Almost nine months ago to the day, the United States Senate, its good name and reputation repeatedly assaulted by news stories of reported misconduct by one of its principal officers, agreed to Senate Resolution 212. The author, Senator John J. Williams of Delaware, believed its language was broad enough to authorize the Rules Committee to investigate any such misconduct on the part of Members or former Members of the United States Senate as well as of its employees.

Four months later a question was raised on the Senate floor as to whether Members were included in the purview of the investigation. Numerous Senators, including the Majority Leader, assured the Senate that the Resolution was so intended.

The issue was an important one because of news accounts by reputable reporters of instances in which Bobby Baker was charged with abusing his office in his relationships with several Members of the Senate. When Bobby Baker was subpoenaed, he declined to testify on Constitutional grounds. Thereafter, I suggested, in an appearance before the Senate Rules Committee, that, despite Baker's refusal to testify, there was another way to get the facts. I suggested that the Committee ask each Senator:

1. Did you ever have any business or financial dealings with Bobby Baker, directly or indirectly? If so, what were they?

2. Did Bobby Baker ever give you, get for you, offer or offer to get for you: any campaign contributions; any help in making up campaign deficits by gifts, purchase of tickets or otherwise; any retainer or employment; any preferment in committee assignment or otherwise; anything of value?

At least three Members of the Senate present at the Committee hearings immediately volunteered that their answers to these questions were in the negative. But the Committee Chairman told the press the suggestions were "the height of demagoguery" and "would be an insult to a Senator," and raised doubts about whether Senators could be queried, news stories of their dealings with Bobby Baker notwithstanding.
The Committee cannot plead ignorance of these news stories, for I presented them at the Committee hearing, and they are in the record. Nor can the Committee argue that there is no precedent for an inquiry to all Senators, for I called to their attention a specific instance in which precisely this was done in 1894, incidentally, in the wake of press stories suggesting corruption in office.

It seemed to me then, it seems to me now, that as Senators we have direct and primary responsibility to assist a committee of the Senate in carrying out its assignment to make a full and complete study of Bobby Baker's activities.

Subsequently, Senator Williams of Delaware and I attempted to amend the original resolution to include Members of the Senate explicitly, but the issue was not permitted to come to a vote. Instead, the Majority Leader, in an extraordinary show of power, succeeded in tabling our amendment. So the die was cast: Senators were not to be questioned in the Bobby Baker inquiry although several had complained publicly of mistreatment at the hands of Mr. Baker, and he had bragged that on any given issue he had 10 Senators in the palm of his hand.

Last week the Rules Committee released its recommendations in the Baker case. Not unexpectedly, they are narrow and very weak.

The entire effort thus far has the ring of an investigation, handcuffed before it started, kept that way no matter what, and now, hopefully, destined for the category of "File and Forget."

But, inadequate and timid as the Committee's inquiry was, it couldn't avoid the conclusion that the evidence it gathered "proves beyond any doubt that the performance and activities of Robert G. Baker, while serving as a high official of the Senate, form a pattern of conduct and activity inimical to the public welfare."

The Committee Counsel's own findings, reported earlier in the press, concluded that Baker used "the prestige of his official position for his own private gain."

The Committee recommended that the Department of Justice review the evidence to determine whether criminal action is warranted. Of course, this should be done. But apparently the Committee feels there is no way to call Baker to account unless violation of specific criminal statutes can be proved.

There is another way.
Actions can be unlawful without being violations of a criminal statute. I suggest that if Bobby Baker did use his public position and influence for personal gain or that of his family, his friends or his associates, his conduct was unlawful, and a legal remedy exists, apart from criminal action.

Bobby Baker can be compelled in a civil action to pay over to the United States every penny he has made through the use of his influence and the prestige of his office.

Public office is a public trust. Is there anyone who would not agree that membership in the Congress of the United States is not only a high honor but a position of high trust? Surely there is no one in this body who does not regard himself as a fiduciary to the people of the Nation and to the Nation itself. And I am sure that each member of our individual staffs and of the staff of the Senate holds a like position of trust.

The Committee in its recommendations joins me in this conviction:

"There is always a need for any public official -- from the highest to the lowest -- to conduct himself in a manner beyond question. As Government grows more complicated and more sensitive to the needs of the public, this becomes more and more important and in the case of this investigation, it has been made abundantly clear that those who serve the public must recognize that their office is a public trust and should not be compromised by private interests."

Where does this principle of public trust lead us? For one thing, it means, of course, that a person who sells his vote violates a trust. It has long been the law that a government can recover a bribe paid to an officeholder to influence his official decision.

But public trust means more than that. It means that each of us, in the Congress or of its staff, holds the influence and prestige which goes with his position as a fiduciary. Such influence and prestige is not his personal property. They are not his to sell or barter or otherwise compromise. They are held in trust for the nation and for all the people. And if he breaches that trust and misuses his office, he must account for—that is pay over—all profits to the government.

The accountability of a government official for breach of his fiduciary duty is well recognized by the courts.

In a recently decided case, U. S. v. Drumm, 329 F. 2d 109 (1st Cir. 1964) the Court of Appeals in the First Circuit held that the Federal Government could recover from a poultry inspector of the Department of Agriculture payments made to him as a consultant by a processor whose operations it was his governmental duty to inspect. Whether preference was actually shown or loss to the government in fact occurred was immaterial. No statute was involved. The potentiality of preferment existed and was alone sufficient to enable the government to recover.
Dougherty v. Aleutian Homes, Inc. 210 F. Supp. 658 (U. S. D. C. D. Ore. 1962), a case in which the United States intervened, involved contracts under which the Mayor and city manager of Kodiak were to receive monies from Aleutian Homes in return for the use of their official positions and influence in securing Federal funds for a housing project. In holding the contracts against public policy and void, the court pointed to a line of cases holding "void and illegal contracts for services that involve personal influence on legislators." The court noted that the question was not whether improper influence was actually used but the corrupting nature of the agreement itself.

A classic case for recovery by a government of profit made through the use of public office or position is Reading v. Attorney-General (1951) A. C. 507. That case involved a British Army sergeant who during the last war had received money from smugglers for escorting their trucks through Cairo, Egypt while in uniform, thus enabling them to pass the civilian police without inspection. The British military authorities got wind of this and took possession of the money. The sergeant brought a suit to recover it. The House of Lords held that the Crown was entitled to the money since the sergeant had gotten it by the use of the uniform of the Crown. It was held immaterial that the sergeant was not acting in the course of his employment and that the Crown had suffered no loss and could not lawfully have made the profit itself.

As the principal opinion in this case put it:

"... any official position, whether marked by a uniform or not, which enables the holder to earn money by its use gives his master a right to receive the money so earned even though it was earned by a criminal act. 'You have earned,' the master can say, 'money by the use of your position as my servant. It is not for you, who have gained this advantage, to set up your own wrong as a defence to my claim.'"

The Harvard Law Review, in commenting on this case in 1952 (vol. 65 at page 502), states that the principle of the case "might well be applied to the currently notorious 'sales of influence' by public office holders."

The Harvard Law Review is right.

In the second quarter of this century, the courts of this country, both state and Federal, took the lead in establishing and enforcing the fiduciary obligations of individuals holding positions of private trust, notably corporate officers, directors, and even majority stockholders.

The standards set are strict. Because a review of some of the leading cases involving private trust is relevant to consideration of the fiduciary obligations of those occupying positions of public trust, I attach a brief memorandum summarizing several of them.
The whole thrust of these decisions is summed up in a statement in 1961 by the Securities Exchange Commission in *Cady Roberts and Company*. In this case, the Commission asserted, with great cogency, that it was the purpose of the Exchange Act "to eliminate the idea that the use of inside information for personal advantage was a normal emolument of corporate office."

I suggest that the principle asserted by the Commission is at least equally applicable to public office. The use of inside information obtained through public office, and the use of the prestige and influence pertaining to public office, for personal advantage is not a "normal emolument" of such public office.

Did Bobby Baker, whose highest salary was no more than $20,000 a year, make $2 million on his own or was the money gained because of his office and the influence it carried? The question has been answered for us by the Rules Committee Counsel in his finding that Baker used "the prestige of his official position for his own private gain."

The slightest examination of the Committee's hearings, inadequate as they are, can leave no doubt of the justification for the conclusion in the Rules Committee's recommendations:

"The vast amount of information and data discovered and assembled by the Committee proves beyond doubt that the performance and activities of Robert G. Baker, while serving as a high official of the Senate, form a pattern of conduct and activity inimical to the public welfare."

or for the statements in the Committee Counsel's report, including:

"Baker used his public office in the Capitol as if it were a private business office. He entertained numerous visitors who were there for private business purposes. From this same office, he communicated with various business associates throughout the United States and even in Puerto Rico. The available records indicate that some of his personal calls were at Government expense."

"The volume of business and financial activities of Baker was so great and had such ramifications that its magnitude is completely inconsistent with his official duties and responsibilities."

"Baker used his acquaintance with numerous individuals and the prestige of his official position to obtain participation in many business ventures."

or for the Counsel's over-all conclusion, already mentioned, that Baker used "the prestige of his official position for his own private gain."
The next step here is, of course, for the Attorney General of the United States. Surely we can assume he will follow the matter wherever it may lead and whomever it may involve. Given the opportunity, I am sure the courts will hold that the influence and power which come to men through the holding of public position is held by them in trust, that it may not be sold or bartered, that it may not be used in any way for personal gain, and that anyone breaching that trust can be held to account and compelled to disgorge every penny of profit.

The time has come in the field of public affairs, as it came in the past few decades in the field of private corporate affairs, to put an end to all short cuts to big loot, to easy money, to the "fast buck." Can there be any surer way of ending wheeling and dealing and influence peddling than by taking the profit out of it?

The doctrine that a public officer or employee is liable to pay over to his employing government any profit derived from the use of his official position is, of course, applicable not only to Members of Congress and its employees. It is equally applicable to all office holders and employees of all governments--Federal, state and local.

The vigorous enforcement of this doctrine could open the way to a great cleansing of public life in America at every level.

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Memorandum of Cases Involving the Fiduciary Obligations of Individuals Holding Positions of Private Trust

In Irving Trust Co. v. Deutsch 73 F. 2d 121 (1934) rev'g 2 F. Supp. 971, directors and their associates were held liable for profits realized through the acquisition of another company which had patent licenses needed by their corporation, even though there was no intention to defraud and their corporation could not get the necessary funds on account of its impending bankruptcy. A similar holding was made by the Delaware courts in Loft Inc. v. Guth 23 Del. Ch. 138, aff'd. 23 Del. Ch. 255 (1939).

In Brophy v. Cities Service Co. 70 A 2d 5, (Del. Sup. Ct. 1949) the Court held that a corporation could recover profits made by the confidential secretary to a director. The secretary was told by the director that the corporation was about to enter a program of buying its own stock. The secretary bought the stock before the corporate purchases began and sold after they ceased. The secretary's purchases and sales were on the New York Stock Exchange and not to or from the corporation. Despite the fact that the director's secretary was not himself an employee of the corporation and had not dealt with the corporation, and though the corporation itself had suffered no loss or damage, nevertheless, the corporation's recovery of the secretary's profit was ordered.

In Mosser v. Darrow 341 U.S. 267 (1951), the Court surcharged a Trustee in Reorganization for all profits realized by employees of the Trustee on their trading in securities of the corporation; some of these profits had been made on resale to the Trustee and others on purchases and sales on the open market. The Trustee himself had made no profits. The Court held it was irrelevant whether the trust estate had been injured or even benefited. It is interesting here that the trustee was held liable for permitting his employees to do what was forbidden to him; that is, trade on the company's securities on the basis of their inside information. Query: might the members of the Senate be responsible for profits made by their employee, Bobby Baker -- might we individually be liable for profits made by our individual staffs?
In *Berner v. Equitable Office Building Corp.* 175 F. 2d 218, (1949) the Court penalized (by reducing his fee) a lawyer involved in reorganization proceedings who suggested the purchase of securities to his brother-in-law. (Obviously one in a position of trust cannot escape liability by having the fruits of his breach of trust placed in the hands of a member of his family rather than taking them himself.)

The Securities Exchange Commission held, in *Cady Roberts & Co.*, *Securities Exchange Act Release No. 6668* (Nov. 8, 1961), that the anti-fraud provisions of the Securities Exchange Act were violated when a registered broker-dealer had gotten from his partner, a director of a corporation, inside information not yet made public of an impending dividend reduction and thereupon caused shares of stock of the corporation owned by his customers in discretionary accounts to be sold on the stock exchange without waiting for public announcement of the dividend reduction. The Commission held that the broker-dealer's fiduciary duty to his customers was overridden by the impropriety of his use of inside information obtained from his partner, a director of the corporation. In this case the Commission asserted that it was the purpose of the Exchange Act to "eliminate the idea that the use of inside information for personal advantage was a normal emolument of corporate office".

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July 7, 1964