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Legislative Ethics

NOTES AND COMMENTS

LEGISLATIVE ETHICS

The concept of public office as a "public trust" was given legal effect under common law. With his status as trustee of the people, the official had the duty of acting on behalf of the public, regardless of his own interests, and the principles of the laws of agency and trust were applied to him in this capacity.[1] Consequently, any gift, gratuity or benefit taken in violation of his duty, or any interest adverse to his principal, acquired without a full disclosure, was a betrayal of his trust and he was required to account to his principal for all he had received.[2]

Activities such as direct theft or embezzlement from the government, or the taking of a bribe, have long been punishable under common law and under statute. But the recent furor over morality of public officials, and, more particularly, the ethics of our legislators, has centered around the so-called "gray areas." For example, a legislator generally is not prohibited by statute from including his relatives on the public payroll, or accepting campaign contributions and gifts from lobbyists and pressure groups. Yet, such behavior is being looked upon with increasing public disfavor. A legislator practicing as an attorney before a state agency or court of claims may arouse suspicion that undue influence is being exerted. In addition, when the legislator who is also a businessman, or banker, or farmer, introduces or votes on a bill dealing with business, banking, or agriculture, the question may arise as to whether he is acting in his own interest or in that of his constituents. Yet, since almost every phase of American life is touched in some way by legislation, it is inevitable that legislators will often have a personal interest in the bills that come before them, even if the interest is only one of a general nature, *e.g.*, taxes or automobile licensing.

Currently, there exists a trend favoring the enactment or the strengthening of legislative ethics laws. The difficulty of enacting effective legislation in this area, however, may be seen from a sampling of the factors that must be considered by the draftsmen of such bills. Most state legislatures have short sessions, with proportionate compensation, thereby requiring many members to retain their usual employment during their terms of office. Although membership in the United States Senate or House of Rep-

[1] United States v. Carter, 217 U.S. 286, 306 (1910).
[2] *Ibid.*

resentatives is more adequately compensated and, often, more in the nature of a career than service in state bodies, it has been found in a recent study[3] that most of our federal legislators also engage in outside activities for compensation. In this respect, the legislative differs from the executive branch, in which most of the members are career officials. Thus, the regulation of the conduct of legislators might not be equitable if the same standards were applied to them as to administrators. In the enactment of ethics laws, consideration must also be given to American political usage, with its tradition of campaign contributions, patronage and compromise.[4]

The draftsmen must keep in mind the fact that an essential concept in ethics legislation is that the evil sought to be avoided is not only the actual abuse of position, but also any appearance of abuse, which tends to undermine public regard for those in office.[5] However, objections may be raised opposing the imposition of criminal sanctions for creating the mere appearance of wrongdoing.[6] Since potential conflicts of interest are so varied, the statute must be broad enough to include the practices sought to be eliminated while not prohibiting necessary and legitimate areas of conflict.[7] The purpose and scope of this note will be to outline and compare the various statutes, both federal and state, that have undertaken to regulate the ethics of legislators, with particular emphasis on the controversial New York law.

Federal Statutes

From its very inception, the federal government recognized the possibility of conflict between the public duty and the private interests of its officials. At its first session, in 1789, Congress made it unlawful for certain treasury department officials to engage in trade or commerce, own a sea vessel, purchase public property or be involved in the purchase or disposal of public securities.[8] Subsequent laws were passed to regulate various activities of other federal employees.[9] Not until 1863, however, did Congress attempt self-regulation. In that year, it enacted a law prohibiting its members from practicing in the United States Court of Claims.[10] Since that time, Congress has statutorily prohibited its members from accepting bribes, making or holding contracts with the federal government, and rendering services for compensation before a federal department or agency.

Under current provisions of the United States Code, it is unlawful to bribe, or attempt to bribe, a Congressman or Congressman-elect, with the intent either: (1) to influence any official act; (2) to influence the legislator to commit any fraud on

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[3] N.Y. Herald Tribune, June 9, 1965, p. 28, cols. 7-8.

[4] Eisenberg, *Conflicts of Interest Situations and Remedies,* 13 RUTGERS L. REV. 666, 667-68 (1959).

[5] See MINN. STAT. ANN. § 3.87 (Supp. 1964).

[6] See U.S. CODE CONG. & AD. NEWS, 87th Cong., 2d Sess. 3865-66 (1962), in which Senator Keating objected to criminal sanctions for *any* of the activities that fall within what he terms "this shadowland of conduct."

[7] The existence of necessary and legitimate areas of conflict was recognized by a recent New York Committee on Ethics when it considered and rejected a rule prohibiting voting on bills in case of conflict of interest. 1964 N.Y. LEG. DOC. NO. 42, REPORT OF THE SPECIAL COMMITTEE ON ETHICS.

[8] *Ex parte* Curtis, 106 U.S. 371, 372 (1882).

[9] *Id.* at 372-73.

[10] REV. STAT. § 1058 (1863), 18 U.S.C. § 204 (Supp. IV, 1963).

the United States; or (3) to induce him to violate his lawful duty.[11] It is likewise unlawful for a member of Congress, or member-elect of Congress, to solicit, receive, or agree to receive, whether directly or indirectly, anything of value, for himself or another, in return for any of the three above-mentioned acts.[12]

A present, former or elected member of Congress who, "otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him,"[13] as well as a person who gives, offers or promises the same to him,[14] shall be fined or imprisoned, or both.[15]

A present or elected member of Congress may not seek or receive any compensation for any service rendered or to be rendered, either by himself or by another, in relation to any proceeding or determination, before any federal department or agency, in which the United States is a party or has "a direct and substantial interest."[16] A criminal sanction is imposed upon violators of the ban on practice in the Court of Claims.[17] A member of Congress may not execute or hold any contract with the United States or any of its agencies. Contracts made in violation of this provision are void, the money advanced to the legislator must be returned, and a maximum fine of three thousand dollars is imposed.[18] This statute covers any contract or agreement, "no matter how fairly obtained or held, how reasonable in its terms, or how advantageous to the United States."[19]

This is the total extent of federal statutory regulation of legislative ethics. Conspicuously absent is any reference to the "gray area" problems, which currently are of greater concern than the traditional bribery and government contract questions of conflict.

State Statutes

The state legislatures generally have been even less active than Congress in enacting measures concerning the ethics of their own members. Apparently, certain states have not even found the problem to be of sufficient importance to warrant consideration.[20] Yet, some recent state legislation is comparable to, and even more in-

[11] 18 U.S.C. § 201(b) (Supp. IV, 1963).

[12] 18 U.S.C. § 201(c) (Supp. IV, 1963). Conviction of any of these crimes carries a maximum penalty of $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisonment for a maximum of 15 years, or both, and possible disqualification from holding any office of honor, trust or profit under the United States.

[13] 18 U.S.C. § 201(g) (Supp. IV, 1963).

[14] 18 U.S.C. § 201(f) (Supp. IV, 1963).

[15] 18 U.S.C. § 201(i) (Supp. IV, 1963). The maximum fine is $10,000, and the maximum term of imprisonment is two years.

[16] 18 U.S.C. § 203(a) (Supp. IV, 1963). A violation of this law by a legislator, or by one who knowingly gives, promises or offers such compensation is punishable by a fine of not more than $10,000 or a prison sentence of not more than two years, or both, and he is thereafter ineligible to hold any office of honor, trust or profit under the United States.

[17] 18 U.S.C. § 204 (Supp. IV, 1963).

[18] 18 U.S.C. § 431 (1958).

[19] United States v. Dietrich, 126 Fed. 671, 673 (C.C.D. Neb. 1904).

[20] See Note, 76 HARV. L. REV. 1209, 1210-11 (1963).

clusive than, the federal sections.

Several states have statutes covering the giving and receiving of bribes by legislators.[21] Another obvious area of conflict has been covered by various states through the enactment of laws forbidding contracts between a legislator and the state. An Arizona statute, for example, provides that members of the legislature shall not be interested, directly or indirectly, in any contract made by the legislature.[22] Kansas prohibits any interest on the part of a legislator, within one year of the expiration of his term, in a contract with the state which is authorized by any law enacted during his term.[23] On the other hand, the wording of the North Dakota statute does not restrict the ban to contracts made through the state legislature.[24] Kentucky law has separate provisions for contracts upon which the legislator may be called to vote and other contracts made with any agency.[25]

The format and coverage of the Massachusetts law[26] resembles the federal statute, even to the extent of its making separate provisions for part-time government employees.

In contrast with statutes which impose criminal sanctions, Minnesota has enacted a code of legislative ethics which is to be enforced by legislative committees. By its terms, a legislator

> should not accept other employment which will impair his independence of judgment in the exercise of his official duties . . . [or receive compensation] for activity before any state board, commission or public agency when such activity is in substantial conflict between his personal interest and his duties in the public interest so as to thereby create a possibility of undue influence or wrongful advantage.[27]

In addition, he should refrain from acting and voting in any matter where the interest of the public and his own interest are or may be in conflict.[28] Permanent committees on ethics were created in both the Minnesota Senate and House of Representatives[29] to render advisory opinions upon request, to receive and consider complaints concerning alleged violations, and to investigate and hold hearings.[30] Should the committee determine that a violation has occurred, it recommends appropriate disciplinary action to the Senate or House, or it delivers its findings to the attorney general for civil or criminal action if he deems it warranted.[31]

A survey of the body of law of other states reveals only occasional provisions governing "gray area" activities. For example, Nevada prohibits a legislator from employing, in any capacity, on behalf of the state or one of its subdivisions, any relative within the third degree of consanguinity or affinity;[32] and Kentucky does not permit a legislator to receive compensation for any appearance before an agency as an expert witness.[33] But these provisions are

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[21] See, *e.g.*, TEXAS CONST. art. 16, § 41; MICH. STAT. ANN. § 28.313 (1962); MINN. STAT. ANN. § 613.06 (1945).
[22] ARIZ. REV. STAT. ANN. § 38-446(A) (1956).
[23] KANS. GEN. STAT. ANN. § 46-132 (1949).
[24] N.D. CENT. CODE § 54-03-21 (1960).
[25] KY. REV. STAT. § 61.096(2), (6) (Supp. 1962).
[26] MASS. ANN. STAT. ch. 268A (1963).
[27] MINN. STAT. ANN. § 3.88(a), (b) (Supp. 1964).
[28] MINN. STAT. ANN. § 3.88(c) (Supp. 1964).
[29] MINN. STAT. ANN. § 3.89 (Supp. 1964).
[30] MINN. STAT. ANN. § 3.90(1) (Supp. 1964).
[31] MINN. STAT. ANN. § 3.90(5) (Supp. 1964).
[32] NEV. REV. STAT. § 281.210(1) (1963).
[33] KY. REV. STAT. § 61.096(3) (Supp. 1962).

too specific to include the wide variety of activities that can be brought within the Minnesota code of ethics.

New York Statute

New York, considered the pioneer in legislative ethics, and from whose law the Minnesota code of ethics is derived, enacted both penal provisions and a non-penal code of ethics in 1954. An executive message to the legislature acknowledged the obvious immorality of bribery and corruption, and sought definitions and guidelines in the less apparent areas of possible conflict between private interest and public service.[34] This message provided the needed impetus for the enactment of a law which made it a misdemeanor[35] for a member of the legislature to commit either of the following acts:

(1) receive, for services to be rendered in any case or matter before any state agency, compensation which is to be contingent upon certain action by the state agency;[36]

(2) 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 let after public notice and competitive bidding. (Included under the prohibition is a firm or association of which the legislator is a member, or a corporation in which he controls ten per cent or more of the stock.[37])

In addition, there was enacted a code of ethics which contained the following provisions applicable to a legislator:

(1) he should not "have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest";[38]

(2) he should not accept other employment which will impair his independence of judgment as a legislator, or which will require him to disclose confidential information acquired as a legislator;

(3) he should not disclose this confidential information, nor use it for his personal interests, nor attempt to use his position to secure unwarranted privileges or exemptions for himself or others;

(4) he should not give reasonable basis for the impression that he can be improperly influenced;

(5) he should conduct himself so as not to raise public suspicion that he is likely to be committing acts violative of his trust.[39]

As in Minnesota, the legislative code of ethics is administered by committees in the Senate and Assembly, set up to receive and investigate complaints and report their findings to the proper body.[40] In addition, the attorney general is authorized to establish an advisory committee on ethical standards for officers and employees of state agencies,[41] the services of which

[34] See 1954 N.Y. LEG. DOC. NO. 39, REPORT OF THE SPECIAL LEGISLATIVE COMMITTEE ON INTEGRITY AND ETHICAL STANDARDS IN GOVERNMENT.
[35] N.Y. PUB. OFFICERS LAW § 73(10), derived from N.Y. PEN. LAW § 1878.
[36] N.Y. PUB. OFFICERS LAW § 73(2).
[37] N.Y. PUB. OFFICERS LAW § 73(4).
[38] N.Y. PUB. OFFICERS LAW § 74(2).
[39] N.Y. PUB. OFFICERS LAW § 74(3)(b), (c), (f), (h).
[40] N.Y. LEGIS. LAW § 87.
[41] N.Y. EXECUTIVE LAW § 74.

committee have been used by members of the legislature,[42] although they are not included by the statute.

The final provision of the ethics legislation passed in 1954 contained a disclosure section which provided that a record of appearances made by attorneys for a fee before certain state departments must be kept open to public inspection.[43]

The special legislative committee which proposed these measures reported that it had been urged to recommend the creation of a commission of non-legislative members to enforce the code of ethics.[44] The committee rejected this suggestion on the ground that the Constitution of New York State imposes upon each house the duties of determining the rules of its own proceedings and the qualifications of its own members.[45] It noted that the courts are reluctant to permit interference with this responsibility by any executive, judicial, or joint legislative agency, even if such an agency be created by the legislature.[46] Despite this decision by the 1954 committee, a similar committee ten years later recommended the establishment of a state ethics commission to render advisory opinions interpreting ethics laws and rules for both legislators and state employees.[47] However, the bill introduced to effect the creation of this commission[48] was not passed.

The other major recommendations of the 1964 committee were the prohibition of practice by legislators before the state court of claims[49] and before state agencies.[50] After much debate, the former was adopted by the legislature[51] and the latter was rejected.[52] Among the additional penal provisions enacted in 1965 are:

(1) a legislator may not, within two years after the termination of his service, receive compensation to promote or oppose the passage of bills by either house;[53]

(2) a legislator may not accept any gift having a value of twenty-five dollars or more, regardless of its form, if it could be reasonably inferred that the gift was intended to influence him;[54]

(3) the firm of which the legislator is a member may transact business with the court of claims so long as he does not share in the profits of such transaction.[55]

The 1965 law also transfers to the Public Officers Law the following provisions that had been added in 1964 to the Legislative Law:

(1) the giving to, and receiving of bribes by members of the legislature is a felony;[56]

(2) the unauthorized receipt by a legislator of something of value for the performance or omission of some official act is also felonious;[57]

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[42] See 1959 N.Y. LEG. DOC. NO. 9, REPORT AND DIGEST OF PERTINENT STATUTES AND OPINIONS RELATING TO INTEGRITY AND ETHICAL STANDARDS IN GOVERNMENT 11-13.

[43] N.Y. EXECUTIVE LAW § 166.

[44] 1954 N.Y. LEG. DOC. NO. 39, REPORT OF THE SPECIAL LEGISLATIVE COMMITTEE ON INTEGRITY AND ETHICAL STANDARDS IN GOVERNMENT 16.

[45] N.Y. CONST. art. III, § 9.

[46] 1954 N.Y. LEG. DOC. NO. 39, REPORT OF THE SPECIAL LEGISLATIVE COMMITTEE ON INTEGRITY AND ETHICAL STANDARDS IN GOVERNMENT 16.

[47] 1964 N.Y. LEG. DOC. NO. 42, REPORT OF THE SPECIAL COMMITTEE ON ETHICS 6-7.

[48] A. Int. 235, Pr. 6664 (1965).

[49] 1964 N.Y. LEG. DOC. NO. 42, REPORT OF THE SPECIAL COMMITTEE ON ETHICS 4-5.

[50] *Id.* at 4.

[51] N.Y. PUB. OFFICERS LAW § 73(3).

[52] N.Y. Times, June 8, 1965, p. 1, col. 1.

[53] N.Y. PUB. OFFICERS LAW § 73(7).

[54] N.Y. PUB. OFFICERS LAW § 73(5).

[55] N.Y. PUB. OFFICERS LAW § 73(9).

[56] N.Y. PUB. OFFICERS LAW §§ 75, 76.

[57] N.Y. PUB. OFFICERS LAW § 77.

(3) disclosure must be made to the clerk of the Assembly or the secretary of the Senate of any financial interest held by a legislator, his spouse, or minor children in any activity which is subject to the jurisdiction of a regulatory agency; of every office and directorship held by him in any corporation or firm so subject; or of any other interest which he determines in his discretion might reasonably be expected to be particularly affected by legislative action, or that should be disclosed in the public interest;[58]

(4) a legislator who knowingly and wilfully makes a false statement in relation to these provisions commits a misdemeanor;[59]

(5) copies of these disclosures are to be open for public inspection;[60]

(6) legislators must certify that they know of, and will conform to, the ethics legislation applicable to them.[61]

The activities encompassed by these sections are carefully specified so as to prevent circumvention by technicalities. It is somewhat ironic that the legislators of the one state which has enacted such a complete legislative ethics law should have been subject to such severe criticism for their allegedly lax attitude on ethics.[62] Much of this criticism was triggered by the rejection of the proposed ban on practice before state agencies. Even assuming that the defeat of that provision was a serious setback to the effectiveness of the statute, it must be remembered that New York is still a leading state in ethics legislation.

Conclusion

A survey of existing statutes on legislative ethics indicates that, despite the difficulties involved in drafting such a law, it is possible to enact provisions which, if properly enforced, will both eliminate corruption and reasonably regulate "gray area" activities. New York has passed such a law and, those states which are considering similar legislation will find the New York statute, with its separate penal and non-penal provisions, its sections on disclosure, and its other specifically defined features, to be a useful guide. Of course, the effectiveness of any legislative ethics law will depend, to a great extent upon the willingness to enforce it, whether by prosecution or by appropriate disciplinary action within each house. Ideally, however, the passage of statutes, which specifically prescribe the standards with which the legislators will be expected to conform, will be sufficient to deter individuals from the proscribed activities so as to preclude any necessity for such prosecution or disciplinary action.

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[58] N.Y. PUB. OFFICERS LAW § 73(6)(a).
[59] N.Y. PUB. OFFICERS LAW § 73(6)(c).
[60] N.Y. PUB. OFFICERS LAW § 73(6)(b).
[61] N.Y. PUB. OFFICERS LAW § 78.
[62] See N.Y. Times, June 8, 1965, p. 1, col. 1; p. 27, col. 3; N.Y. Herald Tribune, June 9, 1965, p. 26, col. 1.