HB

362

Introduced: 4/15/83
Referred: State Affairs,
Judiciary and Finance

BY THE RULES COMMITTEE
BY REQUEST OF THE
SPECIAL COMMITTEE ON
LEGISLATIVE REFORM

IN THE HOUSE

HOUSE BILL NO. 362

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to standards of conduct of legislators and legislative employees and establishing a Legislative Ethics Commission; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 24 is amended by adding a new chapter to read:

CHAPTER 60. STANDARDS OF CONDUCT.

Sec. 24.60.010. LEGISLATIVE FINDINGS AND PURPOSE. The legislature finds that it is essential in the conduct of public business that legislators hold the respect and confidence of the people. Legislators must avoid conduct that even appears to violate the trust the people have placed in them. To ensure and preserve public confidence, legislators should have the benefit of specific standards to guide their conduct. Article II, sec. 12, Constitution of the State of Alaska grants to each house of the legislature the power to judge the qualifications of its members. It is the purpose of this Act to establish standards of conduct for state legislators and legislative employees and to establish the Legislative Ethics Commission to consider alleged violations of this chapter and to render advisory opinions to persons affected by this chapter.

Sec. 24.60.020. APPLICABILITY. (a) This chapter applies to a member of the legislature, to a person employed by a member of the legislature, and to a permanent or temporary employee of an agency of the legislature. This chapter does not apply to

(1) a former member of the legislature or to a person formerly employed by a member of the legislature or an agency of the legislature unless the provision specifically states that it so applies;

(2) a person elected to the legislature who at the time of election is not a member of the legislature;

(3) a person employed by a member of the legislature or an employee of an agency of the legislature whose compensation is below Step A, Range 18 of the state salary schedule established in AS 39.-27.011(c).

II A (b) The provisions of this chapter specifically repeal the provisions of the common law relating to legislative conflict of interest that may apply to a member of the legislature, a person employed by a member of the legislature, or to a permanent or tempo- II B rary employee of an agency of the legislature. They do not supersede or repeal provisions of the criminal laws of the state.

III A Sec. 24.60.030. CONFLICTS OF INTEREST. (a) A person to whom this chapter applies may not use public office for private advancement or gain.

(b) A conflict of interest exists when a person to whom this chapter applies has discretion to take or withhold official action or exert influence which could substantially benefit or harm a financial matter in which the person has a direct or indirect private interest.

(c) Conflicts of interest are prohibited but there is not a conflict of interest if, as to a specific matter, there is no substantial impropriety or appearance of impropriety because

(1) the person's interest is relatively insignificant;

(2) the person's authority is relatively far removed from any official action that could reasonably be affected by the potential

conflict of interest, provided that no attempt has been made to remove the appearance of impropriety by delegating responsibility for official action.

(d) A conflict does not exist if no benefit or detriment accrues to a person to whom this chapter applies beyond that which accrues uniformly to members of the profession, occupation or group to which the person belongs, or to the public at large.

Sec. 24.60.040. CONTRACTS. (a) A person to whom this chapter applies may not be a party to or have an interest in a state contract unless the contract is let by competitive bidding under AS 37.05.230 or the total annual amount of the state contract is $1000 or less. A person has an interest in a state contract under this section if the person receives direct or indirect financial benefits. A person has an interest in a state contract under this section if the contract is awarded to

(1) a firm, corporation, or association that has assets in excess of $5,000,000 and in which the person has an ownership interest greater than 10 percent or that has assets of ~~$5,000,000 or less and in which the person has an ownership interest greater than 25 percent; or~~

(2) a partnership in which the person is a partner.

(b) In this section, "direct or indirect financial benefits" means income, profits or other financial benefits under a state contract, without regard to whether the person is a party to the contract, and without regard to whether the income, profits or other financial benefits inure to the person as a partner, shareholder, investor, agent, employee, consultant, or joint venturer of the contractor.

Sec. 24.60.050. STATE LOANS. (a) It is not a conflict of

interest for a person to whom this chapter applies to participate in a state program or to receive a loan from the state if the program or loan is generally available to members of the public, is subject to fixed eligibility standards, and minimal discretion is exercised in determining qualification.

(b) In determining whether a conflict of interest exists with respect to a state program or to a state loan other than those described in (a) of this section, because a legislator may be in a position to influence the loan agency, the ethics commission must consider, but is not limited to, the adequacy of existing administrative procedures for granting and reviewing loans to legislators.

(c) Upon application for a state loan by a person to whom this chapter applies, other than loans described in (a) of this section, the lending agency must send a copy of the application to the Alaska Public Offices Commission, which will incorporate the material into the applicant's financial disclosure statement, if the applicant is required to file a disclosure statement. All records relating to a state loan to a person to whom this chapter applies may be disclosed to the ethics commission.

(d) Each February 1st, each loan agency must publish a listing of all outstanding loans to persons to whom this chapter applies, except for loans described in (a) of this section. The list shall include the name of the person, the date of issuance and current status of the loan.

(e) State agencies that have authority to grant loans shall adopt regulations that establish separate procedures for granting and reviewing loans to a person to whom this chapter applies. However, the regulations need not govern loans described in (a) of this section.

(f) The division of legislative audit shall annually review state loans granted to or held by persons to whom this chapter applies to determine whether appropriate procedures were observed in granting or reviewing the loans. The division shall report its findings to the ethics commission by April 1.

(g) For purposes of this section "state program" means a program in which tangible assets of the state or a right to use tangible assets of the state are transferred from the state to a private person.

Sec. 24.60.060. CONFIDENTIAL INFORMATION. It is a conflict of interest if a person to whom this chapter applies discloses or uses for personal gain or for the personal gain of another, information that by law is not available to the public and that the person acquired in the course of official duties.

Sec. 24.60.070. INTERESTS BETWEEN PUBLIC OFFICIALS. (a) A person to whom this chapter applies shall disclose to the commission the formation or maintenance of a close economic association involving a substantial financial matter with

(1) a supervisor who has responsibility or authority, either directly or indirectly, over the person's employment, including preparing or reviewing performance evaluations, or granting or approving pay raises or promotions;

(2) legislators;

(3) a public official in another branch, if the public official is required to file a financial disclosure statement under AS 39.50.

(b) It is a prohibited conflict of interest for a person to whom this chapter applies to form or maintain a close economic association involving a substantial financial matter with a lobbyist who is not a

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member of the immediate family of the person.

Sec. 24.60.080. GIFTS. (a) A person to whom this chapter applies may not solicit a gift in any amount, or accept or receive, directly or indirectly, a gift in excess of $100, whether in the form of money, services, a loan, travel, entertainment, hospitality, or other form, under circumstances in which it may reasonably be inferred that the gift is intended to influence the person in the performance of the duties of the person or is intended as a reward for an official action by the person.

(b) It is not a conflict of interest under this section if a person to whom this chapter applies accepts

(1) hospitality at another person's residence, including meals, lodging or ground or water transportation;

(2) discounts that are generally available to the public or a large class of persons to which the person belongs;

(3) an invitation to attend a meal or social event that does not exceed $100 in value received by the person for each meal or event and that does not in the aggregate exceed $250 in value during the calendar year from one person; or

(4) gifts from the person's immediate family.

(c) The commission may establish policies that limit the extent to which persons to whom this chapter applies may accept the benefits set out in (b)(2) of this section, or that require public officials to turn over the benefits to the agency.

Sec. 24.60.090. NEPOTISM. (a) An individual who is related to a member of the legislature may not be employed in the house in which the legislator is a member, by an agency of the legislature established under AS 24.20, or in the other house during the interim between sessions. An individual who is related to an employee of the

legislature may not be employed in a position over which the employee has supervisory authority. In this subsection, "an individual who is related to" means a child, husband, wife, mother, father, sister, brother, or a permanent member of the legislator's household.

(b) An individual is not employed if no compensation is received from the state for the services provided.

Sec. 24.60.100. REPRESENTATION BY LEGISLATORS. (a) Except as provided in this section, a member of the legislature or a person employed by an agency of the legislature established under AS 24.20 may not represent another person for compensation before an agency, board, or commission of the state.

(b) A member of the legislature may represent a client in

(1) an action before a court of the state; or

(2) a matter which was pending at the time a person to whom this chapter applies assumes office or is employed.

(c) A legislator cannot avoid a conflict of interest under this section by waiving compensation for representing another person under circumstances where compensation would ordinarily be expected.

Sec. 24.60.110. ACTION ON A CONFLICT OF INTEREST. A legislator who has a conflict of interest shall immediately

(1) resign the position;

(2) divest the interest that has resulted in the conflict or potential conflict; or

(3) disclose the conflict of interest in the journal of the appropriate body or if the legislature is not in session to the commission which shall maintain a public record of the disclosure and forward the disclosure to the respective house for inclusion in the journal for the first day of the session.

Sec. 24.60.120. STATE PROPERTY AND FUNDS. A person to whom this

chapter applies may not use state property or funds for private gain or campaign purposes.

Sec. 24.60.130. LEGISLATIVE ETHICS COMMISSION. (a) There is established within the legislative branch of the state government the Legislative Ethics Commission.

(b) The commission consists of seven members appointed as follows:

(1) the president of the senate shall appoint one member to the commission from the senate with the concurrence by roll call vote of three-fourths of the full membership of the senate;

(2) the speaker of the house of representatives shall appoint one member to the commission from the house of representatives with the concurrence by roll call vote of three-fourths of the full membership of the house;

(3) the president of the senate shall appoint to the commission two persons who are citizens of the United States and residents of the state with the concurrence by roll call vote of two-thirds of the full membership of the senate;

(4) the speaker of the house of representatives shall appoint to the commission two persons who are citizens of the United States and residents of the state with the concurrence by roll call vote of two-thirds of the full membership of the house;

(5) one member of the commission shall be a former legislator of the state who is appointed by the other members of the commission.

(c) No more than four members of the commission may be members of the same political party or residents of the same borough or of the unorganized borough.

(d) The members of the commission shall elect a chair and vice-

chair and may elect other officers. Those members of the commission who are members of the legislature may not serve as chair or vice-chair.

(e) The term of office of a public member of the commission is four years from February 1 of the year of appointment and until a successor is appointed and qualifies. A legislator appointed to the commission may not serve beyond the expiration of the legislative term of office. A commission member may not serve more than one full term.

(f) A member of the commission may not

(1) hold or seek elective office; founder non party

(2) be an officer of a political party, political committee, or group; or

(3) lobby. defined by statute? + Legislative adm 24.45

(g) The provisions of (f) of this section do not apply to the members of the commission appointed under (b)(1) and (2) of this section.

(h) A vacancy on the commission shall be filled under (b) of this section for the balance of the term.

(i) The commission may contract for professional services and may employ staff as it considers necessary. A member of the commission may not serve on the staff of the commission.

(j) A member of the commission receives no compensation for service on the commission. Members of the commission are entitled to travel expenses and per diem authorized by law for members of boards and commissions under AS 39.20.180, but a member of the commission who is a legislator is not entitled to travel expenses and per diem from the commission if the legislator is receiving travel expenses and per diem as a legislator.

Sec. 24.60.140. DUTIES OF THE COMMISSION. The commission shall

(1) adopt regulations to facilitate the receipt of inquiries and prompt rendition of its opinions;

(2) recommend legislation to the legislature the commission considers desirable or necessary to promote and maintain high standards of ethical conduct in government;

(3) subpoena witnesses, administer oaths, and take testimony relating to matters before the commission, and may require the production for examination of any books or papers relating to any matter under investigation before the commission;

(4) publish semi-annual summaries of decisions, advisory opinions and informal advisory opinions, with sufficient deletions in the summaries to prevent disclosing the identity of the persons involved in the decisions or opinions which have remained confidential.

Sec. 24.60.150. ADVISORY OPINIONS. The commission shall issue an advisory opinion on the request of a person to whom the chapter applies as to whether the facts and circumstances of a particular case constitute a violation of ethical standards. If an advisory opinion is not issued within 30 days after the request is filed with the commission, the facts and circumstances of the particular case do not constitute a violation of the ethical standards. The opinion issued or considered issued is binding on the commission and in any subsequent proceedings concerning the facts and circumstances of the particular case unless material facts were omitted or misstated in the request for the advisory opinion. Except as provided in this chapter an advisory opinion is confidential but may be made public if a written request by the person who requested the opinion is filed with the commission.

Sec. 24.60.160. COMPLAINTS. (a) The commission may initiate, receive and consider complaints alleging a violation of this chapter.

(b) Before the commission may exercise power authorized in (c) of this section, the commission shall by resolution, supported by a vote of three members of the commission, define the nature and scope of the inquiry.

(c) The commission may investigate a violation of this chapter in a proceeding begun within four years after the alleged violation occurs and within one year after termination of state service. Nothing in this subsection bars proceedings against a person who by fraud prevents discovery of a violation of this chapter. A proceeding is commenced by the filing of a complaint with the commission. No complaint, other than a complaint initiated by five or more members of the commission may be received within a period of 60 days preceding a state primary or general election. Nov Gen Elect

(d) A complaint shall be in writing and signed under oath by the person making the complaint. A complaint may also be initiated by three or more members of the commission. The commission shall notify in writing each person against whom a complaint is received and afford the person an opportunity to explain the conduct alleged to be a violation of this chapter. If the commission determines that a complaint does not contain allegations of facts sufficient, if the alleged facts are treated as true, to constitute a violation of this chapter the commission shall summarily dismiss the complaint.

(e) The commission shall investigate the charges filed under this section and issue an advisory opinion to the person alleged to have violated a provision of this chapter. The commission shall investigate all complaints on a confidential basis. If the advisory opinion indicates a probable violation, the person against whom the complaint was made may request a formal opinion or comply with the advisory opinion. If the person fails to comply with the advisory

opinion or if a majority of the members of the commission determine that there is probable cause for belief that a violation of this chapter has occurred, the commission shall file a complaint against the person charged with a violation of this chapter and the complaint and statement of the alleged violation shall be personally served on the person charged. The alleged violator has 20 days after service of the complaint and statement to respond in writing to the commission.

(f) The commission may set a time and place for a hearing with notice to the complainant, if any, and to the person charged with a violation of this chapter. A representative of the commission and the person charged with a violation of this chapter shall have an opportunity to be heard, to subpoena witnesses and require the production of books or papers relating to the proceedings, to be represented by counsel, and to have the right of cross-examination. Each witness shall testify under oath. The hearings are closed to the public unless the person charged with a violation of this chapter requests an open hearing. The commission is not bound by the rules of evidence but the commission's findings must be based upon competent and substantial evidence. The testimony taken at the hearing shall be recorded and evidence shall be maintained. The testimony and evidence is available only to the staff of the commission and to the person charged with a violation of this chapter. If the person charged with the violation of a provision of this chapter requests a copy of the transcript of testimony, the copy shall be furnished by the commission without charge.

(g) A decision of the commission shall be in writing and signed by four or more members of the commission. Each decision of the commission must be accompanied by a written order of the commission determining that a violation of this chapter exists or does not exist.

The order is confined to this determination. This order is a public record.

(h) If the commission issues a decision that a member of the legislature has violated a provision of this chapter or that a legislator has declined or failed to cooperate with the commission, it shall refer the decision to the presiding officers of the legislature. The decision shall contain a statement of the facts determined to constitute the violation or the failure to cooperate and may contain recommendations concerning any penalties the legislature may lawfully impose including imposition of civil penalties in an amount not to exceed $25,000, divestment of the interest, repaying profits, censure, removal from committee assignments, termination of legislative privileges, or expulsion. The commission shall make the decision public 30 days after the referral. Days during which the legislature is not in session may not be counted in determining the 30-day period. The legislature shall act on the decision as it considers appropriate.

(i) If four members of the commission agree to a decision that a former member of the legislature or an employee or a former employee of a legislator or of an agency of the legislature has violated a provision of this chapter, the commission shall issue a public statement of its decision 30 days after the date of the decision. The legislature shall act on the decision as it considers appropriate. In the case of an employee the action may include suspension, demotion, or dismissal.

(j) A commission member or individual who divulges information concerning a charge before the filing of a complaint by the commission, except as permitted by this chapter, is guilty of misuse of confidential information under AS 11.56.860. divulges opinions confidentially

Sec. 24.60.170. DEFINITION. In this chapter, "commission" means

the Legislative Ethics Commission.

* Sec. 2. Section 24.60.130 and Sec. 24.60.140 enacted in sec. 1 of this Act take effect immediately in accordance with AS 01.10.070(c).

Berrier
5-4-83

AMENDMENT

Offered in the SENATE By the State Affairs Committee

TO: CSSB 257 (State Affairs)

Page 12, line 10 through page 15, line 11:

Delete all material and insert

"Sec. 24.60.180. PROCEEDINGS BEFORE THE COMMISSION. (a) The commission may initiate, receive and consider complaints alleging a violation of this chapter.

(b) The commission may investigate a violation of this chapter in a proceeding begun within four years after the alleged violation occurs and within one year after termination of state service. Nothing in this subsection bars proceedings against a person who by fraud prevents discovery of a violation of this chapter.

(c) Before the commission may exercise power authorized in this section, the commission shall by resolution, supported by a majority vote of the full membership of the commission, define the nature and scope of the inquiry. The commission shall investigate all complaints on a confidential basis.

(d) A proceeding is commenced by the filing of a complaint with the commission. A complaint may be initiated by a private person or by three or more members of the commission. A complaint shall be in writing and signed under oath by the person making the complaint. No complaint, other than a complaint initiated by five or more members of the commission may be received within a period of 60 days preceding a state primary or general election.

(e) The commission shall notify in writing each person against whom a complaint is received and afford the person an opportunity to explain the conduct alleged to be a violation of this chapter. If the commission determines that a complaint does not contain allegations of facts sufficient, if the alleged facts are treated as true, to constitute a violation of this chapter the commission may summarily dismiss the complaint.

(f) The commission shall investigate the charges filed under this section and issue an advisory opinion to the person alleged to have violated a provision of this chapter.

(g) If the commission determines that a probable violation exists that may be corrected by action of the person and that does not warrant sanctions other than correction, the advisory opinion shall recommend corrective action. The person against whom the complaint was made may comply with the opinion or may request a hearing before the commission. After the hearing the commission may amend or affirm the advisory opinion.

(h) If the person fails to comply with the advisory opinion or if a majority of the members of the commission determine that there is probable cause for belief that a violation of this chapter that may not be corrected under (g) of this section has occurred, the commission shall formally charge the person. The charge and statement of the alleged violation shall be personally served on the person charged. The alleged violator has 20 days after service of the charge and statement to respond in writing to the commission.

(i) The commission may set a time and place for a hearing before

the commission with notice to the complainant, if any, and to the person charged with a violation of this chapter. A representative of the commission and the person charged with a violation of this chapter shall have an opportunity to be heard, to subpoena witnesses and require the production of books or papers relating to the proceedings, to be represented by counsel, and to have the right of cross-examination. Each witness shall testify under oath. Hearings are closed to the public unless the person charged with a violation of this chapter requests an open hearing. The commission is not bound by the rules of evidence but the commission's findings must be based upon competent and substantial evidence. Testimony taken at the hearing shall be recorded and evidence shall be maintained. The testimony and evidence is available only to the commission and its staff and to the person charged with a violation of this chapter. If the person charged with the violation of a provision of this chapter requests a copy of the transcript of testimony, the copy shall be furnished by the commission without charge.

(j) A decision of the commission shall be in writing and signed by four or more members of the commission. Each decision of the commission must be accompanied by a written order of the commission determining that a violation of this chapter exists or does not exist. The order is confined to this determination. This order is a public record.

(k) If the commission issues a decision finding that a member of the legislature has violated a provision of this chapter or that a legislator has declined or failed to cooperate with the commission, it

shall refer the decision to the presiding officers of the legislature. The decision shall contain a statement of the facts determined to constitute the violation or the failure to cooperate and may contain recommendations concerning any penalties the legislature may lawfully impose including imposition of civil penalties in an amount not to exceed $25,000, required divesture of the interest, repaying profits, censure, removal from committee assignments, termination of legislative privileges, or expulsion. The commission shall make the decision public 30 days after the referral. Days during which the legislature is not in session may not be counted in determining the 30-day period. The legislature shall act on the decision as it considers appropriate.

(l) If four members of the commission agree to a decision that a former member of the legislature or an employee or a former employee of a legislator or of an agency of the legislature has violated a provision of this chapter, the commission shall issue a public statement of its decision 30 days after the date of the decision. The legislature shall act on the decision as it considers appropriate. In the case of an employee the action may include suspension, demotion, or dismissal. The employee is entitled to a hearing before final action is taken.

(m) A commission member or member of the commission staff who divulges information concerning a proceeding, except as permitted by this chapter, is guilty of a class A misdemeanor.

SB 257: ANALYSIS BY SECTION

BY MARK HIGGINS
APRIL 24, 1983

INDEX OF SECTIONS

SB 257: Analysis by Section

By Mark Higgins
April 24, 1983

I Sec. 24.60.010 LEGISLATIVE FINDINGS AND PURPOSE

Commentary: The language in this section is generally good. However, as the new chapter will apply to employees of the legislature as well as legislators, I would amend it as follows:

a) Lines 15-19 are amended to read: Legislators and legislative employees must avoid conduct that even appears to violate the trust the people have placed in them. To ensure and preserve public confidence, legislators and legislative employees should have the benefit of specific standards to guide their conduct.

adopted

b) Further Amendment: To the end of this section add the following sentence: This chapter shall be liberally construed to promote high standards of ethical conduct in the legislature."

The addition of this sentence would provide the commission and courts latitude in interpreting whether or not a situation violates the intent of the law, even if it does not specifically violate the letter of the law.

Traditionally, ethics laws are defined broadly to allow reasonable application of general principles to specific situations. This clause is designed for that purpose and has proven to be a valuable aid to the application and enforcement of ethics legislation. It is especially useful to the courts when a commission decision is appealed based on the language of the law.

II Sec. 24.60.020 APPLICABILITY

a) Sub. Sec. (b) is amended to read: {Lines 11-12}

The provisions of this chapter {specifically repeal} supercede the provisions of the common law relating to legislative conflict of . . .

b) {Lines 15-16}: {They do not...} Nothing in this chapter shall exempt any person from applicable provisions of any other laws of this state.

Commentary: It is not possible to repeal common law. In addition, this subsection, (b), is probably unnecessary as specific law always supercedes general law.

III Sec. 24.60.030 CONFLICTS OF INTEREST

a) Sub. Sec. (a) is amended to read: A person to whom this chapter applies may not use public office for private advancement or gain, or for the advancement or gain of the person's immediate family, or an organization with which the person is associated.

b) Sub. Sec. (b) is amended to read: A conflict of interest is deemed to exist (exists) when a person to whom this chapter applies has discretion to take or withhold official action or exist influence which could substantially benefit or harm a financial matter which the person, the person's immediate family, or an organization with which the person is associated with has a direct or indirect private interest.

c) Sub. Sec. (c) is repealed and replaced with: (c) A person to whom this chapter applies shall not acquire financial interests in any business or other undertaking which the person has reason to believe may be directly involved in official action to be taken by the person.

d) Sub. Sec. (d) is repealed and replaced with: (c) from the bill as written.

c) Need to add (e): (d) as bill is written.

Commentary: The proposed amendments are fairly self explanatory. The suggested added provision (c) is common to ethics legislation and is intended to prohibit self-dealing conduct such as was possibly demonstrated in the Isabelle Pass situation of last session. This clause is intended to draw a distinction between existing conflicts which, in a state with as small a population as Alaska, often can not be avoided and the intentional establishment of a conflict by a public official for the purpose of private gain.

The key phrases in this clause are "directly involved" and "official action". These should and can be carefully defined. A legislator would not as a result of this clause be prohibited from acquiring a business or financial interest which at some point in the future may be affected by the legislators vote. A vote would not constitute "direct involvement" or "official action" as intended by the clause.

However, a legislator could not, if this clause is adopted, acquire a financial interest and then as a function of his or her official position direct the state to transact with that business interest.

IV Sec. 24.60.040 CONTRACTS

Commentary: The wording of the prohibitions established in this section is good and most areas are sufficiently covered to prevent self-dealing by public officials. The requirement of open-competitive bidding on substantiative contracts should substantially enhance the public perception of legislative integrity.

Further, because of these specific guidelines, public officials will enjoy the same privileges as the general public in regard to State contracts. This is an important consideration given the part time nature of Alaska's "citizen" legislature and given the level of State involvement in the economy.

Other comments on Sec. 24.60.040:

a) Does the definition of "contract" include leases? Some states specifically reference leases as well as contracts (eg - Wisconsin).

b) Does a person have an interest "indirectly" if an immediate family member or associated organization qualifies under Subsection (A)? If not, perhaps wording should be added similar to suggested amendments to Sec. 24.60.030 (CONFLICTS OF INTEREST).

c) The definition of "an interest in a state contract" as defined in (a) is perhaps to generous. Maybe a straight 10% figure should be adopted.

Some states, like Hawaii for example, qualify restrictions on state contracts based on a "controlling interest" which is defined as: "an interest in a business or other undertaking which is sufficinet in fact to control, whether the interest be greater or less than fifty percent."

d) Sole Source Contracts: the bill as written does not include a provision allowing the State to circumvent the open-bidding requirement when it is in the best interest of the State to do so. Sole source contracting, is an important consideration in Alaska, where conditions often dictate special requirements or time limitations.

Recommended Wording: (From Hawaii Statute 84-15(a))

"A State agency shall not enter into any contract with a legislator or an employee or with a business in which a legislator or an employee has a controlling interest, involving services or property of a value in excess of $1,000 unless the contract has been awarded through an open, public process. A State agency may, however, enter into such contract without resort to a competitive

bidding process when, in the judgement of the agency, the property or services should not, in the public interest, be acquired through competitive bidding; provided that written justification for the non-competitive award of such contract shall be made a matter of public record and shall be filed with the state ethics commission at least ten days before such contract is entered into." (emphasis added).

c) Need Section on Contract Voidability:

The bill as written has no provision for voiding contracts joined in violation of this chapter. Contract voidability is an important provision and I would recommend the following wording (from: Hawaii 84-16):

"In addition to any other penality provided by law, any contract entered into by the State in violation of this chapter is voidable on behalf of the state; provided that in any action to avoid a contract pursuant to this section the interests of third parties who may be damaged thereby shall be taken into account, and the action to void the transaction is initiated within sixty days after the determination of a violation under this chapter. The Attorney General shall have the authority to enforce this provision.

V Sec. 24.60.050 STATE LOANS

There are several questions regarding this section which will be addressed in relation to the subsection they fall under.

A) Sub. Sec. (C): Requires lending agencies to send a copy of any application for loan not covered by (a) of the section to the Alaska Public Offices Commission. the APOC is to incorporate the material into the applicant's financial disclosure statement. The material may be disclosed to the ethics commission.

Commentary: This subsection raises several considerations:

1) What type of loan would not be subject to procedures outlined in (a) of this section? If there are such loans, is it desirable that state officials have access to them?

2) The bill as written states no time frame/limit within which the lending agency must submit the application to APOC. while this could probably be handled by regulation, it would be better to state it clearly in the statute.

3) Legislative employees are not required to file disclosure statements. Yet this chapter will apply to them as well as to legislators. What procedure is to be followed when they apply for a loan covered by this section?

4) APOC as receptor of loan application: A major problem relates to the assignment of APOC as receptor of the loan application. Financial disclosure statements required by AS 39.50.120 are not nearly as revealing as most loan applications. Individuals covered by this chapter would undoubtedly protest that their privacy would be jeopardized if the APOC had access to more intimate personal financial date than is currently required under present disclosure laws.

Further, records maintained by the APOC are open to public inspection. Given the requirement of confidentiality of investigation under all sections of this chapter, it would be contradictory to allow public inspection of official's loan applications, as would be the case if they were filed with the APOC.

Proposed Solution:

Given that most loans, if not all, would fall into sub category (a) of this section and realizing that any that did not should be carefully scrutinized if they involve a public official, I would recommend that the APOC not be assigned receptor of loan applications as defined in (C). The APOC has no jurisdiction in any other section of this chapter and would perform no function other than storage of the loan applications. Given the privacy issue which would be raised if the APOC is included, I would offer the following amendment to subsection (C).

Require that:

a) each loan which falls into category (C) be reviewed by the division of legislative audit before it is approved;

b) in reviewing the loan application, the division of legislative audit could request from the APOC any financial disclosure data contained in the applicant's file;

c) If after reviewing the loan application, the division of legislative audit found cause to suspect that the loan would violate the intent of the chapter, it would refer the application and all relevant documentation to the ethics commission for review;

d) The ethics commission would be required to render an opinion regarding the appropriateness of the loan within a specified time. If no opinion was rendered within the specified time, it would be deemed that the application did not violate the intent of the chapter.

If adopted, this amendment would further assure the public that legislators and legislative employees would be carefully scrutinized when applying for state funds were discretion is exercised in determining qualifications. Given the small size of Alaska's legislature and given that few loans would fall into such a "discretionary" category, the above suggested procedure would not prove unjustifiably burdensome.

B) Sub. Sec. (d): states that loan agencies shall annually publish a listing of all outstanding loans except for loans described in (a).

Question: Where do they publish the list? Shouldn't they be required to send a copy of the list to either the division of legislative audit or the ethics commission, or both?

C) Sub. Sec. (e): Given the fact that the ethics commission will be the ultimate judge of conflicts involving state loans to persons covered by this chapter, wouldn't it be advisable to require state agencies to submit a proposed regulation for commission review or approval before it is implemented. Such a procedure would ensure the establishment of adequate administrative procedures and would limit commission rulings to whether or not these procedures were followed.

D) Sub. Sec. (F): What action is to be taken by the commission if the loans are in violation of the chapter? Are they voidable? Can the state sue for recovery of funds and damages? What about innocent third parties?

VI Sec. 24.60.060 CONFIDENTIAL INFORMATION

Amend to: It is a conflict of interest if a person to whom this chapter applies discloses or uses for personal gain or for the personal gain of another person or organization, information that by law or practice is not available to the public and that the person acquired in the course of official duties.

Commentary: These amendments are fairly self-explanatory. By adding the words "or practice", the law would be substantially tightened. Such wording was strongly recommended by the executive director of Hawaii's Ethics Commission.

VII Sec. 24.60.070 INTERESTS BETWEEN PUBLIC OFFICIALS

This section as written is less restrictive than many state's statutes regarding financial dealings between public officials. But given the special conditions in Alaska, it is probably sufficient. I would, however, offer the following amendments:

1) Amend (a) to: A person to whom this chapter applies shall disclose in writing to the commission . . .

2) Amend (a)2 to: {legislators} another person to whom this chapter applies.

3) Amend (b) to: . . . involving a substantial financial matter with a lobbyist, as defined by AS 24.45.181, who is not a member of the immediate family of the person.

VIII Sec. 24.60.080 GIFTS

A) Amend (a) to: A person to whom this chapter applies may not solicit a gift in any amount, or accept or receive, directly or indirectly, a gift having an aggregate value in excess of one hundred dollars ($100) in any calendar year from any person or organization, whether in the form of money, services, a loan, travel, entertainment, hospitality, promise, or other form, under circumstances in which it may reasonably be inferred that the gift is intended to influence the person in the performance of the duties of the person or is intended as a reward for an official action ,or inaction, by the person.

Commentary: This amendment would prevent a person or organization from giving an official several gifts, each of an individual value less than $100, but with a combined value in excess of $100.

B) Amend Sub. Sec. (b), to read: hospitality from another person at {another} that person's residence, including meals, lodging or ground or water transportation;

Commentary: This amendment would tighten the wording of this clause and would prevent a person or organization from skirting the intent of the gift provision by offering an official "hospitality" at a commercial lodge or guide service, etc.

For example, if this subsection is adopted as written, a person or organization could pay for a public officials trip or stay ("hospitality") at a commercial lodge, if the owner of the lodge ("another person") resided there, even though the person or organization funding the trip had no association with the residence. This amendment would prevent that.

C) Amend (b)3 to read: an invitation to attend a meal or social event that does not exceed $100 in value received by the person for each meal or event and that does not in the aggregate exceed $250 in value during the calendar year form one person or organization; or

D) Sub. Sec. needed: (d) No person or organization may offer or give to a public official to whom this chapter applies, directly or indirectly, any gift which the public official is prohibited from accepting pursuant to subsection (a) of this section.

Commentary: The addition of this clause, which is contained in many state's gift provisions, would make the giver or offerer of an illegal gift equally liable with the official who accepts it.

VIX Sec. 24.60.090 NEPOTISM

Question: What is the definition of "a permanent member of the legislators household"? Is this legally definable?

Most states are grapling with the problem of how to include "live-in lovers" in their laws. But will this clause accomplish that adequately? Would renters be considered "permanent members"?

X Sec. 24.60.100 REPRESENTATION BY LEGISLATORS

Amend subsection (a) to read: Except as provided in th s section, a member of the legislature or a person employed by an agency of the legislature established under AS 24.20 may not represent another person or organization for compensation before an agency, board, or commission of the State.

Commentary on sub. sec. (b):

1) How does sub. sec. (b) interface with AS 39.50.090(C)? Are they mutually compatible?

2) Are Alaskan courts considered State agencies? If not, then (b) is unnecessary, as the usual rule in ethics legislation is that courts are not generally considered to be agencies of the State. Consequently, this section would implicitly not have representation before a court by a person covered by this chapter.

3) Subsection needed? (d) This section does not apply to representation by a person covered by this chapter if that person is acting in his or her official capacity.

XI Sec. 24.60.110 ACTION ON A CONFLICT OF INTEREST

Commentary: This section seems unusually brief and fails to address employees of the legislature who are faced with a conflict of interest. As this section is extremely important to the chapter, I would recommend that it be re-written as follows:

a) A person covered by this chapter, who in the discharge of official duties, is involved or about to be involved in any matter that could result in a conflict of interests on his or her part shall:

1) Divest the interest that has resulted in the conflict or potential conflict; or

2) Prepare a written statement describing such matter and the nature of the possible conflict of interest and

a) in the case of a legislator, deliver copies of the statement to the commission and the presiding officer of the appropriate body of the legislature, who shall cause such statement to be printed in the journal of the appropriate body or if the legislature is not in session, shall request that the commission maintain a public record of such statement which shall subsequently be included in the journal for the first day of the following session. Upon request of the legislator, the presiding officer of the appropriate body, shall excuse the legislator from votes, deliberations and other actions in regard to such matter; or

b) in the case of an employee of the legislature covered by this chapter, deliver a copy of the statement to the commission and to his or her immediate superior, if any, who shall assign the matter to another, or if the employee has no immediate superior, he or she shall take such steps as the commission shall prescribe or advise to remove himself or herself from influence over actions and decisions on the matter.

XII Sec. 24.60.120 STATE PROPERTY AND FUNDS

Amend to read: A person to whom this chapter applies may not use state property or funds for private gain or for the gain of others or for campaign purposes.

XIII Sec. 24.60.130 LEGISLATIVE ETHICS COMMISSION

Commentary: This section looks pretty good. A few questions:

A) Sub. Sec. (e) states: "A commission member may not serve more than one full term." Does this mean four years, or a term "unit"? In other words, could someone who was appointed to fill a vacancy, serve the remainder of the term of the person who's vacancy they were filling, plus another full term, or could they just serve for the remainder of the term?

B) There is no provision for staggering the terms of the initial appointees to the commission. Such a practice is common when forming a commission and is intended to provide continuity on the commission and also prevent any one member from dominating the commission for a long periods of time.

Recommended Wording: e) the term of office of a public member of the commission is five {four} years from February 1 of the year of appointment and until a successor is appointed and qualifies, except that the members first appointed shall be appointed for terms of office of one, two, three, four, and five years, respectively, and until their successors have been appointed and have qualified.

I suggested increasing the term of service to five years so that no commission member's term of office would coincide with a legislator who appointed him or her, as could be the case with Senate approval and a four year term.

XIV Sec. 24.60.140 DUTIES OF THE COMMISSION

No comments other than that I would recommend that the commission be required to publish annual rather than semi-annual summaries of its decisions and opinions. Annual publications would be consistent with most states and would reduce the bureaucratic requirements of the commission.

XV Sec. 24.60.150 ADVISORY OPINIONS

Amend to read: {Lines 19-20} The opinion issued or considered issued, until amended or revoked, is binding on the commission and in any . . .

Commentary: This amendment would allow the commission to change or revise a decision if facts are brought to light, which in good faith were not known at the issuance or non-issuance of the opinion.

XVI Sec. 24.60.160 COMPLAINTS

Questions:

1) How long will evidence be maintained?

2) Should not the evidence gathered be available to the Attorney General as well as staff and the commission in the event a referal is recommended?

3) Is a referal to the Attorney General possible, desirable for legislators who violate this chapter? employees of the legislature?

XVII Sec. 24.60.170 DEFINITIONS

Commentary: The definitions sections is an essential component of any ethics statute, both for citizen comprehension and court interpretation. This bill's definition section is grossly inadequate.

The following terms need to be defined:

"official action", "relatively insignificant", "relatively far removed", "close economic association", "substantial financial matters", "campaign purposes", "competent and substantial evidence", "state agency", and "organization" (if suggested amendments are adopted).

XVIII OTHER SECTIONS NOT INCLUDED WHICH COULD BE CONSIDERED

1) Joint and Several Liability: eg - "If two or more persons are responsible for any violation, they shall be jointly and severally liable." (Calif. statute).

2) Referal to the AG: eg - "The commission shall refer to the Attorney General violations of the law which in its opinion merit prosecution. The Attorney General shall have responsibility for all prosecutions under the law and may request from the commission all evidence cllected in its investigation."

3) Severability of Chapter: eg - "If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more if its applications, the part remains in effect in all valid applications that are severable from the valid applications."

4) Honorariums and Fees Section

M. Matthew Higgins

Proposed Amendments to:

Sec. 24.60.030 CONFLICTS OF INTEREST by Mark Higgins

a) Sub. Sec. (b) [Lines 20-23] is amended to read:

B

A conflict of interest exists when a person to whom this chapter applies has discretion to take or withhold official action or exert influence which would [substantially] benefit or harm a [financial] matter which the person has a substantial direct or indirect [private] financial interest. A person has a substantial financial interest in a matter if

1) The person is associated with a business, directly or indirectly, as an officer, director, owner, partner, employee or owner of more than ten percent (10%) of the fair market value of such business; or

2) receives an aggregate annual income of more than five thousand dollars ($5,000.00) from such business.

b) Sub. Sec. (c) is repealed and replaced with (d) from the bill as written.

c) Add new Sub. Sec. (d):

In this section "business" means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, holding company, self-employed individual, joint stock company, receivorship, trust or other legal entity or undertaking organizes for economic gain, whether or not for profit.

d) Add new Sub. Sec. (d):

In this section "official action" means a decision, recommendation, approval, disapproval, or other action, including inaction, which involves use of discretionary authority.

adopted

Suggested Amendments to HB 362

by Rep. M.M. Miller

1 Pg. 1, L-18, after "legislators" add "and legislative employees". adopt

2. Pg. 1, L-25, add the following sentence, "This chapter shall be liberally construed to promote high standards of ethical conduct in the legislature." adopt

3. Pg. 1, L-29, after legislature. add, "Except for AS 24.60.090," adopted.

4. Pg. 2, L-11, delete "specifically repeal" and add "supercede". adopt

5. Pg.3, L-7, add a new subsection(e) as follows:

(e) If a member of the legislature determines that an actual conflict of interest exists, or receives an advisory opinion finding that a conflict of interest exists, the member of the legislature shall declare the interest on the floor or in committee, ask to be permitted not to vote, and file a written statement of the conflict of interest with the ethics commission within 48 hours of the determination that a conflict of interest exists. If a person employed by a member of the legislature determines thatan actual conflict of interest exists, the person shall file a written statement with the ethics commission within 48 hours of the determination that a conflict of interest exists and may not participate further in the matter. 15t workaround

6. Pg. 3, delete lines 16-20 and add the following:

(1) a firm, corporation, or association that the person has an interest in which is in fact sufficient to control, whether the interest is greater or less than fifty percent, or an ownership interest greater than 10 percent in a firm, corporation, or association that has assets in excess of $5,000,000 or that has assets of $5,000,000 or less and in which the person has an ownership interest greater than 25 percent; or

7. Pg. 3, L-11, after "less." add "except as set forth in subsection (c)." adopted

Pg. 3, L-28, add the following subsections:

(c) A state agency may enter into a contract without resort to the competitive bidding process under AS 37.05.230 when, in the judgment of the agency, the property or services should not, in the public interest, be acquired through competitive bidding. Written justification for the noncompetitive award of such contract shall be made a matter of public record and shall be filed with the ethics commission at least ten days before such contract is entered into. adopted

(d) In addition to any other penalty provided by law, any contract entered into by the state in violation of this chapter is voidable on behalf of the state; provided that in any action to avoid a contract pursuant to this section, the interests of third parties who may be damaged thereby shall be taken into account, and the action to void the transaction is initiated within sixty days after the determination of a violation under this chapter. The Attorney General shall have the authority to enforce this provision. adopted

8. Pg. 5, L-16, after "disclose" add "in writing".

9. Pg. 5, L-23, delete "legislators" and insert "another person to whom this chaper applies;".

10. Pg. 5, L-29, after "lobbyist" add "as defined by AS 24.45.171,".

11. Pg. 6, L-4, after "gift" delete "in excess of $100," and insert "having an aggregate value in excess of $100 in any calendar year from any person or organization,".

12. Pg. 6 L-9, after"action" insert "or inaction".

13. Pg. 6 L-12, delete line and reinsert the following:

(1) hospitality from another person at that person's residence, including

14. Pg. 7, L-19, delete the entire section and reinsert as follows:

A person covered by this chapter who in the discharge of official duties is involved or about to be involved in any matter that could result in a conflict of interest on his or her part shall:

(1) Divest the interest that has resulted in the conflict or potential conflict; or

(2) Prepare a written statement describing such matter and the nature of the possible conflict of interest and

(A) in the case of a legislator, deliver copies of the statement to the presiding officer of the respective body of the legislator, who shall cause such statement to be printed in the journal or if the legislature is not in session such statement shall be printed in the first journal of the next session; or

(B) in the case of an employee of the legislature covered by this chapter, deliver a copy of the statement to the commission and to his or her immediate superior, if any, who shall assign the matter to another, or if the employee has no immdiate superior, he or she shall take such steps as the commission shall prescribe or advise to remove the employee from influence over actions or decisions on the matter.

15. Pg. 10, L-24, after "opinion" insert "until amended or revoked by the commission."

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3900

M E M O R A N D U M

May 6, 1983

SUBJECT: Standards of conduct and establishment of an ethics commission (HB 362)

TO: Representative Mitchell E. Abood, Jr.
Chairman, House State Affairs Committee

FROM: Billy G. Berrier BGB
Director
Division of Legal Services

You have requested a sectional analysis of HB 362.

Sec. 24.60.010. This is a general introduction which establishes the context in which the operative provisions of the bill will be considered. The first four sentences which end on line 21 are determinations by the legislature of facts which support the need for the bill and the remainder states the purpose the bill is intended to accomplish.

Sec. 24.60.020. (a) establishes the scope of the bill. It applies to legislators and relatively high ranking legislative employees over Step A, Range 18. It does not apply to former legislators or employees except where a specific provision explicitly states that it applies. (For instance, in Sec. 24.60.160(c) the commission may investigate complaints if the complaint is filed within one year after leaving state service.) It does not apply to persons elected to the legislature until they become members.

(b) provides this chapter supersedes the common law of conflict of interest as to persons covered by the bill. It expressly does not change any criminal laws of the state.

Sec. 24.60.030. This section prohibits conflict of interest and establishes broad categories. Use of public office for private advancement or gain is prohibited. A conflict of interest exists under (b) where the person has discretion to act in a matter in which the person has a private interest. Under (c) no conflict exists where the interest is small or the authority is remote. Under (d) there is no conflict if

the person's interest is not specific to the person but is a general interest shared with others.

Sec. 24.60.040. This section prohibits being a party to or having an interest in a contract not let by competitive bidding if it is over $1,000. It then establishes that a person has an interest if the person has a direct or indirect financial interest which is broadly defined in (b). It specifies that there is an interest if the person has an ownership interest in a partnership or an ownership interest in other forms of business organizations based on the asset value of the organization and the percentage of ownership.

Sec. 24.60.050. This section establishes two classes of state programs and loans for purposes of this chapter. If a program or loan has fixed eligibility standards, minimal discretion in determining qualifications and is generally available to the public, no different standards are imposed on persons to whom the bill applies. For other loans and programs special procedures apply. These are:

> (b) In determining whether a conflict of interest exists with respect to a state program or to a state loan, because a legislator may be in a position to influence the loan agency, the ethics commission must consider, but is not limited to, the adequacy of existing administrative procedures for granting and reviewing loans to legislators.
>
> (c) Upon application for a state loan by a person to whom this chapter applies, the lending agency must send a copy of the application to the Alaska Public Offices Commission, which will incorporate the material into the applicant's financial disclosure statement, if the applicant is required to file a disclosure statement. All records relating to a state loan to a person to whom this chapter applies may be disclosed to the commission
>
> (d) Each February 1st, each loan agency must publish a listing of all outstanding loans to persons to whom this chapter applies. The list must include the name of the person, the date of issuance and current status of the loan.
>
> (e) State agencies that have authority to grant loans shall adopt regulations that establish separate

procedures for granting and reviewing loans to a person to whom this chapter applies.

In addition to these requirements the section provides in

> (f) The division of legislative audit shall annually review state loans granted to or held by persons to whom this chapter applies to determine whether appropriate procedures were observed in granting or reviewing the loans. The division shall report its findings to the ethics commission by April 1.

and in

> (g) For purposes of this section "state program" means a program in which tangible assets of the state or a right to use tangible assets of the state are transferred from the state to a private person.

Sec. 24.60.060. This section provides that use of confidential information gained in the course of official duties for private gain is a conflict of interest.

Sec. 24.60.070. This section requires disclosure to the ethics commission of a close economic association involving a substantial financial matter with a supervisor, a legislator or a public official in another branch who is required to file a financial disclosure statement. It prohibits such an association with a lobbyist who is not a member of the immediate family.

Sec 24.60.080. This section prohibits gifts under circumstances where it may be reasonably inferred that the purpose of the gift is to influence performance of duties or as a reward for official action. Soliciting a gift in any amount in the circumstances is prohibited. A gift of $100 or less may be accepted.

In (b) certain types of gifts are excepted. These are hospitality at a person's home, generally available discounts, meals or social events not exceeding $100 or$250 a year from one person and gifts from the immediate family.

Under (c) the commission may limit the discounts or require the benefits to be turned over to the state.

Sec. 24.60.090. This section restricts employment of relatives. A relative may not be employed by the house in which a legislator is a member during the session or by either house during the interim. A relative may not be employed in a position over which an employee to which he is related has supervisory authority. A relative is defined as a child, spouse, parent, brother or sister, or permanent member of a person's household.

Sec. 24.60.100. This section is a general prohibition of representation of another person for compensation before an agency, board or commission of the state. A legislator may represent a client in court or in a matter pending at the time of election or employment. Waiving compensation in circumstances where compensation is normally expected does not avoid a conflict of interest.

Sec. 24.60.110. This section provides that a legislator who has a conflict of interest shall resign, divest the interest or disclose the interest in the journal or to the commission of the legislature is not in session.

Sec. 24.60.120. This section prohibits use of state property or funds for private gain or campaign purposes.

Sec. 24.60.130. (a) establishes a seven member ethics commission.

(b) provides that the commission consists of two senators and two other persons appointed by the president of the senate; two representatives and two other persons appointed by the speaker of the house; and a former legislator appointed by the other members of the commission. The appointments of the speaker and president of legislative members must be approved by three-fourths of the full membership of the house and the others must be approved by two-thirds.

(c) provides that not more than four members of the commission may be of the same political party or residents of the same borough or the unorganized borough.

(d) requires election of a chair and vice-chair of the commission and allows selection of other officers.

(e) establishes four year terms for the public members and provides that legislative members may not serve beyond the end of their term.

(f) prohibits a member of the commission from holding elective office, from being an officer of a political party, committee or group and from lobbying.

(g) excepts legislative members from these prohibitions.

(h) provides vacancies are filled in the same manner as original appointments.

(j) provides commission members receive no compensation for service on the commission but may receive SALARY???? or per diem.

Sec. 24.60.140. This section provides that the commission shall

(1) adopt regulations to facilitate the receipt of inquiries and prompt rendition of its opinions;

(2) recommend legislation to the legislature considers necessary;

(3) subpoena witnesses, administer oaths, and take testimony and allows requiring production of documents; and

(4) publish semi-annual reports with deletions to prevent disclosure of confidential material.

Sec. 24.60.150. This section provides for issuance of advisory opinions on the request of a person to whom this chapter applies, makes these opinions binding on the commission unless material facts are misstated or omitted and provides these opinions are confidential unless the person who requested the opinion makes a written request that they be public.

Sec. 24.60.160. This section provides for complaints and procedures for their consideration. A proceeding is commenced by filing of a complaint which may be done by a member of the public or three members of the commission. The complaint must be in writing and under oath.

Before the commission may investigate the complaint, it must define the scope of the inquiry by resolution. The commission must notify a person against whom a complaint is received and afford an opportunity to explain the conduct.

If the commission determines that the facts alleged in the complain even if true would not constitute a violation, it must summarily dismiss the complaint.

The commission is limited to investigating violations that occurred within four years of the complaint and the proceeding must commence within one year after termination of state service.

The commission shall investigate the complaint on a confidential basis and issue an advisory opinion to the alleged violator

If the advisory opinion indicates a probable violation, the person may comply with the advisory opinion or request a formal opinion.

If there is non-compliance with the advisory opinion or if the commission determines a violation has occurred the commission shall file a complaint and the person has 20 days after service to respond in writing.

The commission may set a time and place for the hearing with notice to the complainant, if any, and to the person charged. The commission and the person charged each have the right to be heard, to compulsory process, to be represented by counsel and to cross-examine witnesses. Witnesses shall testify on oath. The rules of evidence do not apply but the findings must be based on competent and substantial evidence. The testimony shall be recorded and the evidence retained.

The hearings are closed to the public unless the person charged requests they be open. The testimony and evidence are available only to the commission staff and to the person charged. If the person charged requests a transcript, it shall be furnished him without charge.

The decision shall be in writing and signed by four or more members of the commission. Each decision is accompanied by an order which is public. The order is limited to a determination that a violation does or does not exist.

If the commission decides that a member of the legislature has violated a provision of this bill or has not cooperated, it shall refer the decision to the appropriate presiding officer. The decision shall contain a statement of facts and may recommend any penalties the legislature may lawfully impose. The commission shall make the decision public 30 days after referral but days the legislature is not in session are not counted.

The legislature shall act on the decision as it considers appropriate.

If the commission determines an employee or former member has violated a provision of the bill, it shall make the decision public 30 days after the date of the decision. The legislature shall act on the decision as it considers appropriate. Action may include suspension, demotion or dismissal.

A person who divulges information concerning a charge except as permitted by the bill is guilty of misuse of confidential information (which is a class A misdemeanor under AS 11.56.860).

BGB:ljb
15/028

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

December 3, 1982

Hon. Jay S. Hammond
Governor
State of Alaska
Pouch A
Juneau, AK 99811

Re: Conflict of interests.
Our files: 366-255-83, 366-286-83,
A66-393-81, J66-457-81

Dear Governor Hammond:

I. INTRODUCTION

Seven situations have been brought to our attention which require analysis of the law of conflict of interests. We address this opinion to you because of the statewide importance of these questions and because of the profound implications of our remarks for all officers and employees of state government.

At the outset we must emphasize our key theme. The fact that there may be no conflict of interests statute that makes a particular course of conduct criminal or otherwise improper does not mean that it is legal. A transaction may not violate Alaska's criminal conflict of interests law, AS 39.50.-090; it may not even violate any one of a dozen civil statutes which prohibit conflicts of interests in specific agencies; yet it may still be illegal. By this opinion, we hope to make state officers and employees aware of an ethical code which is not in

the Alaska Statutes but which is in force in Alaska: the common law. Unless and until the legislature puts a different body of enacted law in its place, the common law of conflict of interests, as declared by the courts, prescribes the standards of conduct which must be followed by all state officers and employees.

The common law provides, generally, that public officers and employees are trustees of the people, and as such they are forbidden to have outside interests which conflict with that trust; they not only may not, as public officers, make decisions to benefit their own private businesses (or influence other public officers to do so), but they must avoid even the appearance that they have engaged in self-dealing or attempts to influence official decision-making for their private advantage. Where there is the fact or appearance of impropriety, the courts will declare the contract, transaction, or decision void unless a statute permits the action in question, and this result cannot be avoided by the expedient of letting a "disinterested" colleague or subordinate make the decision.

The questions which prompted this opinion are related below. Our analysis follows thereafter.

First, may a legislator, or his or her company, contract with the state to provide the state with goods or services? The answer is no.

Second, may a legislator, state officer, or state em-

ployee receive a loan from the state? The answer with respect to educational and residential loans is a qualified yes. Because educational and residential loan programs have relatively rigid requirements and loan ceilings, there is much less opportunity for improper influence; thus, state legislators, officers, and employees may receive such loans. However, it would be incumbent upon the applicant/lendee to insure that no one takes any step which might be viewed as an attempt to influence the administrators of the program in their evaluation of the applicant/lendee's application and their administration of the loan. Commercial loans are much more questionable transactions which we will discuss below.

Third, may a legislator vote on a bill which will inure to the financial benefit of the legislator? The answer is yes, unless the legislator's interest is peculiarly personal, such as when the bill benefits only a tiny class of which the legislator is a member, or when the bill concerns a project on which the legislator, or the legislator's company, is a contractor.

Fourth, may a director of a state corporation, board, or commission which is governed by no specific conflict of interests statute hold that position if he or she is also an officer, manager, or large stockholder of a private company which has entered into contracts to provide the state with goods or services? If the director's company has a contract with an agency of state

government different from the agency in which the director serves, and if the likelihood that the two agencies will interact on other than routine, ministerial matters is small, there would be no conflict. If, however, the director's company has contracts with the agency in which the director serves, the director must divest himself of his private holdings or resign his directorship; otherwise, any contracts his company executes with that agency would be void.

Fifth, may an officer of the Division of Minerals and Energy Management of the Department of Natural Resources (DMEM) own a mineral claim, an interest in a mine, or an interest in the products of a mine on land under state jurisdiction? Ownership of such interests is not prohibited under AS 27.05.010 unless DMEM is engaged in an "investigation" described in AS 27.05.010 -- 27.05.070. However, the common law does prohibit the ownership of such interests: A conflict of interests would exist because the officer (or the officer's subordinates) would be required to review and approve the officer's filings with DMEM concerning the officer's mining interests. In addition, the officer would have a substantial voice in the department's land use classifications, which could inure very much to the officer's benefit were he an actual or potential investor in mineral claims on land subject to state regulation.

Sixth, may an inspector in a state regulatory agency

sell the right to use a process the inspector developed and patented to companies whose plants he inspects? The answer is no. Neither may that inspector obtain a state grant to test the process in plants which he inspects.

Seventh, may a person with an interest in a business that has a contract with the state be a member of the board of the Alaska Resources Corporation (ARC)? The answer is a qualified yes. A member is forbidden to acquire any conflicting interest after joining the board. AS 37.12.065(b). Concerning interests which a member holds and held before joining the board, there are two answers: First, if the contract is with an agency other than ARC, and if that other agency has only routine, ministerial contacts with ARC, there is no conflict. Second, if the contract is with ARC, the board member must abstain from voting and take no formal or informal part in discussions of ARC's policies or actions toward the business in which the member has an interest. Id.

II. THE ROLE OF THE ATTORNEY GENERAL

The attorney general is the chief legal officer of the state and "the legal advisor of the governor and other state officers." AS 44.23.020(a). As such, he is duty bound to assist the governor in "the faithful execution of the laws." Alaska Const., art. III, § 16. These laws include the common law of

conflict of interest, see AS 01.10.010; the constitutional requirements that "[no] appropriation of public money [be] made ... except for a public purpose," and that "[n]o obligation for the payment of money shall be incurred except as authorized by law." Alaska Const., art. IX, §§ 6, 13; and AS 39.50 concerning conflicts of interests.

The attorney general performs this function by prosecuting legal actions, AS 44.23.020(b)(1), and furnishing written legal opinions. AS 44.23.020(b)(4). The attorney general is also empowered to bring an action to recover state funds which were illegally paid or paid to a person not authorized to receive them. AS 37.10.090. Short of court action, the attorney general may advise against an agency course of action which he believes is against the public interest. See Mobil Oil Corp. v. Kelley, 353 F. Supp. 582, 586 (S.D. Ala. 1973), aff'd 493 F.2d 784 (5th Cir. 1974). Indeed, the attorney general is duty bound, in the service of the public interest, to give such advice, even in the face of objections from client agencies, officers, or legislators. D'Amico v. Board of Medical Examiners, 520 P.2d 10, 20 (Cal. 1974)(In Bank); Commonwealth ex rel. Hancock v. Paxton, 516 S.W.2d 865 (Ky. 1974). The first allegiance of the attorney general is to the public interest. Id.

In this opinion, we advise on various courses of action. This advice is based upon our best reading of the case law

and our conviction that, were the specific situations presented to a court in a lawsuit, particular outcomes would follow. This is not a certain prospect: as will be made clearer below, we are, with few exceptions, dealing not with specific statutes but with the common law, a general and changing body of principles developed and applied by courts over the centuries. Our conclusions are based upon what we believe a court would do given those general principles, prevailing public policy, the public interest, and the continuing silence of the legislature in this area generally. Thus, this memorandum is a prescription for agency action in the face of conflicts of interests not addressed by statute, and a guide for legislative action should the agency or court resolution be unsatisfactory to the legislature.

... State agencies, officers, and employees should heed advice in this memorandum until ordered to do otherwise by a court. See Gray v. Main, 309 F. Supp. 207, 220 (M.D. Ala. 1968); State v. District Court of Mayes County, 440 P.2d 700, 707 (Okla. 1968).

III. STATUTES AND COMMON LAW PRINCIPLES

There are more than a dozen provisions dealing with conflict of interests scattered through the Alaska Statutes. Only AS 39.50 applies to state officers generally. One of that chapter's purposes is "to discourage public officials from acting

upon a private or business interest in the performance of a public duty," AS 39.50.010(a)(1), and it declares that "public office is a public trust which should be free from the danger of conflict of interest." AS 39.50.010(b)(1). Its main feature is its disclosure requirements. E.g., AS 39.50.020. The chapter's only prohibitions are contained in AS 39.50.090, subsection (a) of which provides:

> No public official may use his official position or office for the primary purpose of obtaining financial gain for himself, or his spouse, child, mother, or father, or business with which he is associated or owns stock.

Violation of this subsection is a crime. AS 39.50.090(d).

Other Alaska conflict statutes incorporate AS 39.50 by reference, 1/ or impose other limitations. 2/ The other limitations range from a simple prohibition on the employment of close relatives, AS 14.14.140, to a duty to divest oneself of the conflicting interest or suffer forfeiture of one's office. AS 42.07.061.

The statutes mentioned above speak only to a relative handful of government agencies, boards, corporations, and commissions. 3/ In some cases, the statutes prescribe rules of conduct

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1/ AS 24.55.310; AS 46.12.090.

2/ AS 06.88.391; AS 14.14.140; AS 18.55.080; 18.55.500; AS 21.06.040; AS 24.20.291; AS 27.05.020; AS 37.12.065(b); AS 38.06.035; AS 42.07.061; AS 44.07.330; and AS 44.88.180.

3/ See nn.1, 2. supra.

for officers of state agencies, but offer no guidance for employees. 4/ There remain hundreds of conflict situations to which no Alaska conflict legislation 5/ pertains except as AS 39.50. 6/

It is well-settled in the federal courts, particularly with regard to criminal sanctions for bribery and fraud, that the existence of criminal statutes (such as AS 39.50.090) does not extinguish the common law rights and remedies which would ordinarily exist. United States v. Kearns, 595 F.2d 729, 732-733 (D.C. Cir 1978); Continental Management, Inc. v. United States, 527 F.2d 613, 620 (Ct. Cl. 1975), and cases cited therein. We believe that the same rule would apply in Alaska: AS 39.50 will not be held to repeal, amend, or preempt the common law of conflict of interests which will apply "unless and until the Alaska legislature acts to modify it." Surina v. Buckalew, 629 P.2d

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4/ Compare AS 21.06.040, AS 27.05.020, and AS 44.07.330 with AS 44.88.180, AS 46.12.090, and AS 48.55.500.

5/ Personnel Rules 13 12.0 and 13 16.0 apply to most executive branch personnel and prohibit conflicts of interests in terms which essentially incorporate the standards of the common law.

6/ AS 39.50 governs the conduct of very few persons. AS 39.50.200(a)(1) limits the chapter's scope by excluding officers or employees below the director level from the coverage of the provision. There remain outside the coverage of the Act deputy directors in the executive branch, assistant attorneys general, appointive officers of the legislative branch (including legislative assistants), non-judicial officers of the court system, and all subordinate employees of these agencies. Thus, fully 90 percent of state officers and employees are beyond the reach of the criminal sanctions in AS 39.50.090(a).

969, 973 (Alaska 1981). Thus, a person may act illegally without violating the criminal law, and serious non-penal consequences may follow.

Neither is it possible to formulate a rule of administrative decision for a given situation by analogy, based upon legislative pronouncements with respect to other agencies, for no consistent policy is apparent from an examination of the various statutes. One statute lays down no other rule than that school boards may not hire close relatives of the board members, AS 14.-14.140, and even that rule may be waived by the commissioner of education. Id. Thus, on local school boards, were it not for the common law rule and AS 39.50.090(a), a board member could let a contract to himself. 7/ In another agency, the law provides that a board member may not vote on a contract with his own firm or one in which he holds a "direct" ownership interest, but he need not divest himself of the interest. AS 44.88.180. In still other agencies, such interests are prohibited and the officer must dispose of the interest or forfeit the office. AS 42.07.-061. See AS 21.06.040; AS 24.20.291; AS 27.05.020; AS 38.06.035. From this range of solutions, no overriding general policy prescription is apparent for the guidance of public officers and employees.

7/ A stricter rule applies to regional school boards. AS 14.-08.131.

* * * *

Most conflict of interests situations in Alaska are covered not by statute but by the common law. Judge Wickersham described the common law in In Re Burkell, 2 Alaska 108 (D. Alaska 1903):

> The common law includes those principles, usages, and rules of action applicable to the government and security of person and property which do not rest for their authority on any express and positive declaration of the will of the Legislature (1 Kent's Com. 533), a system of elementary principles and of general judicial truths which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade and commerce and the mechanic arts and the exigencies and usages of the country (Pierce v. Props. Swan Point Cemetery, 10 R.I. 227, 14 Am. Rep. 667).

Id. at 117. See Howard v. Pfeifer, 443 P.2d 39, 44 (Alaska 1968). In Alaska, the common law controls judicial decision-making "unless and until the Alaska legislature acts to modify it." Surina v. Buckalew. See AS 01.10.010.

The common law of conflict of interests is clearest in the case of a contract made by a public officer who will, as a private person, benefit from the contract. The most comprehensive discussion of the typical situation, the controlling rule, and the underlying public policy is found in Beebe v. Supervisors of Sullivan County, 19 N.Y.S. 329 (App. Div. 1892), aff'd 37 N.E. 566 (N.Y. 1894):

> At the time of his employment [by the board of supervisors as the board's attorney in several

> collection matters], the defendant Anderson was a member of the board of supervisors. They were the agents of the county of Sullivan, and as such had no right to enter into contracts for their own benefit with their principal, the county of Sullivan. They are trustees, and have no right to enter into contracts with each other at the expense of those for whom they are acting, and whose interests they are bound to guard and protect. The illegality of such contracts does not depend upon statutory enactments. They are illegal at common law. It is contrary to good morals and public policy to permit municipal officers of any kind to enter into contractual relations with the municipality of which they are officers; and this principle applies with particular force to members of a board like the board of supervisors, which not only makes the contract, but subsequently audits the bill.
>
> But it is said that in the case before us the supervisor who was employed did not vote on the question of his own employment, or upon the audit of his bill. That does not cure the evil. The influence upon fellow members is the same. His constituents are entitled to his judgment in making contracts, to his scrutiny in passing upon accounts, and to his unbiased and disinterested efforts in both; and he cannot make the violation or neglect of the duties he owes to his constituents the means of validating an otherwise illegal act. He cannot put on and off the garb of a public official, and discharge or refuse to discharge the duties of his trust, at will, and as best subserve his private interests. He is a part of the board of supervisors. Its act is his act; and he cannot, as a supervisor, make a contract with himself as a private citizen.

Id. at 630 (citations omitted).

IV. THE PROCESS OF COMMON LAW ADJUDICATION

In the absence of legislation, it is the task of the courts, with the assistance of the attorney general, other mem-

bers of the bar, litigants, and amici curiae, to apply common law principles and policies articulated by the Beebe court and hundreds of other courts and commentators before and since. The task is a difficult one because, with the exception of the self-dealing public officer situation just described, the law is not settled; the courts must reason from the situations already addressed by the courts to solutions for new questions presented.

For this undertaking the common law is well-suited, as Chief Justice Lemuel Shaw noted in his classic description of the process:

> It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adopted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles founded on reason, natural justice, and enlightened public policy modified and adapted to the circumstances of all the particular cases which fall within it.
>
> ....
>
> Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances.

Norway Plains Co. v. Boston & Main Railroad, 1 Gray (67 Mass.)

263 (1854), reprinted in Hart and Sacks, The Legal Process: Basic Problems In The Making And Application Of Law (1958) 386-395. 8/

It is our task to begin with the legislative solutions to determine if any statute answers any of the conflict questions posed. Failing that, we must turn to the common law and, beginning with the first principles, reason to the conclusion the courts would likely reach given the facts, judicial precedent in analogous cases, and prevailing public policy.

V. LEGISLATOR CONFLICTS

Two questions are presented concerning potential legislator conflicts: First, may a legislator, or his or her firm or business, contract with the state to provide the state with goods or services? Second, may a legislator receive a state loan?

The first question does not concern classic self-dealing, the letting of contracts by an official to himself or his relatives, associates or company. It is a different problem described in the following terms:

> There is a great possibility that an official who has no immediate administrative connection with

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8/ Thus, even if there is no statute and not one case addressing the situation before a court, that court may, by the process of common law adjudication, formulate a wholly new answer to settle the dispute which gave rise to the lawsuit. See Howard v. Pfeifer, 443 P.2d at 44.

> the contract may be sufficiently motivated by his personal interest to exert whatever influence his position allows to pressure the public official who in fact has a direct responsibility concerning the contract to favor that personal interest. In this way, an official without a personal interest in the contract acquires a conflicting interest in the sense that he must choose between appeasing the pressuring official and properly discharging his duties in the matter.
>
> Experience indicates the harm that may flow from [this situation]. Contracts may be awarded that are over-priced or unnecessary, or the performance rendered under the contract may be inferior, all because of official favoritism, compromise or intentional oversight. Even if the abuse is nothing more than partiality in awarding a contract, it may import an aspect of unfairness into public administration, engendering popular disrespect for government.

Note, Conflict-of-Interests of Government Personnel: An Appraisal of the Philadelphia Situation, 107 U. Pa. L. Rev. 985, 987-988 (1959). See Eisenberg, Conflict of Interest Situations And Remedies, 13 Rutgers L. Rev. 666, 686 (1959).

There are no cases which squarely hold, as a matter of common law, that a legislator, having no formal, institutional connection with the letting or oversight of a contract, can or cannot contract with the state. The archetypical situation arises in the municipal context where principles of separation of powers do not apply and assemblymen or councilmen act administratively as well as legislatively. Thus, an assemblyman might, in a private contractor capacity, offer goods or services to the city, which goods or services are accepted, inspected, super-

vised, and compensated by the assembly on which the contractor sits. It is the virtually universal rule at common law that such a transaction is illegal, even if the assemblyman-contractor abstains and takes no part in the review and compensation of the performance. E.g., Beebe v. Supervisors of Sullivan County, quoted supra. While some commentators have declared that the common law rule has been extended to bar such transactions if any public officer or employee, regardless of their official connection with the transaction, is the private contractor, 9/ a close analysis of the cases decided to date and due regard for the difference between holding and dicta belie the claim. 10/

Many states have statutes or constitutional provisions which prohibit legislators or other public officers from contracting with the state. A number of cases have declared that such provisions are declaratory of the common law, i.e., even if there were no statute, the same rule would apply by force of the common law. One case is Schultze v. City of New York, 136 N.Y.S.

9/ E.g., Note, Conflict of Interests: State Government Employees, 47 Va. L. Rev. 1034, 1039 (1961).

10/ Kaplan and Lillich, Municipal Conflicts of Interest: Inconsistencies and Patchwork Prohibitions, 58 Col. L. Rev. 157, 158-174 (1958). We were guilty of uncritically accepting the conclusion of the Virginia Law Review note writer in our formal opinion of August 8, 1979; fortunately, it made no difference in the result in that opinion since the individual in question was an officer with authority to vote on the award of contracts and review the contractor's performance.

715 (App. Div. 1912), aff'd 106 N.E. 1042 (N.Y. 1914). Schultze was a duly appointed coroner's physician whose duty it was to perform autopsies and give evidence at coroners' inquests. He was called upon to assist the district attorney in a homicide case involving a decedent whom Schultze had not examined; he acted as an expert consultant. He submitted a bill which was disapproved under a charter provision which forbade officers to become interested, directly or indirectly, in performance of any contract or work to be paid for from the city treasury; a violation was a misdemeanor, the violator forfeited his office, and the contract was voidable. The court held that the city was not required to pay the bill, and observed that "[t]hese prohibitions are merely declaratory of the common law." Id. at 718. Accord, Mariohn Realty Co. v. City of Long Beach, 204 N.Y.S. 53, 55 (Sup. Ct. 1924), aff'd 206 N.Y.S. 933 (App. Div. 1924).

The case of Norbeck & Nicholson Co. v. State, 142 N.W. 847 (S.D. 1913), involved a legislator who contracted with the state to drill a well. The contract was voided on the basis of a constitutional provision which prohibited legislators to be directly or indirectly interested in any state contract. However, there followed extremely broad dicta:

> A member of the state Legislature, by virtue of his office, stands in a fiduciary and trust relation towards the state; in other words, he is the confidential agent of the state for the purpose of appropriating the state's money in payment of the lawful contractual obligations of the

> state, and it seems to be almost universally held that it is against sound public policy to permit such an agent, or any agent occupying a like position, to himself be directly or indirectly interested in any contract with the state or other municipality, during the period of time of the existence of such trust and confidential relationship. The private interest of such an agent should not become antagonistic to his public duty.

Id. at 849.

On the other hand, at least two courts have described statutory prohibitions of such contracts as new legislative rules foreign to the common law. In re Opinion of Justices, 82 A. 90, 93 (Me. 1911); Lindberg v. Benson, 70 N.W.2d 42, 45 (N.D. 1955). However, the Lindberg court went on to state in forceful terms the very public policy considerations which militate in favor of a common law rule in the absence of legislative action:

> The purpose of the enactment was to extend the ancient common-law rule that no state officer may be interested in any contract which he has a voice in letting (which rule is expressed in many statutes of this state) by providing a more comprehensive legislative rule, founded in public policy, which would take away from legislators as a class any personal incentive to increase their opportunities to make profitable contracts by their votes in the legislature or to use their influence as legislators in securing contracts or the approval of the work done under them. The members of the Legislative Assembly exercise a high degree of control over the fiscal affairs of the State and its subdivisions. They regulate assessments and tax levy limits. They authorize bond issues and, for the State, they make all appropriations. By enacting this initiated measure the people have attempted to remove from the legislators temptation to venality in the exercise of their legislative functions. Many states have constitutional or legislative provisions which are similar in

> nature and which have remained in force unchallenged for many years.

Id. at 45-46.

In two recent cases, courts have held that legislator attorneys may not represent persons in litigation against their city or state. In Georgia Department of Human Resources v. Sistrunk, 291 S.E.2d 524 (Ga. 1982), the Sistrunks were represented by Hill, a state legislator. The department invoked fiduciary principles and a Georgia constitutional provision which declared that "[p]ublic officers are the trustees and servants of the people, and at all times are amenable to them." The court expressly noted that this was not analogous to the classic self-dealing situation, since Hill was not representing both the Sistrunks and the state. Id. at 526.

The Sistrunk court framed the issued in the following terms:

> All public officers, within whatever branch and at whatever level of our government, and whatever be their private vocations, are trustees of the people, and do accordingly labor under every disability and prohibition imposed by law upon trustees relative to the making of personal financial gain from the discharge of their trusts.
>
> ...
>
> May one trustee of the people, as attorney and for his own financial gain, negotiate on behalf of another for a favorable official dispensation at the hands of another trustee of the people?
>
> Specifically concerning legislators, may one

> trustee of the people -- in whose office are vested the powers of enhancement, diminution, and destruction of the office of another trustee of the people -- as attorney and for his own financial gain act in a manner to hinder or frustrate the discharge by such other trustee of the duties of their common trust?
>
> No.

Id. at 528.

It bears noting that the court in Sistrunk based its decision on a Georgia constitutional provision and not on the common law. However, that provision is so general in its terms and was analyzed with such close attention to common law trust principles that the Sistrunk holding has significance independent of the constitutional language. A similar provision appears in Alaska law. 11/

In a California case, People v. Municipal Court of San Diego Judicial District, 138 Cal. Rptr. 235, 238 (Cal. App. 1977), the court barred a city councilman-attorney from representing a defendant being prosecuted by the city. The decision appears to rest primarily on the ethical standards of, and trust reposed in, members of the bar, rather than on any statutory or constitutional provision. 12/

11/ Compare the Georgia constitutional provision quoted in the text with AS 39.50.010(b)(1), which provides "public office is a public trust which should be free from the danger of conflict of interest."

12/ However, the court did, in passing, compare the councilman's

A legislator contract also raises novel and troubling questions of separation of powers. The federal courts have, in perhaps a dozen cases, condemned the practice of interference by individual legislators or committees in executive branch decision-making. The leading case is Pillsbury Co. v. Federal Trade Commission, 354 F.2d 952 (5th Cir. 1966). In Pillsbury, a decision of the FTC in its quasi-judicial capacity was invalidated because of intense Congressional committee pressure while the decision was pending.

Much less pressure was required to invalidate the decision at issue in Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), cert. denied 439 U.S. 1052 (1978). The court ruled that a letter sent by Congressman Dingell to the Secretary of the Interior, in effect urging him to deny several applications for "native village" status, compromised the Secretary's impartiality in quasi-judicial proceeding; the court ordered reconsideration of the applications by the new Secretary. In other cases, however, explicit and extreme threats were said to be required before invalidation would occur. E.g., D.C. Federation v. Volpe, 459 F.2d 1231 (D.C. Cir. 1972)(threat of loss of appropriation for unrelated project); Texas Medical Association v. Mathews, 408 F.

12/ cont. . . .
representation to conduct by "[a] local agency officer or employee" which is statutorily proscribed as "incompatible." Id. at 238.

Supp. 303 (W.D. Tex. 1976)(threat of loss of job).

Here, as in the federal legislator influence cases, the legislators would be placing themselves in a non-legislative, i.e., administrative or quasi-judicial, arena. But the kind of legislator pressure which caused the court in Pillsbury to invalidate the FTC decision is not involved here. Still, the federal legislator interference cases lead us to conclude that a court would not require a showing of direct threats where a legislator acted on behalf of himself rather than on behalf of a constituent.

The remarks of the Alaska Supreme Court in two opinions bear on this inquiry. Both cases, Begich v. Jefferson, 441 P.2d 27 (Alaska 1968), and Warwick v. State ex rel. Chance, 548 P.2d 384 (Alaska 1976), involved legislators who held or wished to hold an office of state government outside the legislative branch.

In Begich, the court observed generally:

> Alaska's constitutional prohibition against members of our three separate branches of state government holding any other positions of profit under the State of Alaska reflects the intent to guard against conflicts of interest, self-aggrandizement, concentration of power, and dilution of separation of powers in regard to the exercise by these governmental officials of the executive, judicial, and legislative functions of our state government. The rationale underlying such prohibitions can be attributed to the desire to encourage and preserve independence and integrity of action and decision on the part of individual members of our state government.

441 P.2d at 35.

In Warwick, the court considered Alaska Constitution, article II, section 5, which forbids a person to accept a government post which was created, or the salary for which was increased, while that person served in the legislature. The court observed:

> There is little disagreement as to the purpose of the type of constitutional provision under consideration here. Although the exact language varies from state to state, all such provisions are aimed at a common goal: to remove improper motives from considerations of legislators in voting for increased salaries or the creation of new offices. In one often-cited quotation, Justice Story, commenting upon a like provision in the Constitution of the United States, said:
>
> > The reasons for excluding persons from offices who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness.
>
> This type of constitutional provision is designed not only to stop overt trafficking in offices, but also to prevent less obvious influences on a legislator's actions:
>
> > [T]his constitutional provision was enacted through fear that a legislator might be, either consciously or unconsciously, influenced by selfish motives when voting for or against a bill.
>
> Another purpose has been said to be the elimination of even the suspicion that legislators were acting with improper motives. As in the case of the judiciary, it is important that the legislature not only avoid impropriety, but also the appearance of impropriety.

548 P.2d at 387-388 (emphasis added by the court, footnotes omitted).

Both the Alaska Constitution and AS 39.50 were adopted by popular vote. From these electoral expressions it is clear that Alaskans view as morally opprobrious public officials who use public office for private gain. Indeed, even the appearance of impropriety is a circumstance to be avoided. Warwick at 388, quoted supra; Falcon v. A.P.O.C., 570 P.2d 469, 477 (Alaska 1977). See AS 39.50.010(b)(1)("public office is a public trust which should be free from the danger of conflict of interest").

The size of the legislature and the executive branch is also an important consideration. There are only 60 legislators, all of whom are likely well-known to the relatively few departmental commissioners, deputy commissioners and directors. Most of these persons work together in close proximity in Juneau for five months of the year.

Our legislators have a keen interest in the budget process. Those legislators who sit on the finance committees are usually familiar with the thousands of pages of budget documents in the minutest detail and make allocations in multi-billion dollar budgets in increments of thousands of dollars. Any legislator, and especially a member of the finance committees or the free conference committee on the budget, can have an enormous impact on the budget of a state agency. Recent legislative ses-

sions have seen both the creation and destruction of agencies at the behest of single or a few legislators who took the initiative to bless or gut the agencies. In recent years, the legislature has also taken to designating its own non-governmental agents to carry out state programs. E.g., p. 25, § 51, ch. 120, SLA 1980.

Alaska is a very small state, with a small pool of talented people from which to draw its leaders. Many of the most talented have extensive commercial enterprises which may do business with the state. Unreasonable barriers should not be placed before these most promising aspirants to public service. Yet, with the legislature tending toward a half-time profession, and with the great potential for conflicts of interests with multi-billion dollar budgets and pervasive government involvement in private commerce, the courts might well be convinced that the only solution in the public interest is a common law prohibition. This would be all the more compelling in the absence of evidence that aspirants to public service are being dissuaded by a common law rule prohibiting legislator contracts, and in the absence of legislative action in this area. Indeed, such a common law prohibition might be a telling experiment for the information of the courts and the legislature.

As we have already noted, there is no case authority directly on point pro or con, but the foundation is there, in Beebe and its progeny, in Begich, in Warwick, and in AS 39.50,

upon which a common law rule against legislator contracts could be constructed. Any voter could bring an action to void such contracts 13/ and we would likely support that result in the absence of a compelling contrary justification. 14/

It is therefore our conclusion that a contract between a state agency, 15/ on the one hand, and a legislator, a business owned or operated by a legislator, or a business in which the legislator is an officer, manager, or large stockholder, on the other hand, would be illegal under the common law. 16/

* * * *

The second legislator conflict situation concerns legislators (and some state officers and employees) who apply to re-

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13/ See AS 39.50.100.

14/ Were a legislator contractor the only possible source for particular goods or services, we might support an exception. Similarly, an exception might be justifiable if a legislator proposed to provide non-unique, "off-the-shelf" goods (e.g., office supplies, motor oil) where price would be virtually the only variable. Exceptions are not supportable where the transaction requires the exercise of judgment by an administrator or an extended period of performance by the legislator. See State v. Yoakum, quoted infra.

15/ A court might well go further and say that legislators may not, as private contractors, do business with any entities (state agencies, municipalities, nonprofit corporations) whose projects are financed with state funds.

16/ At this time, we offer no opinion on situations where the legislator is an employee of the contracting firm, or where a close relative of a legislator is an officer, manager, large stockholder or employee of the contracting firm.

ceive loans from the state. The only case which offers even brief analysis of the public policy considerations which would underlie an exception to the common law rule is State v. Yoakum, 306 S.W.2d 39 (Tenn. App. 1957). In explaining why a loan to a school board of which the president of the lender bank was a member did not violate a statutory prohibition of a direct or indirect interest in a public contract, the court impliedly undercut any common law prohibition:

> A loan of money, however, is unlike a contract for goods or services involved in all our reported decisions. Because they involve questions of value, contracts relating to goods and services provide opportunity for imposition upon the public. In the loan of money the law fixes the maximum rate of interest and no question of value is involved. Only a rate of interest below the maximum fixed by law can be the subject of negotiation. In the loan here involved it is not insisted that such a short term loan could have been made elsewhere at a lower rate of interest and, as we have seen, the loan actually resulted in a loss to the Bank. To apply the statutes to such a situation, it seems to us, would be going beyond their meaning and purpose and result in great inconvenience in small communities where bank officers and stockholders frequently occupy positions of public trust and authority.

Id. at 40.

While the analysis is terse, Yoakum provides a basis for distinguishing the loan situation from other contracts between the state and legislators. However, we can say this with confidence only in the cases of loans for tuition or personal residences, where loan ceilings are relatively low, eligibility

standards are fixed, and the range of administrator discretion subject to influence and abuse is small. 17/ Commercial loan programs, where ceilings are much higher and where evaluation of credit-worthiness is more subjective, may yet present conflicts of interests where the loans are made to legislators.

However, there is potential for influence or abuse in any loan program, especially when foreclosure or other enforcement actions must be considered. Thus, whether the loan is educational, residential, or commercial, a conflict of interests may arise, and state legislators (and some state officers and employees) and their agents, must act with the greatest circumspection and propriety in dealing with the agency concerning the loan or any other matter. The agency, in order to maintain public confidence in the fairness of its program, should brook not even a hint of interference and should report questionable communications to the attorney general.

* * * *

We view the third question, concerning the propriety of a legislator voting on a bill which will financially advantage the legislator, in a different light. It is clear in the case law that, when a legislator acts in a legislative capacity, that

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17/ Even a competitive bidding procedure is subject to greater influence and abuse where the contracting officer has discretion in evaluating the responsibility of the bidders. AS 39.05.230. See AS 36.98.040 -- 36.98.050.

action can be challenged only when the legislator's conduct is "tainted with fraud, or palpably not in the service of the public interest, or otherwise a clear perversion of power." Rollins v. Carter, 69 A. 777 (N.H. 1908); Pyatt v. Mayor of Dunellen, 89 A.2d 1, 3 (N.J. 1952); MASON'S MANUAL OF LEGISLATIVE PROCEDURE, § 522. However, when a legislator acts outside the legislative sphere, with respect to a particular transaction or adjudication in which the legislator is interested, a challenge may be sustained if there is found a "private interest at variance with the impartial performance of ... public duty." Pyatt; Rollins. See Burton v. United States, 202 U.S. 344, 366-367 (1906); Pillsbury Co. v. Federal Trade Commission, 354 F.2d 952, 964 (5th Cir. 1966); Note, Conflicts of Interest of State Legislators, 76 Harv. L. Rev. 1209, 1214, n.38 (1963)("[I]mproper activities in other capacities should not be protected merely because the impropriety arises from the fact that the actor is also a legislator.").

Therefore, where a legislator votes on a bill which will financially benefit the legislator as a member of the public generally, e.g., personal income tax repeal, or where a legislator votes on a bill which will financially benefit the legislator as a member of a numerous though limited class of Alaskans, e.g., bank deregulation or corporate income tax repeal which will benefit shareholders, the legislator's vote may not be challenged. See the memorandum opinion from Kenneth E. Vassar to Wilson L.

Condon dated April 1, 1982.

Where, however, the class of beneficiaries of the legislation is tiny, especially where the bill relates to a project for which the legislator is a private contractor or affiliated with a private contractor, the legislator must disclose the conflict of interests and the legislative body should bar the legislator from voting. See MASON'S MANUAL OF LEGISLATIVE PROCEDURE, § 522 (1979).

VI. OFFICER CONFLICTS

Four potential conflicts of interests by executive branch officers have been presented for our review. We will treat them in turn.

It is first asked whether a director of a state corporation, board, or commission which is governed by no specific conflict of interests statute has a conflict if he or she is an officer employee, or large stockholder of a company or firm which has contracts with the state to provide goods or services. If there is a conflict, what remedial steps need be taken?

The question is answered by the Beebe case, quoted supra, and the accompanying discussion: a conflict clearly does exist if the person with the potential conflict is associated with both parties to the contract, i.e., the state agency procuring the goods or services and the private contractor providing

them. 18/ If, however, the person with the potential conflict works for a state agency with no contracts with the private contractor with which the person is associated, there would be no conflict. 19/

The Beebe case makes it clear that public service demands total fidelity to the public interest at all times. A public servant, faced with a conflict of interests by reason of private financial associations may not pass official decision-making responsibility on to a colleague or subordinate who may share the same prejudice or be subject to influence. "He cannot put on and off the garb of a public official, and discharge or refuse to discharge the duties of his trust, at will, and as best subserve his private interests." Id. at 630. Faced with a conflict, the person must either resign his or her position, or forego the private opportunity to do business with the state.

18/ If the person is only an employee, there may not be a conflict. Those situations must be addressed on a case-by-case basis.

19/ We must qualify this last mentioned conclusion by noting that a conflict might arise even if the person was not an official in the contracting state agency if the person nevertheless has extensive contacts with the contracting state agency. For example, certain officers of the Department of Law and the Office of the Governor, though not within the Department of Administration, may have extensive contacts with, and considerable influence in, the Department of Administration. A person with similar "interdepartmental" duties might be in a conflict situation if he or she entered into an agreement as a private contractor with the other department.

* * * *

It is next asked whether an officer of the Division of Minerals and Energy Management (DMEM) may hold a mining claim, an interest in a mine, or an interest in the products of a mine on land under state jurisdiction. AS 27.05.020 provides:

> In conducting the inquiries and investigations authorized by AS 27.05.010 -- 27.05.070, no officer or employee of the department may have any personal or private interest in a mine or the products of a mine under investigation, or accept employment from a private party for services in the examination of private mineral property. Nothing in this section prevents employment by the department, in a consulting capacity or in the investigation of special subjects, of an engineer or other expert whose principal professional practice is outside his employment by the department.

The syntax of AS 27.05.020 is not an aid to understanding. A thoughtful reading of the provision reveals that it is not any officer or employee of the department who is prohibited from holding an interest in a mine under investigation; only officers and employees "conducting the inquiries and investigations authorized by AS 27.05.010 -- 27.05.070" are so restricted. We are informed by the director of DMEM that that division conducts virtually none of the "investigations" in question; those matters are within the jurisdiction of the Division of Geological and Geophysical Surveys. However, there is still the common law.

DMEM is the state agency which regulates the acquisition of mining claims and leases on lands under state jurisdiction, see AS 38.05.185 -- 38.05.280; 11 AAC 86, and issues mis-

cellaneous land use permits. See 11 AAC 96. DMEM also has a representative on the regional planning teams which make recommendations to the commissioner on state land use classifications. See AS 38.04.065; 11 AAC 55.

As the regulatory agency for mining claims, DMEM receives the filings of persons who stake mineral claims. See AS 38.05.195. It must review the filings to verify that there has been a discovery, see 11 AAC 86.105, and that the claim has been properly staked. See 11 AAC 86.205 -- 11 AAC 86.215. On an annual basis, DMEM receives additional filings from each claim owner attesting to the performance of statutorily-required annual labor on the claim, see AS 38.05.210; 11 AAC 86.220, and must verify that the claimed labor meets prescribed requirements. Id. A major component of the DMEM mining section's effort and budget is devoted to this "adjudication" of mineral claims.

In this light, we believe that an ownership interest in mineral claims (or in a company which owns mineral claims) on lands under state jurisdiction creates a common law conflict of interests on the part of officers and employees of DMEM. Given the size of the mining section of DMEM (25 persons) and the likely close working association of all the officers and employees, it is probable that a court, as a matter of common law, would forbid any person in DMEM to own a mineral claim on lands under state jurisdiction since the opportunity for influence is so evi-

dent. It is even clearer that a court would forbid a supervisory officer to own such a mineral claim since it would be that person's subordinate who would review the sufficiency of the claim and the annual labor affidavit. 20/ And, as we noted, supra, at page 31, the conflict is not cured by removing oneself from the review of one's own filings: the public has the right to demand that a state officer bring his or her skills to bear in all matters which the office calls upon him or her to consider.

DMEM is one of only three agencies principally responsible for overseeing mineral exploration and mining activities on lands under state jurisdiction. DMEM personnel cannot be both regulators and regulated. If they wish to serve in DMEM, they must forego this relatively narrow range of investment opportunities. The common law requires officers and employees in DMEM who have interests in mining claims to dispose of those interests with all deliberate speed, or resign. 21/

20/ DMEM officers and employees also have access to confidential geological, geochemical, geophysical, and airborne surveys. See AS 38.05.240. Were they permitted to own mineral claims, they might have a distinct advantage over other prospectors, miners, and investors. This is another aspect of the conflict of interests inherent in the situation.

21/ The Department of Law has had the full cooperation of DMEM officers and employees in this inquiry; indeed, it was a DMEM officer with an interest in mineral claims who first asked our advice on this matter. At that time, we informally advised him that there was no conflict, and he ordered his affairs accordingly. Thus, it was our erroneous advice, and no wrongdoing by the DMEM officer, that allowed the conflict situation to develop.

* * * *

It is next inquired whether a Department of Environmental Conservation (DEC) inspector of seafood processing plants may sell the right to use a process he developed and patented to companies whose plants he inspects. The answer is clearly no.

The evil of such an arrangement is patent: seafood processors might feel compelled to purchase the right to use the process or suffer the wrath of the seller when next he inspects their plants.

We hasten to add that there is not the slightest suggestion that the particular inspector involved has ever acted improperly; it is the appearance of impropriety which condemns these proposed transactions. If the inspector wishes to market his process, he must resign or sell his rights in the process to another who may market it. 22/

The same inspector also wishes to apply to the Department of Commerce and Economic Development (DCED) for a grant to test his process. Because the grant project would likely involve one or more seafood processors in a cooperative effort to test the process, a conflict of interests on the inspector's part

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22/ If the inspector chooses the latter course, he may not reserve any right to receive royalties or license fees; were he to do so, the spectre of influence would again appear since, though he is not personally marketing the process, each seafood processor that used the process would be paying the inspector indirectly.

would almost certainly arise. In that case, the grant would be illegal. See Newton v. Demas, 253 A.2d 376 (N.J. App. 1969)(municipal engineer had an outside contract with a developer to design a water system; the contract was void because the engineer would have had to review his own design in his official capacity).

* * * *

It is last asked whether a member of the board of the Alaska Resources Corporation (ARC) has a conflict of interests if he or she is associated with a company that has a contract with the state. AS 37.12.065 provides:

> (a) Members of the board are subject to the provisions of AS 39.50.
>
> (b) No member or employee of the board may acquire an interest, direct or indirect, in a corporation, company, association, or project owned, controlled, or invested in by the corporation. If a member or employee owns or controls such an interest, he shall immediately disclose the interest in writing to the board and refrain from participating in any manner in any activity relating to that interest.

Subsection (b) modifies the common law as it would apply to ARC. Under the common law, the member could neither acquire a new interest nor keep an old interest in a company doing business with ARC, and this disability could not be cured by abstaining on votes and taking no part in deliberations. Under AS 37.12.065, acquisition is forbidden, but interests owned upon appointment may be retained, so long as the member abstains from

voting and has no contact, formal or informal, with other members concerning ARC's policies or actions toward the firm in which the member has an interest. This departure from the common law applies only to members and employees of ARC. 23/

VII. CONCLUSION

The common law of conflict of interests is uncharted water for most public officials, including government attorneys. They err when they believe that a public official's conflict can be cured if the official takes no part in the decision in which he or she is interested. They err when they believe that a court will not invalidate a contract if, though a party to the contract has a conflict, it is still a fair price.

The courts take the view that officials have a duty to the public to participate in all the decisions they were elected or appointed to make. The courts ordinarily will not allow an

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23/ It was also inquired whether an ARC board member may also be a member of the Alaska Historical Commission. AS 44.27.061, et seq. In view of the clear prohibition on holding "any other state or federal office, position, or employment . . . . ," AS 37.-12.045(b), we believe the board member must resign from either ARC or the Alaska Historical Commission. This prohibition goes further than the common law; indeed, as applied in this situation, it appears to advance no laudable goal. But it is within the legislature's power, and it does prevent the appearance of conflict of interests in many other situations. If a more refined provision is to be substituted, one which is better able to discriminate between real and imagined potential for abuse, the legislature alone has the power to do it.

official to decline to make a decision in order that he or she might be free to have the benefit of that decision.

The courts will not allow an official to make a contract with his agency and, when challenged, assert as a defense that the contract was more advantageous to the state than any other offer received.

The common law of conflict of interests aims not only to prevent officials from actually taking unfair advantage of their office. It also aims to eliminate the potential for abuse and the appearance to the public that officials are subject to temptation. For these reasons, the courts have dealt sternly with officials in conflict situations, and they will continue to do so. Unless the legislature formulates another means to sustain the public's confidence that public officials are not benefitting in private from their positions in public, we, and all public officials, must abide by the common law.

Sincerely yours,

Wilson L. Condon
Attorney General

WLC/pjg

MEMORANDUM State of Alaska

TO: Heads of All Departments, Boards, Commissions, and Authorities

DATE: December 28, 1982

FILE NO:

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Implementation of Conflict of Interests Opinion

By now I hope you have had the opportunity to review the opinion issued by this office on December 3, 1982 concerning conflicts of interest. All supervisors should be aware of, and sensitive to, the concerns addressed in that opinion.

I recognize the opinion sets out principles which are, in large part, new to virtually all state officers and employees. As a practical result, therefore, persons with the kinds of conflicts addressed in the opinion may find it difficult to immediately eliminate them. Also, as recognized in the opinion, the common law rules relating to conflicts of interest may be modified or even rejected by the legislature through the enactment of general laws dealing with the subject. Obviously, the legislature has not yet had an opportunity to consider the rules set out in the opinion and determine whether, or to what extent, it may wish to alter them in Alaska.

Consequently, given the potentially harsh consequences (e.g. termination of employment, cancellation of contracts, and forced divestiture of various business and property interests), I believe it appropriate to exercise the discretion which I have by deferring, except in more serious circumstances (e.g. where an official's public duties may directly advantage his or her private business interests or where the conflict violates express civil or criminal statutes), any "enforcement" action until after the close of the upcoming legislative session. By doing so, the legislature will have the opportunity to address the common law rules set out in the opinion and make whatever changes to them it considers appropriate.

I suggest that you ask your officers and employees to examine their private business interests and dealings to determine if there are interests which might be viewed as causing divided loyalty. If there are such interests, then you should consider how, in the coming months, either their duties or their business interests might be changed to eliminate the conflict.

Additionally, I believe it would be helpful to the legislature in addressing conflicts problems if it had as complete a listing of the kinds of potential conflicts which may exist as possible. In this regard, I would appreciate it if you would advise me of any situations which you identify as potentially coming within the proscriptions of the conflicts opinion.

cc: Representative Joe Hayes
Speaker of the House

Senator Jalmar Kerttula
Senate President

CONFLICTS OF INTEREST OF STATE AND LOCAL LEGISLATORS

As government at all levels continues to grow and play a more important role in the economy of the country and private life of the individual citizen, concern for honesty on the part of elected government officials becomes increasingly important. This concern for the integrity of elected public officials is manifested by various codes and standards of conduct which have been adopted by state legislatures.[1] Nevertheless, the proper standard of conduct for elected public officials is not easily defined or enforced.

In public life there is a growing need for qualified men and women, especially those who are peculiarly qualified for public service because of their commercial or professional experience. But because the pay scale for most elected public officials on the state and local level is inadequate to attract many full-time employees,[2] these persons may be unwilling to divest themselves of their private business and professional interests in order to enter public life. A strict rule prohibiting persons from holding public office while retaining these private interests would be unacceptable since it would deter those qualified people from entering public service.[3] Such dual allegiances on the part of public officials, therefore, are nearly inevitable on the state and local levels of government, and raise the problem of how to cope with actual and potential conflicts of interest.

Any attempt to control conflicts of interest must balance the need for unquestionable integrity in government with the need for competent personnel. Thus, it is imperative that a system be devised so that competent people can become active in governmental affairs without jeopardizing society's interest in prohibiting the inevitable evils of representing two masters; that is, the legislator's personal interests and his constituents' interests. Unquestionably, it is in the public interest

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[1] *See* MONT. CONST. art. V, § 44; ARIZ. REV. STAT. ANN. § 38-446 (1966); KAN. STAT. ANN. § 46-132 (1964); MINN. STAT. §§ 3.87-.90 (1967); N.Y. PUB. OFFICERS LAW §§ 73, 74 (McKinney Supp. 1969).

[2] *See* W. Gribben, *Structures and Procedures*, COUNCIL OF STATE GOVERNMENTS, THE BOOK OF STATES 1968-69, at 44-45 (1968); Kaplan, Book Review, 68 HARV. L. REV. 1097, 1101 (1955). Since elected public office at this level is thus part-time, usually only those occupational classes which are flexible enough to allow part-time participation in legislative activity are usually represented. As a result most state legislatures are composed of farmers, lawyers, merchants or insurance and real estate brokers. All of these may frequently have a direct personal interest in state legislation. *See* C. AUERBACH, L. GARRISON, W. HURST & S. MERMIN, THE LEGAL PROCESS 583 (1961).

[3] *See* Kaufman and Widiss, *The California Conflict of Interest Laws*, 36 S. CAL. L. REV. 186, 203 (1963); Note, *Conflict-of-Interests of Government Personnel: An Appraisal of the Philadelphia Situation*, 107 U. PENN. L. REV. 985, 986 (1959); Legislation Notes, 16 DEPAUL L. REV. 453, 456 (1967).

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to promote integrity and public confidence in government[4] without discouraging potential public servants from entering public life.[5]

This Note will discuss the general nature of conflicting interests, the various methods that have been employed to prevent conflicts of interests from arising, and the procedures by which legislation tainted with conflicts of interest may be avoided.

I. The Nature of a Disqualifying Conflict of Interest

Generally, a conflict of interest arises when a legislator has a personal or private interest in legislative action under consideration that is not shared in common with the general community.[6] These distinct interests are deemed to endanger the proper functioning of government. In public life the spectrum of conflicts of interest may include either a direct division of loyalties or only potential conflicts which may undermine public confidence in government. In attempting to define what actions, actual or potential, constitute conflicting interests courts have articulated a general standard; namely, any actions that are irreconcilable with the public welfare.[7] These actions are usually ones that permit the public official opportunity for private gain at public expense.[8] This private benefit, however, usually must consist of a present, personal, and pecuniary interest before a conflict of interest arises.[9]

Since this general test is rather broad, it is often difficult to determine precisely what is and what is not a conflicting interest. Typically, no conflict would arise if the legislator voted upon legislation establishing tax rates, utility rates, or licensing fees. Although this type of legislation would affect the individual legislator personally, it would affect him in the same manner as the entire community and hence would not be an illegal conflict of interest.[10]

Even some interests which are distinct have been found not to be prohibited conflicts of interest. A prime example involves legislation

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[4] *See* Note, *Conflicts of Interests of State Legislators*, 76 Harv. L. Rev. 1209 (1963) [hereinafter cited as 76 Harv. L. Rev.].

> "Involved and needed, therefore, is a careful regulatory scheme that effectively restrains official conflicts of interest without generating pernicious side effects on recruitment of both regular staff, and talents or capabilities on an occasional or temporary basis, for performance of governmental functions and responsibilities." [1961-62] Nev. Op. Att'y. Gen. 112.

[5] *See* Eisenberg, *Conflicts of Interest Situations and Remedies*, 13 Rutgers L. Rev. 666, 668 (1959); 76 Harv. L. Rev. 1209.

[6] *See* Piggott v. Borough of Hopewell, 22 N.J. Super. 106, 111-12, 91 A.2d 667, 670 (1952); Erie City v. Grant, 24 Pa. Super. 109, 112-13 (1904).

[7] *See* Note, *Conflict of Interests: State Government Employees*, 47 Va. L. Rev. 1034, 1045 (1961).

[8] *See, e.g.*, People v. Elliott, 115 Cal. App. 2d 410, 417, 252 P.2d 661, 665 (1953); Watson v. New Smyrna Beach, 85 So. 2d 548, 549-50 (Fla. 1958); Note, *Conflict of Interests: State Government Employees*, 47 Va. L. Rev. 1034, 1045 (1961).

[9] *See* Note, *Conflict of Interests: State Government Employees*, 47 Va. L. Rev., 1034, 1045 (1961).

[10] *See* Piggott v. Borough of Hopewell, 22 N.J. Super. 106, 111-12, 91 A.2d 667, 670 (1952); Erie City v. Grant, 24 Pa. Super. 109, 112-13 (1904).

that will affect the legislator's or councilman's private employer. If the legislator's or councilman's personal interest in this particular legislation is only to the extent of his natural concern for the welfare of his employer's business enterprise, he is not prohibited from voting upon the legislation. On the other hand, if the legislator's or councilman's salary is based on a percentage of his employer's profits, a conflict of interest may arise if he participates in the enactment of such legislation.

A conflict of interest may also arise in cases where an elected board or city council votes on the letting of contracts, granting of variances to zoning ordinances, or granting of licenses to competitors. An example is the case of *Younkers Bus, Inc.* v. *Maltbie*.[11] There the New York court held that an alderman who was the president of a bus company had a disqualifying interest in an ordinance granting a certificate of convenience and necessity to a third party, rival bus company.

Conflicts of interest may also arise indirectly when a city councilman has vested interests in social or community organizations. It appears that an interest in the general welfare of the community is not a disqualifying interest, but an interest in the improvement of a civic organization of which the councilman is a member may be disqualifying. For example, in the case of *Batchelor* v. *Avon-by-the-Sea*,[12] the New Jersey court held that the signing of a petition addressed to the city council seeking improvements of certain streets did not disqualify petitioner from acting as commissioner of assessment, since this was an interest which applied to the entire community affected by the assessment. In *Wiesmenthal* v. *Atlantic City*,[13] however, the court held that a councilman who was a member of the volunteer fire department could not vote on the purchase by the city of property from the fire department. These cases indicate that the general, imprecise test articulated by the courts makes it extremely difficult to determine what is a conflicting interest. This in itself breeds uncertainty and may discourage qualified persons from becoming active in public service. It is thus desirable for communities to attempt to further clarify what activities present prohibited conflicts of interest and to develop devices designed to control such activities.

II. Devices Designed To Prevent Conflicts of Interests

Many devices have been employed to prevent conflicts of interest from arising and resolve them once they do arise. Although practical solutions have as yet to be developed, several statutory and non-statutory approaches have been attempted. Such devices have been either in the form of checks on the individual legislator or sanctions upon legislation tainted with conflicting interests.

A. *Checks Upon the Individual Legislator*

1. *Nonstatutory Devices*

At least four non-statutory approaches can be used to prevent individual legislators from participating in potentially harmful conflicts

[11] 23 N.Y.S.2d 87 (1940), *aff'd* 260 App. Div. 893, 23 N.Y.S.2d 91 (1940).

[12] 78 N.J.L. 503, 74 A. 561 (1909).

[13] 73 N.J.L. 245, 63 A. 759 (1906).

of interest situations. Generally, all four are incomplete if not totally ineffective.

a. *Legislative Rules of Ethics*

In many states, legislative bodies have adopted codes of conduct that serve as internal checks to deter improper conduct on the part of their members.[14] These checks generally take the form of promulgated standards by which the legislator should abide.[15] If a conflict of interest is discovered before legislation is enacted the code may disqualify the legislator from participation in pending legislation.[16] If the improper conduct is discovered after the legislation is enacted, censure or expulsion for conduct unbecoming a member of the legislative body may be employed.[17] There are, however, several defects in these legislative codes. Since the standards in these codes are usually phrased in rather general terms, an individual legislator is often uncertain as to what specific action constitutes improper conduct. In such a system, even though bi-partisan political motives of individual legislators should serve to expose any conflict of interest issue, there is also an inherent and ever-present temptation to exploit such checks for political gain by fellow legislators. Moreover, independent and objective judgment is easily ignored when the standards are enforced by fellow members.[18] Most important, unless there is a persistent external stimulus for reform from the press or the electorate, enforcement of internal checks or codes may be only sporadic.[19] Thus, legislative codes of conduct and self-policing activity, though partially remedial to the extent that they may prevent blatant abuses, are ineffective in coping with most conflicts of interest problems.

b. *Sanctions From the Mayor's or Governor's Office*

Conflict of interest problems may also be controlled by sanctions from the executive department. Nearly every governor, and many mayors, have sources of political power that will enable them to attack a legislator's conflict of interest. One such power is that of the governor or mayor to withdraw political support from any legislator of his party who fails to meet acceptable standards.[20] Another power is the governor's ability to suggest that the executive department withhold lucrative government contracts from certain legislators or their firms until they comply with acceptable standards.[21] Moreover, investiga-

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[14] *See* MONT. CONST. art. V, § 44; ARIZ. REV. STAT. ANN. § 38-446 (1966); KAN. STAT. ANN. § 46-132 (1964); MINN. STAT. §§ 3.87-.90 (1967); N.Y. PUB. OFFICERS LAW §§ 73, 74 (McKinney Supp. 1969).

[15] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 268A, § 23 (Supp. 1969); MINN. STAT. ANN. §§ 3.87-.90 (1967); TEX. REV. CIV. STAT. ANN. art. 6252-9 (1962).

[16] *See* N.Y. PUB. OFFICERS LAW § 74 (McKinney Supp. 1969); TEX. REV. CIV. STAT. art. 6252-9 (1962); 76 HARV. L. REV. 1211-12.

[17] *See* N.Y. PUB. OFFICERS LAW § 74 (McKinney Supp. 1969); TEX. REV. CIV. STAT. art. 6252-9 (1962); 76 HARV. L. REV. 1211-12.

[18] *See* 76 HARV. L. REV. 1230-31.

[19] *Id.* at 1231.

[20] *Id.* at 1218.

[21] *Id.* at 1219.

tions of a legislator's appearances before state agencies or involvement with the allocating of government contracts may be instituted by an executive committee,[22] or more specifically, the comptroller general.[23] The fear of the possible public exposure connected with such an investigation alone may deter any further questionable activity.

Political considerations, however, may limit the use of these executive attacks on unethical practices.[24] Furthermore, these checks of the executive branch lack uniform standards because they may be invoked only at the discretion of the individual executive officer. It is quite possible, therefore, that use of these devices may readily vary from individual to individual and situation to situation. As such, they are ineffective checks because they may not be imposed in an equal manner in all cases.

Despite some of its shortcomings, the executive branch can, nevertheless, play an ancillary role in defining harmful conflicts of interest by rendering advisory opinions from the attorney general's office. Upon request from a legislator, the propriety of future action may be decided by the attorney general's office.[25] Such an approach has the advantage of taking the promulgation of standards from the legislative body. However, enforcement under this approach may be sporadic because this device is not implemented until the respective legislator requests an opinion. Moreover, every legislator may not be aware that there may be problems of questionable ethics involved in some of his actions, and even if he is aware of such problems, he may decline to request an advisory opinion on the problems. Hence, this approach may not be an effective device for preventing harmful conflicts of interest.

Finally, on the state level, the chief executive may employ the veto power[26] if members of a legislative body fail to comply with minimal standards of ethical conduct. This sanction may be extremely instrumental in directing public attention to the problem of improper lobbying[27] or vested private interests of particular legislators. However, in effect, the veto power is an "over-kill" approach because it not only deters the undesired conduct, but also nullifies the entire legislative bill.

c. *Exposure in Election Campaigns*

The fact that legislators must periodically submit their records to the voting public so as to be re-elected may serve as another check on legislative misconduct. Theoretically, the voting public will receive complete information concerning past violations of a legislator's public

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[22] *See* LA. REV. STAT. § 42:1119 (1965); N.Y. EXEC. LAW § 63 (McKinney Supp. 1969).

[23] *See* N.Y. EXEC. LAW § 63 (McKinney Supp. 1969).

[24] *See* 76 HARV. L. REV. 1219.

[25] *See* 26 ORE. ATT'Y GEN. BIENNIAL REP. AND OP. 114 (1952-1954).

[26] IOWA CONST. art III, § 16. In 1956 President Eisenhower vetoed a bill because of improper lobbying. *See* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, Dwight D. Eisenhower 1956, at 256.

[27] *See* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, Dwight D. Eisenhower 1956, at 256.

trust through the self-motivated revelations of each candidate's opponents. By means of the ballot the ethical standards of the electorate will then be imposed upon its legislative representatives.[28] As a practical matter, however, the electorate may be an ineffective check. Local legislative races are seldom hard fought and in such races party affiliation may be highly determinative of the outcome.[29] Moreover, subtle ethical problems inherent in the conflict of interest area may be all but impossible to communicate to the voting public in a campaign where issues must be simple and easily understood.[30] Indeed, an opposing candidate may be reluctant to raise a subtle conflict of interest charge because he may be misunderstood or politically embarrassed by false charges of his own misconduct.[31]

Although it might be urged that the need for popularity before an election will deter improper conduct by an incumbent, political realities may dictate a different result. The financial realities of a campaign may force an incumbent to become dependent upon funds raised through private contributions.[32] This may create distinct personal obligations which conflict with his public duties as a legislator. It is also possible that a self-interested legislator could realize the benefit of his actions before the next elected legislative body would be able to enact corrective measures.[33] Moreover, such corrective measures might be ineffective against citizens who relied upon the prior action or extremely detrimental for those who had.[34] Even if the power of the electorate could operate efficiently, it is an unpredictable sanction lacking uniform standards by which legislators can determine what constitutes acceptable conduct.

d. *The Federal Government*

The growth of the federal government's involvement in nearly every aspect of state and local government enables it to serve as another source of control on conflicts of interest problems. The multiplying use of federal funds for state and local government projects in education, road construction, urban renewal, and other public works provides the federal government with a lever by which a code of ethical conduct can be imposed upon officials of governmental bodies receiving and dispensing such aid.[35] For example, federal grants-in-aid to state and local governments may be conditioned on requirements prescribing standards of conduct as a prerequisite to receiving this

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[28] THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND FEDERAL SERVICE 15 (1960) [hereinafter cited as ASS'N OF THE N.Y. BAR]; 76 HARV. L. REV. 1213.

[29] *See* W. ANDERSON, AMERICAN CITY GOVERNMENT 207 (1925).

[30] 76 HARV. L. REV. 1213.

[31] *See id.*

[32] *See* Eisenberg, *supra* note 5, at 667.

[33] *See* 57 MICH. L. REV. 423, 425 (1959). *Cf.* A. McQUILLIN, MUNICIPAL CORPORATIONS § 25.181, at 12 (3d ed. 1957).

[34] *See* 57 MICH. L. REV. 423, 425 (1959).

[35] *See* 76 HARV. L. REV. 1220. *See generally* 23 U.S.C.A. §§ 105, 140, 141 (Supp. 1969).

aid.[36] Dispersal of federal funds also raises the possibility of employing Congressional investigations to expose legislative misconduct where federal money is being used.[37] Adverse publicity engendered by these investigations may serve as an additional deterrent to misconduct in the handling of federal funds.[38] This publicity, however, may produce undesired results because the effect of such publicity may be to destroy the political careers of a few while accomplishing little in solving the problem in the future.[39] Furthermore, attention given to blatant criminal aspects of misconduct exposed by Congressional investigations may gloss over the more subtle problems of conflict of interests.

The self-imposed rules of legislative bodies, the public eye of the electorate, the chief executive's position of influence, and the power of the purse and investigation that the federal government possesses can all be employed to prevent conflicts of interest from tainting state and local legislation. Their utility in coping with the problem is, however, limited because in many instances they are only a partial and sporadic solution to the problem. Moreover, the employment of several of these devices can result in a situation in which the remedy is more deleterious than the problem being resolved. For these reasons some commentators believe that stringent statutory devices are needed to cope with the conflicts of interest problems.[40]

2. *Statutory Devices*

Some states have attempted to control conflicts of interest by statute.[41] Statutory controls usually resemble a code of ethics either with or without criminal sanctions.[42] Those without criminal sanctions attempt to define certain conflicts of interest and prohibit such in specific situations where the distinction between proper and improper activity is not clear.

Where the conflict can be specifically and objectively defined and determined, statutes with criminal sanctions are most appropriate. Where it is usually difficult to objectively define what conflicts of

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[36] *See* 23 U.S.C. § 112(c) (1964).

[37] *Cf. Hearings Before the Special Subcomm. on Federal-Aid Highway Programs of the House Comm. on Public Works*, 87th Cong., 2d Sess. pts. 1 & 2 (1962); *Hearings Before the Subcomm. to Study Senate Concurrent Resolution 21 of the Senate Comm. on Labor and Public Welfare*, 82d Cong., 1st Sess. (1951). *See generally* ASS'N OF THE N.Y. BAR. 123-30.

[38] 76 HARV. L. REV. 1221.

[39] *Id.*

[40] *See* Note, *State Conflict of Interest Laws: A Panacea for Better Government?*, 16 DEPAUL L. REV. 453, 464 (1967); Note, *Conflict of Interests: State Government Employees*, 47 VA. L. REV. 1034, 1076 (1961); Comment, *Criminal Law—Official Misconduct—The Need for Legislative Reform*, 57 KY. L.J. 598, 604-05 (1969).

[41] *See, e.g.*, ARIZ. REV. STAT. ANN. § 38-446 (1956); ILL. REV. STAT. ch. 102, § 3 (Supp. 1969); IND. ANN. STAT. § 10-3713 (1956); KAN. STAT. ANN. § 46-132 (1964); KY. REV. STAT. §§ 61.092-.096 (1969); MINN. STAT. §§ 3.87-.90 (1967); N.M. STAT. ANN. §§ 2-1-4 to 1-7 (1954); N.Y. PUB. OFFICERS LAW §§ 73, 74 (McKinney Supp. 1968); N.D. CENT. CODE § 54-03-21 (1960).

[42] *See, e.g.*, KY. REV. STAT. §§ 61.092-.096 (1969); MASS. GEN. LAWS ANN. ch. 268A § 23 (Supp. (1969); MINN. STAT. § 3.88 (1967).

interest are or should be illegal, criminal sanctions may have an undesirable effect because the fear of being accused of criminal misconduct may discourage competent men and women from seeking public office.

The most common statutory provisions are those which prohibit some or all public contracts with public officers.[43] Some states forbid the awarding of state government contracts to members of the legislature unless the contract is procured through public notice and competitive bidding.[44] Others categorically forbid such contracts.[45] Most states, however, have a de minimis exception allowing a limited fractional interest in the contract.[46]

When such contracts are permitted, the statutes usually require that the public officer's conflicting interest be disclosed. In New York the requirement is that the disclosure be accessible to the public.[47] Texas[48] and Washington[49] require that a report of the officer's interest be filed with the Secretary of State and be accessible only to those officials awarding the contract. Other statutes provide that disclosure be made to the body of which the officer is a member.[50] The Texas and Washington plans seem to be most desirable because their disclosure provisions safeguard the public from undesirable conduct without indiscriminately invading the legislator's privacy.

Another statutory approach to the conflicts of interest problem is the establishment of a committee, independent of the legislative body, which could promulgate and administer a code of ethics.[51] Upon request, this committee could conduct administrative hearings and make official determinations on the propriety of a specific legislator's activities. In order to protect the legislator, a private preliminary hearing could be conducted to determine whether there is merit to charges against the legislator. If the charges have sufficient merit, the committee could then conduct a formal public hearing. The findings of the committee in this hearing could be publicized and referred to the appropriate agency for further action. Upon its own initiative or upon request of any interested party the committee could also render advisory opinions which would be made public. These opinions would form a collection of the ethical principles applicable to specific cases.

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[43] *See, e.g.*, ILL. REV. STAT. ch. 102, § 3 (Supp. 1969); NEV. REV. STAT. § 218.580 (1967); N.D. CENT. CODE § 54-03-21 (1960).

[44] *See, e.g.*, KY. REV. STAT. § 61.090(6) (1969); N.Y. PUB. OFFICERS LAW § 73(4) (McKinney Supp. 1969); OHIO REV. CODE ANN. § 2919.09 (Page 1954).

[45] *See, e.g.*, ARIZ. REV. STAT. ANN. § 38-446 (1956); ILL. REV. STAT. ch. 102, § 3 (Supp. 1969); KY. REV. STAT. § 61.096 (1969).

[46] *See, e.g.*, KY. REV. STAT. § 61.096(6) (1969) (limited to contracts exceeding $25); N.Y. PUB. OFFICERS LAW § 73(4) (McKinney Supp. 1969) (limited to contracts exceeding $25); OHIO REV. CODE ANN. § 2919.09 (Page 1954) (limited to contracts exceeding $50).

[47] *See* N.Y. PUB. OFFICERS LAWS § 74 (4).

[48] *See* TEX. REV. CIV. STAT. ANN. art. 6252-9, § 3(b) (1962).

[49] *See* WASH. REV. CODE ANN. § 42.22.050 (1961).

[50] *See* CAL. GOV'T. CODE § 1091 (West 1966); IOWA CODE ANN. § 403.16 (Supp. 1969); NEV. REV. STAT. § 315.400(1) (1967).

[51] *See* LA. REV. STAT. §§ 42:1144, 42:1145 (1965).

This plan has several advantages over the traditional statutory and non-statutory approaches. Since rulings would develop as a result of specific cases, this system could deal with the more subtle conflicts of interest problems that cannot be dealt with by drafters of legislative criminal codes. Because the committee would be independent of the legislature, this plan would also be unfettered by the inherent defects of political considerations or legislative inertia which thwart most constructive action in this area.[52] Furthermore, if the committee commanded sufficient prestige, publication of its rulings without further action might serve as an adequate deterrence to undesirable conduct.[53]

These various statutory devices that have been employed may effectively deter certain conflicts of interest from arising. These devices do not, however, completely resolve many conflict of interest problems. In many situations the subtle and subjective characteristics of these problems can seldom be sufficiently defined so as to be effectively prohibited by statute without creating considerable confusion as to what is prohibited and what is not. More importantly, these various statutory devices do not solve the problem of what to do with legislation which may have been affected by a conflict of interest.

B. *Sanctions upon Legislation Tainted with Conflicts of Interest*

1. Judicial Invalidation

Despite present attempts to curb conflicts of interests, certain conflicts of interest will almost inevitably arise in the legislative process. When this happens, most courts not only disqualify the interested legislator from participating, but hold that legislative action tainted by participation of a member having a conflicting interest is invalid.[54] However, the courts' intervention in the conflicts of interest area has been so sporadic and unpredictable that it is difficult to determine exactly what action will be invalidated by the courts.[55] For this reason alone courts are ineffective in controlling conflicts of interest.

On the state level most courts are reluctant to review actions involving conflicting interests of state legislative officials.[56] There may be two explanations for judicial restraint in this area: It is difficult if not altogether impossible for the court to consider rights of innocent third parties not before the court;[57] and it is nearly impossible for a court to ascertain and describe legislative misconduct.[58] This attitude of judicial restraint is reinforced by provisions in many state constitutions which contain ambiguous clauses limiting judicial intervention in legislative matters. The most common provision is a clause which

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[52] *See* text accompanying note 18 *supra*.

[53] *See* 76 HARV. L. REV. 1232.

[54] *See, e.g.*, Wilson v. City of Iowa City, 165 N.W.2d 813, 825 (Iowa 1969); Baker v. Marley, 8 N.Y.2d 365, 367, 170 N.E.2d 900, 901 (1960); Piggott v. Borough of Hopewell, 22 N.J. Super. 106, 117, 91 A.2d 667, 670 (1952).

[55] *Compare* Piggott v. Borough of Hopewell, 22 N.J.Super. 106, 91 A.2d 667 (1952) *with* Gardner v. City of Bluffton, 173 Ind. 454, 460, 89 N.E. 853, 855 (1909).

[56] *See* 76 HARV. L. REV. 1214.

[57] *See* Fletcher v. Peck, 10 U.S. 87, 130 (1810).

[58] *Id.*

establishes a separation of powers between the executive and judicial branches without defining the extent to which the legislative and judicial branches should interact.[59] Hence, judicial restaint and the court's role as interpreter of the constitution are apparently partially responsible for judicial inaction in this area.

At the state level of government, however, the need for intensive checks is perhaps less urgent than on the municipal level because the problem is less likely to arise. In state government the need to acquire a majority in the legislative process produces concessions and compromises among colliding interests to such an extent that it is highly improbable that any single interest will acquire everything it desires,[60] especially in a body as large as most bi-cameral state legislatures. Further, since a disqualifying interest is usually defined as one that is unique to the official, most state legislation will enlarge the benefited group to the extent that such a distinct personal interest will seldom arise.[61] This is the case, for example, when a farmer-legislator votes for an increase in the level of parity.

Thus, at the state level of government, statutes embodying criminal sanctions for gross misconduct that can readily be determined by applying objective standards, and the promulgation and interpretation of a code of conduct by an independent body are needed to clarify the problems and questions in the conflict of interest area. In the less easily defined area where objective standards cannot be readily applied, strict rules and judicial intervention should be prohibited. Here the tribunal of the electorate, not the courts, is the most qualified body to judge whether their representatives have violated these standards. For it is consistent with the agency position which a legislator holds that his constituents, the electorate, rather than an independent and unrelated court, determine whether he has gone beyond the discretionary duties his constituents have entrusted in him.

On the local level courts avoid these problems by characterizing the activity as being judicial or quasi-judicial rather than legislative.[62] The rationale underlying this distinction is probably based upon the reasoning that if the prohibited activity can be characterized as legislative, the courts lack power to review the problem because it may encompass elements of discretion on the part of the individual councilman that are exclusively his as a legislative member. A recent example of such judicial intervention on the local level occurred in the case of *Wilson* v. *City of Iowa City*.[63] There the Iowa Supreme Court invalidated a resolution of the city council defining the boundaries of a proposed urban renewal district because certain members of the city council either owned property within the proposed district or were officials of an institution that owned property within that district. The

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[59] *See, e.g.*, CALIF. CONST. art. III, § 1; ILL. CONST. art. III; OKLA. CONST. art. IV, § 1.

[60] 75 HARV. L. REV. 423, 424 (1961).

[61] *Id.*

[62] *See, e.g.*, City of Miami Beach v. Schauer, 104 So.2d 129, 131 (Fla. 1958); Gardner v. City of Bluffton, 173 Ind. 454, 460, 89 N.E. 853, 855 (1909); Piggott v. Borough of Hopewell, 22 N.J. Super. 106, 110, 91 A.2d 667, 669 (1952).

[63] 165 N.W.2d 813 (Iowa 1969).

Iowa court indicated that not only an actual but also a potential conflict of interest on the part of any councilman would result in invalidation of the specific legislation even though the disqualified councilman's vote would not alter the result.

The ramifications of such a strict ruling are devasting. In invalidating the city council's resolution because of certain councilmen's conflicting interests the Iowa court very effectively prevented the city of Iowa City from initiating an urban renewal program. Such a decision may also deprive a municipality of the services of highly qualified and duly elected or appointed officials.[64] Therefore, because of the consequences of such a rule, it is imperative that the voters choose to represent them a man or woman who possesses neither an actual nor potential conflict of interest. Otherwise, if a conflict does arise, important municipal improvements such as improvements of utility service, street maintenance, or slum clearance may be abrogated or at least impeded until a subsequent election. Even then a disinterested minority may deliberately re-elect a disqualified member so as to effectively thwart the legitimate will of the majority. Moreover, a candidate for public office may intentionally declare no conflicts of interest with proposed municipal improvements only to acquire a conflicting interest before the proposal is enacted as an ordinance or to reveal a conflict after the ordinance is enacted.

2. *Alternatives to Complete Judicial Invalidation*

Some courts, cognizant of the ramifications of complete invalidation, have upheld the legislative action and simply disqualified the legislator where the result would have been the same despite his disqualification.[65] This approach is advantageous because it deters improper conduct on the part of individual councilmen by nullifying their votes without preventing city government from enacting measures clearly within its defined powers.

In approval of this approach, the Iowa General Assembly recently enacted a law which sharply limits the occasions for invalidating a council resolution or ordinance.[66] Under the new Iowa law a city council's ordinance or resolution is valid unless the vote of the councilman with the conflicting interest was decisive in the passage or re-

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[64] *See* Van Italie v. Borough of Franklin Lakes, 28 N.J. 258, 269, 146 A.2d 111, 116 (1958).

> Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. But in doing so they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. *Id.*

[65] *See* Singewald v. Minneapolis Gas Co., 274 Minn. 556, 558, 142 N.W.2d 739, 740 (1960).

[66] *See* ACTS OF 63RD IOWA GEN. ASSEMBLY, House File 733 (1969 IOWA LEGISLATIVE SERVICE 42).

jection of the measure.[67] This law recognizes that, except in the area where his personal interest alone is the subject of proposed legislation, it is extremely difficult, if not impossible, to determine when a legislator's discretionary action is beyond the scope of his agency as a representative of his constituents. As such, this law reflects the view that a representative's constituents are more qualified than the courts to determine whether a legislator has violated the public trust invested in him.

Even with the Iowa statute in force important city ordinances might be unnecessarily invalidated. Situations may arise where disqualification of a legislator's vote will change the outcome because the council would then be without a quorum. In such situations provisions should be made whereby the instruments of direct participation of the voters could be employed as an alternative to invalidation of the proceedings.[68] These direct participatory devices enable voters to vote a representative out of office at times other than the regular scheduled elections and directly enact certain legislative proposals without operating through the orthodox channels of the city council. Therefore, instruments of direct participation such as the recall, initiative or referendum should be used as an alternative to invalidating ordinances.

Recall is the power of a given percentage of the voters to require the holding of a special election upon the question of whether a city councilman should be removed from office before the end of his term.[69] If a councilman who has a conflicting interest casts the decisive vote, refuses to disqualify himself, and thereby subjects the council's entire action to invalidation, the councilman could be recalled. The recall is premised upon the assumption that an incumbent is unfit to continue to hold his official position.[70] The petitioners for recall promulgate a statement of their objections to the officer's continuance in his post and then proceed to elicit the requisite number of signers for the petition demanding an election for recall.[71] If enough signatures are valid, the petition goes to the city council which is then required to call a special election within a period of time specified by law.[72] To effectuate the recall a majority of those voting must affirmatively request recall of

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[67] *Id.*

[68] Recall is the legal power of a given percentage of the voters to call an election upon the question of removing some public official, usually an elected official, from office before the end of his term. The initiative is essentially a device whereby a given percentage of the electorate is given the legal power to draft and submit measures for adoption as ordinances requiring a public referendum thereon in case the council fails to or is not empowered to enact them.

The referendum is basically a device whereby voters specifically voice their opinions on a particular item of legislation in an election by voting approval of or disagreement with a specific item of proposed legislation. In certain forms it is merely a consensus measuring device; in others it is a device whereby the lawmaking power is placed in the hands of the electorate.

[69] *See* W. Anderson, American City Government 268 (1925); W. Munro, The Government of American Cities 350-51 (1912); J. Pate, Local Government and Administration 148-49 (1954).

[70] *See* authorities cited note 69 *supra*.

[71] *See* authorities cited note 69 *supra*.

the elected official.[73] In addition, threat of a recall may be used to indicate citizen disapproval of a councilman's conduct and, thus, persuade him to refrain from participating in municipal action in which he may have a conflicting interest. This can be employed to force a councilman who intends to invalidate municipal action by deliberately voting to either disqualify himself or be subject to removal from office.

Although it is an alternative to complete invalidation of proceedings tainted with conflicting interests, there are many reasons why use of the recall is an inappropriate substitute to judicial invalidation. The recall is often expensive, time consuming, confusing, and ineffective.[74] In situations where it is important that an ordinance be enacted as rapidly as feasible, postponement of action on the proposed legislation because of the time consumed in implementing the recall may effectively block this legislation in the critical period in which it may be vitally needed. Furthermore, the fear of having to account for every public act at the expense of early removal from office may inhibit legitimate conduct or deter qualified persons from entering public life.

Another alternative to avoid invalidation of proposed ordinances is the use of the initiative. This is a device whereby a given percentage of the electorate is given the legal power to draft and submit measures for adoption as ordinances. A public referendum is required on them if the council fails to or is not empowered to enact them.[75] With the initiative as the enacting device, the ordinance enacted and the elected councilman are totally unrelated. Hence, this device allows voters to elect whomever they desire and still enact desired ordinances untainted with conflicts of interest.

A third alternative to judicial invalidation of proposed legislation is the use of the referendum. Although found in several different forms, in its most fundamental form a referendum is a method by which important legislation is submitted to a direct vote of all the people.[76] It may be employed to obtain the opinion of the voting public on important ordinances that determine general policies of a municipality. Hence, the decision whether to initiate urban reedvelopment in a proposed district would be a good example of what would be the proper subject of a referendum.[77]

The required number of signers is usually high, generally at least 25 percent of the number of electors who cast ballots in the previous general election. When the required number of signers is attained, a city clerk or other appointed official verifies the validity of the signatures. W. ANDERSON, AMERICAN CITY GOVERNMENT 268 (1925).

[73] W. ANDERSON, AMERICAN CITY GOVERNMENT 268 (1925).

[74] *See* id. at 270.

[75] *See* W. ANDERSON, AMERICAN CITY GOVERNMENT 265 (1925); W. MUNRO, THE GOVERNMENT OF AMERICAN CITIES 321 (1912); J. PATE, LOCAL GOVERNMENT AND ADMINISTRATION 148 (1954).

[76] *See* W. ANDERSON, AMERICAN CITY GOVERNMENT 265 (1925).

[77] *See generally* W. ANDERSON, AMERICAN CITY GOVERNMENT 266-68 (1952); MUNRO, THE GOVERNMENT OF AMERICAN CITIES 321-50 (1912).

[77] At the present time use of the referendum to approve urban renewal projects would be limited, since some states provide that it can only be approved by a resolution by the city council. *See* IOWA CODE ANN § 403.5 (Supp. 1969).

Generally, there are three types of referenda. In the first type, certain categories of legislative matters such as charters, charter amendments, and bond issues are required to be submitted to the vote of the electorate.[78] A referendum of this nature is intended to give the voters a check upon municipal government in matters concerning important public interests. The second form of referendum is similar to a consensus measuring device. It is used when a municipal charter confers exclusive ordinance-making power upon the city council, and the council, in order to determine the opinion of the people on a specific question, submits the question to a vote of the people.[79] This type of referendum confers no lawmaking power upon the electorate,[80] and, therefore, is ineffective in avoiding invalidation of conflict of interest legislation. The third and most common form of referendum is a device by which a given percentage of the voters are given the legal power to prevent the enforcement of a newly enacted ordinance and to require a public referendum on the question of whether it shall become law.[81] If an ordinance is suspended by the petition, the city council may call a special election to decide the question. However, the expense of a special election will usually forestall any action until the next general election.

Under the third type of referendum a councilman could be re-elected without jeopardizing the enactment of an ordinance that is in the public interest. Such a plan would not force the electorate to choose between a proposed ordinance and an incumbent who may be especially qualified in all respects except for a specific disqualifying interest. If an ordinance which was voted upon by a councilman with an apparent conflict of interest is later approved by the referendum that ordinance would be valid despite the disqualifying interest of a specific councilman. The referendum would indicate that the apparent self-interest of the disqualified councilman was actually in accord with the public will. Therefore, the reason for invalidating such an ordinance would no longer exist. By referendum the electorate became the legislating body.[82]

Since it is highly impractical, because of expense and confusion, for all municipal action to be subject to referral, it is necessary to limit local referenda to items concerning only important policy considerations. However, a provision specifically requiring referral when a measure is subject to potential invalidation because of conflicting interests seems essential even though there may be some extra expense and possible delay. Such a system would allow the machinery of a democratic government to operate while deterring violations of the public trust by corrupt and indiscreet public officials.

Theoretically, at the state level, the initiative, referendum, and recall are viable checks upon legislation that is the product of official misconduct. In reality, however, because of the size of nearly every state and the remoteness of legislators from their constituents, these de-

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[78] *See* W. Anderson, American City Government 266 (1925).

[79] *Id.* at 266-67.

[80] *Id.* at 267.

[81] *Id.*

[82] 75 Harv. L. Rev. 423, 424 (1961).

vices are extremely impractical as checks upon legislative misconduct and as alternatives to judicial invalidation.

III. Conclusion

In the conflict of interest area there is a basic need to define by what standards a conflict of interest is to be determined. Once certain conflicts of interest are ascertained, attention must then be directed toward implementing devices that will, if possible, effectively prevent individual legislators from acquiring such conflicts. This may entail bringing direct sanctions against the individual concerned or simply calling it to his attention. When a conflict of interest arises in specific legislation, the crucial issue of the legislation's legitimacy arises. The traditional approach of invalidating this legislation is extremely harmful because it may effectively impede the legislative process. Hence, the Iowa rule which permits invalidation only where the conflict of interest may have been decisive in enacting the legislation is a viable solution to the problem. However, where the Iowa rule sanctions invalidation, conflicts of interest legislation could then be saved and circumvented by one of several devices of direct voter participation. Under direct participation, the voters could then, either in a subsequent election or by referendum, decide whether the legislation he voted upon is in accord with their interests. This approach recognizes the need for clarifying and controlling conflicts of interest problems while enabling the people a legislator represents, not the courts, to determine when he has violated the public trust invested in him.

CONFLICTS OF INTEREST OF STATE LEGISLATORS*

I. The Problem

State legislators continue to be governed in their choice of nonlegislative occupations primarily by their own consciences and by the occasional voice of the electorate, despite the fact that almost every state legislature has considered the general area of public servants' conflicts of interest and has attempted at least partial statutory controls.[1] Certain acts constituting a violation of the legislator's ethical responsibilities — bribery, blackmail, and dishonest election practices, for example — are easily delineated and proscribed; however, serious problems of definition arise in the more subtle area of conflicts of interest.[2] The conflict may involve actual division of loyalties as in cases in which the official acts in his public capacity on matters which affect him in his private capacity.[3] Often the conflict is only potential or the problem centers around the appearance of misconduct which itself undermines public confidence in government.[4] There is also the possibility of unfair advantage accruing to the legislator who deals with state agencies. It should be the aim of any attempt to deal with public servants' conflicts of interest to promote both the actual practice and the public appearance of impartiality and objectivity in government operations without disqualifying present and potential capable public servants through excessively stringent restrictions.[5]

To be effective, the guidelines expressing this balance must be closely tailored to the circumstances of those whose behavior is to be governed. The position of the legislator in most states is unique in that his job is customarily part-time only[6] and he receives regular compensation from

* Acknowledgement is made of the kind cooperation of the attorneys general and the legislative reference services who provided source materials and personal information otherwise unavailable. Over 65 communications were received from 38 states. Recent statutory history and other references not otherwise documented are taken from these sources.

[1] See Note, *Conflict of Interests: State Government Employees*, 47 Va. L. Rev. 1034, 1042 n.26 (1961). See generally Eisenberg, *Conflicts of Interest Situations and Remedies*, 13 Rutgers L. Rev. 666 (1955).

[2] See N.J. Legislative Comm'n on Conflicts of Interest, Report to the Senate and General Assembly 15 (1957) [hereinafter cited as N.J. Report].

[3] Similar problems arise when the legislator in another capacity acts for a party whose interests are adverse to those of the state and when, in discharging obligations of a private nature, the legislator is required to apply knowledge gained exclusively for use in his official capacity.

[4] See Special Comm'n on the Federal Conflict of Interest Laws, Ass'n of the Bar of the City of New York, Conflict of Interest and Federal Service 17 (1960) [hereinafter cited as Bar Association Report].

[5] "In the long run, the objective is a policy which neither sacrifices governmental integrity for opportunism, nor drowns practical staffing needs in a sterile moralism." [1961–1962] Nev. Ops. Att'y Gen. 112.

[6] Regular sessions are convened only biennially in all but twenty states and are subject to specific time limitations in all but sixteen. In Wyoming, for example, the biennial session is limited to forty calendar days. Council of State Governments, The Book of the States 1962–1963, at 42–43 (1962).

sources other than the state.[7] Few occupations are sufficiently flexible to permit time off for legislative participation: statistics indicate that most of the legislators are lawyers, farmers, merchants, or insurance or real estate brokers.[8] Of these, all except lawyers frequently have a direct personal interest in state legislation, while lawyers may have similar interests in a representative capacity.[9] The prevalence of these outside occupations with a natural proclivity toward government involvement militates toward stringent regulation of legislators' outside activities; yet it would seem undesirable for the imposition of such restrictions to result in a further narrowing of the occupational classes from which legislators will be drawn. Furthermore, in all states there is hardly an item of concern to any state employee or officer which does not fall under the aegis of the legislature. Included are many subjects perennially under its scrutiny which affect every legislator no matter what his occupation, such as tax rates, auto license fees, and utility rates; [10] other concerns such as "blue sky" laws, teachers' qualifications, or barbers' licenses are likely to affect certain lawmakers in their chosen fields.

The fact that the legislator holds office by virtue of public election may variously affect his susceptibility to conflicts of interest. On the one hand, the importance of popularity may deter conduct which is potentially unpalatable to the public; [11] conversely, the need for campaign funds raised through private contribution may create personal obligations generative of conflicts. In acting as representative of a particular geographical group, the legislator may be faced frequently with situations in which his personal judgment would lead him to action contrary to the interests of his electors. While such a conflict is inherent in the structure of representative democracy,[12] a resolution in favor of his electors may raise ethical issues when the particular constituents concerned are major campaign contributors, employers, clients, or associates.[13]

In many states there has persisted in this area a reluctance to legislate, which is variously explained by constitutional limitations,[14] the notion

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[7] See Kaplan, Book Review, 68 HARV. L. REV. 1097, 1101 (1955). The same is true of the British Parliament, some of whose members are supported by outside organizations, particularly trade unions. N.J. LAW REVISION AND LEGISLATIVE SERVICES COMM'N, MEMORANDUM: IN RE: CONFLICTS OF INTEREST AMONG GOVERNMENT OFFICERS AND EMPLOYEES IN GREAT BRITAIN 2–3 (1957). For current levels of legislative salaries, see COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 6, at 44–45.

[8] See AUERBACH, GARRISON, HURST & MERMIN, THE LEGAL PROCESS 583 (1961); COMM. ON AMERICAN LEGISLATURES, AMERICAN POLITICAL SCIENCE ASS'N, AMERICAN STATE LEGISLATURES 70–73 (1954).

[9] See State v. Foord, 142 Conn. 285, 113 A.2d 591 (1955) (bribery conviction of legislator who had accepted "legal services" fee upon award of monopoly to client). Compare Stillwell, *Texas: Owned by Oil and Interlocking Directorates*, in OUR SOVEREIGN STATE 330–31 (Allen ed. 1949) (hereinafter cited as ALLEN).

[10] See Reilly v. Ozzard, 33 N.J. 529, 541–50, 166 A.2d 360, 370 (1960).

[11] *But see* note 31 *infra*.

[12] BAR ASSOCIATION REPORT, *op. cit. supra* note 4, at 14–15.

[13] "When a member of the General Assembly fails to vote his honest convictions for fear of losing a client, then the cause of democracy suffers." Special Message on Conflict of Interest by Governor DiSalle to the 104th General Assembly of Ohio, Jan. 30, 1961, at 6.

[14] See pp. 1214–15 & note 163 *infra*.

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[18] See Rule 22(7), Official Rules of
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that "morality cannot be legislated," [15] and denials that the problem is of importance.[16] In reconsidering these arguments this Note, after reviewing the effectiveness of the existing nonstatutory tools, will proceed to discuss the form, scope, and content of possible enactments in the light of experience with existing legislation. It must be emphasized at the outset that the preliminary inclusion of any class of behavior within the area to be controlled does not mean that such behavior is improper. The classification imports only an awareness that conduct within the area is — or may appear to be — peculiarly susceptible to corrupting pressures and that ethical guidelines may be necessary to instruct the legislator in protecting himself from such forces and from an unsavory public appearance.

II. Nonstatutory Solutions to the Problem

A. The Legislators

To the extent that an individual legislator is able to perceive the threat of a conflict of interest and his personal sense of responsibility compels him to take remedial or precautionary measures, no external stimulus is necessary. In practice, however, the effectiveness of internal checks may depend on the likelihood of an external challenge; moreover, there will undoubtedly be areas in which individual perception is incomplete.[17] The existence of a formal or informal system of checks within the legislature itself would provide both the threat of external challenge and the advantage of pooled perception. If the challenge were personal, informal, and before the fact, the legislator could accede to the challenger's standards by a private decision to eliminate the cause of the conflict or, alternatively, submit his problem to his fellow legislators. If the conflict were publicly imminent or already existed, however, the challenge would take overt institutionalized form: compulsory disqualification, by ruling [18] or resolution,[19] from participation in a pend-

[15] See, e.g., Mass. Legislative Research Council, Report Relative to Conflict of Interest 11 (1961) [hereinafter cited as Mass. Report].

[16] Correspondents in two states have characterized the problem as "little" or nonexistent. Letter From S.D. Director of Legislative Research to the *Harvard Law Review*, Feb. 2, 1962; Letter From an Assistant Attorney General of Va. to the *Harvard Law Review*, March 15, 1962.

[17] Mont. Const. art. V, § 44 provides that "a member who has a professional or private interest in any measure or bill . . . shall disclose the fact to the house of which he is a member, and shall not vote thereon."

"In the two sessions that I have observed, no legislator to my knowledge has ever passed a vote because of a conflict of interest; yet it is quite obvious that real conflicts exist in some instances. The problem, of course, lies in definition and the broad language in the constitutional provision has never been narrowed by statute or court interpretation." Letter From Executive Director of Mont. Legislative Council to the *Harvard Law Review*, Feb. 6, 1962.

[18] See Rule 22(7), Official Rules of Procedure Adopted by the House of Representatives, State of Hawaii, First State Legislature, General Session, 1961, providing for disclosure of interests by the legislator and a ruling on the disqualifying effect of such interests by the speaker of the house. *But see* Conn. State Journal, Nov. 1960, p. 10: "Any outward testing . . . in this connection usually ends up with the presiding officer . . . and the ruling of the chair usually leaves it to the conscience of the individual legislator."

[19] Compare the now unusual approach of Kan. Senate Rule 19: "Any Senator, who is directly interested in a question, may be excused from voting . . . . [after

ing legislative matter; [20] censure by his house for past improprieties based on existing rules or on an *ad hoc* majority determination; [21] or, finally, expulsion for conduct unbecoming a member.

That a challenge to interested voting made before the fact, even on the floor, normally can be handled amicably and without any invidious implications may be illustrated by the following excerpt from the *Wisconsin Senate Journal for 1937*:

> Senator Callan rose to the point of order that Senator Leverich . . . was not entitled to vote on the bill as it contains appropriations to [the Agricultural Authority, of which he is an incorporator] . . . .
>
> The president held that as a matter of propriety and to remove the possibility that this bill might on this ground be invalidated if enacted into law [the senator] . . . should refrain from voting . . . .[22]

Even this mild sanction may be resisted if pressed, however:

> Senator Duel rose to the point of order that . . . Senator Leverich might be the beneficiary of lucrative offices or appointments [in the Authority] . . . and under the rule of Jefferson's Manual . . . should retire when the bill is under consideration.
>
> The president held the point of order not well taken and . . . [since the] Authority was a . . . non-profit corporation [and] no profits could accrue to any of the incorporators thereof [he] . . . therefore reversed his ruling on the [earlier] point of order . . . .[23]

The most serious limitations on the efficacy of after-the-fact checks in the legislature stem from considerations of political reality — especially where egregious defalcations are suspected. Two recent examples, almost simultaneous but unconnected, demonstrated this fact. In both cases, individual legislators made public charges of improper activities by fellow legislators.[24] The merits of the two allegations are less relevant than the animus with which the two legislatures received them. In New York the Assembly Committee on Ethics and Guidance devoted a significant portion of its report on conflict charges against the Speaker of the Assembly to biting innuendo and outright accusations of bad faith and misrepresentation on the part of the accuser.[25] Said a leading editorial, "within the terms of its title of Committee on Ethics and Guidance it is incomprehensible to us that this bipartisan body could find no single word of unfavorable comment to utter on . . . [the accused's] judgment, taste or candor as to his relationships . . . ." [26] Neverthe-

stating his reasons, by] a two-thirds majority of those voting . . . ." Letter From Fiscal Analyst of Kan. Legislative Research Council to Director, N.M. Legislative Council, Dec. 28, 1961.

[20] See, *e.g.*, MASS. REPORT, *op. cit. supra* note 15, at 16: "Any member . . . has the right to demand disqualification of another member for violation of . . . rules [forbidding members to act on matters concerning their private interests]. And this procedure has been exercised, though rarely."

[21] See, *e.g.*, p. 1213 & articles cited note 28 *infra*.

[22] P. 137, quoted in Letter From Chief of Wis. Legislative Reference Library to the *Harvard Law Review*, Feb. 2, 1962.

[23] *Id.* at 138.

[24] See N.Y. Times, Feb. 22, 1962, p. 1, col. 5; Boston Herald, Feb. 22, 1962, p. 1, col. 1.

[25] *E.g.*, COMM. ON ETHICS AND GUIDANCE, N.Y. STATE ASSEMBLY, REPORT 26 28 (1962) [hereinafter cited as ETHICS COMM. REPORT].

[26] N.Y. Times, Feb. 22, 1962, p. 24, col. 1. The paper did admit that the accuser "in his zeal had overstated the case." *Ibid.*

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less the Assembly accepted that report by a vote of 143 to 1, since the entire affair had been converted into a political test of confidence in the Speaker.[27] In Massachusetts the rebuke was even more direct: the committee was called not to investigate the charges made but specifically to challenge the accuser to substantiate them or face a recommendation of censure. The report recommending censure was described as "one of the most vitriolic condemnations ever handed a legislator by a body of his fellows." [28]

Such evidence suggests that reliance on internal *ad hoc* sanctions after the fact is unrewarding. The effective role for the legislators themselves is that of establishing in advance and without reference to any particular case a general set of ground rules and an external mechanism to implement them. Before a legislature could be persuaded to delegate such powers, however, there probably would have to be a showing that existing institutions are inadequate for the task of guiding and policing members' conflicts of interests.

B. The Electorate

A stock answer to the demands for controls on legislators' ethics is that lawmakers must periodically subject their records to voter scrutiny.[29] The public, it is said, will receive complete information through the self-interested revelations of each candidate's opponents, and by means of the ballot the ethical standards of the voter will be imposed on his legislative representative.[30] However accurate this description may be as applied to national and statewide elections, it is unlikely to be meaningful in local legislative races, where the campaigns seldom are hard-fought and the results may depend more upon party affiliation than upon substantive issues.[31] Moreover, the conflict-of-interest area encompasses subtle ethical problems — situations in which the behavioral norms are not self-evident; campaign issues are, by contrast, normally gross and easily understood. Indeed, the candidate who raises a narrow charge based on conflicts of interest without clear statutory support runs the risk of being misunderstood or perhaps being politically embarrassed through revelations of some facet of his own connections, possibly innocent, which would provide material for a return attack vitiating the utility of the original charges. And success in a campaign

[27] N.Y. Times, Feb. 22, 1962, p. 1, col. 5. The absence of support from even the accuser's own party may have been due to the "club" atmosphere of most legislatures which causes any attack on an individual legislator to be viewed as an attack on the entire body. In Congress this attitude is reflected in a "rule of congressional courtesy" that no member may make a personal criticism of another on the floor of either House. See Time, March 8, 1963, p. 26.

[28] Boston Herald, Feb. 21, 1962, p. 5, col. 3. See also *id.*, p. 28, col. 8.

[29] See, *e.g.*, ETHICS COMM. REPORT, *op. cit. supra* note 25, at 34: "The legislator goes back to his constituency every two years where his work is reviewed by his constituency and subjected to criticism and attack by the opposition."

[30] "Self-discipline and the voters must be the ultimate reliance for discouraging or correcting . . . abuses." Tenney v. Brandhove, 341 U.S. 367, 378 (1951); *cf.* Election and Election Privileges Comm., Report to the 58th General Assembly of Iowa 39 (1958): [T]he chief hope . . . is based on . . . the power of the voter to defeat any party or candidate who does not live up to the highest standards."

[31] Even in the face of active opposition and his own inability to campaign, a Massachusetts legislator was elected easily while serving a jail sentence for defrauding the state. See Boston Herald, Dec. 3, 1962, p. 42, col. 4.

despite the establishment of conflicts charges may be interpreted as public approval of the suspect connections.[32] The primary objection, however, to relying upon the voters to police conflicts of interest is that such control — even if it operates efficiently — provides an inconsistent and sporadic sanction without any rational set of primary standards by which legislators can measure a projected action before the fact.

C. The Courts

The state judiciary, as the traditional arbiter of legislative actions and as the constitutional articulator of the public conscience, would seem to be the most appropriate branch of the government to provide an independent check on legislators' ethics. Yet the courts have in fact taken little responsibility. Judicial hesitancy to enter the field appears unwarranted in light of analysis of state constitutions and judicial precedents which reveals that neither necessarily prohibits the judiciary from exercising some degree of supervision.

1. Constitutional Aspects. — The typical state constitution contains three provisions relevant to judicial supervision of legislative ethics. The first establishes a separation of powers but does not define the extent to which the legislative and judicial departments should interact.[33] Some explicit guidance is provided in the second typical provision: "Each House shall . . . be the judge of the elections, returns and qualifications of its own members."[34] Cases under the identical portion of the federal constitution, which may be of assistance by analogy, establish that such language does not strip the judiciary of power to act in this area,[35] and some state courts have taken a stronger view.[36] The most formidable obstacle to judicial initiative is the third type of provision, asserting the power of each house to "determine the rules of its own proceedings, punish members for disorderly conduct, and, with the consent of two-thirds, expel a member . . . ."[37] The narrow language of such articles would not seem to preclude courts from considering aspects of legislators' ethics manifested by activities off the floor of the legislature.[38] The Supreme Court, construing the equivalent clause in the

[32] See BAR ASSOCIATION REPORT, *op. cit. supra* note 4, at 15: "[I]f the constituency continues to elect a man in spite of improprieties, some leeway must be left for the principle that the people get the kind of government they deserve."

[33] *E.g.*, OKLA. CONST. art. IV, § 1; see Kilbourn v. Thompson, 103 U.S. 168, 190–91 (1881).

[34] *E.g.*, N.Y. CONST. art. III, § 9.

[35] See Burton v. United States, 202 U.S. 344, 366–67 (1906) (construing statute to proscribe receipt of compensation for services rendered by a congressman before a department).

[36] See State *ex rel.* Jones v. Lockhart, 76 Ariz. 390, 265 P.2d 447 (1953) (applying quo warranto to a state legislator); State *ex rel.* Benton v. Elder, 31 Neb. 169, 47 N.W. 710 (1891) (ordering house speaker to open returns despite contrary resolution of both houses); People *ex rel.* Myers v. Haas, 145 Ill. App. 283 (1908) (ordering clerk to notify governor of legislator's improper dual office holding); People *ex rel.* Sherwood v. State Bd. of Canvassers, 129 N.Y. 360, 29 N.E. 345 (1891) (refusing to order certification of dual-office-holding senator).

[37] *E.g.*, TEX. CONST. art. 3, § 11.

[38] The notion of legislative privilege may provide separate protection for actions directly connected with legislative functions. See Tenney v. Brandhove, 341 U.S. 367, 372–75 (1951). But improper activities in other capacities should not be protected merely because the impropriety arises from the fact that the actor is also a legislator. See Burton v. United States, 202 U.S. 344, 366–67 (1906); Reilly v. Ozzard, 33 N.J. 529, 545, 166 A.2d 360, 368 (1960).

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[39] United States v. Ballin, 144
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[40] See Tool Co. v. Norris, 69 U.S

[41] *Cf.* United States v. Smith, 2
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[42] Note, 100 U. PA. L. REV. 121;

[43] PA. CONST. art. 3, § 33. See al
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[44] See Note, *supra* note 42, at 12

[45] *E.g.*, NEB. CONST. art. III, § 9;

[46] See, *e.g.*, Briggs v. Neville, 10
1952] NEB. ATT'Y GEN. REP. 378;
Nicholson Co. v. State, 32 S.D. 18
corporation void because legislator
and stockholder of the company).

[47] 10 U.S. (6 Cranch) 87 (1810)

[48] *Id.* at 131.

federal constitution, has indicated that the legislature's freedom to control even intramural affairs may be limited.[39] If the right to be governed by representatives whose judgments are untrammelled by the temptation of personal gain may be considered fundamental,[40] even the constitutional establishment of exclusive jurisdiction in the legislature over matters of legislative procedure should not absolutely bar the judiciary from taking a hand.[41]

A number of state constitutions contain provisions which may tend to facilitate rather than impede judicial control. The Pennsylvania constitution, noted for its "inherent distrust of the legislature," [42] is one of several which require legislators with personal interests in proposed bills to disclose that fact and refrain from voting.[43] No cases in Pennsylvania, however, appear to have asserted duties under this clause. Since Pennsylvania courts have construed related constitutional provisions as matters of internal procedure which the legislature could waive at will,[44] the disclosure and disqualification rule might be similarly devitalized. Explicit constitutional limitations upon legislators' contracts with the state have proved more successful.[45] In Nebraska, for example, both the courts and the attorney general have enforced this and related prohibitions strictly without supportive legislation.[46]

2. *Judicial Abstention.* — The frequent statement that a court will not inquire into the motives of a legislative body or assume them to be wrongful is traceable to the landmark case of *Fletcher v. Peck*.[47] However, examination of Chief Justice Marshall's opinion reveals that it does not support such a broad statement of the rule. The plaintiff alleged breach of title covenants by his vendor, claiming that the original grant of the land in question was defective because of the flagrant corruption of the legislature which had made it as part of a sale of thirty-five million acres of state land to speculators for half a million dollars. In holding that an attack on the grant could not be grounded on the supposedly improper interests of the legislators, Marshall specifically noted that grave questions of ethical impropriety should not be forced upon the Court in the attenuated and collateral form of a suit between two private litigants far removed from the original enactment.[48] Where the remoteness element is absent, Marshall indicated in dictum two ad-

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[39] United States v. Ballin, 144 U.S. 1, 5 (1892). Nor could the Nebraska legislature vote a member compensation for his services to a legislative investigating committee in the face of a constitutional provision that members receive no pay other than salary. Wilkins v. State, 116 Neb. 748, 219 N.W. 9 (1928).

[40] See Tool Co. v. Norris, 69 U.S. (2 Wall.) 45, 54–55 (1865).

[41] *Cf.* United States v. Smith, 286 U.S. 6 (1932) (court may interpret Senate rule).

[42] Note, 100 U. PA. L. REV. 1217 (1952).

[43] PA. CONST. art. 3, § 33. See also, *e.g.*, OKLA. CONST. art. V, § 24; TEX. CONST. art. 3, § 22.

[44] See Note, *supra* note 42, at 1219.

[45] *E.g.*, NEB. CONST. art. III, § 9; OKLA. CONST. art. V, § 23.

[46] See, *e.g.*, Briggs v. Neville, 103 Neb. 1, 3, 170 N.W. 188, 189 (1918); [1951–1952] NEB. ATT'Y GEN. REP. 378; [1949–1950] *id.* at 220. See also Norbeck & Nicholson Co. v. State, 32 S.D. 185, 142 N.W. 847 (1913) (state contract with corporation void because legislator voting for the authorizing act was president and stockholder of the company).

[47] 10 U.S. (6 Cranch) 87 (1810).

[48] *Id.* at 131.

ditional qualifications on judicial intervention: consideration of the rights of innocent third parties not before the courts, and the practical difficulties of defining legislative misconduct.[49]

The cases in which courts have asserted a wide rule of presumptive judicial nonintervention typically involve situations within one or more of Marshall's three reservations. The exceptional situation occurs in the context of small sublegislative bodies like municipal councils and zoning boards, where the attacks are direct and immediate and the practical difficulties of clearly identifying a conflict of interest are removed by the directness of effect of the body's action on a small group. Courts that have recognized the need for judicial intervention in such cases have achieved the result not by creating rational and workable exceptions to the rule, but by describing the action of the sublegislative body as "quasi-judicial" and therefore outside the protection assumedly afforded "legislative" actions.[50] In two recent New Jersey cases,[51] for example, the "quasi-judicial" nature of the local council was found in the fact that it took testimony and weighed "conflicting public considerations" as to zoning ordinances. The classification appears arbitrary; the decisions could equally have been made by a "purely legislative" body.[52] Perhaps the judiciary should admit that the classification is artificial and conclusory, and look instead to the clarity of the conflict and the effect of a judicial remedy.[53] Such pragmatic criteria — similar to those set up by Marshall for the state bodies — tend to be met more frequently in the local body cases, where the scope of the actions is narrow, the number of votes small, and the identification of improper interests less difficult.[54]

3. Political Questions. — Another potential impediment to judicial remedy in the area of legislative conflicts of interest is the "political question" doctrine.[55] Mr. Justice Brennan, writing for the majority in *Baker v. Carr*,[56] has provided a useful list of conditions for invoking the doctrine, any one of which is sufficient. Relevant to the current problem are:

> a lack of judicially discoverable and manageable standards for resolving . . . [an issue]; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government . . . .[57]

[49] *Id.* at 230.

[50] See, e.g., Low v. Town of Madison, 135 Conn. 1, 60 A.2d 774 (1948).

[51] McNamara v. Borough of Saddle River, 64 N.J. Super. 426, 166 A.2d 391 (App. Div. 1960); Aldom v. Borough of Roseland, 42 N.J. Super. 495, 127 A.2d 190 (App. Div. 1956).

[52] Compare City of Miami Beach v. Schauer, 104 So. 2d 129 (Fla. Dist. Ct. App. 1958), classifying amendatory zoning ordinance as a "legislative act" and upholding ordinance resulting in half a million dollars benefit to board member.

[53] See 57 MICH. L. REV. 423 (1959); *cf.* Zell v. Borough of Roseland, 42 N.J. Super. 75, 125 A.2d 890 (App. Div. 1956) (dictum) (literal reading of statute precludes classification of function).

[54] Compare Wilkins v. State, 116 Neb. 748, 219 N.W. 9 (1928); Norbeck & Nicholson Co. v. State, 32 S.D. 189, 142 N.W. 847 (1913).

[55] See generally Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925); Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1925).

[56] 369 U.S. 186 (1962).

[57] *Id.* at 217.

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Admittedly the courts have had little experience discovering and applying standards in the specific context of legislators' conflicts of interest,[58] but criteria of improper conduct may be drawn from such analogous areas as conflicts of interest of fiduciaries,[59] corporate officers, judges, local legislators,[60] and nonlegislative public servants.[61] Courts have transplanted remedies from the nongovernmental to the governmental sphere for other public servants but not for the legislator.[62] Justice Brennan's "discretion" condition is merely a variant of Marshall's concern for clarity of the ethical issue. As for the third condition, the meaning of the "respect due" the legislature is not clear. It might assume the nature of an intragovernmental "comity," aimed at assuring the smooth functioning of each branch in the areas in which it is most competent, without unnecessary intervention from other branches.[63] This principle should not apply where a court realizes that the legislature is unlikely to fulfill its obligations in the area of its primary competence.

Perhaps another type of respect may be contemplated: deference to a superior power. A court should be wary of taking any action which threatens its independent capacity to deal with its normal judicial business. State judges generally do not have the protected tenure provided their federal counterparts,[64] and legislators may be in a position to nullify judicial reforms in a variety of ways.[65] The harm done by any such legislative reaction might outweigh the benefit accruing from the exercise of control over a single case of conflicts. Thus state judges would have to consider matters of practical politics and the state of public opinion to be certain their decisions would not cause adverse repercussions. Even if such factors were proper for judicial consideration, they seldom could be assessed with certainty. Courts would be likely to run the risk of legislative retaliation only in the most important cases. State courts have on occasion confidently approached related matters of legislative behavior, indicating that the scales can balance toward

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[58] *But see*, e.g., cases cited note 54 *supra*.

[59] See generally Haggerty, *Conflicting Interests of Estate Fiduciaries in New York and the "No Further Inquiry" Rule*, 18 FORDHAM L. REV. 1 (1949).

[60] See, e.g., Griggs v. Borough of Princeton, 33 N.J. 207, 162 A.2d 862 (1960).

[61] See, e.g., Clarke v. Town of Russia, 283 N.Y. 272, 28 N.E.2d 833 (1940) (town board member could not have contract with town).

[62] For a suggested reform, see Lenhoff, *The Constructive Trust as a Remedy for Corruption in Public Office*, 54 COLUM. L. REV. 214 (1954).

[63] It is true, however, that the disposition of a case on the voluntary basis of "comity" implies an affirmation of power to decide the merits and, as such, may stimulate the legislature to act. *Cf.* Gomillion v. Lightfoot, 364 U.S. 339, 346 n.7 (1960).

[64] See, e.g., ALA. CONST. art. 6, § 155 (judges elected every six years).

[65] Recent developments in two states emphasize this possibility. In Oregon the attorney general ruled that common law principles prohibited contracts between legislators and the state. [1953–1954] 26 ORE. ATT'Y GEN. BIENNIAL REP. AND OPS. 114. In response the legislature enacted provisions prohibiting only self-dealing and "own-body" contracts, casting one section in the form "an officer . . . may contract with the state . . . if . . . ." ORE. REV. STAT. §§ 279.360, 279.362 (1961). In Washington, the 1959 code of ethics for public officers, violations of which were a misdemeanor, did not include legislators as such, but the term "other public official" could be so construed. WASH. REV. CODE § 42.22.030 (1959). See MASS. REPORT, *op. cit. supra* note 15, at 27, listing Washington among states whose codes cover legislators. See also State *ex rel.* Jones v. Lockhart, 76 Ariz. 390, 394–95, 265 P.2d 447, 450 (1953). In 1961 the statute was amended to delete the ambiguous term. WASH. REV. CODE ANN. § 42.22.030 (1961). A similar term remains, however, in other parts of the code, e.g., WASH. REV. CODE § 42.22.040 (1959).

action.[66] Moreover, when legislators attempt to use the courts affirmatively to enforce improperly secured rights, judicial inaction may produce a desirable result.[67] In general, however, judicial control supplies only a random check on legislators' improprieties in a limited class of cases.

D. The Executive Department

In dealing with legislators' conflicts of interests, the executive department of each state has several tools of amelioration available to it, but only in a few states have any of them been utilized. Almost every governor has some degree of political power providing him a unique opportunity for direct action; he may withdraw political support from any legislator of his party found deficient in meeting the standards of the office and campaign for more honorable candidates and incumbents. Except in extreme cases, however, such direct action would seem less productive than measures which set advance standards and secure adherence by incumbent legislators. At two points individual legislators may personally come into contact with the executive department and thus provide a basis for assertion of executive initiative: appearances by members of the legislature before administrative agencies or offices representatively or individually, and awards of state contracts to firms with which they are connected. Investigations with regard to these matters, informational or accusatory, may be instituted by a governor's committee,[68] the comptroller general,[69] or others. When investigation reveals patent abuses, such as easing of licensing or bidding requirements, sanctions may be invoked against the executive personnel who facilitate such abuses and proceedings initiated to revoke the license or invalidate the contract. Often, however, no obvious wrongdoing will appear. A statistical study might show, for example, that on certain road projects the difference between the original offer made by the state and the ultimate award in land condemnations was invariably greater for the clients of legislators than for those of private lawyers.[70] For

[66] See, *e.g.*, cases cited note 36 *supra*; Hall v. Blan, 227 Ala. 64, 148 So. 601 (1933) (statute granting legislators expense allowance contravenes constitutional fixing of remuneration).

[67] See, *e.g.*, Wilkins v. State, 116 Neb. 748, 219 N.W. 9 (1928) (legislator suing for additional compensation); People *ex rel.* Sherwood v. State Bd. of Canvassers, 129 N.Y. 360, 29 N.E. 345 (1891) (legislator seeking to compel board to grant certificate of election); Norbeck & Nicholson Co. v. State, 32 S.D. 189, 142 N.W. 847 (1913) (legislator's corporation suing on state contract); *cf.* Tenney v. Brandhove, 341 U.S. 367, 378 (1951), differentiating cases of privilege "in which the defendants are members of a legislature" from those in which "the legislature seeks the affirmative aid of the courts to assert a privilege."

The Board of Tax Appeals applied an imaginative means of controlling legislative ethics when it disallowed deductions claimed by a gravel company for commissions paid to a state senator on sales of sand and gravel to the state, although the sales were by competitive bid and no state law prohibited such a relationship. Alexandria Gravel Co. v. Commissioner, 35 B.T.A. 223 (1937). The Fifth Circuit reversed, stating that the "revenue laws of the United States are not oversqueamish." 95 F.2d 615, 616 (1938).

[68] See, *e.g.*, MINN. GOVERNOR'S COMM. ON ETHICS IN GOVERNMENT, ETHICS IN GOVERNMENT (1959).

[69] The New York State Comptroller, for example, conducted "Conferences on Competitive Bidding and Conflicts of Interest" throughout the state in January and February 1962.

[70] Compare the information developed as to appraisers in *Right-of-Way Acquisition Practices in Massachusetts, Federal-Aid Highway Programs of* [illegible] Cong., 2d Sess., pts. 1 & 2 (1962).

such cases, it may be sufficient to basis and periodically publicize r order to appropriate department the form of limitations on ex par legislators' appearances before officials,[71] and, where there is ex maximum permissible formalities tors are in any way involved.[72] attorney general may provide statutory enactments.[73]

Political considerations may tacks on allegedly unethical legi any specific type or range of ticularities of the local situatio which the executive department ventiveness without risking p honestly concerned with the p frequently seek guidance from past such offices have generally constitutional and statutory pr which the typically conservative to be controlling.[74] It seems de

[71] *Compare* 17 C.F.R. § 201.2(e) standards of those appearing befo BIENNIAL REP. 70 (ruling that legisl fore agencies whose personnel was Nev. Attorney General's Office to th

[72] The problem of legislators' ope withholding legislative and finan public agencies and officials adver interests, is also a quite common volved a delicate balancing of int public responsibilities impartially of required legislation and finance to carry on present official func . . . new . . . functions, in the p

[73] See Code of Ethics Proposal, Study Commission to the *Harvard* tried to gain an improper advantage ment, this act would come under sc partment employees are covered. In one is covered by this proposal."

[74] See, *e.g.*, Special Message by of Ohio, Jan. 30, 1961, at 5–6; TE STATE OFFICERS AND EMPLOYEES 2,

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[75] See Davis, *The Federal Con* 896 & nn.15, 16 (1954). *But see* T those who may apply for opinions other than committee chairmen.

[76] See, *e.g.*, [1956–1958] 28 O that the constitutional provision

such cases, it may be sufficient to put the investigation on a continuing basis and periodically publicize relevant findings. Perhaps an executive order to appropriate department members could provide guidelines in the form of limitations on ex parte contacts, procedural rules governing legislators' appearances before certain decision-making groups and officials,[71] and, where there is executive discretion, orders requiring the maximum permissible formalities in letting state contracts when legislators are in any way involved.[72] Finally, both the governor and the attorney general may provide objectively considered suggestions for statutory enactments.[73]

Political considerations may dictate circumspection in executive attacks on allegedly unethical legislative practices;[74] the advisability of any specific type or range of action ultimately depends on the particularities of the local situation. There is, however, one context in which the executive department can exercise a certain amount of inventiveness without risking political conflict. A legislator who is honestly concerned with the propriety of some proposed action may frequently seek guidance from the attorney general's office.[75] In the past such offices have generally written opinions construing the relevant constitutional and statutory provisions narrowly, assuming the bounds which the typically conservative state courts would set on the legislator to be controlling.[76] It seems desirable, however, that attorneys general

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quisition Practices in Massachusetts, Hearings Before the Special Subcommittee on Federal-Aid Highway Programs of the House Committee on Public Works, 87th Cong., 2d Sess., pts. 1 & 2 (1962)).

[71] *Compare* 17 C.F.R. § 201.2(e)(2) (1962) (SEC rules controlling the ethical standards of those appearing before it) *with* [1947–1949] Conn. Att'y Gen. Biennial Rep. 10 (ruling that legislators could, in absence of statute, practice before agencies whose personnel was chosen by legislature). See also Letter From Nev. Attorney General's Office to the *Harvard Law Review*, Feb. 21, 1962:

> The problem of legislators' openly attacking public agencies and officials or withholding legislative and financial support thereof, when the functions of public agencies and officials adversely impinge upon their personal or political interests, is also a quite common and general matter. Manifestly, there is involved a delicate balancing of interests . . . : discharge by agencies of official public responsibilities impartially and in conscientious fashion *versus* support of required legislation and finances through legislative appropriations effectively to carry on present official functions or to establish and implement desired . . . new . . . functions, in the public interest.

[72] See Code of Ethics Proposal, quoted in Letter From La. Reorganizational Study Commission to the *Harvard Law Review*, Feb. 12, 1962: "[I]f a legislator tried to gain an improper advantage in a transaction with, say the highway department, this act would come under scrutiny of the Commission since all highway department employees are covered. In other words, it takes two to collude and at least one is covered by this proposal."

[73] See, *e.g.*, Special Message by Governor DiSalle to the 104th General Assembly of Ohio, Jan. 30, 1961, at 5–6; Tex. Legislative Council, A Code of Ethics for State Officers and Employees 2, 53 (1956) (attorney general's proposal).

[74] "After some rather heated discussion among the members of the committee, a majority . . . felt that it would not be politic for this office to recommend to the legislature that they adopt a code of ethics covering members of the state legislature." Letter From Wash. Attorney General's Office to the *Harvard Law Review*, April 12, 1962, quoting report of attorney general's legislative committee.

[75] See Davis, *The Federal Conflict of Interest Laws*, 54 Colum. L. Rev. 893, 896 & nn.15, 16 (1954). *But see* Tex. Rev. Civ. Stat. art. 4399 (1948), enumerating those who may apply for opinions of the attorney general but omitting legislators other than committee chairmen.

[76] See, *e.g.*, [1956–1958] 28 Ore. Att'y Gen. Biennial Rep. and Ops. 163, ruling that the constitutional provision barring legislators from acting as attorneys in

take a wider view of their function. Once the legislator has shown the initiative and conscientiousness to seek an opinion, the opinion writer could consider "whether, aside from strict legal minima, the . . . activity . . . is such that it would, even though it is not a breach of the law, lessen the confidence of the general public in . . . or otherwise tend to reflect unfavorably on all government services." [77] Such opinions could serve to set new standards, the effectiveness of which is governed more by consensual validation of their logic over time than by the deterrent effect of threatened sanctions.[78] In fact, since they would be the result of an accretion of careful thought on discrete factual situations, such standards might well be found more realistic and acceptable than an ethical code drawn in the abstract at a fixed point in time.[79]

Finally, the executive possesses the extraordinary tool of the veto to impel the legislature towards the adoption or observation of ethical standards. This sanction might be useful at least in calling attention to the problem where the governor feels that a particular piece of legislation reflects the initiative and support of lawmakers with too great a private interest in its outcome.[80]

E. Other Institutions

1. The Federal Government. — The increasing use of federal funds for state-run projects in education, road building, hospitals, urban redevelopment, and other public works provides not only a broad field for potential contacts between legislators and state agencies, but also supplies a linkage through which the federal government might impose its standards of ethical conduct upon those who are dispensing and receiving its funds. It would be preferable for these standards to be imposed before the fact, carefully outlining the permissible and impermissible procedures in such areas as condemnation, construction bidding, supply contracts, and staffing. But such programs generally operate through the normal state channels once the long-range plans and technical criteria of the federal program have been met.[81] Thus in

prosecution of any claim against the state did not prevent a legislator from representing a "defendant" in a condemnation proceeding. Note the earlier attitude of the same office on the occasion cited in note 65 *supra*.

[77] Honolulu Corporation Counsel, Opinion No. 61-117, Aug. 10, 1961. Compare the Massachusetts attorney general's opinion construing the legal disclosure rule narrowly but adding:

> [W]hile not legally required, it is desirable that a public servant supply such information as is necessary to indicate whether or not a conflict of interest exists . . . .

Letter From Mass. Attorney General to Mass. Secretary of State, Nov. 20, 1961. For an opportunity missed, see opinion cited note 71 *supra*.

[78] The attorney general does have certain sanctions available: threat of prosecution (see attorney general's ruling on illegality of testimonial dinner for appointed official, resulting in its cancellation two days before scheduled, Boston Herald, Jan. 20, 1963, p. 1, col. 7); prevention of routine processing of claims against the state (see Ariz. Attorney General, Opinion No. 53-20, Feb. 2, 1953); rejection of proposed contracts or leases as illegal (see [1953-1954] 26 ORE. ATT'Y GEN. BIENNIAL REP. AND OPS. 114).

[79] See pp. 1230-32 *infra*, attempting to combine the advantages of definite standards with continuing, flexible enforcement.

[80] *Cf.* President Eisenhower's veto of a bill because of improper lobbying. PUBLIC PAPERS OF THE PRESIDENT 1956, at 256 (Natural Gas Bill).

[81] See, *e.g.*, 23 U.S.C. §§ 106, 112, 114(a) (1958).

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practice it is only after the fact that the federal authorities take cognizance of the problems. These authorities may discover deficiencies in construction or supplies, shortages of funds, overpayments, bribery, collusion, or criminal fraud which involve state officials or state legislators, but it is only in passing that the question arises of the propriety of legislators' contracts with or appearances before the state. Perhaps the conflict-of-interest problems might be most effectively exposed to public discussion through the congressional investigation.[82] The range of subject matter open to analysis, the opportunity to investigate past occurrences in detail with a power of subpoena, and the duty to consider proposals for future ameliorative measures allow a committee both to capture the public eye with exposure of the blatant abuses and to provoke consideration of the subtleties of setting standards for the legislator who would be willing to comply with sufficiently definitive rules. The value of committee investigation as a solution to the problem is limited, however; the blatant criminal aspects may be so shocking that more subtle ethical points are obscured. On the other hand, publicity concerning the innocent involvement of a few may be so exaggerated as to ruin them politically while doing little to solve the problem which they faced originally in deciding upon the propriety of their activities.

2. Professional and Other Private Associations. — The lawyer-legislator, although subject only to sporadic guidance from governmental sources, comes under the constant scrutiny of his bar association. Canon 26 of the American Bar Association Canons of Professional Ethics provides that a lawyer appearing

> before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government [must do so] upon the same principles of ethics which justify his appearance before the Courts . . . [and must not] employ secret personal solicitations, or . . . use means other than those addressed to the reason and understanding, to influence action.[83]

One commentator has observed that "the Canon is either so strict as to be impossible, or so vague as to be useless." [84] Canon 32 proscribes "disloyalty to the law whose ministers we are" and "corruption of any person . . . exercising a public office or private trust, or deception or betrayal of the public." [85] On the basis of these two canons, the Committee on Professional Ethics of the ABA has ruled that

> a law firm could not accept employment to appear before a legislative committee while a member of the firm is serving in the Legislature, ... [and that] a full disclosure before the committee would not alter

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[82] *Cf., e.g., Right-of-Way Acquisition Practices in Massachusetts, Hearings Before the Special Subcommittee on Federal-Aid Highway Programs of the House Committee on Public Works*, 87th Cong., 2d Sess., pts. 1 & 2 (1962); *Hearings Before a Subcommittee to Study Senate Concurrent Resolution 21 of the Senate Committee on Labor and Public Welfare*, 82d Cong., 1st Sess. (1951).

[83] ABA, CANONS OF PROFESSIONAL ETHICS 22 (1957). See also *id.* at 11 (Canon 6); Sharpless, *The Lawyer-Legislator and the Canons of Ethics*, Hawaii B.J., Jan. 1959, p. 11.

[84] HORSKY, THE WASHINGTON LAWYER 56 (1952).

[85] ABA, *op. cit. supra* note 83, at 27.

this ruling nor would it be changed by the fact that the member of the Legislature would not share in the fee received thereby.[86]

The advantage of such rulings, particularly those of local units,[87] is that to a large extent they can be promulgated without reference to any specific parties and can be tailored by the local group to its special circumstances, while carrying the ultimate force of professional sanctions.[88]

Additionally, the bar associations and other private groups may be able to undertake studies of the situation from the public's viewpoint, publicizing significant findings and marshalling public opinion in favor of reforms. For instance, the Association of the Bar of the City of New York, recognizing the need for information and reform in federal conflict-of-interest control, undertook to study the problem and published its analysis and proposals.[89] The Committee on American Legislatures of the American Political Science Association conducted a four-year study of state legislatures,[90] finding serious structural and procedural defects in the existing bodies. The latter study's chapter on the nature of the legislative membership[91] could be a starting point for a more thorough analysis of the conflict-of-interest problem from the political scientists' point of view.

Finally, there are myriad possibilities for direct local action. A network television program documenting bookmaking operations in Massachusetts shocked the citizenry into violent dispute over a subtle conflict problem — lawyer-legislators' representation of criminal defendants — when one legislator appearing on the show charged "that some legislators are 'actively involved' with bookies."[92] Less spectacular would be nonpartisan preelection reports on the outside interests of all candidates by such service groups as the League of Women Voters and the Citizens Union, as well as efforts by journalists to promote public attitudes which might induce candidates and incumbents to sever conflict-prone connections — at least where great sacrifice is not involved.

[86] Opinion 296, Aug. 1, 1959, 45 A.B.A.J. 1272 (1959). See also ABA, *op. cit. supra* note 83, at 30 (Canon 36 relating to retired public officials). *But see* N.Y. Pub. Officers Law § 73(6), allowing legislator's firm to appear before agencies if he does not share in the fee.

[87] See, *e.g.*, the Hawaii Bar Association ruling that legislators and their associates could not appear before legislative committees, nor, in the case of senators, before agency personnel whose appointments are subject to senate confirmation, quoted in Sharpless, *supra* note 83, at 16.

[88] Here exists an additional mode of judicial control through each court's supervisory powers over the legal profession. See *In re* Becker, 16 Ill. 2d 488, 158 N.E.2d 753 (1959). Compare Honolulu Corporation Counsel, Opinion No. 61-82, June 13, 1961, ruling on the basis of *Becker* that a councilman could not appear as a lawyer before the zoning board.

[89] Bar Association Report, *op. cit. supra* note 4. The recent federal legislation relies heavily on the report's suggestions. See Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev. 1113, 1116–17 (1963).

[90] *Op. cit. supra* note 8.

[91] *Id.* at 61–88.

[92] See Boston Herald, Feb. 21, 1962, p. 1, col. 1. Ultimately the code of ethics commission decided not to recommend specific legislation on the particular problem. Mass. Special Comm'n on Code of Ethics, Report to the General Court 11–12, March 31, 1962 [hereinafter cited as Mass. Comm'n]. In Tennessee it was recommended that legislators be enjoined from appearing before the parole board for any inmate whom they had not represented in the committing court. [1959–1960] Legislative Council Comm., 81st General Assembly of Tenn., Final Report 48. The legislature did not pass the proposed provision. Letter From the Committee to the *Harvard Law Review*, Feb. 1, 1962.

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III. Statutory Controls

A. Types of Statutes and Means of Instigation

Although the nonlegislative approaches suggested thus far present considerable potential for some control of legislative ethics, it seems clear that they cannot provide the necessary guidance and deterrence. The remaining solution — statutory control — appears more promising. In terms of their attempts to control their members' conflicts of interest by statute, state legislatures may be classified as follows: (1) those which have no legislation on the subject; [93] (2) those with recent and comprehensive conflicts enactments which exempt legislators; [94] (3) those with old unenforced or rarely enforced miscellaneous provisions; [95] (4) those with fairly recent comprehensive legislation with inadequately designed or enforced provisions as to legislators; [96] and (5) those which have seriously considered the problem of legislators' conflicts but have failed to enact suggested legislation.[97] The overall record of the states does not encourage optimism; the limited progress in a few, however, indicates a recognition of and willingness to consider the problem despite its political sensitivity and a concerted and thoughtful attack based on particular local needs.

The impetus for legislative action may come from varied sources. In New York, it was the executive that took the lead. Governor Dewey delineated the nature of the general conflicts problem to the state legislature in 1954 and included recommendations specifically concerning the lawmakers themselves.[98] By the end of 1954 a comprehensive landmark statute [99] had been enacted, with the reservation that it was just a beginning from which refinements would be made.[100] There have, however, been no amendments or additions since 1954. The impetus to action in Massachusetts came from aroused public opinion after startling revelations of "widespread improprieties and defalcations" in one state body.[101] The Legislative Research Council presented a comprehensive report on strong bills filed by the governor and the senate president late in the 1961 legislative session, but as it was impractical to attempt to draft

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[93] *E.g.*, Iowa and Virginia.

[94] See, *e.g.*, the situation in Washington described in note 65 *supra*.

[95] Some cover a wide range of public servants. *E.g.*, Ill. Rev. Stat. ch. 102, § 3 (1961); Ind. Ann. Stat. § 10-3713 (1956); Ohio Rev. Code Ann. § 2919.69 (Page 1954). Others cover legislators specifically. *E.g.*, Ariz. Rev. Stat. Ann. § 38-446 (1956); Kan. Gen. Stat. Ann. § 46-132 (Supp. 1961); N.M. Stat. Ann. §§ 4-1-4 to 1-7 (1953); N.D. Cent. Code § 54-03-21 (1960).

[96] Criminal provisions but no code of ethics: Ky. Rev. Stat. §§ 61.092-.096 (1962). Code of ethics but enforced by legislative committee: Minn. Stat. § 3.87-.90 (1961); N.Y. Pub. Officers Law §§ 73, 74; N.Y. Sen. Res. No. 131, March 20, 1954.

[97] See, *e.g.*, Fla. House Bill No. 737 (1961) (criminal provisions); Hawaii H.B. No. 1005, 1st Legislature (1961) (code of ethics); N.H. House Bill No. 316 (1957), N.H. House Bill No. 316 (New Draft) (1957), N.H. House Bill No. 15 (1959) (progressively weaker versions); Ohio Sub. H.B. No. 279, 104th Gen. Assembly, Reg. Sess. (1961-1962) (code of ethics and criminal provisions); New Jersey bills discussed *infra* p. 1224.

[98] See N.Y. Special Legislative Comm. Report on Integrity and Ethical Standards in Government 11-14 (1954) [hereinafter cited as N.Y. Report].

[99] N.Y. Pub. Officers Law §§ 73, 74; N.Y. Pen. Law § 1878.

[100] See N.Y. Report, *op. cit. supra* note 98, at 31-33.

[101] See Mass. Report, *op. cit. supra* note 15, at 7, 14.

and pass adequate penal legislation at the time, the political necessity for some legislation in the area was satisfied by a perfunctory adaptation of the nonpenal New York code of ethics.[102] Nevertheless, the legislature reaffirmed its intentions to produce more than merely token legislation by providing for an unpaid special commission to study the problem further and recommend amendments to the next session.[103] In March 1962 the commission proposed a draft of stringent penal legislation based largely on pending federal legislation,[104] explicitly covering legislators, but with subtle limitations so as not to cut too deeply into their legitimate outside sources of income.[105] After minor changes in committee the bill was passed to take effect on May 1, 1963.[106]

In New Jersey, despite continuous pressure from the state bar association,[107] progress has been slow. The legislature created a commission in 1956 "to make a study of the subject of conflicts in the performance of public duties by persons holding public office, position or employment, with their personal, business or professional interests."[108] The commission spent a major part of its four public hearings considering a bill aimed directly at legislators,[109] and developed a remarkably useful published record detailing the views of capable witnesses as to the pragmatic difficulties of designing legislation in the field.[110] In subsequent sessions of the legislature three bills — the commission bill,[111] a slightly less stringent bill,[112] and one significantly less so[113] — have been repeatedly introduced, but none has been enacted.[114] A similar situation has prevailed in Rhode Island since 1955.[115]

B. Criminal Provisions

Most attempts at comprehensive conflict-of-interest legislation have borrowed heavily from the New York statute of 1954,[116] although the provisions of that act were designed as a mere starting point and they have not produced satisfactory results.[117] The New York formulation

[102] Mass. Acts and Resolves 1961, ch. 610. There was a criminal penalty for noncompliance with the disclosure provision. § 1(4)(j).

[103] § 2.

[104] 18 U.S.C. §§ 201–18 (Supp. IV, 1963).

[105] See pp. 1225–30 *infra*.

[106] MASS. GEN. LAWS ANN. ch. 268A (Supp. 1962).

[107] See 80 N.J.L.J. 227, 561 (1957); 81 *id.* 254, 562 (1958); 82 *id.* 243, 573 (1959); 83 *id.* 265 (1960); 84 *id.* 260 (1961).

[108] See N.J. REPORT, *op. cit. supra* note 2, at 37.

[109] See 80 N.J.L.J. 227 (1957).

[110] See *Hearings Before the Commission To Study the Subject of Conflicts in the Performance of Public Duties by Persons Holding Public Office, Position or Employment, With Their Personal, Business or Professional Interests*, N.J. Legislature (1957) (4 vols. and app.).

[111] See N.J. REPORT, *op. cit. supra* note 2, at 24–33; N.J. Senate No. 35, N.J. Assembly No. 72 (1961).

[112] N.J. Assembly No. 24 (1962); N.J. Assembly No. 1 (1961).

[113] N.J. Senate No. 140 (1962); N.J. Senate No. 78 (1961).

[114] The assembly adopted a code of ethics on the last day of the 1958 session applying only to that one day. Letter From Head of Bureau of Law and Legislative Reference, N.J. Department of Education to the *Harvard Law Review*, Feb. 2, 1962, quoting Assembly Minutes 1958, at 1090.

[115] See, *e.g.*, H. 1157 (1959); H. 1435 (1960).

[116] N.Y. PUB. OFFICERS LAW §§ 73, 74; N.Y. PEN. LAW § 1878.

[117] See the incident described pp. 1212–13 *supra*, and the characterization of the legislature's ethics committee as "dormant" since its establishment. N.Y. Times, Feb. 7, 1962, p. 26, col. 4.

did suggest a valid design, be scribing specific, objectively tions are appropriate. More a "code of ethics" with initia tional body.[118]

1. Contracts. — Constitut some or all state contracts w among the oldest and most field.[119] The designs of thes ever. Some states prohibit ment itself, no matter how p any state agency unless proc bidding,[121] a procedure thou contractir officers who migh legislator-contractor. But m and even after a competitiv considerable area of discretic personnel regarding routine standards, and contract qua payment withholding penali The new Massachusetts s key provisions at work in th minimum:[124] he may hold "if his direct and indirect i in the corporation . . . with aggregate amount to ten per in, *and* the contract is mad with the state secretary a terest . . . ."[125] Possessior these conditions subjects th or two years imprisonment c cancellation of the contract state of contract profits or fi

[118] Unfortunately New Yor guidance for legislators. Sen. Re

[119] *E.g.*, ILL. REV. STAT. ch. 1961); N.D. CENT. CODE § 54–0

[120] *E.g.*, ARIZ. REV. STAT. A terms contracts made by the leg scribe contracts on which the le *E.g.*, KY. REV. STAT. § 61.096(2) acts is that the legislator's influ contracts over which he has son

[121] *E.g.*, KY. REV. STAT. § 61 OHIO REV. CODE ANN. § 2919.09

[122] *E.g.*, N.Y. PUB. OFFICERS CENT. CODE § 54–03–21 (1960) with state); OHIO REV. CODE 2919.21 (5% or $500 ownership.

[123] See Note, 47 VA. L. R available under a "lowest respo

[124] Compare NEV. REV. STA with the state for all officers, 1960).

[125] MASS. GEN. LAWS ANN.

[126] § 7. A stock interest of

did suggest a valid design, however. To the extent that a standard proscribing specific, objectively defined conduct is desired, criminal sanctions are appropriate. More subjective standards must be contained in a "code of ethics" with initial guidance supplied by a nonjudicial definitional body.[118]

1. Contracts. — Constitutional or statutory provisions prohibiting some or all state contracts with state officers, including legislators, rank among the oldest and most common efforts in the conflict-of-interest field.[119] The designs of these provisions vary in several respects, however. Some states prohibit only contracts with the legislative department itself, no matter how procured.[120] Others prohibit contracts with any state agency unless procured through public notice and competitive bidding,[121] a procedure thought to leave minimum discretion among the contracting officers who might otherwise be subject to pressure from the legislator-contractor. But most states have a *de minimis* exception,[122] and even after a competitively awarded contract, there is normally a considerable area of discretion entrusted to the state contract-enforcing personnel regarding routine maintenance of time schedules, quality standards, and contract quantities, as well as initiatives in preventing payment, withholding penalities, or instituting suit in case of breach.[123]

The new Massachusetts statute presents a useful illustration of the key provisions at work in the field. The act allows the legislator a bare minimum: [124] he may hold a contract, other than with the legislature, "if his direct and indirect interests and those of his immediate family in the corporation . . . with which the contract is made do not in the aggregate amount to ten per cent of the total proprietary interests therein, *and* the contract is made through competitive bidding *and* he files with the state secretary a statement making full disclosure of his interest . . . ." [125] Possession of any financial interest other than under these conditions subjects the legislator to a three thousand dollar fine or two years imprisonment or both.[126] Additional remedies available are cancellation of the contract if actual influence is shown, recovery by the state of contract profits or five hundred dollars, whichever is greater, and

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[118] Unfortunately New York picked an intramural entity to provide this guidance for legislators. Sen. Res. No. 131, March 20, 1954.

[119] *E.g.*, ILL. REV. STAT. ch. 102, § 3 (1961); NEV. REV. STAT. § 218.580 (Supp. 1961); N.D. CENT. CODE § 54-03-21 (1960).

[120] *E.g.*, ARIZ. REV. STAT. ANN. § 38-446 (1956). The statute also prohibits in terms contracts made by the legislator in his official capacity. Some states also proscribe contracts on which the legislator may merely be called upon to vote or act. *E.g.*, KY. REV. STAT. § 61.096(2) (1962). The underlying policy assumption of these acts is that the legislator's influence is most easily felt in his own body and as to contracts over which he has some official control.

[121] *E.g.*, KY. REV. STAT. § 61.096(6) (1962); N.Y. PUB. OFFICERS LAW § 73(3); OHIO REV. CODE ANN. § 2919.09 (Page 1954).

[122] *E.g.*, N.Y. PUB. OFFICERS LAW § 73(3) ($25 contract; 10% ownership); N.D. CENT. CODE § 54-03-21 (1960) (5% ownership; $10,000 annual limit on contracts with state); OHIO REV. CODE ANN. § 2919.09 (Page 1954) ($50 contract); § 2910.11 (5% or $500 ownership, unless officer or director or conspiracy to defraud).

[123] See Note, 47 VA. L. REV. 1034, 1055 (1961), pointing out the discretion available under a "lowest responsible bidder" system.

[124] Compare NEV. REV. STAT. § 281.220 (Supp. 1960), prohibiting all contracts with the state for all officers, defined to include legislators in § 281.010 (Supp. 1960).

[125] MASS. GEN. LAWS ANN. ch. 268A, § 7(c) (Supp. 1962). (Emphasis added.)

[126] § 7. A stock interest of less than one per cent is exempted.

additional civil damages up to twice the profit if there has been no final conviction or acquittal in the criminal action.[127] The stringency of the penalties is relieved somewhat by the requirement of knowledge or reason to know of the financial interests and by provision for exculpating disclosure and divestiture.[128] The attorney general is charged with institution of suit for civil damages and penalties,[129] and is aided by the act's provision for a general prohibition of any financial interest and placing of the burden on the defendant to prove himself within one of the specified exceptions.[130]

The Massachusetts rule may be a surprisingly harsh reaction to past abuses, but in states where passage is politically feasible, where the ineligibility of a number of business firms would not hinder the state's procurement processes, and where the elimination of a number of prospective legislative candidates would not cause a serious shortage, the disqualification of legislators as state contractors seems a desirable prophylactic measure and in some states may be a necessary step to the elimination of present or apparent conflicts.[131] The Massachusetts statute is weaker than it might be in one aspect: the end of the legislator's term ends the contract prohibition, although other parts of that act extend their prohibitions beyond the cessation of duties.[132] Moreover, violative contracts are voidable, at the state's option, only if actual influence is shown. The prophylactic effect might have been increased by declaring voidable any contract made by a party who knew of the legislator's prohibited interest at the time of the contract, regardless of the legislator's knowledge or later disclosure and disposal.[133] In addition, the Massachusetts sanctions are more limited than those in several states, where conviction under the conflict-of-interest prohibitions carries with it disqualification from office.[134] It is conceivable that removal from office might be made an independent sanction invoked without regard to criminal proceedings, but there has been little disposition so to utilize the tool of judicial removal.[135]

The Massachusetts statute also seems deficient in that it leaves un-

[127] § 9. The additional damage verdict bars criminal prosecution.

[128] § 7.

[129] § 9.

[130] See Mass. Comm'n, *op. cit. supra* note 92, at 13.

[131] Some regard should of course be shown for established interests. *Compare* N.Y. Unconsol. Laws § 8052(4) (McKinney 1961), excepting interests held at a given date if disposed of within one year of effective date of the act, *with* § 8052(7), excepting any racing license if the licensee was qualified to hold it on a certain date.

[132] Mass. Gen. Laws Ann. ch. 268A, § 5 (Supp. 1962). Legislators may also hold contracts with counties, § 14(b), and municipalities, see § 26.

[133] Compare Cal. Gov't Code § 1091(d). Provisions rendering violative contracts void *ab initio* would seem to give the contracting party an undeserved option to escape. See, *e.g.*, Ky. Rev. Stat. § 61.096(2) (1962).

[134] Compare Ariz. Rev. Stat. Ann. § 38-447 (1956) (fine or imprisonment and permanent disqualification from office); Cal. Gov't Code § 1097 (same); Ind. Ann. Stat. § 10-3713 (1956) (fine, imprisonment, and temporary disenfranchisement and ineligibility for office).

[135] Some statutes might be read to permit such an independent remedy: Ill. Rev. Stat. ch. 102, § 4 (1961) (contracts: "may be" imprisoned or fined and also "any office . . . held by any person so convicted shall become vacant, and shall be so declared as part of the judgment of the court."); Nev. Rev. Stat. § 281.220(4) (Supp. 1960) (contracts: "any person violating . . . this section, directly or indirectly, shall forfeit his office" and be subject to fine and imprisonment); N.Y. Unconsol. Laws § 8052(2) (McKinney 1961) (interests in parimutuel racing: "a

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clear the meanings of "financial interests" and "directly or indirectly." [136] Is there a financial interest in a contract with the state when a legislator agrees to a valuation of his land in a condemnation proceeding, or applies for emergency state loans or crop aid, or when his son receives a state scholarship? Perhaps a listing or general description of desirable exceptions,[137] or a procedure for exempting them, is necessary to assure that narrow judicial interpretation of the general terms will not dilute the prohibition. Even where the financial interest of a business entity is clear, there is a serious question as to the degree of association necessary to impute such interest to the individual legislator.[138] California attempts to provide a limited exception, after disclosure and ratification, for a "remote interest," [139] unless actual influence is shown. It is arguable that a process which would allow a legislator's tenant, client, or customer to receive a state contract without restrictions lacks sufficient deterrent effect; although the legislator may have had no power over the letting of the contract, the recipient may well think he did, and may feel obligated to the legislator on its account.[140] Yet extending the harsh prohibitions to this level might interfere with the professional capacity of the legislator or with the state's ease of procurement. Perhaps a satisfactory solution lies in a mechanism which would except those cases where alternative sources of supply are not readily available and where the legislator's indirect interest is not easily severed or is clearly significant in relation to his livelihood though remote as to the contract.

2. Representation of Interests Adverse to State or Before State Agencies. — The same dangers inherent in permitting legislators to contract with the state — influence-peddling by the legislator or at least a competitive advantage due to imagined influences and partiality on the

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knowing and wilful violation . . . shall be cause for removal . . . by appropriate authority having the power . . . or at the suit of the attorney-general").

Because of the supposedly exclusive control of each house over members, some courts have been reluctant to assert similar powers, which may constitute the sole sanction, under incompatible-office statutes, but other courts have not withheld such relief. See, *e.g.*, People *ex rel.* Myers v. Haas, 145 Ill. App. 283 (1908).

If a dependent sanction of removal is within judicial competence, there would seem to be no constitutional or logical reason why the mere omission of additional criminal sanctions should destroy that competence. *But see* TEX. LEGISLATIVE COUNCIL, *op. cit. supra* note 73, at 48.

[136] For a discussion of these terms in related contexts see BAR ASSOCIATION REPORT, *op. cit. supra* note 4, at 200–02; Kaplan & Lillich, *Municipal Conflicts of Interest: Inconsistencies and Patchwork Prohibitions*, 58 COLUM. L. REV. 157, 174–81 (1958); Note, *supra* note 123, at 1042–44, 1048–56.

[137] Compare CAL. GOV'T CODE § 1091.5(c); MASS. GEN. LAWS ANN. ch. 268A, § 4 (Supp. 1962). The New York statute is limited to the sale of goods or services to the state. N.Y. PUB. OFFICERS LAW § 73(3).

[138] Should the entity's interest be imputed to its salaried and nonsalaried officers and directors, employees, landlord, tenant, attorney, accountant, insurance broker, subcontractor, supplier, partners, members or relations of any of these or of the owners? Compare N.Y. UNCONSOL. LAWS § 8052(2) (McKinney 1961), noted pp. 1229–30 *infra*.

[139] CAL. GOV'T CODE § 1091. Note that MASS. GEN. LAWS ANN. ch. 268A, § 7 (Supp. 1962), implies that there is no violation if the legislator's brother owns 100% of a contracting corporation, but there is if the brother owns 9% and the legislator 1½%.

[140] Compare NEV. REV. STAT. § 281.230(1) (Supp. 1960):

> no state . . . officer . . . shall in any manner, directly or indirectly receive any commission, personal profit, or compensation of any kind or nature, inconsistent with loyal service to the people, resulting from any contract or other transaction in which the state . . . is in any way interested or affected.

part of the agency personnel — also appear when legislators represent parties before state agencies. Since historically a legitimate function of the legislator has been assistance to his constituents in their dealings with the state government,[141] use of influence may be impossible to prevent in these informal administrative contacts. Thus the lines generally have been drawn on the basis of the type of agency involved, the type of state interest, and whether the legislator receives compensation. In New York, for example, the legislator may not receive for services before a state agency compensation which is contingent on any action by that agency.[142] However, the statute permits fees based on the reasonable value of the service rendered. New York supplements its rule by requiring a number of regulatory agencies to maintain a public record of all compensated appearances before them.[143] In Massachusetts the proscription is against receipt of or request for compensation "in relation to a particular matter [a defined term] in which the commonwealth or a state agency has a direct and substantial financial interest other than collection of taxes, criminal fines or penalties, and fees or charges for permits or licenses, and corporation fees."[144] Nor may the legislator act even without compensation as agent or attorney in connection with any such matter, nor for anyone prosecuting any claim against the commonwealth.[145] Thus the legislator appears barred from receiving any fees for assistance in procurement of a contract, for advice on any negotiation or claim, for appearing as a character or expert witness,[146] or from appearing *at all* as official representative of a party unless the state's interest is slight, except that the legislator-lawyer's tax and criminal practice remain intact, as well as his routine processing of license applications.[147] Such exceptions, especially when valuable interests are involved and abuses likely — for example, in procurement of racing and liquor licenses[148] — would seem to dilute seriously the purpose of the general rule, both because of the adverse positions of the legislator and the state government and because of the opportunity for or appearance of influence or partiality in the course of prosecution or settlement.

Massachusetts complements the penalties against legislators with sanctions directed at would-be clients to deter them from hiring legislators with a view to using their supposed influence. The statute penalizes one

[141] See BAR ASSOCIATION REPORT, *op. cit. supra* note 4, at 16. A legislator opposed to the new Massachusetts act reportedly objected that legislators "with a heart" would no longer be able to convince department heads and the "administration and finance people" to give constituents 30-day jobs in state agencies, or to intercede with the motor vehicle registry for a father of five who faces license suspension but needs his car for work. Boston Herald, Jan. 30, 1963, p. 29, cols. 5–6.

[142] N.Y. PUB. OFFICERS LAW § 73(2).

[143] N.Y. EXECUTIVE LAW § 166. Texas, which does not prohibit appearances of any kind, requires full public disclosure of compensated appearances before or contacts with all agencies, unless solely to obtain information with no attempt to influence action. TEX. PEN. CODE art. 183–2 (Supp. 1962).

[144] MASS. GEN. LAWS ANN. ch. 268A, § 4 (Supp. 1962).

[145] § 4(c). Compare 18 U.S.C. § 205 (Supp. IV, 1963).

[146] Unless testifying under oath. MASS. GEN. LAWS ANN. ch. 268A, § 4 (Supp. 1962). KY. REV. STAT. § 61.096(3) (1962) specifically covers expert witness appearances.

[147] See Mass. Comm'n, *supra* note 92, at 16–17. Other exceptions are set out in § 4.

[148] See N.J. REPORT, *op. cit. supra* note 127, at 18.

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[149] MASS. GEN. LAWS
[150] § 3(k).
[151] See § 3(b).
[152] See p. 1230 *infra*.

who knowingly directly or indirectly gives, promises, or offers compensation in cases in which the legislator cannot legally receive it,[149] but it does not punish a client whose legislative agent or attorney is acting gratuitously.

Few clear generalizations can be made about the legislator's agency-appearance problem. Probably in some of the smaller states in which state agency practice is a significant part of the legislator-lawyer's practice, a major readjustment would be necessary in the legislative personnel or in their professional practices to secure the desired prophylaxis. In a few of these states such an upheaval might in fact be desirable, not only as a prophylactic but as a curative measure.

In delineating the "particular matters" concerning which the legislator may not act as agent or receive compensation, the Massachusetts act specifically excludes any legislative enactment.[150] Thus a legislator may act as consultant or adviser to a person or firm seeking legislative action, or even to a lobbyist, so long as he could not be proved to have been influenced in his own action as legislator by the fee received.[151] In addition, if the state has no "substantial financial interest" in a matter before a legislative committee or if the committee is concerned with "general legislation," a legislator may appear as attorney for a witness called before that committee. These two types of activity are disapproved by most "codes of ethics" applicable to legislators,[152] but they are sufficiently well defined for application of criminal penalties, and there appear to be no strong reasons for excluding them from general prophylactic measures.

In controlling noncontractual legislator-state contacts, it must be noted that the legislator may be involved as a principal in any activity subject to state regulation. Appearances as principal before an agency or against the state would present at least as much appearance, temptation, and risk of undue influence and unfair advantage as do representative appearances. Yet a total prohibition on legislators' appearances would seem unwarranted. Although legislators might be prohibited from seeking licenses or franchises for new businesses, especially when these are scarce and therefore valuable, they probably should be permitted to appear as principals to maintain their *status quo*. All land condemnations involving legislators could be preceded by full court proceedings with the burden on the legislator to show value over the assessment. As for legislators' personal injury or other claims, either a full litigation requirement or a provision suspending the running of the statute of limitations until the end of the legislator's term might provide a just solution.

Two other devices for coping with problems of legislators' interests should be considered. Where egregious misbehavior is likely, whole areas of activity might be precluded to legislators. In New York, for example, legislators may not hold licenses from the racing commission or have any interest in, be an employee or officer of, or sell any goods or services to parimutuel racing licensees, firms licensed to do business at

[149] MASS. GEN. LAWS ANN. ch. 268A, § 4(b) (Supp. 1962).
[150] § 2(k).
[151] See § 3(b).
[152] See p. 1230 *infra*.

racetracks, or lessors of tracks.[153] California prohibits legislators from accepting "any commission for the placement of insurance on behalf of the State."[154] Another mode of attack has been to require general disclosure. New York and Texas require, as formerly did Massachusetts, filing with the secretary of state of a statement of interest in regulated activities. The New York and Massachusetts formulations cover only financial interests exceeding ten thousand dollars in value, and explicitly make these disclosures public.[155] The scope of the Texas reports is wider; it includes officers, agents, members, and controlling owners of any corporation, firm, partnership, or other business entity, but public access or release is not specifically required.[156] The Massachusetts Special Commission on Code of Ethics[157] rejected general disclosure as "unnecessary" and recommended that it be required only where "it is meaningful and essential." However, the information developed from general mandatory disclosure would be a useful tool in the enforcement of many of the conflict-of-interest rules and would, especially under the former Massachusetts version which included "any business entity which does business with the commonwealth," provide contracting agencies with a list of possibly ineligible firms.

C. Enforcement of a "Code of Ethics"

There exist other serious violations of conflict-of-interest standards which might lend themselves to criminal sanctions, but which no state has seen fit to outlaw.[159] In this area foreknowledge, intent, and appearances may be determinative, and may in turn depend on the existence of some warning or on the public's rising ethical expectations. Thus the reaction of several states has been to provide a nonjudicial, nonpenal mechanism for communicating such warnings and reflecting such varying expectations, usually in the form of a "code of ethics."[160] The codes of ethics set forth general rules proscribing "substantial conflicts" and enumerate standards in more specific areas of concern such as independence of judgment, use of confidential information, favoritism, unwarranted privileges and exemptions, actions creating public suspicion of violations of trust, gifts, interested voting, and receipt of compensation for official services.

The task of interpreting, applying and expanding this groundwork for legislative ethics is difficult and politically sensitive; independence

[153] N.Y. UNCONSOL. LAWS § 8052(2) (McKinney 1961).

[154] CAL. GOV'T CODE § 1000.1.

[155] N.Y. PUB. OFFICERS LAW § 74(j); Mass. Acts and Resolves 1961, ch. 610, § 1(4)(j). The latter was greatly weakened even before its repeal in 1962 when the attorney general found the following statement sufficient:

> In compliance with [this section] . . . I herewith file my name with you, being subject to jurisdiction by state regulatory agencies.

Letter From Mass. Attorney General to Mass. Secretary of State, Nov. 20, 1961.

[156] TEX. REV. CIV. STAT. art. 6252-9, § 3(b) (Supp. 1958).

[157] Mass. Comm'n, *op. cit. supra* note 92, at 11.

[158] For example, voting when there is a direct, substantial financial interest in the outcome. Sanctions here may present constitutional questions of privilege.

[159] Except perhaps NEV. REV. STAT. § 281.230(1) (Supp. 1960), quoted note 140 *supra*, which might be construed to cover a wide range of ethical improprieties.

[160] *E.g.*, MASS. GEN. LAWS ANN. ch. 268A, § 23 (Supp. 1962); MINN. STAT. §§ 3.87-.90 (1961); N.Y. PUB. OFFICERS LAW § 74; TEX. REV. CIV. STAT. art. 6252-9 (Supp. 1958).

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[161] *E.g.*, MINN. STAT. § 3.89 (

[162] Compare the results in
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[164] Compare Massachusetts
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and objectivity are the prime requisites of the agency responsible for this task. Therefore the choice by many states of legislative committees to perform these functions [101] could hardly have been expected to produce satisfactory results.[102] Regularized intramural enforcement of statutory restrictions would suffer from the same inadequacies as do intramural sanctions on an *ad hoc* basis. Just as the criminal provisions to check the legislature place the initiative in the hands of the executive and the remedy in those of the judiciary, the implementing mechanism of the code of ethics should be located outside the legislature. No existing institution seems satisfactory, however, for executing the subtle mandates of such a code. Perhaps a special government agency, such as a Legislative Ethics Commission, should be established by the legislature and then severed from further control.[103] Appointment of members should be on a nonpartisan, nonrepresentative basis, but it would seem desirable that the attorney general be a member ex officio and that the governor have an appointee. Other appointing parties might include the legislative majority and minority leaders, the state bar association, the judicial conference, deans of law schools, presidents of universities, the labor council, and the chamber of commerce. Insofar as possible the appointees should be persons with sufficient independence and prestige in the community to make decisions without regard to the identity or power of those affected.[104] In addition the attorney general might institute the practice of giving formal opinions at the request of a legislator applying the code standards to actual or hypothetical facts. While the contents of such opinions should be made public, the identity of the addressee could be kept confidential on request. The Commission then could undertake promulgation of a general regulation or of a specific opinion based on its investigation of the topic to supplement or modify the opinion of the attorney general. It might also institute a

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[101] *E.g.*, MINN. STAT. § 3.89 (1961); N.Y. Sen. Res. 131, March 20, 1954.

[102] Compare the results in Massachusetts and New York, both states with legislature-enforced codes, pp. 1212–13 *supra*.

[103] It follows from the discussion of the absence of restraints on judicial powers, pp. 1214–15 *supra*, that there is no insuperable constitutional objection to the legislature's investing power in nonlegislative agencies to control the relationship between each member's official and private activities. The legislative committee which considered the problem in New York assumed that "disciplinary action or even review or referring would necessarily involve the question of 'qualification.'" N.Y. REPORT, *op. cit. supra* note 98, at 16. The Texas attorney general was of the opposite opinion, suggesting an independent agency to receive complaints, hold hearings, and refer conclusions to the legislature for final action to be taken within thirty days, after which the complaint and evaluation would be made public. TEX. LEGISLATIVE COUNCIL, *op. cit. supra* note 73, at 53. The Legislative Council's report, while noting the New York position at length, concluded only that "the possibility that the validity of such an agency might be questioned on constitutional grounds does exist." *Id.* at 54. It is noteworthy that a comprehensive statute with an independent agency has been introduced in Minnesota, which has had a legislative ethics committee since 1961. A Bill for an Act Relating to Public Service Ethics, in Letter From Minn. Assistant Attorney General to the *Harvard Law Review*, March 9, 1962. Moreover, in New Jersey a bill with an independent agency has passed the assembly at least twice. Assembly No. 2 (1960), Assembly No. 1 (1961).

[104] Compare Massachusetts special commission (Mass. Acts and Resolves 1961, ch. 610, § 2); proposed Louisiana commission (La. Legislative Council, Joint Resolution to Amend Article XIX, at 11–15, in Letter From La. Reorganizational Study Commission to the *Harvard Law Review*, Feb. 12, 1962); proposed Minnesota commission (*supra* note 163).

general study of a range of problems and publish general regulations when needed. The final duty of the Commission would be to assess asserted violations of the code and to invoke sanctions against violators. If the Commission had sufficient prestige, if its pronouncements were adequately publicized, and if its decisions did not adopt unrealistic standards, then the mere publication of a finding that a particular legislator had committed, or continued to commit, a violation might be enough of a sanction to deter offenders. An additional sanction would lie in the Commission's implied power to make recommendations of suitable action in the legislature — disqualification, censure, or removal. In some cases it might be necessary or desirable to give the Commission the power to issue orders enforceable by injunction in the courts. In cases of particularly pernicious conflicts — not susceptible of remedy by publicity or injunction — a more potent sanction might be necessary. By analogy to the device employed by certain other governmental agencies[165] the Commission might be empowered to promulgate specific regulations which would become assimilated into the criminal provisions of the act. The criminal sanctions could be designed to take effect after a specified time absent disapproving action by a two-thirds vote of the legislature.[166] Thus, for example, if the Commission found that the sale by legislators of insurance to contractors on state highway projects was not otherwise proscribed but that such sales invariably tended to invite serious abuses and to produce an unsavory public appearance then it might prohibit such sales generally by placing them in the special category. After the failure of the legislature to veto the criminality recommendation, any violator would be subject to the statutory penalties for any such sale.

The suggested commission is merely one possible method of formally placing the initiative and responsibility for policing legislative ethics outside the legislature. It would take advantage of a temporary peak in the legislature's reforming spirit by permanently entrusting this spirit to a body less likely to let it die. It would allow the legislators themselves to set out the basic topics of concern, and the nonlegislators to apply them flexibly and usefully, providing a clearer guide to behavior and a deterrent to misbehavior. It may be that no legislature would institute such a system without provocation, but such provocation in state politics is not unknown.[167]

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[165] See Securities Act of 1933, 48 Stat. 85 (1933), as amended, 15 U.S.C. § 77a (1958); 48 Stat. 87 (1933), as amended, 15 U.S.C. § 77 yyy (1958).

[166] Compare 28 U.S.C. § 2072 (1958) (method of adopting rules of procedure in federal courts).

[167] For example, passage of the Massachusetts conflict-of-interest law, covering both state and local legislators, was attributed to "a clamor in the towns for a cleanup of corruption and conflict of interest." Boston Herald, Feb. 1, 1963, p. 7, col. 7.

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MEMORANDUM

TO: Alaska Legislature--Special Joint Committee on Legislative Reform

FROM: Ken Wonstolen, Esq., consultant to NCSL
Candace Romig, Staff Associate, NCSL

DATE: March 15, 1983

RE: Legislative Ethics

This memorandum is organized as follows:

I. Background
--NCSL assistance
--purpose of memo

II. Introduction and Overview
--public trust doctrine
--appearance of impropriety
--practical code of ethics
- public pressure/Attorney General's Opinion
- policy rationale

--Alaska situation

III. Control Mechanisms
--elective process
--public exposure
--partisanship
--executive branch
--judiciary
--legislative commission
- intramural
- independent

IV. Selected Issues
--personal gain
--conflict of interest
- nature of duty
- disclosure and abstinence
- disclosure and excuse

--voting/vested interest
--state loans

--state contracts
--agency appearances

V. Legislative Guidance
--courses of action
- legislative ethics bill
- comprehensive legislation
- interim study

--policy questions

I. Background

NCSL has been commissioned to assist the Committee in its deliberations. Three general areas have been identified for study: Legislative rules and procedures; the legislative budget process; and legislative ethics. Ethics have been identified as the area of most immediate and pressing concern, and this memo is part of NCSL's response. The purpose of this memo is to stimulate the thinking of interested legislators and staff and provide a vehicle for discussion by and guidance from the committee. NCSL is also preparing a detailed analysis that reviews current legislative initiatives on ethics vis-a-vis other state and model codes. In addition, NCSL staff will visit Alaska during the week of March 21 to communicate directly with the Committee, as well as other interested legislators and staff. The Committee's discussion of this memorandum on March 21 and a subsequent working session with Alaska legislative staff on March 22 are designed to result in a specific ethics proposal.

II. Introduction and Overview

Both the American political tradition and Alaska's statutes hold that "public office is a public trust" (see footnote #1) in which independent judgement must be exercised to further the public welfare. The United States Supreme Court has recognized as fundamental the right to be governed by representatives whose judgements are untrammelled by considerations of personal gain. (See footnote #2)

This trust responsibility is imposed on legislators not just to safeguard the public welfare, but also to maintain public confidence in the system of government. Instances of corruption, influence peddling and personal gain-seeking undermine public faith in institutions. This means that even the appearance of impropriety and the "danger of conflict of interest" (see footnote #3) must be avoided. Legislators are held to a high standard, commensurate with their positions of influence and responsibility.

Recognizing these basic tenets, the next step is to devise and implement a practical code of ethics to govern day-to-day legislative affairs. This is a difficult and complex task. The goal should be to develop a set of guiding principles, supplemented by specific rules for recurring, clearly-defined situations. This must be coupled with a process whereby these principles and rules may be extended to novel situations. Finally, provision must be made for enforcement.

The Alaska legislature has engaged this challenge. Cases of actual or perceived misconduct have led to public pressure for reform. The

Attorney General has issued an opinion indicating the applicability of common law standards absent statutory controls. Since the common law is not well settled on the majority of ethical issues, confusion and uncertainty persist. The common law does have a role to play in guiding the practical application of statutory ethics, however. Almost all statutes acquire a judicial gloss over time, whereby the common law is created or supplemented. The advisory opinions of an enforcement body would be a valuable "common law" adjunct to an ethical statute.

Nevertheless, legislative enactment of an ethical code is a worthy goal. It would provide more definitive guidance than the common law. Public desires for reform would be accommodated. Most importantly, a process would be established for applying, extending and enforcing ethical provisions.

Alaska's special situation must be kept in mind in developing such legislation. That is, the state has a relatively small population and pool of potential legislators. The legislature itself is a compact body. Further, members are part-time legislators, retaining their varied outside business interests. Finally, state government is heavily involved in Alaska's economy. These factors call for sensitivity to the possibility of discouraging the pursuit of political office by capable, commercially active citizens.

III. Control Mechanisms

The fundamental control over legislative conduct is, of course, the elective process. Ironically, the elective process may also generate those personal obligations which tend to create potential conflicts. In addition, state legislative elections are more likely to turn on local issues or party affiliation than on subtle questions of ethics. Therefore, the elective process is an unreliable and unpredictable control mechanism.

Associated with the elective process is the effect of the light of publicity. Its power is dependent on open processes, active media and interested citizens. Alaska has disclosure requirements for certain public officials, including legislators (see footnote #4). It has also made provision for public notice and participation in its legislative processes. Any ethical control method adopted by the legislature must balance individual rights to privacy against the public right to know.

It has also been suggested that partisan considerations may operate as a control over legislative ethics. While it is true that disclosure of ethical violations might occur due to partisan motives, there are objections to relying on partisanship as an ethical control. First, there may be a temptation to use knowledge of a violation for partisan advantage, rather than disclosing the problem. Second, considerations of comity dictate against reliance on a mechanism which would tend to exacerbate partisan divisions. Finally, public accountability is minimal.

The executive branch may also exert some control over legislative ethics. The Attorney General is currently occupying the field. He asserts the right to advise on ethical issues and bring legal actions for ethical violations. The Governor might, by executive order, establish

ethical parameters for agency actions, including dealings with legislators. Conversely, the legislature may exert its authority over executive branch ethics by enacting a statute.

Courts are probably the ultimate arbiters of legislative ethics. For constitutional reasons (see footnote #5) plus a disinclination to deal with "political questions", courts play this role with reluctance. However, legal precedent indicates that legislative authority over intramural affairs may be limited by the public trust doctrine. (See footnote #6.) Nevertheless, statutory guidance is important to the judicial process as well.

Courts are less likely to assert jurisdiction over legislative ethics in the presence of some formal control mechanism established by statute. There is a natural desire to preserve legislative autonomy in this regard. The legislature has the constitutional authority to judge its members, and peer review is an accepted means of establishing ethical standards in many professions. An internal policing body may be taken more seriously by legislative members and has certain advantages in the advisory or consultative process involved in ambiguous or unclear ethical situations. However, exercising this prerogative is unlikely to assuage judicial or public concerns over legislative ethics. Practical difficulties are raised as to majority, minority and factional representation, as well as the small pool of legislators available. Partisanship would be a troubling element. Finally, the record of such intramural bodies is mixed. (See footnote #7.)

An independent legislative ethics commission is a concept worthy of consideration. It would have enhanced credibility vis-a-vis the other branches of government, the media and the public. It would minimize the practical and partisan concerns raised by intramural bodies. And, it would isolate the ethical arena from the vagaries of legislative attention. Members of such an independent commission might include former legislators, retired judges, university deans and corporate directors. The Attorney General might be an ex-officio member. Appointments might be made by the majority and minority leadership of each house, as well as the Governor, State Bar Association and Chamber of Commerce.

IV. Selected Issues

Whatever the control mechanism adopted, substantive statutory guidance will be essential. Several major issues will be considered here. Additional points will be covered in NCSL's detailed comparative analysis.

Ethical concerns may, perhaps, be summed up by two basic proscriptions. First, public office should not be used for personal gain. This includes such violations as accepting bribes or kickbacks, exerting improper influence, using or disclosing confidential information, and using state property for personal purposes. Second, office holders should not conduct outside business which conflicts with the conscientious performance of duties or the independent exercise of judgment. Conflict of interest implies an interest which is present and personal, and not shared by the general community. It includes the notion of vested interest, as well as the notion of division of loyalty.

Disclosure and abstinence are the proper courses of action regarding conflicts of interest. A higher duty is imposed, however. Legislators are elected to exercise their judgment on matters of public concern and should strive to conduct their outside business so as to minimize conflict situations (see footnote #8). Indeed, a legislator may not receive a personal benefit by declaring a conflict, abstaining and letting a "disinterested colleague" make the decision. (See footnote #9.)

This raises a concern relating to the current Alaska practice of allowing a single vote to prevent a legislator from abstaining on a decision after declaring a conflict. The possibilities for collusion and abuse are apparent. It is unlikely that the common law would excuse an ethical violation on this basis. Similarly, full disclosure and a sworn statement that independent judgment will be exercised may be insufficient to excuse a conflict. Quorum considerations are the only justification for such practices. They should be used with restraint and should be specifically covered in a statute.

The Attorney General's opinion raises three specific issues. One relates to the notion of vested interest. That is, a legislator may vote on a bill by which he benefits, as long as the benefit is not peculiarly personal. If the legislator is one of a small class of beneficiaries or if the bill affects a venture with which he is commercially connected, he must abstain.

A second issue relates to state loans to legislators. Here the relevant factors involve the size, availability and discretionary aspect of the loan in question. Loans with standard criteria as to qualification, amount, security and repayment, and general availability, are acceptable. Large commercial loans involving discretion in determining creditworthiness, terms and administration, and which are of limited availability, are more problematic.

A third issue relates to legislators contracting with the state. The Attorney General finds the common law to prohibit such contracts, with limited exceptions (see footnote #10). Some states allow legislator/state contracts which are "de minimus" (small in value or legislator has fractional interest). Others allow competitive contracting. The latter exception is problematic, raising concerns over improper influence, use of confidential information and discretion in the awarding and administration of such contracts. The course of action most consistent with the duty of legislators to avoid even the appearance of conflict would be a prohibition.

A final issue, not raised by the Attorney General's opinion, relates to legislator appearances before state agencies. While it is a traditional legislative function to intercede with state bureaucracies on behalf of constituents, this must be distinguished from appearing as a principal or in a representative capacity. Some states allow appearance as a principal to maintain the status quo regarding a business interest, but not to obtain a new franchise. Some allow representation of a client, even for compensation, if such compensation is disclosed and is not contingent on the agency action. Public perceptions should be considered in this regard.

V. Legislative Guidance

Three courses of action are suggested for legislative consideration:

- Enact a legislative ethics bill during the 1983 session. NCSL assistance, including this memo and a detailed comparative analysis, as well as on-site consultation is being provided under NCSL's contract with the Committee. Senator Fischer has prepared a working draft which could form the basis of a bill.

- Enact a companion bill for other state officers and employees, or a comprehensive statute covering all public officials. HB 20 (by Rep. Miller, et al) could serve as the basis for a comprehensive approach.

- Defer action on one or both of the above areas (legislators/other public officials) until the next session and conduct additional study during the interim. Such an interim study could be organized and staffed by NCSL as a follow-on to its existing contract, consistent with its commission to assist the enhancement of Alaska's legislative process.

If immediate action is chosen as a course of action, legislative guidance would be useful on a number of specific policy areas:

- What kind of control mechanism or policing body is preferred?
  --intramural/independent
  --publicity of proceedings, remedies
  --advisory/enforcement function

- How broadly or narrowly should conflict of interest be construed?
  --nature of duty
  --role of disclosure
  --excuses: collegial; sworn statement; quorum issues
  --vested interests: peculiar benefit; degree of connection

- How should state loans be dealt with in legislation?
  --specific consideration of existing programs
  --general principles/advisory opinions

- How should legislator contracts with the state be handled?
  --prohibition/allowance
  --exceptions: de minimus; only source; common goods
  --competitive processes: role of disclosure

- To what extent should legislator appearances before state agences be regulated?
  --for constituents

--as principal
--as client

- What additional or related ethical issues should be addressed?
  --lobbyist controls
  --open meetings
  --campaign finance

These areas all call for the exercise of legislative policy judgment, in the light of the ethical principles and concerns raised in this memo. Specific guidance will be essential to staff in drafting legislation.

FOOTNOTES

1. AS 39.50.010 (b)(1)
2. Tool Co. v. Norris, 69 U.S. 45, 54-55 (1865)
3. AS 39.50.010 (b)(1)
4. AS 39.50.030
5. Alaska Constitution Article II, Section 12
6. U.S. v. Ballin, 144 U.S. 1, 5 (1892); ct. U.S. v. Smith 286 U.S. 6 (1932)
7. See 76 Harv. Law Rev. 1209 (1963)
8. See AG Opinion pp. 37-38
9. See AG Opinion p.2
10. See footnote 14, p. 26 of AG Opinion

OUTLINE OF MAIN FEATURES AND POLICY CONSIDERATIONS FOR PROPOSED CONFLICT OF INTEREST/ETHICS LEGISLATION

1. Prohibited Conduct
2. Disclosure
3. Ethics Agency

1. PROHIBITED CONDUCT

In general, a conflict of interest exists if a public official must take official action which would beneficially or detrimentally affect a business, property, contract, venture, or transaction in which the public official has a financial interest, or for which he acts as legal counsel, advisor, consultant, agent, or representative. Financial interests which create a conflict of interests are prohibited, unless the financial interest is so small or so removed from the impact of official action that a reasonable person's official action could not be influenced by the financial interest.

WHAT IS SPECIFICALLY PROHIBITED? (Amend AS 39.50.090)

1. Contracts with state (or local) gov't involving an agency that could be influenced by person, including sole source contracts and including contracts w/in twelve months of termination

2. Representation for compensation before gov't agencies
   Exception for representation in courts (or quasi-judicial agencies) where the opposing party is not a gov't agency

3. Assisting a person or business for compensation, within twelve months of termination, on any matter upon which the public official took action.

4. Receiving state loans
   Except land lottery, student loans, housing loans

5. Use of gov't property, equipment, or services for non-gov't purposes unless reimbursement system established (i.e. xerox copies)

6. Receipt (or solicitation) of gifts from persons who deal with the state, including discounts or other benefits which could be used to advantage by the state.

7. Substantial financial dealings between employees and supervisors, between representatives from different branches of gov't,

8. Use of confidential information for non-gov't purposes

9. Nepotism

10. Financial interest in a business or industry regulated or influenced by the public official

11. Action that may affect any investment, property or other financial matter

2. DISCLOSURE

a. DISCLOSURE OF CONFLICT

Disclosure must be made to: supervisor, legislature, court, or municipal assembly, as appropriate, and either (1) immediately eliminate the conflict (i.e. divest interest), or (2) refrain from taking any action that creates an appearance of conflict, including delegating responsibility for the decision, and immediately seek advisory opinion from ethics agency.

b. FINANCIAL DISCLOSURE

WHO DOES IT APPLY TO? (Amend AS 39.50.020 and 200)

In addition to the persons covered by AS 39.50, consideration should be given to requiring the following persons to file disclosure statements with the appropriate ethics agency:

Ethics Agency	
APOC	Executive Branch: All employees above Salary Range _____ plus other employee classifications by regulation plus all nominees for appointed positions to boards, commissions, department and division heads
APOC or Legislative Ethics Committee	Legislative Branch: Employees of an agency of the Legislature above Range _____ plus individual and committee Legislative staff above Range _____ plus other employees by regulation or rule
APOC or Supreme Court/ Judicial Council or Judicial Qual. Comm.	Judicial Branch: Administrative personnel above Range _____ plus other employees by regulation or rule
APOC or Municipal Assembly	Municipal Bodies: Lower ranking employees

HOW COMPLETE MUST FINANCIAL DISCLOSURE BE? (Amend AS 39.50.030)

In addition to the information required by AS 39.50.030, consideration should be given to requiring disclosure of the following information which is required to be disclosed in some states:

Federal Income Tax Returns
Any gift received or given greater than $100
All trusts of which person is a trustee
Transactions with employees or supervisors

3. ETHICS AGENCY

All public employees are answerable to an ethics agency, even if they were not required to file financial disclosure statements.

WHAT IS THE FUNCTION OF THE ETHICS AGENCY?

Advisory opinions - to public officials, employees and to members of the public

Handle complaints - from public officials, employees and from members of the public

Preliminary Inquiry: preliminary factual determination by staff of the agency as to whether there is any reasonable possibility to believe the facts may be true
-and- a preliminary legal determination as to whether the alleged facts, if true, would constitute a violation.
-if either can be answered in the negative, the matter will remain confidential
-if both can be answered yes:

Investigation: as extensive as necessary to allow the committee to determine whether further agency action is needed.

Hearing: to determine facts, make legal conclusions and, if necessary, impose sanctions under an appropriate standard of proof, and through defined procedures.

WHAT ARE THE POWERS OF THE ETHICS AGENCY?

Investigative powers:
- subpoena
- contempt sanctions
- note: legislative immunity problems may may exists unless the ethics agency is within the legislature
- note: testimonial immunity problems exist

Sanctions available:
- contracts voidable
- private or public reprimand
- legislative censure (take away privileges)
- legislative expulsion
- termination of employment
- levy fines
- forfeiture of gifts to the state
- order restitution, enforceable in court
- suspend sanctions on certain conditions
- recommend prosecution
- recommend sanction to employer/legislature/court

H

TO: Joint Special Committee on Legislative Reform

FROM: Connie Halford, Concerned Citizen

SUBJECT: Make-up of proposed committee

DATE: March 28, 1983

The legislature has the opportunity to show some leadership and help to alleviate the conflict of interest problem that exists, not just for legislators themselves, but for the administration and whomever else may be affected by such conflict questions. Having everyone police their own will look like a whitewash to the public and shows that the legislature will only respond as far as it is forced to in dealing with this question. A committee made up of legislators and two commissioners will not have the public trust. Commissioners must be confirmed by the legislature, present their budgets, and are subject to conflict of interest charges themselves, as we have seen lately when the Commissioner of Commerce, the Commissioner of Natural Resources, as well as the Attorney General and the Governor themselves have come under scrutiny. Who will rule on the Governor, AG, & Commissioner of Natural Resources, who are involved in the same incident? The AG ruled on the Commissioner of Commerce--can the AG rule credibly on possible conflicts of other members of his boss' cabinet?

I see the best solution as one "Conflict of Interest Board" that would deal with everyone. It would need to draw from a wide spectrum of viewpoints in order to have maximum credibility. It is essential that the officials themselves, as well as the public, be able to have confidence in the rulings of the Board. The Board would decide whether conflicts did exist and whether conflicts would exist, the latter in response to a request from someone prior to undertaking certain action. If a determination of nonconflict was gained from the Board, the individual must be able to have confidence that he will not later be prosecuted or persecuted for following that determination. That can only be the case if the Board has the credibility that would be gained from careful structuring. If a credible Board is established, the legislation should provide that an individual following the determination of the Board can't get in trouble for it as long as no evidence was misrepresented by him before the Board.

Possible make-up of the Board might be a member from the Attorney General's office, a member from APOC, a few legislators, some members of the public (chosen some way other than appointment by legislative leadership or the Governor).

REPRESENTATIVE DON CLOCKSIN

Alaska House of Representatives

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J

TO: Members, Special Committee on Legislative Reform

FROM: Rep. Don Clocksin

DATE: April 4, 1983

Thank you for the opportunity to testify before you on Thursday, March 31, 1983, regarding the "Speech and Debate Clause" of the Alaska Constitution. I have now received the legal opinion I requested on the immunity of a legislator from punishment for his or her activities during a legislative session.

That opinion, which is attached, appears to indicate it is difficult to hold legislators responsible for actions taken during a session, even if they are unethical. This is consistent with the recent ruling in State v. Dankworth, also attached.

I encourage you to carefully review this problem. If it is not addressed, we run the risk of passing legislation which exceeds our authority and which may be viewed by the public as a facade.

Several specific points should be addressed regarding our "speech and debate clause". That provision provides as follows:

> Legislators may not be held to answer before any tribunal for any statement made in the exercise of their legislative duties while the legislature is in session....

First, does the language "may not be held to answer" prohibit even an investigation with subpoena powers? The Dankworth opinion addresses this on page 9.

Second, does the language "before any other tribunal" allow a legislative committee to investigate a legislator? What if some members of that committee were not legislators?

Third, does the language "for any statement made in the exercise of their legislative duties" protect actions taken in committees or in the budget process? See the discussion in the Dankworth opinion at pp. 6-8.

Fourth and most important, can the Legislature waive the constitutional immunity? It would seem that a waiver may not be possible. See the Dankworth opinion, at pp. 9-13. Even if it is, substantial policy reasons exist for protecting legislators from politically motivated harassment which interferes with their ability to represent their constituents. The issue is where the line is drawn between the public's right to expect honest legislators and the voters' right to have their legislator free to act in their interests. The history of this constitutional immunity, and the federal counterpart, is replete with examples of politically motivated interference with honest legislators and illegal actions by dishonest legislators.

Good luck with your work!

enclosures:

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I

TO: Special Joint Committee on Legislative Reform

FROM: The National Conference of State Legislatures

RE: Preliminary Report on Work on Conflict of Interest Legislation

DATE: April 1, 1983

As required under the contractual agreement between the Alaska Legislature and the National Conference of State Legislatures, this report is submitted to the Joint Special Committee on Legislative Reform and will recap the work and findings to date in the NCSL's work on the issue of conflict of interest.

SUMMARY OF ACTIVITIES TO DATE

Following an initial on-site visit by NCSL staff to Juneau to determine the priorities and parameters of the overall project, the NCSL staff has devoted most of its efforts to the immediate concern over the development of conflict of interest legislation during the 1983 legislative session. To assist the Joint Special Committee on Legislative Reform in its deliberations on this issue, the NCSL staff has completed the following tasks:

- a detailed search and analysis of statutory provisions dealing with conflict of interest and related legislative ethics issues in the other 49 states;
- a review and analysis of legislative rules provisions dealing with voting procedures and conflict of interest in the other 49 state legislatures;
- in-depth telephone interviews with legislative staff nd ethics authorities in four states where similar legislative characteristics or ethics problems have been addressed;
- analyses of current Alaska ethics statutes and four legislative proposals currently pending before the Alaska Legislature;
- on-site interviews with legislators, legislative staff and others;
- presentations before the Joint Special Committee on Legislative Reform on fundamental ethics questions, and
- participation in a decision-making workshop designed to facilitate the committee's consideration of ethics legislation.

Attached are the background documents, bill analyses and research memoranda prepared by the NCSL staff for the committee.

DISCUSSION OF THE PROJECT TO DATE

Ethics issues are complex, requiring great balance between personal liberties, public service obligations and institutional legislative needs. The job of drafting appropriate legislation on this issue currently is complicated in Alaska by pressures of time in the current legislative session.

The NCSL staff has attempted to provide the Joint Special Committee on Legislative Reform with information which will further the understanding and discussion of legislative ethics issues. In addition, the NCSL staff has tried to help facilitate the process by identifying the major policy decisions which must be addressed in legislation. (The attached workshop summary from March 22,1983, reflects the outline of decisions facing the committee.) In terms of these major policy decisions, the NCSL staff offers the following comments and findings on the process of developing a legislative ethics bill thus far.

Scope of Coverage

The legislature has before it proposals which would deal with only legislators and ones which would cover all public officials. There is no consensus on this issue.

Comment: Given th constraints of the legislative session, a bill covering only legislators and legislative staff persons is probably more realistic and feasible at this time. Conflict of interest statutes covering only legislators and legislative staff persons are in force in 33 states, and the separation of powers doctrine makes it appropriate for the legislature to deal with ethics issues for itself, independent of other government officials.

Control Mechanism/Policing Body

1. There seems to be a consensus that a legislative committee with public citizen members should be established to oversee and enforce provisions of a legislative conflict of interest or ethics bill.

Comment: The separation of powers doctrine and constitutional bases give credence to the concept of an internal legislative ethics committee. At the same time, the involvement of independent citizen members mitigates some of the difficult dynamics which legislative members face when judging and penalizing their peers. A selection process controlled by the presiding legislative officers is appropriate with safeguards for minority representation. To insure a balance of independence, citizen members probably should be appointed by some independent process, e.g., selection by the state judiciary or nominees by the state judiciary or the governor and selection by lottery.

2. The staffing of an ethics committee must be adequate to the powers assigned to do it.

Comment: If the powers of an ethics committee are primarily advisory and the principal enforcement strategy is for full and early disclosure, a limited legal and administrative staff may be adequate to serve the

committee. If, however, an ethics committee is vested with investigatory responsibilities, then a more substantial staff is required.

3. There seems to be a consensus that the proceedings of an ethics committee should be confidential until such time as findings and rulings are concluded and published.

Comment: Confidentiality in the preliminary stages of an investigation and in an advisory process is appropriate.

Conflict of Interest

1. There seems to be a consensus that early disclosure of potential conflicts of interest is essential, and that a legislator is obliged to report a potential conflict as soon as he or she is aware of such a conflict.

Comment: This approach is fundamental and appropriate.

2. A legislator must represent constituents and vote on matters before the legislative body.

Comment: Most state legislative rules prohibit members from voting on matters in which they have a direct personal or pecuniary interest, and the most common practice is to allow the member to state the reasons for not voting and then, without debate, to have the rest of the membership vote by simple majority to excuse the member. It is valid to balance quorum considerations with the process of minimizing potential conflicts of interests, however, Alaska's rules which require unanimous consent of the body to excuse a member from voting are among the most stringent. Ony three other legislative bodies require unanimous consent to excuse a member. In a small legislative body, abstaining from a vote and legislative action may contribute to the conflict of interest. Consequently, the most equitable method to resolve these situations is by early and full disclosure of the potential conflict. Particularly in light of the unanimous consent provision, the NCSL staff suggests that disclosure include a sworn statement that independent judgment will be exercised.

Loans

1. Legislators should be eligible for non-discretionary state loans.

Comment: This is appropriate and reflects a consensus among the legislators.

2. There is no consensus on the question of whether state legislators should be eligible for discretionary loans.

Comment: Alaska represents a unique situation for which there is no parallel in other states. The dominant role of the state in the commercial loan market is not evident in other jurisdictions. At a minimum, a conflict of interest statute dealing with state loans should require full and early public disclosure of loans and loan applications by public officials.

Contracts

1. There seems to be consensus that legislators should be eligible for contracts with the state under competitive bidding procedures.

Comment: In 31 states, public official face some restrictions on entering into public leases or contracts. Fourteen states allow public officials to enter into contracts through a competitive bidding process. Again, as a minimum standard, the NCSL suggests that early and full disclosure be required of legislator bids on contracts and contract awards to lawmakers.

Appearances

1. There seems to be consensus that some restrictions would be appropriate on legislators representing constituents or themselves for compensation before state agencies.

Comment: Nineteen states require disclosure of compensation received by public officials who represent clients or constituents before state agencies, and 28 states restrict appearances by public officials. Disclosure is imperative in these instances, and public perceptions of undue influence may require more stringent safeguards.

CONCLUSION

To date, no specific piece of legislation before the legislature reflects a consensus view on conflict of interest. Opinions remain divided on major policy questions. Fundamental decisions must be addressed by the Joint Special Committee on Legislative Reform and by the legislature as a whole on this question. Given the time constraints of the legislative session, resolution at this time may not be possible, however, inaction on the part of the legislature must be balanced with public perceptions of the immediacy of this question.

PROVISION	ALASKA LAW (Chapter 50)	HOUSE BILL 20	SENATOR FISCHER'S MEMORANDUM	OTHER STATES
Scope of Statutes	The statute covers: • All legislators • Judicial officials • All candidates for state and municipal elective offices • The governor, lieutenant governor, and selected state agency officers.	The legislation would cover: • All legislators and legislative employers • All municipal officers and employers • The governor and lieutenant governor.	Legislation would apply to: • All legislators • Legislative staff working with committees and legislators • Legislative members-elect • Former legislative members.	• Idaho, Vermont, and West Virginia have no disclosure laws or restricted activities • Public officials, including legislators (14 states) • Specific legislation for legislators (33 states)
Disclosure Requirements	Requires disclosure of: • All income over $100 by official or family • Business interests and ownership • Real property • Trusts • Loans or loan guarantees, and • Contracts or offers to contract with the state. Assets or liabilities under $500 need not be disclosed Disclosure statement filed annually; sworn statements required of some officials. Blind trusts are acceptable but must be reported.	Requires disclosure of: • All items required under AS 39.50.020 • Specific conflicts require preparation of a separate statement by certain state executive officials and municipal officers • Other public officials required to state a conflict at the time of official action.	Legislation would require disclosure of the following: • Direct interest in an enterprise affected by a vote on proposed legislation • Financial benefit derived from a close economic association with an individual with direct interest in an enterprise affected by a vote on proposed legislation • Financial benefit derived from a close economic association with a person lobbying, or who hires a lobbyist, to propose legislation or to influence legislators' votes • Gifts, loans, or payments in the aggregate amount of $100 or more from anyone with an interest in an enterprise affected by a vote on proposed legislation • Fees and honorariums received in excess of $100 • Financial transactions involving legislators and staff in excess of $1000 • All contracts with the state	States require disclosure for: • Source of income (34) • Income of business if partnership or shareholder (23) • Investments (29) • Real estate interests (33) • Offices and/or directorships (31) • Creditor indebtedness (24) • Leases or contracts with public agencies (14) • Gifts (19) • Compensated representation before state agencies (19) • Fees or honorariums (23) • Reimbursement of travel expenses by private sources (10) • Professional or occupational licenses held (8) • Deposits in financial institutions (10) • Retainers (4) • Cash surrender value of insurance (5) • Nature of outside employment (22)

PROVISION	ALASKA LAW (Chapter 50)	HOUSE BILL 20	SENATOR FISCHER'S MEMORANDUM	OTHER STATES
Disclosure Requirements (continued)			Recommended procedures for disclosure: • Legislator declares conflict of interest on the floor of the legislative body and requests to be disqualified from voting • A written statement submitted to the committee describing conflict bars legislator or staff from further action on the legislation in question, unless the statement asserts to the satisfaction of the committee the objective ability of the party to participate in the legislative action.	• Professional services rendered (11) • Identification of trusts by trustee (11) • Identification of trusts by beneficiary (10) • Financial interests of official's spouse and dependents (33) Reports and statements are generally required to be filed within a specified time period.
Conflicts of Interest: General	The statutes prohibit public officials from: • Using his office for financial gain to himself, business or family • Soliciting money for legislative advice or other assistance relating to his public employment • Representing a client before a state agency for a fee (Municipal officers similarly are barred from representing a client before their municipal body.).	The bill would prohibit public officials from: • Soliciting gifts to influence or reward an official action • Using public office to seek employment, contracts or compensation benefiting the official or his household • Using public time, equipment or facilities for private or political purposes • Soliciting financial transactions in businesses an offical supervises • Using confidential information for personal gain • Participating in actions affecting a business or property in which a public offical has a personal financial interest • Representing a person before a state agency for compensation (legislators and staff)	Legislation would proscribe the following as conflicts of interest: • Undue influence exerted as a result of public office • Participation in outside business or professional activity inconsistent or in conflict with official duties • Misuse of state property or funds • Owning capital stock in a corporation in excess of $1000 • Acting as an officer, director, or agent of a corporation • Representation for pay of a client before any state or local agency • Nepotism, excepting unpaid relatives • Confidential information not available to general public and obtained in the course of official duties used for personal benefit.	States have restrictions on the following: • Use of public position to obtain personal benefits (40) • Giving benefits to influence public officials and/or public employees (3 • Use of confidential information (37) • Post-governmental employment (22) • Receipt of gifts (31) • Public officials representing clients before public bodies (28) • Receipt of fees and honorariums (23) • Nepotism (15) • Public official's outside employment or business activity (28)

PROVISION	ALASKA LAW (Chapter 50)	HOUSE BILL 20	SENATOR FISCHER'S MEMORANDUM	OTHER STATES
Conflicts of Interest: General (continued)		• Assisting persons for compensation to pass or defeat legislation or secure a contract, claim or transaction before the legislature, a state or municipal agency. Former officials would be prohibited from: • Using confidential information for personal gain • Representing persons in transactions in which the official was involved. (12 mos. time period)		
Conflicts of Interest: Contracts and Loans	The statutes do <u>not</u> prohibit public officials from receiving state loans or contracts.	The bill would <u>not</u> prohibit public officials from receiving state loans or contracts. The bill would prohibit public officials from assisting for compensation other persons who are seeking to obtain contracts, claims, etc.	Legislation would proscribe the following activities with regard to contracts and loans: • Contracts made with state and local government without public competitive bid process; non-bid contracts may be awarded at the discretion of the committee provided no undue influence is exerted to obtain the contract and it does not conflict with the conscientious performance of official duties • Discretionary state benefits not available to the general public such as loans and land disposals in which the decision-making process does not safeguard against the appearance of improper influence.	Specific restrictions pertaining to contracts and loans: • Public officials entering into public leases or contracts (31) • Competitive bidding (14)
Activities Not Restricted	No unrestricted activities are specifically identified.	No unrestricted activities are specifically identified.	Proposed legislation specifically allows: • Outside employment and business opportunities, provided an advisory opinion of the committee is sought in cases of potential conflict	• Kansas, Maine, and Missouri are three states which allow a state officer to contract with the state in a process of competitive bidding or for which the price or rate is fixed by law

PROVISION	ALASKA LAW (Chapter 50)	HOUSE BILL 20	SENATOR FISCHER'S MEMORANDUM	OTHER STATES
Activities Not Restricted (continued)			• Former legislators and staff may lobby or work for state agencies immediately upon leaving the legislature subject to the constitutional ban on legislators taking a position with a salary increase created while the legislator was a member.	• In Maine, legislators may serve on public boards, commissions or other authority created by the legislature provided no consideration is paid.
Control Authority	The statute is administered by the Alaska Public Offices Commission, an independent commission within the Department of Administration. The commission duties and powers include a provision to: • Maintain records, reports and disclosure statements and establish reporting procedures The commission is not authorized to initiate or conduct investigations relative to violations. All disclosure statements and reports are public records.	The bill would assign new duties to the already existing Alaska Public Offices Commission, an independent commission within the Department of Administration. The commission duties and powers would include to: • Issue advisory opinions and publish edited versions of opinions to maintain confidentiality • Accept, initiate and investigate complaints • Subpoena witnesses, take testimony and hold hearings on complaints • Maintain necessary records, reports, forms and establish reporting procedures • Make determinations of appropriate action • Assess civil penalties for violations • Refer impeachable offenses to other state officials for subsequent action • Refer determinations warranting removal to the appropriate appointing authority. Advisory opinions may be edited for confidentiality. Complaints and a determination by the commission are public record.	Proposed legislation provides: • Creation of a standing ethics committee in each house • Duties --investigate complaints of ethics violations --issue findings --issue advisory opinions and statements of policy --make reports to the legislature and the public • Powers --initiate complaint alleging ethics violation --hold hearings --subpoena witnesses and documents --take testimony under oath --appoint special investigator when needed --issue a private reprimand --make recommendations to the legislative body for remedies. Advisory opinions may be made public at any time by agreement of the committee and the person requesting the opinion.	• 8 states have standing legislative ethics committees • No state has a joint legislative ethics committee • 28 states have external commissions, agencies or boards with responsibility for conflict of interest. It is uncertain what jurisdiction over the legislature all of the agencies have • All external agencies but three were created by statute.

PROVISION	ALASKA LAW (Chapter 50)	HOUSE BILL 20	SENATOR FISCHER'S MEMORANDUM	OTHER STATES
Penalties	Penalties for violation of reporting requirements include: • Fines, imprisonment or both for false or misleading reports • Fines for late filings • Removal from office for failure to file • Barring a candidate from assuming office for failure to file. Penalties for violation of conflict of interest requirements include: o A misdemeanor punishable by fine and/or imprisonment.	Penalties would include: • Impeachment • Removal from office • Fines not to exceed twice the economic benefit derived by the official or a fine of not more than $2000 where no benefit is received • Contracts entered into in violation of these provisions are voidable by the state or a municipality.	Legislation provides the following penalties: • Violations are subject to private written reprimand from the committee • Upon the recommendation from the committee the legislative body may act to censure or expel the member or may recommend that the attorney general prosecute under criminal statutes • Attorney general may bring a civil action to recover compensation for damages • Members of the committee or their staff found guilty of disclosing the identity of anyone requesting an advisory opinion may have a civil action brought against them for damages • Staff found guilty of violating these provisions are terminated from employment • Any agreement contracted illegally is voidable • It is a violation of law to take any punitive or retaliatory action against a person who has initiated or assisted in the investigation of an ethics violation subject to the specified penalties of this legislation.	Information is not available for all states, however: • Maine provides that anyone convicted of filing a false charge of conflict of interest with the commission will be guilty of a Class E crime. • Maryland provides that the legislature may, by resolution, require compliance, issue a reprimand, or censure the guilty member • Wisconsin provides that the ethics board can make a recommendation to the district attorney in whose jurisdiction the violation occurred to commence criminal prosecution.
Other	The statutes allows a "qualified Alaska voter" to bring a civil action to enforce the provision.	The bill would allow legislators and other public officials to participate in an action or decision even in the case of a conflict if: • Participation is necessary to constitute a quorum • The official has filed a disclosure statement	Other features of the proposed legislation are: • Transferrable promotional benefits resulting from official business become the property of the state • When circumstances prevent the divesture of property or contracts to meet the requirements of law, disclosure must be made and an advisory opinion requested of the committee	• California defines financial interest as having an investment or interest of over $1000, having any source of income over $250 within 12 months or being employed as management in a business entity.

PROVISION	ALASKA LAW (Chapter 50)	HOUSE BILL 20	SENATOR FISCHER'S MEMORANDUM	OTHER STATES
Other (continued)		• The official announces the nature of the conflict when action is taken. The attorney general is counsel to the commission, but the chief justice of the supreme court may appoint a special counsel if requested by the commission.	• Meetings of the committee are covered by the open meetings law, but any meeting which may tend to prejudice the reputation and character of any person may be closed. Privacy of anyone mentioned in a committee opinion will be protected. • Specific definitions prescribed: household, business associate, compensation, personal financial interest.	• Kansas provides that legislators cannot be litigants in legal proceedings involving constitutionality of law enacted while he or she was a legislator. • In Maryland legislators may participate in legislative action provided their vote is needed to obtain a quorum and they have submitted a signed statement identifying conflict; the commission is required to compile a list of business entities doing business with the states. • Missouri and Oklahoma restrict the sale, rent or lease of property to the state. • Montana legislators are prohibited from participating on legislation affecting a business competitive with their own. • Nevada legislators are prohibited from suppressing documents and disclosing confidential information for money. • All New York legislators must receive, read, and understand the ethics code.

PROVISION	ALASKA LAW (Chapter 50)	HOUSE BILL 20	SENATOR FISCHER'S MEMORANDUM	OTHER STATES
Other (continued)				• South Carolina legislators must put assets in a blind trust to avoid conflicts of interest and may not appear before a board on rate- or price-fixing matters; statement declaring a conflict of interest delivered to presiding officer within 24 hours of action or decision is in compliance with the law. • The Wisconsin ethics board must report the identity of person seeking information from a statement of economic interests to the person who filed the information; no orders become effective until 20 days after it is issued.

Called Back
2-24-83

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

STATE OF ALASKA,

Plaintiff,

vs.

MILTON EDWARD DANKWORTH,

Defendant.

(C)

No. 1JU-S82-1705 CR

MEMORANDUM OF DECISION
AND ORDER RE MOTION TO
DISMISS INDICTMENT

Defendant has moved to dismiss both counts of a two count misdemeanor [1/] indictment on the grounds that neither count is supported by sufficient evidence as required by Crim. R. 6(q). Defendant's motion regarding Count II is combined with an attack on the admissibility of most if not all of the evidence presented to the grand jury in support of Count II. For the reasons set out below, [2/] the motion to dismiss as to Count I will be denied and the motion to dismiss as to Count II will be granted.

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1. The State notes in passing that "the defendant is probably not entitled to a judicial review of the evidence presented to a grand jury which returned an indictment for misdemeanor offenses," State's Memorandum in Opposition to Motion to Dismiss Indictment [hereinafter "Opposition Memo"] 37. Nonetheless, it declines to rely on that point. Id.

2. Especially as to Count I, the reasons for the court's decision are not set out in great detail. There has been insufficient time to do so. Oral argument was held on February 4, 1983 and, at the request of counsel (who need to know whether to prepare for an estimated three-week trial with more than 50 witnesses), a decision was promised by February 11. In fact, this decision will issue on February 14. Every court day between argument and decision has been entirely consumed by other matters. Hence, review of the memoranda, authorities cited by counsel, transcript and exhibits has been relegated to other times, and the time remaining for the written decision necessarily has been quite brief.

COUNT I

Sufficiency of the Evidence

Crim. R. 6(q) provides in relevant part:

> The grand jury shall find an indictment when all the evidence taken together, if unexplained or uncontradicted, would warrant a conviction of the defendant.

Upon a challenge to an indictment, the State must show that it has presented admissible evidence supporting each of the elements of the offense, Adams v. State, 598 P.2d 503, 508 (Alaska 1979), which is "adequate to persuade reasonable minded persons that if unexplained or uncontradicted it would warrant a conviction of the person charged." State v. Parks, 437 P.2d 642, 644 (Alaska 1968). Because there is a presumption that a grand jury "acted on sufficient evidence," State v. Shelton, 368 P.2d 817, 819 (Alaska 1962), and because a motion to dismiss tests sufficiency of evidence reviewed on a cold record, all reasonable inferences from the evidence must be drawn in favor of the non-moving party.[3]

Count I of the indictment charges that the defendant used his official position as a State senator for the primary purpose of obtaining financial gain for himself, in several ways:

(1) by receiving information from Alyeska Pipeline Services Company that Isabel Pass Pipeline Camp was available for purchase by the State;

(2) by communicating to Alyeska that the State was most probably not interested in purchasing the camp;

(3) by promoting an interest in the purchase of the camp by the State from him for approximately $3,000,000, knowing at the time that the camp was still available for purchase by the State directly from Alyeska;

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3. Defendant conceded this standard of review at oral argument.

(4) by participating in the subsequent purchase of the camp for $900,000, knowing at the time that the camp was still available for purchase by the State directly from Alyeska; and

(5) by further promoting the sale of the camp to the State for approximately $3,000,000.

Defendant concedes that he was a public official at the time in question and that his activities concerning his purchase of and attempted sale of Isabel Camp were undertaken primarily to obtain financial gain for himself. He vigorously disputes, however, that he used his office in any way in undertaking these activities. He analyzes, in close detail, each of the allegations of use of office. The State responds with a similar analysis.

This court has reviewed the evidence. Drawing all reasonable inferences in a light most favorable to the State, the evidence would be adequate to persuade a reasonable minded person that, if unexplained or uncontradicted, it would warrant a conviction of the defendant. That of couse is not to say that there are not other, reasonable inferences which might be drawn which would be favorable to the defendant. Indeed, counsel for the defendant have drawn such inferences and presented them in their memoranda. But it is not for this court to decide which view of the evidence is correct. It can only determine if, at this stage, the evidence is sufficient to go forward. [4/] In the view of this court, it is.

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4. Specific examples of relevant and probative evidence which support this conclusion are not provided, for the reason that the trier of fact should not be potentially exposed to the court's specific drawing of inferences -- this case has received intensive pretrial publicity -- nor does the exposure of the court's weighing process to counsel serve any apparently useful purpose. Generally, the evidence and inference urged by the State (Opposition Memo 8-21, 31-34) appear sufficient to defeat the motion to dismiss.

Requirement of Consciousness of Wrongdoing

In his Reply to State's Opposition to Motion to Dismiss [hereinafter Reply Memo], defendant raises the issue whether a person, to be convicted, must be shown to have committed acts proscribed by law with some consciousness of wrongdoing. (Reply Memo 4) He argues forcefully that unless such a scienter requirement is an element of the crime of conflict of interest, the statute would be unconstitutionally void for vagueness.

The argument appears well-founded, and the State at oral argument, in arguing that the record contained much evidence from which the defendant's consciousness of guilt could be inferred, appears to have accepted the defendant's thesis that a consciousness of guilt must be shown. (Additionally, the State argues that this scienter requirement is satisfied by a showing that a conflict of interest defendant used his office for the primary purpose of realizing personal gain.) At any event, taking all reasonable inferences arising from the evidence in a light most favorable to the State, there is sufficient evidence to conclude that the defendant acted with a consciousness of wrongdoing. Again, this conclusion merely tests the sufficiency of the evidence, not its final effect on the trier of fact.

COUNT II

Defendant has moved for dismissal of Count II of the indictment on alternate grounds He argues first that the evidence presented to the grand jury was insufficient as a matter of law to support the indictment. Alternatively, he contends that "the very allegations of Count [II] of the indictment, together with all of the evidence put forth to prove these allegations[,] are barred by the speech [or] debate clause". (Defendant's Memo 58, emphasis in original) For the reasons discussed below, this court concludes that what both parties refer to as the "speech or debate clause" of the Alaska

Constitution prohibits prosecution of Count II. For this reason, Count II must be dismissed.

Legislator Immunity Under Art. II, § 6

Art. II, § 6 of the Alaska Constitution reads in relevant part as follows:

> Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session.

The parties agree that this is a case of first impression [5/] in Alaska. (Defendant's Memo 40, Opposition Memo 63) They therefore frame their arguments around federal decisions outlining the contours of the federal constitution's "speech or debate clause" -- the defendant arguing that the immunity resulting from the Alaska Constitution should be identical to the immunity provided by the federal constitution, while the state argues that the Alaska Constitution provides a much narrower grant of immunity.

The federal constitutional provision is similar but by no means identical to the Alaska provision set out above. It reads:

> [F]or any speech or debate in either house, [members of Congress] shall not be questioned in any other place.

U. S. Const., Art. I, § 7. The most striking difference between the two provisions is the activity which is protected: Alaska protects "any statement made in the exercise of . . .

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5. The term "first impression" is used in the sense that the Alaska Supreme Court has not had the application of Art. II, § 6 before it in the context of a criminal case. The only prior judicial expression on Art II, § 6 located by the parties was the set of instructions to the grand jury in State v. Hohman, No. 1JU-81-464 CR, given by Judge Thomas B. Stewart. The parties vigorously dispute the proper interpretation of those instructions and their application to this case. No appellate decision, much less a trial court decision, concerning Art. II, § 6 has been brought to this court's attention.

legislative duties," while the federal provision, textually at least, [6/] covers only "speech or debate in either house."

Although the parties have not argued it, this difference appears to be important. The development of federal law under the federal speech or debate clause has largely been the process of defining the concept of "legislative acts" so as to accommodate the Supreme Court's concern that the literal statement of the immunity found in the text was too narrow to serve the great historical purposes of the framers. While that development may well support the result reached herein (see the defendant's arguments at Defendant's Memo 31-40, Reply Memo 18-19 and the analysis below at 15-19), it is not strictly necessary to the interpretation of the Alaska constitutional provision which protects "any statement made in the exercise of . . . legislative duties." It seems beyond question that the proper function of this court is to examine the acts charged in the indictment and the evidence of those acts, and determine if the defendant is, by virtue of this prosecution, being held to answer for any statement made in the exercise of his legislative duties. If the answer is in the affirmative, Count II cannot stand.

The indictment charges, in Count II, that the defendant used his position for the primary purpose of obtaining financial gain for himself "by taking action to assure that an appropriation source was enacted during the 1982 session of the Alaska State Legislature" from which a pipeline camp owned by defendant could be purchased by the State of Alaska. That is, the action which is the subject of the indictment is that of taking steps

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6. It is true that the federal cases have expanded the immunity to cover acts necessary to the legislative function. But, as the U.S. Supreme Court has noted, and as the State emphasizes, "The heart of the Clause is speech or debate in either House." Hutchinson v. Proxmire, 443 U.S. 111, 126, 61 L. Ed. 2d 411, 426 (1979), quoting Gravel v. United States, 408 U.S. 606, 625, 33 L. Ed. 2d 583, 602 (1972).

to create a legislative appropriation (for a particular, and allegedly unlawful, purpose).

The evidence of those acts largely consisted of telephone calls. One was made by the defendant to Jerry Reinwand, executive assistant to the governor, concerning language in the governor's budget. The others were with William Hudson, Commissioner of the Department of Administration, concerning language in the budget allowing for the purchase of a pipeline camp and concerning alternate sources of funding for other Department of Administration expenses (which sources might free other Department of Administration appropriations to purchase a pipeline camp).

In comparing the indictment and the evidence under it with the provisions of Art. II, § 6, the first inquiry is whether the act of assuring (or creating) a funding source is a legislative duty. The answer is yes. Art. IX, § 13 of the Alaska Constitution provides in relevant part:

> No money shall be withdrawn from the treasury except in accordance with appropriations made by law.

It has been said that the power to control the expenditure of state monies is the supreme legislative power. A classic statement is found in Colbert v. State, 39 So. 65, 66 (Miss. 1905):

> Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and not to be surrendered or bridged, save by the Constitution itself, without disturbing the balance of this system and endangering the liberties of the people. The right of the Legislature to . . . determine . . . the objects upon which [public revenue] shall be expended . . . is firmly and inexpugnably established in our political system.

No one could seriously contend that activity related to the creation of the budget is not legislative activity.

Not only was the formulation of the budget clearly legislative business, but the defendant's role in the process was central: He was co-chair of the Finance Committee in the Senate. While his role as Finance co-chair is not critical to this analysis, it serves to reinforce the conclusion that his participation in putting together the budget was a part of his legislative duties.

The next inquiry is whether any statements of the defendant which were made in the performance of these duties are at issue. There is no question of this. At oral argument counsel for the State was asked what evidence would remain under Count II if the defendant's interpretation of the Alaska "speech or debate clause" were applied. In a supplemental pleading filed after the argument, the State has conceded that "if . . . evidence of the defendant's phone conversations with Jerry Reinwand and William Hudson is suppressed, there will not be sufficient evidence to uphold Count II of the indictment." (State Supplemental 3, emphasis in original)

The next inquiry is whether this prosecution is tantamount to holding legislators "to answer before any other tribunal". The answer is clearly yes. A grand jury and a court are "other tribunal[s]" as the Alaska Constitution uses that term. Every U.S. Supreme Court case construing similar language in the federal speech or debate clause, ("[members of Congress] shall not be questioned in any other place") has dealt either with a grand jury proceeding, e.g., Gravel v. United States, supra, 408 U.S. at 615, 33 L. Ed. 2d at 597, [grand jury subpoena at issue, held: Senator protected from criminal or civil liability or from questioning "elsewhere than in the Senate"], or a trial, e.g., United States v. Johnson, 383 U.S. 169, 173, 15 L. Ed. 2d 681,

684 (1966) [conviction at issue, held: certain evidence utilized at trial barred by speech or debate clause]. Likewise, it is clear that the defendant legislator is "held to answer" by the instigation of charges (and perhaps by the mere investigation by the grand jury), and that there need not literally be the putting of questions to him or her.

The final inquiry is whether the constitutional injunction against holding legislators to answer in any other tribunal may have been (or may be) waived in this case. The State offers two theories of waiver. Neither is persuasive.

The State first argues that AS 39.50.090(a) waives legislative immunity. The argument is based on a similar argument made by the government in United States v. Helstoski, 442 U.S. 477, 61 L. Ed. 2d 12 (1979). The defendant there was a congressman accused of bribery, a violation of 18 U.S.C. § 201. The Court set out, and dispatched, the government's argument as follows:

> The Government also argues that there has been a sort of institutional waiver by Congress in enacting § 201. According to the Government, § 201 represents a collective decision to enlist the aid of the Executive Branch and the courts in the exercise of Congress' powers under Art. I, § 5 to discipline its Members. This Court has twice declined to decide whether a Congressman could, consistent with the Clause, be prosecuted for a legislative act as such, provided the prosecution were "founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." Johnson, supra, at 185, 15 L Ed 2d 681, 86 S Ct 749. United States v. Brewster, 408 US, at 529 n 18, 33 L Ed 2d 507, 92 S Ct 2531. We see no occasion to resolve that important question. We hold only that § 201 does not amount to a congressional waiver of the protection of the Clause for individual Members.

Id. at 492, 61 L. Ed. 2d at 28. Significantly, the Court noted that there was a question whether the Congress had the power at all, even if acting through a "narrowly drawn statute", to strip

members of the protection of the speech or debate clause. It quoted from Coffin v. Coffin, 4 Mass. 1, 27 (1808), to the effect that "the privilege . . . is not so much the privilege of the house . . . as of each individual member composing it, who is entitled to this privilege even against the declared will of the house." Id. The Court concluded that even "[a]ssuming [for the purpose of argument] that the Congress could constitutionally waive the protection of the Clause for individual Members, such waiver could be shown only by an explicit and unequivocal expression." Id. at 493, 61 L. Ed. 2d at 26 (emphasis added). The statute in the instant case is no stronger for the prosecution here than were the federal statues involved in Helstoski, Brewster and Johnson. AS 39.50.090(a) contains no explicit and unequivocal waiver of Art. II, § 6 of the Alaska Constitution (again assuming for the sake of argument that the Legislature had the power to do that). Indeed, it contains no waiver language whatsoever. It is clearly insufficient to accomplish the "institutional waiver" which the State urges this court to find. 7/

The State next argues that the defendant waived his protection under the Alaska speech or debate clause by voluntarily testifying before the grand jury. 8/ The defendant responds

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7. The State's primary argument in regard to its theory that AS 39.50.090(a) waives speech or debate clause protection is based on its perception of what is good policy. (Opposition Memo 73-78) Thus, the State argues extensively that there are sound reasons not to apply legislative immunity to criminal cases, that at the least the level of immunity protection should be less in criminal than in civil cases, that the need for honest government requires that speech or debate immunity be limited, etc. While these arguments may have merit, this court is not free to construe the Alaska Constitution according to what it believes to be good policy. It must read and apply the words of that document in an attempt to carry out the intent of its authors.

8. The State contends that this waiver makes admissible the defendant's grand jury testimony and any other testimony concerning it, though the State concedes that the waiver would not extend to trial.

that, under the applicable law, no waiver occurred here.

The facts in this regard were as follows: The defendant voluntarily appeared before the grand jury, was given a "target warning", [9/] and was represented by counsel. He was not

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9. The warning read as follows:

GRAND JURY TARGET WARNING

To: M. E. Dankworth

1. You are and have been the subject of an investigation conducted by the State of Alaska and by a grand jury sitting in Juneau, Alaska, investigating allegations of criminal misconduct in connection with the acquisition of the Isabel Pass Pipeline Camp by a business entity in which you are a principal and efforts to sell the camp to the State of Alaska. There is at this time probable cause to believe that your role in the acquisition of the camp and in efforts to sell it to the State of Alaska constituted a criminal offense and there exists the possibility at the conclusion of the Grand Jury proceedings that sufficient evidence may have been presented upon which criminal charges could be returned.

2. In addition, in accordance with prior communications made to your attorney, you should be aware that the Grand Jury may consider charges other than that included within the conflict of interest provision contained in AS 39.50.090(a). Evidence before the Grand Jury may support other criminal charges, including felony offenses.

3. You have agreed to appear and testify before the Grand Jury without a subpoena upon the conditions that you are afforded an opportunity at the conclusion of your testimony to give a brief statement to the Grand Jury and that your attorney be afforded an opportunity after the presentation of evidence to review that evidence with prosecuting attorneys and to set forth reasons why an indictment should not be returned prior to the final presentation of this matter to the Grand Jury.

4. You have the right to refuse to answer any question put to you before the grand jury that might inciminate you. (continued)

advised of his privilege under the speech or debate clause, and he did not make any statement waiving the protection of that provision. Under these facts no waiver has been shown.

As noted by the defendant, the situation in United States v. Helstoski, supra, was much stronger for the government, yet the court there rejected the government's claim of waiver. In Helstoski the defendant congressman had appeared voluntarily ten times before the grand jury, each time being warned of his fifth amendment privilege against self-incrimination. At his ninth appearance, the congressman for the first time mentioned his speech or debate clause privilege and declined to answer a

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9. (continued)

> 5. You have the right to be represented by an attorney before the grand jury, and while an attorney may not enter the grand jury room with you, he may be present immediately outside the grand jury room and you have the right to interrupt the proceedings at any point in time to confer with your attorney and obtain his advice.
>
> 6. If you cannot afford an attorney to represent you, you may apply to the Superior Court of the State of Alaska to request the court to appoint an attorney to represent you. If the court finds you cannot afford an attorney it will appoint an attorney for you.
>
> I have read the above Grand Jury Target Warning and understand the rights set out therein.
>
> DATED at Juneau, Alaska, this 26th day of October, 1982.
>
> /s/ M. E. Dankworth
>
> /s/ Avrum M. Gross
> Witness
> Attorney for M. E. Dankworth
> Oct. 26, 1982

question on the basis of it. The trial court found, however, that he was aware of the privilege from before his first appearance: He had recently concluded litigation in which he had relied on the speech or debate clause, and the attorney who represented him in that case was the same attorney who represented him before the grand jury. Nonetheless, the Supreme Court held that "waiver can be found only after explicit and unequivocal renunciation of the protection." [10] 442 U.S. at 491, 61 L. Ed. 2d at 24. Finding no such renunciation, it rejected the waiver theory. In the instant case, the defendant did not even talk about his speech or debate privilege, and there is no showing that he was even aware of it. Certainly there was no "explicit and unequivocal renunciation" of it. Under these circumstances, there can be no finding that the defendant waived his protection under the Alaska Constitution.

The conclusion of this analysis of the scope and effect of Art. II, § 6 of the Alaska Constitution is that it bars prosecution of Count II of the indictment, both because the indictment itself attempts to hold the defendant to answer before a court for statements made in the exercise of his legislative duties and because the evidence presented to the grand jury in support of the indictment is barred by Art. II, § 6. Because the constitutional language seems clear on its face, it is not strictly necessary to address the following issues. However, both because the parties disputed them at length and because they serve to lend additional support to this court's conclusion,

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10. Significantly, the Court found that the standard for waiver of speech or debate clause protection is even higher than the ordinary standard for determining waiver of a constitutional right set out in Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed. 2d 1461, 1464 (1938): "intentional relinquishment or abandonment of a known right or privilege." 442 U.S. at 491, 61 L. Ed. 2d at 24. This is of significance because this court does not believe even the Johnson v. Zerbst standard could be satisfied on the facts of this case.

they are considered here, at least briefly. They include: (1) the significance of drafting changes made at the Constitutional Convention concerning Art. II, § 6 and comments by the convention delegates concerning that section; (2) the instructions given to the grand jury in State v. Hohman, 1JU-81-464 CR; and (3) federal case law developed under the speech or debate clause of the federal constitution.

The Alaska Constitutional Convention. The State places great significance on the fact that Art. II, § 6 originally provided that no legislator should be held to answer "for any statement made or action taken" in the exercise of his legislative functions. The underlined language was later deleted, and the State urges that this deletion suggests a narrowing of the protection. Whether such an inference is properly drawn, it is not important in the context of this case. The defendant does not seek immunity for "actions" he has taken, but for statements which he has made.

The State also argues that the Alaska provision "is narrower because its protection applies only 'while the legislature is in session.'" (Opposition Memo 62) Again, even if the inference is warranted, it is not relevant here: All of the statements of the defendant which concern Count II occurred while the legislature was in session.

The State relies on a statement made by Delegate McCutcheon, who was the chair of the Committee on the Legislative Branch. Delegate McCutcheon said:

> There is also an immunity clause which provides a legislator will not be held liable for anything he says during a session.

Alaska Constitutional Convention Proceedings 1099. The State reads this comment (and one made concerning the privilege from arrest, which is not relevant to this case) as suggesting that "the protection in Alaska was intended to apply only to the type

of conduct that the United States Supreme Court refers to as 'pure speech or debate.'" (Opposition Memo 61) This court can draw no such conclusion from the discussion referred to. "[A]nything [a legislator] says" is clearly broader than "pure speech or debate". There is simply no basis for concluding, as the State attempts to do, that the history of the Alaska Constitutional Convention supports the conclusion that the Alaska constitutional protection for legislators is as narrow as the State would find it.

Instructions Given in State v. Hohman. The State contends that the instructions given by Judge Thomas B. Stewart in State v. Hohman, supra, support its view of the proper scope and effect to be given to Art. II, § 6 of the Alaska Constitution This court cannot agree, and adopts the analysis of the defendant concerning the Hohman instructions, which is found at Reply 22-23

Federal Cases Interpreting the Federal Constitution. At the outset, it should be remembered that there are relatively few United States Supreme Court cases interpreting the speech or debate clause of the federal constitution. ("The Speech or Debate Clause has been directly passed on by the Court relatively few times in 190 years." Hutchinson v. Proxmire, supra n.6, 443 U.S. at 124, 61 L. Ed. 2d at 424.) There are, of course, an almost limitless number of factual situations in which the speech or debate clause could be implicated. Therefore, there is a substantial amount of extrapolation required in attempting to find guidance from the federal cases. With this caveat in mind, certain general principles can be drawn from the cases.

The first is that, contrary to the State's assertion that the clause properly has more to do with protecting legislators against civil liabilities, the great historical purpose of the speech or debate clause was to protect legislators against the executive and the judiciary:

> There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause.

United States v. Johnson, 383 U.S. 169, 182, 15 L. Ed. 2d 681, 689 (1966). It is true that the Court retreated slightly from this position in United States v. Brewster, 408 U.S. 501, 508, 33 L. Ed. 2d 507, 515-16 (1972), when it noted that "the English system differs from ours in that the Parliament is the supreme authority not a coordinate branch", and suggesting that "our history does not reflect a catalog of abuses at the hand of the Executive that gave rise to the privilege in England." Nonetheless, it cannot be denied that the primary purpose of the clause was "to prevent intimidation by the executive and accountability before a possibly hostile judiciary". Johnson, supra, 383 U.S. at 181.

From the earliest decisions, the scope of the privilege has been found to be broader than speech or debate on the floor of the Congress. Kilbourn v. Thompson, 13 Otto. 168, 26 L. Ed. 377 (1881), quoted approvingly from Coffin v. Coffin, 4 Mass. 1 (1808), which it referred to as "the most authoritative case in this country on the construction of the provision". 26 L. Ed. at 391. In Coffin, Chief Justice Parsons stated:

> [T]he article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to <u>every other act resulting from the nature and the execution of the office</u>. And I would define the article as securing to every member exemption from prosecution for <u>everything said or done by him as a representative, in the exercise of the functions of that office</u>, without inquiring whether the exercise was regular according to the rules of the House, or irregular and against

those rules.

4 Mass. 1, 27 (emphasis added). After quoting extensively from Coffin, the Supreme Court in Kilbourn concluded that "[i]t would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forceable in its application to [various actions]. In short, to things generally done in a session of the House by one of its members in relation to the business before it." 26 L. Ed. at 391-92.

Later cases have refined the standard, but have not retreated from it. Thus, in Tenney v. Brandhove, 341 U.S. 367, 95 L. Ed. 1019 (1950) the Court said, against the argument that the state legislative committee involved was acting improperly, that "[t]he claim of an unworthy purpose does not destroy the privilege." 341 U.S. at 377, 95 L. Ed. at 1027. The Court in Tenney emphasized that a court may not "inquire into the motives of legislators", a holding which has remained unquestioned in this country from earliest times.

In United States v. Johnson, supra, the Court affirmed the reversal of a conspiracy conviction of a member of Congress, because the prosecution had inquired into the defendant's motive in making a particular speech:

> The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and as will appear that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry.

Id. at 180, 15 L. Ed. 2d at 688.

In United States v. Brewster, supra, the Court denied a speech or debate clause challenge to a bribery indictment. Its reasoning, while perhaps not totally consonant with its earlier decisions, lends no support to the State's position here. The Court distinguished Johnson on the ground that it held that the privilege "protected Members from inquiry into legislative acts

or the motivation for actual performance of legislative acts", 408 U.S. at 509, 33 L. Ed. 2d at 516, whereas the taking (or agreeing to take) money for a promise to act in a certain way is not a legislative act. Moreover, since the illegal conduct is shown by proof of taking or agreeing to take money for a promise to act in a certain way, there is no need for the government to show that the defendant actually fulfilled the alleged illegal bargain. Thus, there is no need to inquire into any legislative act or the motivation for any legislative act. While the exception carved out by Brewster was vigorously disputed by the three dissenters in that case, it does not affect the analysis here. The case does, however, provide another definition for "legislative act", which is of assistance in the instant case:

> A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. In sum the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the house or the senate in the performance of official duties and into the motivation for those acts.

408 U.S. at 512, 33 L. Ed. 2d at 517-18.

Gravel v. United States, 408 U.S. 606, 33 L. Ed. 2d 583 (1972) was decided the same day as Brewster. It concerns primarily whether a legislative aide is protected by the speech or debate clause. However, it contains the following language describing legislative acts:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

408 U.S. at 625, 33 L. Ed. at 602.

As noted above, this court views the Alaska "speech or debate

clause" as being different from and, in regard to the scope of the acts protected, broader than its federal counterpart. Nonetheless, review of the approach which the United States Supreme Court has taken to interpreting the federal speech or debate clause is instructive. Under that general approach, and under the specific definitions of "legislative acts" which the Court has established, it appears that the actions of the defendant in the instant case would be protected.

CONCLUSION

For the reasons discussed above, defendant's motion to dismiss Count I is denied, and defendant's motion to dismiss Count II is granted.

DONE at Juneau, Alaska, this 14th day of February, 1983.

Walter L. Carpeneti
Superior Court Judge

CERTIFICATE

This is to certify that on the above date I provided a copy of the above Memorandum of Decision and Order to:

Daniel W. Hickey, Esq.
Patrick J. Gullufsen, Esq.
Dean J. Guaneli, Esq.
Avrum M. Gross, Esq.
Susan A. Burke, Esq.
Clifford J. Groh, Esq.

Secretary to the Judge

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH V - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3600

M E M O R A N D U M March 31, 1983

SUBJECT: Waiver of rights under the Speech and Debate Clause, Article II, section 6, Alaska Constitution (Work Order No. 13-0981)

TO: Representative Don Clocksin

FROM: Richard A. Bradley
Legislative Counsel

You have requested an analysis of Judge Carpeneti's February 14, 1983, decision in State v. Dankworth. Your request suggests that Judge Carpeneti ruled that a legislator is immune from prosecution under the conflict of interest statute. You suggest that Judge Carpeneti implied that a narrowly defined waiver might be permissible.

You ask that I draft such a waiver and predict its constitutionality. A bill is enclosed that is responsive to this request.

The area of the opinion that concerns you is apparently derived from that portion of the opinion, at page 9, that addresses the question whether AS 39.50.090(a) waives legislative immunity under the state equivalent of the Speech and Debate Clause of the United States Constitution: Article II, section 6 of the Alaska Constitution:

> Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session. * * *

That argument was made by the state in the Dankworth case and is based on a similar consideration argued in United States v. Helstoski, 442 U.S. 477 (1979).

In the Helstoski case, the argument was made that a "narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members" could

constitute a waiver by Congress of the immunity of a member of the Congress from being held to answer in any other tribunal.

The Helstoski case accordingly merits analysis. Mr. Helstoski was a member of Congress. He was investigated by a grand jury on his introduction of numerous private immigration bills, allegedly for compensation. During the investigation, he voluntarily cooperated with the grand jury, appearing before it on ten occasions. Initially, he made no claim of privilege under the Fifth Amendment but eventually claimed the privileges of it and of the Speech and Debate Clause.

Congressman Helstoski was indicted on the charge of accepting money for the performance of official acts; he sought dismissal of the indictment on the ground that it violated the Speech and Debate Clause.

The District Court denied the motion to dismiss but held that the Government was precluded from introducing "evidence of a past legislative act" in any form.

In taking its appeal to the Court of Appeals, the Government argued that the Speech and Debate Clause does not prohibit the introduction of all evidence relating to legislative acts. It conceded that, absent a waiver, it could not introduce evidence of the bills or Acts themselves. And it used several theories to rationalize its requested use of evidence of discussions and correspondence which relate or describe legislative acts if the discussions or correspondence did not themselves occur during the legislative process (none of which the court accepted).

But it is also argued that "by enacting 18 U.S.C. 201 (1966), Congress has shared its authority with the Executive and the Judiciary by express delegation authorizing the indictment and trial of Members who violate that section -- in short an institutional decision to waive the privilege of the Clause." 47 U.S.L.W. 4713.

The U. S. Court of Appeals affirmed the evidentiary holding, stating that legislative acts could not be introduced to show motive, since otherwise the protection of the Speech and Debate Clause would be negated and that Mr. Helstoski has not waived the protection of the Clause during the grand

jury proceedings. United States v. Helstoski, 576 F.2d 511 (3d Cir. 1978).

The United States Supreme Court affirmed. United States v. Helstoski, 442 U.S. 478, 47 U.S.L.W. 4710 (1979).

The Court stated that its holdings in United States v. Johnson, 383 U.S. 169 (1966) and United States v. Brewster, 408 U.S. 501 (1972) "leave no doubt that evidence of a legislative act of a Member may not be introduced by the Government in a prosecution under sec. 201." 47 U.S.L.W. 4713. It explained its decision in the Brewster case:

> Johnson thus stands as a unanimous holding that a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts. A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. In sum, the Speech and Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts. 408 U.S., at 512.

The Government argued that the interpretation of the Court of Appeals would make the prosecution of members of Congress more difficult; the Court agreed. "Indeed, the Speech and Debate Clause was designed to preclude prosecution of Members for legislative acts." 47 U.S.L.W. 4713. But, the Court said, "Promises by a Member to perform an act in the future are not legislative acts. Brewster makes clear that the compact may be shown without impinging on the legislative function." 47 U.S.L.W. at 4713.

With this as background, it is possible to reach your question: Can a narrowly drafted statute constitute "a sort of institutional waiver" by the legislative branch of the immunity of an individual member of the legislature?

In my view, the portion of Helstoski not quoted by Judge Carpeneti forces a negative response to your question; Judge Carpeneti reaches these issues at page 10 of his opinion with intimations of a similar conclusion.

Some measurable quotes from the Helstoski opinion are necessary to make these points.

In both the Johnson and the Brewster opinions, the Court declined an invitation to decide whether "a Congressman could, consistent with the [Speech and Debate] Clause, be prosecuted for a legislative act as such, provided the prosecution were 'founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members'. * * * We see no occasion to resolve that important question. We hold only that sec. 201 does not amount to a congressional waiver of the protection of the Clause for individual members."

But the Court then went on, presumably in dicta, to suggest its views on that question.

> "We recognize that an argument can be made from precedent and history that Congress, as a body, should not be free to strip individual Members of the protection guaranteed by the Clause from being 'questioned' by the executive in the courts. The controversy over the Alien and Sedition Acts reminds us how one political party in control of both the Legislative and Executive Branches sought to use the courts to destroy political opponents.
>
> "The Supreme Judicial Court of Massachusetts noted in Coffin, 'the privilege secured . . . is not so much the privilege of the House as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house.' 4 Mass., at 27 (emphasis added [in original]). In a similar vein in Brewster we stated:
>
> > "'The immunities of the Speech or Debate Clause were not written into the Constitution simply for the private or personal benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.' 408 U.S., at 507 (emphasis added [in original]).
>
> "See also id., at 524. We perceive no reason to undertake, in this case, consideration of the Clause in terms of separating the Members' rights from the rights of the body.
>
> "Assuming, arguendo, that the Congress could constitutionally waive the protection of the Clause for individual members, such waiver could be shown only by an

> explicit and unequivocal expression. There is no evidence of such a waiver in the language or the legislative history of sec. 201 or any of its predecessors. [Bracketed materials added]."

As I suggested, these quotes would undoubtedly be characterized as dicta either by the Court or a commentator. But even agreeing that it is dicta and therefore not controlling in future cases before the Court, it seems that the Court has signalled adequate reasons founded in constitutional policy for concluding that such a waiver by a legislature would probably violate the privileges of an individual member of that legislature to be free from the pressures of a legislative majority or of executive pressures exerted through the courts.

I take the Court's emphasis on "explicit and unequivocal language" to mean simply that in any such statute, the statute itself must state that the legislature does not intend that the Speech and Debate Clause be a defense to a charge under the statute and, perhaps, that the legislature intends the statute to stand as a waiver by the legislature of those rights.

But, as suggested, even in such premises, I believe that the privileges of the individual members of the legislature would be protected.

You will find a bill attached to this memorandum.

Because the language of AS 39.50.090 is so awkward and also because it will need revision the next time AS 39 is printed because of the policies stated in Chapter 58, SLA 1982, I considered it appropriate to put these changes before the legislature for its ratification, particularly because the provisions of this section affect members of the legislature so intimately. Except for the change to the penalty provisions in moving to the more standard penalty style (the imprisonment possible is unchanged; the fine moves from a maximum $2,000 to a maximum $5,000), the provisions of sec. 90 are substantively unchanged. And these provisions may be deleted if you believe that they confuse the basic thrust of your bill.

The material responsive to your request appears in new sec. 39.50.091.

If I may be of further assistance, please advise.

RAB:ljb

Enclosure
12/045

STATE OF ALASKA

ALASKA PUBLIC OFFICES COMMISSION

BILL SHEFFIELD, GOVERNOR

REPLY TO:

☑ 610 C STREET, SUITE 211
ANCHORAGE, ALASKA 99501-3598
(907) 276-4176

☐ JUNEAU BRANCH OFFICE
POUCH CO
JUNEAU, ALASKA 99811-0222
(907) 465-4864

April 24, 1983

The Honorable Vic Fischer, Chairman
Alaska State Senate
State Affairs Committee
Pouch V
Juneau, AK 99811

Dear Senator Fischer:

As I indicated Wednesday evening at the teleconference, I expect that the Commission's comments on SB 257 will be largely confined to those specific sections which involve the APOC; I understand you discussed Section 24.60.050 on disclosure of loan applications in committee on Thursday and indications were that you anticipated the APOC would develop an appropriate form for deleting confidential information and monetary amounts from the loan applications prior to including them in the AS 39.50 files. That perspective on intent started a small chain reaction as you'll see below.

While I appreciate the expression of confidence in our ability to develop a "good" form, I would hope for a good understanding of Legislative intent about the items to be deleted if the Commission is to do the deleting. In addition, I tried to do a little research on Friday and was told that there are over 100 loan programs involving state funds (that for $250 one can buy a private publication which summarizes those programs!) and that pinpointing whether a given program is "other than those described in (a) of this section...." may be moot because lending laws include the concept of "prudent lending" in which eligibility standards and criteria are always necessary. It appears that the lending agencies will decide which applications must be sent to the Commission, but the Commission may find itself receiving records (subject to provisions of confidentiality) for which it has no need and which may require special handling -- unlike all the existing disclosure material.

Loans or loan guarantees are already required to be included on Conflict of Interest Statements by AS 39.50.030(6), but in cases where banks are administering a program of loans based on state funding, often only the name of the bank appears. If your desire is to make that requirement include specific reference to the state funding in the case of other than subsection (a) loans that should be easy enough. Beyond that, if the summary of Thursday's Committee meeting I had was adequate, it sounded like you would not wish to include the purpose of the loan, the amount, and the interest rate as well. (Bill White of the Anchorage Times did an article last fall on Legislative loan-holders which you may recall, listing that kind of information based on a study by the House Research Agency.)

Application to a state loan program appears to be the only additional information that SB 257 would include in a AS 39.50 file. Since the present requirement in AS 39.50.030(6) specifies only any loan or loan guarantee made to the reporting official, "...his spouse or dependent child of his or nondependent child of his who is living with him...," loans to businesses other than sole proprietorships are not required to be listed and it appears that Sec. 24.60.050 does not change that situation.

Those items seem to me to cover the "disclosure" aspect of section 24.60.050; my apologies if these are things you've already taken into account or that were discussed by the Joint Committee.

Finally, as I indicated on the teleconference, I am pursuing some analysis of the SB 257 language even though the APOC's mention in it is peripheral because of my feeling that it will be helpful in reviewing any subsequent proposals in the ethics arena which might involve the APOC. (As you recall from previous years some ethics bills have created entirely separate commissions while others proposed the APOC as the administering agency.) As you expressed interest in the outcome of that effort, enclosed is the material which has been prepared by Mark Higgins as background for the Commission. While the document doesn't represent recommendations to the committee, you are, of course, more than welcome to use it if you feel it might be helpful. I expect to present it to the Commission members at their regular meeting next Thursday and will convey whatever remarks they wish to make about the filing of loan applications to you or other committees if you have moved the bill by then.

Sincerely,

ALASKA PUBLIC OFFICES COMMISSION

THEDA S. PITTMAN
Executive Director

cc: APOC Members
Rebecca Burch, Dept. of Administration

ALASKA STATE LEGISLATURE HKOOD

SENATE STATE AFFAIRS COMMITTEE POUCH V, JUNEAU 99811

SENATOR VIC FISCHER, CHAIRMAN (907) 465-4954

April 29, 1983

MEMORANDUM

TO: All Senators
FROM: Vic Fischer, Chairman
RE: SB 257, Legislative Standards of Conduct
FOR YOUR INFORMATION

Attached is the State Affairs committee substitute for SB 257 and a sectional analysis of the bill.

We are distributing this bill to you now to inform all members of the progress of this important legislation and to permit your review of the bill pending further committee consideration in the Senate next week.

The State Affairs CS provides for a legislative ethics commission as recommended by the Joint Legislative Reform Committee. Also attached is alternative language providing for separate ethics committees within each house of the legislature with only legislative members.

SECTIONAL ANALYSIS OF SB 257

Sec 010 FINDINGS

Refers to Constitutional basis for legislative enforcement of legislative ethics. States that legislators and staff should avoid conduct that even appears to violate the public trust.

Sec. 020 APPLICABILITY

The bill applies to legislators (once sworn in), legislative staff Range 18A and over, and former legislators in limited cases. Employees under Range 18 should be covered in the general ethics bill expected from the Attorney General next week. This bill specifically supersedes the common law in this area.

Sec. 030 CONFLICTS OF INTEREST

A conflict is defined as when a person takes or withholds official action or exerts influence which could substantially benefit or harm a financial matter in which the person has a direct or indirect private interest. Situations are defined where no conflict exists because of the person's distance from either benefits or influence.

Sec. 040 CONTRACTS

Persons covered by this bill may not be a party to a contract or lease with the state not let by competitive bid unless the contract is for $1,000 or less. Legislators may not have an interest in a non-competitive contract with the state (interest defined by percentage of ownership and size of company) and staff may not be a party to a non-competitive contract. The ethics commission may allow exceptions to this provision if it is satisfied that no misuse of influence has occurred. The existence of all contracts between people covered by this bill and state and local governments is published in the Journal.

Sec. 050 STATE LOANS

Legislators and staff are not prohibited from receiving state loans if the program is widely available and minimal discretion is exercised. Examples of these kinds of loans are student and AHFC home loans.

For other types of loans extensive provisions are made for special review of loans to people covered by this bill. The existence and status of all state loans held by people covered by this bill will be published in the Journal yearly.

Sec. 060 CONFIDENTIAL INFORMATION

Confidential information acquired in the course of official duties may not be knowingly disclosed or willfully used for personal gain of the gain of another.

Sec. 070 INTERESTS BETWEEN PUBLIC OFFICIALS

People covered by the bill must disclose to the commission any economic associations valued at over $1,000 between legislators, supervisors and employees, and public officials in another branch who are required to file APOC statements. Economic associations may not be formed with lobbyists.

Sec. 080 GIFTS

Persons covered may not solicit or receive gifts with a cumulative annual value of over $100 from one source under circumstances in which it may be reasonably inferred that the gift is intended to influence the person in the performance of official duties. Specifically excluded is hospitality within the state, including meals, lodging or transportation and invitations to meals or social events.

Sec. 090 NEPOTISM

People related to members of the legislature may not be employed in the house in which the legislator is a member or by a legislative agency. Relatives may be employed in the other house during the session only. Employees may not supervise relatives. Employees who are not on state payroll are exempt from these limitations.

Sec. 100 REPRESENTATION BY LEGISLATORS

Legislators and employees may not represent another person for compensation before any court or agency of the state. Lawyer-legislators may represent clients before state courts in criminal actions and in civil cases where the state is not a party. The ethics commission may waive these restrictions if it determines that the representation will not involve improper influences..

Sec. 110 ACTION ON A CONFLICT OF INTEREST

If a legislator knows or has been notified that a conflict exists shall immediately resign the position, divest the interest, or disclose the conflict for inclusion in the Journal.

Sec. 120 RETALIATION

Retaliation for filing an ethics complaint or providing truthful testimony to the commission is, in itself, a violation of legislative ethics..

Sec. 130 EMPLOYMENT OF FORMER MEMBERS AND EMPLOYEES

To the extent not prohibited by the Constitution, former members may accept employment with state agencies upon leaving office. Former members may lobby upon leaving office. Neither former members nor former employees may use confidential information obtained in the course of official duties except for the benefit of the state.

Sec. 140 STATE PROPERTY AND FUNDS

State property and funds may not be used for private gain.

Sec 150 LEGISLATIVE ETHICS COMMISSION

The seven-member Commission is established within the legislative branch. The presiding officers of of the house and senate

each appoint one of their members with the concurrence of three-fourths of the full membership of the respective house. Each presiding officer also appoints two public members who are confirmed by the same method. The other members of the Commission then appoint the seventh member who must be a former legislator. Not more than four members of the Commission may be members of the same political party or reside in the same borough or the unorganized borough. Public members serve staggered three-year terms. The Commission may hire or contract for staff. Commission members receive no compensation beyond expenses and per diem.

Sec. 160 DUTIES OF THE COMMISSION

The Commission may recommend additional legislation and, with the concurrence of the president or the speaker subpoena witnesses and documents. The Commission shall adopt formal procedures and publish annual reports.

Sec. 170 ADVISORY OPINIONS

Summarized below.

Sec. 180 COMPLAINTS

Summarized below.

EFFECTIVE DATES

The Commission comes into effect upon passage. The rules of ethics and other enforcement and notice sections take effect in the normal 90 days.

SB 257: THE PROCESS OF ADJUDICATION

NOTE: SB 257 uses some labels for the different documents in this process that are confusing. Legal Services is in the process of clarifying the adjudication section of this bill and it is likely that new labels will be used for the different steps.

ADVISORY OPINION

--requested by person covered by bill
--must be issued in 30-days unless Commission extends time
--must be in writing and sworn
--if complete disclosure made is binding on Commission for further action under this section
--is confidential if publication not requested by person requesting. Summary of opinion published yearly
--if the terms of the advisory opinion complied with ===NO FURTHER ACTION===
--if advisory opinion not followed complaint may be filed

COMPLAINT

--may come from anyone, must be in writing signed under oath
--allegations must have occurred within four years or within one year of termination of state service unless discovery prevented by fraud
--no complaints may be received within 60 days of an election unless initiated by five or more members of the Commission
--commission determines if all allegations, when taken as true, constitute a violation of complaint. If not ===DISMISS===
--person against whom made is notified and afforded an opportunity to explain
--commission defines nature and scope of investigation
--commission makes confidential investigation, may subpoena witnesses, take oaths, and require production of books and papers. Subpoena powers derived through legislature.
--if no violation is found ===NO FURTHER ACTION, OPINION MAY BE MADE PUBLIC===

"COMMISSION" ADVISORY OPINION (P13 L4)

--if a violation is found, the person may be offered a recommended course of action; person may comply with the recommendation of the preliminary opinion or may request a FORMAL OPINION.
--if a majority of the members determine there is probable cause for belief that there has been a violation of the chapter the commission shall file a complaint against the person charged

CHARGES (a complaint)

--must be personally served on person
--person has 20 days to respond in writing to the commission
--commission sets time and place for hearing

--person charged has right to be heard, subpoena witnesses and documents, be represented by counsel and have the right to cross examine witnesses testifying under oath.
--hearings closed to public unless requested by person accused
--no formal rules of evidence, evidence must be competent and substantial, Commission evidence rules will be set out in Commission Procedures
--testimony only available to commission and staff and person charged; is recorded and preserved. Transcripts available to person charged

DECISION
--shall be in writing and signed by four or more members
--accompanied by a written (summary) order which is made public at once
--decision is referred to the presiding officer of person's body
--contains statement of the facts making up the violation and recommendations concerning penalties
--penalties for legislators may include
-fine up to $25,000
-required divestiture
-repaying profits
-censure
-removal from committee assignments
-termination of legislative privileges
-expulsion from the legislature
--Penalties for staff may include
-suspension
-demotion
-dismissal
--made public 30 days after referral. Days in which the legislature is not in session are not counted

ALTERNATIVE LANGUAGE SETTING UP SEPARATE ETHICS COMMITTEES

ARTICLE . ETHICS COMMITTEES.

Sec. 24.60.200. ETHICS COMMITTEES ESTABLISHED. (a) An ethics committee of the senate and an ethics committee of the house of representatives are established as permanen committees of the legislature.

(b Each ethics committee sr all provide the particular house of the legislature and its members with guidance on legislative standards of conduct through the establishment of substantive and procedural guidelines,

the issuance of advisory opinions, and the investigation of complaints of violations of legislative standards of conduct by members of the legislature and by persons employed by a member of the legislature.

(c) Nothing in this chapter authorizes the referral by the presiding officer of legislation to an ethics committee at a regular or special session of the legislature.

Sec. 24.60.210. MEMBERSHIP. The ethics committee of the senate is composed of three members of the senate appointed by the president of the senate and the ethics committee of the house of representatives is composed of five members of the house of representatives appointed by the speaker of the house. The membership of each committee shall include at least one member from each of the two major political parties represented in that house. The appointing authority in each house shall announce the appointment of members of each committee within 15 days after the convening of the first regular session of each legislature.

Sec. 24.60.220. TERM OF MEMBERSHIP. A member serves for the duration of the legislature in which the member is appointed and a member reelected to office or serving a term of office extending into the next succeeding legislature may continue to serve until a successor is appointed.

Sec. 24.60.230. VACANCIES. If a vacancy occurs in the membership of an ethics committee the presiding officer shall fill the vacancy within 30 days. If the office of the president of the senate or speaker of the house of representatives becomes vacant and a vacancy occurs among the appointed member of a committee, the remaining committee members shall appoint a new member. A member of the legislature appointed to fill a vacancy shall be a member of the same political party as the member vacating the seat, if possible.

Sec. 24.60.240. STAFF. (a) Each ethics committee may hire and determine the compensation of staff of the committee. Staff members serve at the direction and at the pleasure of the ethics committee.

(b) Staff shall maintain the integrity of the functions and services of each ethics committee by refraining from joining or supporting any partisan political organization, faction or activity that would tend to undermine the essential nonpartisan nature of their functions and services. The provisions of this section do

not restrict staff from expressing private opinion, registering or voting.

Sec. 24.60.250. MEETING OF THE ETHICS COMMITTEE. Each ethics committee shall meet as necessary during a legislative session and during the interim and it may meet at the request of its chair or of three members of the committee.

Sec. 24.60.260. QUORUM. A quorum of the ethics committee consists of three members and the vote of three members is required to adopt a motion, determination, or advisory opinion of the ethics committee.

ARTICLE . DEFINITIONS.

Sec. 24.60.900. DEFINITIONS. In this chapter,

(2) "ethics committee" means the ethics committee of the house of the legislature to which the member of the legislature or the member employing a person belongs.

Prepared by Mark Higgins, N.P.O.C.

COMPONENTS OF A MODEL ETHICS LAW

The following is an overview of the essential components of an enforceable ethics law.

1) LEGISLATIVE FINDINGS AND STATEMENT OF PURPOSE:

This section emphasizes the necessity for the avoidance of conflicts between the private financial interests of public officials and employees and their responsibilities to the public and to the government that employs them.

2) APPLICABILITY SECTION:

This section names the official positions to which the law applies.

3) DEFINITION OF TERMS:

A careful definition of terms used in the law is crucial to a good and legally enforceable ethics statute. Sections containing undefined ambiguities are often subject to unfavorable judicial interpretation.

4) ESTABLISHMENT OF A STATE ETHICS COMMISSION:

a) Members' 'Staff: Outlines whether the commission is to be composed of citizens, legislators or a combination of citizens and public officials.

b) Powers and Duties: This section authorizes the Commission to carry out its routine housekeeping functions. It also grants the Commission authority to make rules consistent with the law, and it provides the Commission with the necessary powers to conduct investigations, hold hearings and determine cases.

c) Complaints; Hearings: Outlines procedures for the Commission to follow when investigating complaints and when holding hearings. This provision is designed not only to ensure prompt action by the Commission, but also to make sure that cases will be dealt with impartially and not buried or delayed for political reasons.

d) Advisory Opinions: The power of the Commission to issue advisory opinions is intended to provide protection to persons who seek advance determination as to whether particular activities will violate the law. If a person submits a true and complete statement of facts to the Commission, and if the person follows the Commission's opinion in good faith, then the person will be protected against civil and criminal penalties.

5) CONFLICTS OF INTEREST:

a) Gifts: This section commonly prohibits public officials from soliciting or accepting anything of value which might reasonably be assumed to impair the officials' impartial judgement. Sometimes dollar limits are stated, under which a gift is acceptable (usually $100). This provision does not include gifts from family.

b) Confidential Information: This section prohibits the use of confidential information gained in the course of official action or position. Such information cannot be used for the financial gain of the public official or anyone or organization financially associated with the official.

c) Representation Before State Agencies: This section puts restrictions on appearances before State agencies by public officials on behalf of any individual or private organization if the appearance is for a fee or other compensation. Restrictions are usually limited to agencies over which the official has influence.

d) Post Employment: This section addresses the so-called "revolving door" problem where State officials and employees leave public office to work in the private sector and then use confidential information and close contacts gained during public employment for the advantage of their private employers' customers or clients. Usually the prohibition lasts between 1 and 2 years and is limited to matters with which the former State official or employee had any direct influence or contact.

e) Contracts: The intent behind restricting public officials' participation in State contracts is to prevent self-dealing on the part of the official while still allowing the State to take advantage of business opportunities with public officials, if they are in the best interest of the State. The normal requirement is that any contract involving a public official and involving more than $1,000 must be let through a competitive bidding process.

f) State Loans: The intent is the same as in contract restrictions - to prevent self-dealing by public officials. Guidelines vary from state to state, but the usual practice is to require that any loan involving discretion as to requirements be carefully scrutinized.

g) Nepotism: This section prohibits the employment of close relatives within the same agency or department if their official responsibilities overlap. In the legislative branch relatives are prohibited from working in the same body during session.

h) Financial Dealings Between Public Officials: This section either prohibits or closely monitors financial associations between public officials themselves and between lobbyists and public officials.

i) Honorariums and Fees: Requires that any compensation paid to public officials for official engagements which resulted from the officials' position with the State, be turned over to the State.

6) PENALTIES:

a) Criminal Prosecution: Matters may be referred to the Attorney General for criminal prosecution if it is determined that there was a knowing and willful violation of a conflict of interest law. Commonly such violations are classified as misdomeanors subject to varying fines and imprisonments, usually not exceeding one year per offense.

b) Civil Action; Injunctions; Civil Penalties: This section authorizes the Commission to bring civil action for two purposes. First, to serve injunctions against violation of the Act, or to compel compliance with its provisions and, second to sue for the collection of civil penalities under the Act.

Civil action and civil penalities imposed at the Commission level is preferred approach to ethics legislation enforcement. This is because it is usually much easier to arrive at a Commission decision and imposition of civil penality than it is to get an Attorney General action leading to a conviction on criminal charges.

Alaska State Legislature

IN SESSION:
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JUNEAU, ALASKA 99811
(907) 465-4949

BOX 142
EAGLE RIVER, ALASKA
99577

Representative Randy Phillips

HOUSE DISTRICT 15

MEMORANDUM

TO: REPRESENTATIVE MITCH ABOOD
CHAIRMAN, HOUSE STATE AFFAIRS

FROM: REPRESENTATIVE RANDY PHILLIPS

DATE: APRIL 22, 1983

RE: HOUSE BILL 362

Your office has requested backup documentation regarding House Bill 362. While most of the "documentation" is contained in discussions held before the Joint Special Committee on Legislative Reform, I am sending to you the following for your committee's consideration:

1. December 3, 1982 letter from the Attorney General to Governor Jay Hammond. Letter deals with conflict of interest.

2. Memorandum dated December 28, 1982, from the Attorney General to Governor Bill Sheffield. Memorandum is entitled, "Implementation of Conflict of Interests Opinion."

3. Harvard Law Review article entitled "Conflicts of Interest of State Legislators."

4. Iowa Law Review article entitled "Conflicts of Interest of State and Local Legislators." (NOTE: Items 3 and 4 were forwarded to the Special Committee by Rep. Joe Flood under lated dated Feb. 28, 1983.)

5. Memorandum from NCSL dated March 15, 1983.

6. Undated, unsigned memorandum entitled "Outline of Main Features and Policy Considerations for Proposed Conflict of Interest/Ethics Legislation." This was presented to the Special Committee by the Department of Law and was submitted in March of 1983. It is my recollection that Assistant Attorney Generals Dean Guaneli (Criminal Division, 465-3460) and Dianne Colvin (Civil Division, 465-3600) presented this to the Special Committee.

7. March 28 Memorandum from Connie Halford concerning makeup of the committee.

8. April 1, 1983, NCSL "Preliminary Report on Work on Conflict of Interest Legislation."

9. April 4, 1983 Memorandum from Rep. Don Clocksin

I realize this is quite a group of material for the committee to review in a relatively short time. I do plan on being at your committee meetings when this bill is considered and I will be happy to answer any questions you might have. In addition, Representative Mike Miller was a member of the Special Committee and is also a member of the State Affairs Committee.

Thank you for your consideration and assistance.

RP:jss
Enclosures: As Above

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. HB No. 362
Title An act relating to standards of conduct of legislators and legislative employees and establishing a Legislative ~~EXXX~~ Ethics Commission
Requested by: House State Affairs Date: April 19, 1983

II. FISCAL DETAIL
Agency Affected Legislative Affairs Agency
Program Category Affected General Government
BRU, Program, Or Subprogram(s) Affected Legislative Affairs Agency
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES		-0-				
200 TRAVEL		44.1				
300 CONTRACTUAL		50.0				
400 COMMODITIES		-0-				
500 EQUIPMENT		-0-				
600 LAND & STRUCTURES		-0-				
700 GRANTS,CLAIMS,ETC.		-0-				
TOTAL		94.1				

FUNDING. (Thousands of Dollars)

GENERAL FUND		94.1				
FEDERAL FUNDS		-0-				
OTHER (Specify Source)		-0-				

POSITIONS None

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

SEE ATTACHMENT

IV. DATE April 20, 1983 PREPARED BY Wally Harrison, Director, Admin. Svcs.
AGENCY Legislative Affairs Agency
PHONE 465-3850

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/82)

ATTACHMENT

Fiscal Note for House Bill No. 362:

III ANALYSIS:

There are no guidelines in the bill for amount or level of staff or for amounts of travel and per diem. It is necessary, therefore, to establish a set of assumptions on which to build a fiscal note.
Using input from various legislators who worked on the bill, I have made the following assumptions:

Assumption 1: There will be no permanent staff at this time. Personal services and professional services will be contracted as needed; therefore, no office space or equipment will be needed. The commission will determine how the central files are to be kept.

Personal Services Contracts	20.0
Professional Services Contracts	20.0
Other Contractual Services	10.0
	50.0

Assumption 2: To establish a good average for travel costs, I have hypothetically assumed that the Commission is to be made up of members living in Nome, Bethel, Fairbanks, Anchorage, Kodiak, Juneau, Ketchikan, and will travel coach fare: 3 roundtrips to Juneau; 4 roundtrips to Anchorage; and 5 roundtrips to Fairbanks for meetings. There will be no more than an average of three days per month of travel and per diem for meetings. There be no more than an average of one meeting per month.

Per Diem ----------	$18,720
Travel ----------	$25,385
TOTAL Trvl/PD	$44,105

Assumption 3: Additional costs, if any, for reports or copies made by other agencies for the Commission will be absorbed in that agency's operation budget.

Assumption 4: The Legislative Affairs Agency print shop can print the semi-annual summaries of decisions and advisory opinions.