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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[27] N.Y. Times, Feb. 22,
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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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[40] See Tool Co. v. Norris, 69 U.S

[41] *Cf.* United States v. Smith, 2
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[43] PA. CONST. art. 3, § 33. See al
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[45] *E.g.*, NEB. CONST. art. III, § 9;

[46] See, *e.g.*, Briggs v. Neville, 10
1952] NEB. ATT'Y GEN. REP. 378;
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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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[85] ABA, *op. cit. supra* not

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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[100] See N.Y. Report, *op.*
[101] See Mass. Report, *op.*

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.

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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

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[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
legislature-enforced codes, pp. 12

[163] It follows from the discus
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[164] Compare Massachusetts
ch. 610, § 2); proposed Loui
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sole commission (*supra* note 163