he might benefit,[14] had been violated, and that Wenzell's illegal conduct rendered the contract unenforceable. Hence the fact that a part-time Government consultant participated in preliminary negotiations, coupled with a substantial probability that his private employer, a third party, would profit from the contract yet to be negotiated between Dixon-Yates and the Government, was sufficient to negate the contract and preclude the recovery of the contractor's actual damages in proceeding under the contract. Obviously third parties dealing with the Government also have an interest in clarifying the conflict of interest law.

The study concludes its first part ("The Present Situation") with a masterful summation of the existing pattern of conflict of interest restraints and its faults. The remainder of the study ("A Proposed Remedy") is a program for action by the Congress (enactment of a single integrated statute replacing present laws), the President (establishment of standards and general regulations; creation of a coordinating office), and the agencies (particularized rules adapted to the special risks in the particular agency).

The statute proposed by the drafters is long—45 pages as introduced in Congress.[15] But considering the inordinate complexity of the subject, the myriad situations needing coverage, and the varying degrees and kinds of flexibility needed, the bill is well and tightly drafted. Most of the first 12 pages constitute definitions—a welcome boon to harassed lawyers and administrators who have worked in the fog enshrouding the present statutes. A statutory code follows, setting forth the conflict of interest restraints in six sections. They fill the gaps in the present statutes, eliminate the glaring deterrents to effective recruitment, and

13. United States v. Mississippi Valley Generating Co., 29 L.W. 4079 (Jan. 10, 1961).
14. 18 U.S.C. § 434 (1958).
15. *E.g.*, HR 10575, 86th Cong., 2d Sess. (1960).

provide a much-needed mechanism under which exceptions can be granted to particular restraints. Greater emphasis is placed on administrative controls—through grant of investigative powers, provision for supplemental regulations and interpretive advice by the President and the agencies, and a battery of administrative remedies in case of violations: disciplinary actions; agency debarment of former employees; rescission of contracts and other actions influenced by violations; and publication of findings and decisions invoking these sanctions. In addition to criminal penalties for purposive or knowing violations of the code, civil actions for damages or penalties are provided.

It is a detailed and comprehensive statutory scheme. It places the responsibility where it ought to be, and should insure that the problem receives throughout the Executive Branch the attention it deserves.

Among the many flashes of insight that illumine the study is this statement: "In a sense conflict of interest is a luxury issue—a matter that only an otherwise secure and established society can afford to worry about. Only when grosser larcenies in Government have been reduced to tolerable limits—only when overt venality is uncommon enough to shock—is it possible for government to concentrate on potentials for evil and to try to head off corruption at its source . . . In a back handed way, it is a tribute to the general moral health of American Government today that headlines can be made of potential evil."[16]

We can congratulate ourselves because this is true. But we can hardly continue to rock back and forth as we have over recent years, with studies and investigations, but no real attack on the problems so graphically presented in this book. The darkening chill of the cold war is upon us. There are high stakes riding on the maintenance of a strong and effective corps of public servants and on the maintenance of public confidence in their moral integrity.

In this context we can ill afford to treat conflict of interest as a luxury issue. We should be grateful to the Association of the Bar of the City of New York for a clear exposition of an extraordinarily complex situation and the dangers lurking in it, and for a constructive and comprehensive proposal for change.[17]

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16. P. 6.

17. After the foregoing review was written and submitted, President Kennedy transmitted to Congress a message on "Ethical Conduct in the Government" which follows the broad outlines of the New York City Bar Association study both in its findings and in its recommended program actions. The chief substantive difference appears to be that Congress is asked to legislate only what is necessary in the way of revising the criminal statutes, while the President proposes to take care of establishing the needed administrative controls, including Presidential orders and regulations with

respect to employee conduct, instructions to agency heads to issue appropriate agency regulations, and a centralized office to coordinate ethics administration throughout the Executive branch. See Message from the President of the United States relative to Ethical conduct in the Government, H.R. Doc. No. 145, (87th Cong., 1st Sess.') April 27, 1961.

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