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THE CONGRESS AND ITS DOUBLE STANDARD

Senator Clifford P. Case *

On Capitol Hill, the majestic dome of the Capitol rises newly white and strong against a background of the Mall and downtown buildings of the executive branch. Its new gleam was accomplished during the course of an extensive repair and renovation program ordered by the Congress when the East Front of the building showed unmistakable signs of deterioration.

The signs of the need for a rehabilitation program of the Congress itself are at least equally plain, but so far they have gone largely unheeded. One such sign is the low esteem in which Congress is currently held by many Americans. A recent poll reported that a majority of those questioned believe Congress tends to represent "special interests working for private gains." 1

This conclusion may not be surprising after the many months of piecemeal and still incomplete accounts of the activities of Bobby Baker and some of his associates. But the Baker case, and especially the handling of it, are only the latest demonstration of a basic cause of public mistrust and cynicism, i.e., the double standard so long practiced by Congress—one standard for the executive branch, another lesser standard for its own members.

"We are not investigating Senators," 2 said the Chairman of the Senate Rules Committee when queried about the scope of the Baker investigation. In that one sentence, he expressed a view that is all too characteristic of the Congress. It shows up in many ways.

I remember, for example, a meeting several years ago, when I was a member of the Senate Interstate and Foreign Commerce Committee, to consider a Presidential nomination for a vacancy on the Federal Communications Commission. The nominee, a lawyer by profession, had previously served the government with distinction. His qualifications were not questioned. Nonetheless, the nominee was there to withdraw his nomination. The explanation helps to highlight the double standard that today prevails in Washington.

The Federal Communications Act provides, inter alia: 3

... No member of the Commission or person in its employ shall be financially interested in the manufacture or sale of radio apparatus or of apparatus for wire or radio communication; in communication by wire or radio or in radio transmission of energy; in any company furnishing services or such apparatus to any company engaged in communication by wire or radio or to any company manufacturing or selling apparatus used for communication by wire or radio; or in any company owning stocks, bonds, or other securities of any such company; nor be in the employ of or hold any official relation to any person subject to any of the provisions of this chapter, nor own stocks, bonds, or other

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* United States Senator from New Jersey since 1955; Member, House of Representatives 1945-53; A.B., Rutgers, 1925; LL.B., Columbia, 1928.


3 48 Stat. 1066 (1936), 47 USC 154 (b).
securities of any corporation subject to any of the provisions of this chapter.

As it happened, the nominee had a prudent father. Some years before, he had established a small, and irrevocable, trust fund for his two sons, to be managed by trustees outside the family. Soon after its establishment the trustees invested a portion of the funds in stock of a well-known electrical firm which manufactures, among other things, equipment in the communications field. Over the years the stock had greatly increased in value. At the time of the hearing the trustees could not justify, in the light of their fiduciary duty toward the beneficiaries, sale of the stock. Since neither beneficiary had any control over the investments made by the trust and the trust itself was irrevocable, there was no way in which the nominee could divest himself of this involuntary financial interest.

The committee agreed it came within the proscription of the Act. The provisions of the Act are clear, and I do not question them or the rightness of the decision to withdraw. However, I could not help thinking of the contrast between the stringent restrictions on membership on the Federal Communications Commission and the complete absence of any restriction on membership on the Senate committee which oversees it and passes on legislation in the communications field.

Another hearing on a Presidential nomination comes to mind. The nominee, from private industry, had worked for his firm through the first six months of the year in which he was nominated. He had relinquished all financial interest in the firm, which did some work for the branch, but was hopeful that he might be permitted to take a half year’s share in the profit-sharing plan of the company in line with his employment for the first half of the year. With some reluctance I felt obliged to point out that this seemed inconsistent with the clear intent of the law (as interpreted) as the company’s profits were calculated for the purposes of its profit-sharing plan on a yearly basis, and the value of a six-months share would be determined partly by the profits realized in the second half of the year. The committee agreed.

Again our action highlighted the difference between standards applied to executive appointees and the members of Congress. For members of Congress may, and do, sit on committees which act on measures that, directly or indirectly, affect their personal financial interests. And, on occasion, members of Congress have attempted to influence the actions or decisions of an agency from which they may stand to benefit personally.

In 1962, Congress revised the statute covering bribery, graft, and conflicts of interest. The revision has been described as both strengthening and liberalizing the prior statute. But, whatever one’s view of the specific provisions adopted, they represent an attempt to deal with the problems presented by the post-war growth in the government’s use of consultants and part-time advisors and the post-employment activities of former government employees. By contrast no effort was made to reach the problems of conflicts of interest in the legislative branch. The Congress once again concentrated its attention on the executive arm of government. Certain provisions, such as those covering bribery continue to apply specifically to members of Congress as well as to others. Others such as section 208 dealing with “Acts

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2 Note 4, supra. See also § 203 barring services before the departments and agencies but not services in court rendered for compensation solicited or received.
affecting a personal financial interest" apply only to officers and employees of the executive branch. It was upon the precursor of section 208 that the Dixon-Yates affair turned.

The overall public policy embodied in these provisions was described by Chief Justice Warren in United States v. Mississippi Valley Generating Co., the litigation that became known as the "Dixon-Yates case."

The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. Consonant with this salutary moral purpose, Congress has drafted a statute which speaks in very comprehensive terms.* * *

... the statute establishes an objective standard of conduct, and that whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, regardless of whether there is positive corruption. The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened ...

... The statute is directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption...

If this is good public policy for Congress to proscribe for the government generally, is it any less good for the Congress itself?

To put it another way: If a member of Congress applies "pressure" in his capacity as a member of Congress to an executive agency to maintain or expand a program which will benefit the company in which he holds stock, is it any less reprehensible than if he were acting as a paid representative of the company?

Does the fact that he is a member of Congress dispel the possibility of suspicion which the statute seeks to avoid?

Such actions may be infrequent but they are not unknown. I think it is probable that when a member of Congress does exert pressure in such circumstances, he does so with a sincere conviction that the action sought is in the national interest. But sincerity is not the test. Nor is it in point that private and public interest may, and sometimes do, coincide. Rather the question is: If "What's good for General Motors is good for the country" is considered at best naive when expressed by a member of the executive branch, it is less so when proclaimed by a member of the legislative branch?

It would be unrealistic, I believe, to suggest that members of Congress should be required to divest themselves of all financial interests which might conceivably be affected by legislation or by action of executive agencies under the

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* 18 USC 208. Section 205 bars services rendered with or without compensation before the court as well as the departments and agencies. Certain limited exceptions are provided.

† Former § 434 of 18 USC; 35 Stat. 1106 (1909).

purview of a committee on which a member serves. But should a member of Congress, whose law firm represents a common carrier, act as a committee member, or vote on the floor, on measures affecting common carriers? Or should one with business associations in the mining industry pass on such measures as depletion allowances for income tax purposes?

Every lawyer is familiar with his obligation not to represent conflicting interests. Canon 6 of the American Bar Association's canons explicitly states the "... duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel."¹⁶ We expect a member of the judicial branch to disqualify himself from sitting in a case where his personal interests or associations might be thought to color his view. A member of the executive branch has a similar obligation. The public could reasonably look to Congress to follow this practice. And it is a matter of record that some members of Congress have refrained from voting on particular measures because they had a direct personal interest affected by them.

It would, I think, be impossible to frame statutory prohibitions adequately safeguarding against conflicts of interest in the infinitely broad and varied situations with which Congress, and members of Congress, have had to deal. But there is, I believe, a way in which Congress can provide better protection than now exists for the public interest, and in a manner consonant with its elective status. That is by applying the principle of public disclosure to the financial interests of members and the top staffs of the legislative branch and to their dealing with executive agencies at the behest of a particular party of interest.

Specifically, I have proposed in this and three preceding Congresses legislation that would require that all top officials in the legislative, as well as the executive, branch report annually their sources of income including gifts of 100 dollars or more in value and their financial assets and liabilities.¹⁶ The reports would also include a statement of all dealings in securities or commodities and all purchases and sales of real property or any interest therein. They would be filed with the Comptroller General as public records available to both press and public.

A second part of my bill would also apply the disclosure principle to both oral and written communications concerning particular cases to regulatory agencies, whether from a member of Congress or a member of the executive branch outside the agency involved. For example, all communications, routine or otherwise, from a member of Congress in behalf of a particular application for a broadcasting license from the Federal Communications Commission would be made a part of the public record of the proceeding. Failure to cover ex parte contacts with regulatory agencies, as recommended by President Kennedy, is another notable omission of the 1962 revision of section 201 of title 18.

Public disclosure is not a new principle. Preventive rather than punitive in approach, it already applies, in part, to the area of campaign contributions and expenditures. It is the principle behind the requirement that lobbyists register and report expenditures to the Congress.

For another application of the principle, it is notable that in the 1963 Judi-

¹⁶Canons of Professional and Judicial Ethics, Opinions of Committee on Professional Ethics and Grievances 3, American Bar Association (1957).

cial Conference the problem of financial activities of judges was fully discussed. The Conference adopted a resolution forbidding any federal justice or judge from serving as an officer, director, or employee of a corporation organized for profit. The Conference disapproved of a Senate bill to require each judge to submit regularly complete financial reports open for inspection by any member of the judicial council of each circuit but the action was taken on the ground that "regardless of the merits of the proposal, judges should not be singled out from other officials of the United States Government to make such reports." 12

Public disclosure is particularly appropriate in an area where a flat prohibition might raise questions of infringement upon the right of the people to elect the representative of their choice, be he rogue or shining knight. Certainly, it would help to give the electorate a better basis on which to judge.

For the Congress as a whole and for the individual members of it, a requirement for disclosure of financial interests would help to dispel the cynicism and disdain with which so many citizens view the political practitioner. This attitude is, I am convinced, for the most part unfair. Yet it certainly has some historical basis. It was, after all, Daniel Webster who reminded officials of the Second Bank of the United States "... my retainer has not been renewed or refreshed as usual." 13

The venality and corruption of many state legislatures in the mid-19th and early 20th centuries were notorious. I am confident that the Congresses in modern times compare very favorably with those of an earlier day. Certainly, in my experience, the great bulk of members of Congress, for example, are honest, conscientious men, trying to do the best job they can in the interests of the nation and their state or district.

For officials in the executive branch and particularly in regulatory and semi-judicial agencies, the obligation to file regular financial reports would be both preventive and salutary. The maintenance of public confidence in the integrity of these agencies is essential. With them rest determinations that may vitally affect the well-being of a particular enterprise or industry and the communities of which they are part. The necessity to make such a report would serve as a stop-and-think warning. In conjunction with the requirement for disclosure of communications, it would also tend to check the all too prevalent inclination of the general public to ascribe, without tangible ground, any particular decision to "influence" or a "fix." Contrary to common supposition, they are, I believe, the exception rather than the rule.

Support for the principle of disclosure is growing. For example, at this writing, thirty members of the Congress, including this writer, have made public financial statements.

To accomplish the objective, however, disclosure should, as the Judicial Conference report suggests, apply equally to all, and to the same extent. And it should include all sources of income.

Adoption of this disclosure requirement will not, of course, resolve all of the conflicts of interest problems with which Congress is confronted. By no means do all conflicts of interest problems fall in the category of pecuniary interest, at least in the direct sense. Every member of Congress is confronted, at

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12 Id. at 63; S. 1613, 88th Congress, 1st Sess. (1963).
13 Schlesinger, The Age of Jackson 84 (Little Brown, Boston, 1950).
one time or another, with the problem of drawing the line between legitimate representation of constituent interest and so-called improper influence or pressure. Every member has also, I venture, at some time wondered whether the offer of a particular campaign contribution was made in the expectation of a subsequent favor even though it was proffered solely as the fruit of a laudable desire to return a worthy official to office. Further, there are a host of other problems, large and small, that trouble many members of Congress. More than one member with limited personal resources has to tussle with the problem of how to meet the expenses which serving as a member of Congress entails.

Travel, for example, is a costly item for most members. Once upon a time, Congress met for four to six months and adjourned for the rest of the year. Since the war, sessions have been steadily lengthening. In 1963 the session ended only when Christmas impended. There is an official travel allowance, but in the Senate it covers only three round-trips a year. This does not begin to meet the needs of most members who are rightly expected to get back home far more frequently. The cases of use of official transportation for personal purposes justifiably provoke headlines. But little notice is given to the fact that most members spend 10 to 20 per cent of their salaries on travel to and from their home states or districts for necessary functions and meetings.

A pay raise would provide a partial answer to some of these problems but it would not go to the fundamental considerations involved. To consider them, my bill would establish a Commission on Legislative Standards. But there are still other areas in which Congress itself can act immediately to eliminate the double standard that now prevails, e.g., accountability in the expenditure of public funds. Congress demands a scrupulous accounting by the executive branch, but takes a far less stringent view of its own expenditures.

One result is that congressional travel abroad has gotten a bad name in many quarters. And understandably so. Yet, with a substantial part of our military forces dispersed around the globe and with millions of United States tax dollars being spent in foreign assistance, Congress has a responsibility which legitimately involves, indeed requires, some on-the-spot inspection and firsthand observation. The “junkets” of a few have tended to make all such trips suspect. Fortunately, a few years ago Congress did act, after repeated exposés, to impose minimal requirements for reporting expenditures on the use of counterpart funds by committee members and staff traveling overseas. The scope of these reports should be broadened to include all committee expenditures, domestic as well as abroad, and in greater detail than is now prescribed.

Another spot vulnerable to criticism is the process of appropriating for the legislative branch. Congress tends to regard legislative expenditures as its “own business” while it treats those of other governmental agencies as “public business.” “Comity” between the houses normally precludes any real questioning of appropriations for its own use approved by the other “body.” But even within each body too many expenditures are shrouded in secrecy and the budget is approved without most members knowing what it may really provide by way of swimming pools or draperies, not to speak of more major matters.

This is perhaps understandable. In a body of 100 or 435 peers—some of them more equal than others—it is unrealistic to expect the kind of scrutiny that occurs between independent though coordinate branches of government.

Through the years, Congress has shown it cannot, will not, police itself.
One need go back no further than the McCarthy era to see the futility of expecting the Congress to exercise effective self-discipline.\textsuperscript{14}

At this writing, the Senate Rules Committee is considering the recommendations it was directed to make under S. Res. 212 to "make a study and investigation ... whether additional laws, rules, or regulations are necessary or desirable" and to "report to the Senate at the earliest practicable date the results of its study and investigation together with such recommendations as it may deem desirable."

Some members of the Committee have proposed a code of ethics with the sanction of censure. Promulgation of such a code is all very well as an expression of sentiment, but more than another hortatory exercise \textsuperscript{15} is needed.

Historically, as well as practically, it is the watchful eye of the press and public that exerts the strongest pressure to keep to the strait and narrow. That is why I believe continuing information, readily available to both public and press, covering the financial interests of members of Congress is the most promising solution to the problem. It would not be a cure-all, but it would go a long way toward protecting the public interest in the integrity of the legislative process. And, after the initial shock, I suspect the vast majority of the members of Congress would find it a positive help in carrying out their official responsibilities.

\textsuperscript{14} Of the more than 250 cases summarized in Senate Election, Expulsion and Censure Cases from 1789 to 1960, by far the greater number involved a challenge of credentials or charges of election irregularities. Only a handful involved the conduct of the office of Senator; and in the last century the Senate acted to condemn or censure in only two of these cases. The case study was compiled for the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration (S. Doc. No. 71, 87th Cong., 2d Sess. (1962)).