

## REVIEWS

**Congress and the Public Trust—Report of The Association of the Bar of the City of New York Special Committee on Congressional Ethics.** JAMES C. KIRBY, JR. (EXEC. DIR.). Atheneum, New York, 1970. Pp. xxvii, 351. \$8.95.

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On October 4, 1967, the Executive Committee of the Association of the Bar of the City of New York created a Special Committee on Congressional Ethics, consisting of eleven distinguished leaders of the Bar,<sup>1</sup> “to conduct research and related studies on conflicts of interest and ethical standards in Congress.” *Congress and the Public Trust* is the scholarly product of the Committee’s efforts.

The study’s seven chapter headings provide an excellent analytical framework for considering this complex subject matter. They show the scope of the study, and identify some of the major aspects of congressional service that give rise to problems of political ethics: I. The Pressures of Congressional Service, II. Conflicts of Interest, III. Congressional Law Practice, IV. Campaign Financing, V. Salaries and Allowances, VI. Gifts, Supplemental Funds, and Honoraria, VII. Congressional Self-Discipline: Ethics Codes and Committees.

Within this framework, the Committee develops twenty-nine recommendations for congressional and political procedural reform, and provides convincing support in the form of objective data, well reasoned legal analyses, and political information illuminating the ethical problems which confront members of Congress as they perform their obligations of public trust.<sup>2</sup> The recommendations, summarized on pages 233-38, relate to particular chapter headings.

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<sup>1</sup> Eleven distinguished leaders of the Bar from Boston, Chicago, Detroit, New York, and Washington, D.C. composed the Special Committee: Chairman Louis M. Loeb, H. Brian Holland, Everett L. Hollis, Charles A. Horsky, William Josephson, Robert M. Kaufman, David W. Kendall, William L. Lynch, Orison S. Marden, Samuel I. Rosenman, and Cyrus R. Vance.

James C. Kirby, Jr., former professor of law at Northwestern and New York Universities, now Dean of the Ohio State University College of Law, served as Executive Director of the study. Mr. Armin Rosencranz, lawyer and former congressional fellow, was the Associate Director. The Ford Foundation provided financing.

<sup>2</sup> The footnotes are compiled, chapter by chapter, at the end of the text. They not

Chapter II discusses ethical problems of members of Congress arising from avoidable conflicts of interest, which the authors define as those conflicts "created by personal economic interests which substantially risk impairment of independence and are unnecessarily held by a Member."<sup>3</sup> The study emphasizes that "the interests in question are those carrying substantial risks to independence of judgment"<sup>4</sup> and concludes:

*The basic thesis of this Report and the opinion of this Committee is that an avoidable conflict of interest should normally be avoided. If not avoided, it should be disclosed to the Member's colleagues and to the public and perhaps should result in disqualification from voting or committee service.*<sup>5</sup>

The major thrust of the Committee's recommendations for checking congressional abuses resulting from avoidable conflicts of interest is to require annual public disclosure of all substantial financial affairs of members of Congress. In my judgment, based on twenty-four years of experience in the Senate, this one recommendation would have a greater cleansing effect on corrupt practices within Congress than any other single recommendation of the Committee. During the last twenty years of my service in the Senate, I repeatedly introduced a public Financial Disclosure Bill. In many drafts the Bill's requirements covered not only members of Congress and staff but also members of the judicial and executive branches. From time to time during those years, other Senators introduced financial disclosure bills which varied in coverage and disclosure details. All were based on a recognition that the ethics of public officials are likely to be stained by financial and other conflicts of interest.

For twenty years, these financial disclosure bills were buried in Senate committees without being scheduled for public hearings. The most common argument in opposition was the one frequently expressed by Senator Everett Dirksen, and shared by many of his colleagues, that public disclosure of the financial affairs of members of Congress interfered with their right of privacy. My rejoinder was to ask what rights they think they retained after taking up public abode in the political fish bowl! If holding public office is, indeed, a public trust, then the public

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only document the thorough research, but also clarify and enrich the text; therefore, they should be followed carefully. Also, the six appendices and the extensive bibliography will be of great help to the student, teacher, legislator, and researcher who may use this authoritative reference work for further research leading to greatly needed legislative reforms in congressional procedures and political conduct.

<sup>3</sup> P. 46.

<sup>4</sup> *Id.*

<sup>5</sup> P. 47.

is entitled to have full knowledge, from year to year, of the financial affairs of its congressional, judicial, and executive officials so that they may judge whether there is any cause-effect relation between financial, and other, conflicts of interest and the trustworthiness and independence of judgment of a given public official.

The Committee states:

The subject of disclosure also has its origins in the law of fiduciary obligations. A fiduciary frequently must affirmatively disclose relevant information to those to whom he owes a duty. Corporate insiders must disclose much to prospective investors, and lawyers must disclose conflicting client interests to the clients involved. Since both houses have already adopted rules requiring a measure of financial disclosure, much of the debate over whether any degree of disclosure should be required has become moot.

. . . .

A second purpose of disclosure is to deter some avoidable conflicts of interest. If a Member of Congress knows that he may have to justify his voting record alongside a particular investment, he may be deterred from holding it. . . .

Finally, disclosure informs a Member's constituents and Congressional colleagues of facts relevant to decisions they must make. The public can judge whether a Member is reasonable in his retention of a particular holding which creates a conflict of interest that arguably is avoidable. Disclosure is the best means of policing avoidable conflicts which a Member may claim that he continues because to do otherwise would be a personal hardship. Other Members can better weigh his arguments and positions. To satisfy these purposes, disclosure must be public, but it need not be "complete" in the usual sense. . . .

. . . This means disclosure must be public, but its scope may nonetheless be limited to that needed for the public intelligently to assess the trusteeship of Members. To go further than this merely to satisfy public curiosity would be burdensome for Members, and possibly embarrassing, without corresponding benefits to the public.<sup>6</sup>

In its model disclosure rules, the Committee proposes that members of Congress and officers and employees of Congress receiving in excess of \$18,000 per annum furnish for public disclosure the following information: identity of assets worth more than \$5,000; sources of income exceeding \$1,000; debts; honoraria exceeding \$300; interests of spouses

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<sup>6</sup> Pp. 73-74.

and minor children. The proposal requires the reports to be filed both in Washington and in the member's state or district.<sup>7</sup>

These requirements differ markedly from current congressional practice. On March 22, 1968, the Senate adopted a Senate Ethics Code, and on April 3, 1968, the House adopted a House Ethics Code. Both codes contain rules for financial disclosure.<sup>8</sup> However, the financial reports required by Senate Rule XLIV and House Rule XLIV are too limited to insure adequate public disclosure. Under the Senate rule, most of the pertinent information is filed with the Comptroller General in a sealed envelope. It is available to the Senate Committee on Standards and Conduct only by a majority vote of the Committee in the event of an investigation of alleged misconduct. In the House, a similar procedure empowers the Committee on Standards of Official Conduct to receive a sealed report disclosing certain financial interests as provided by the rule. Furthermore, the Senate and the House Rules provide only for limited disclosure of the financial interests of members of the Senate and House and their staff members.

Although the 1968 financial disclosure rules of the Senate and House, along with the other sections of the Senate and House Ethics Codes, represent substantial progress in congressional adoption of procedures for checking conflict of interest abuses, I believe that they fall far short of providing the public with adequate disclosure. It is the existence of conflicts of interests which too frequently makes men corrupt and untrustworthy as members of Congress, judges, or executive officials.

The effort to "keep the public in the dark" as to conflicts of interests is one technique in the increasing trend toward government by secrecy in our nation. Therefore, I agree heartily with the recommendations of the authors of *Congress and the Public Trust* that the financial reports called for by its Model Disclosure Rules should be public documents and should be reasonably available for copying by any person.

Chapter III, Congressional Law Practice, deals with a major source of conflict of interests on the part of lawyers in Congress. The record of such conflicts throughout the history of Congress does not justify a continuation of this unfortunate practice. Discussing congressional law practice, the authors state:

As developed in Chapter 2, public officials should generally be held to fiduciary standards under the "public office-public trust" concept. This precludes official action where the circumstances even risk impairment of impartial judgement. Under

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<sup>7</sup> Pp. 75-76.

<sup>8</sup> Appendix D, p. 261.

this test a Member of Congress should never be heard to say that he can subordinate clients' interests to the public interest.

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Can it be said that all law practice conflicts with the public duty of a Member of Congress? Since Federal-agency practice is now precluded by law, some may argue that those areas of practice legally available to a lawyer-Member have little potential for conflict with his Federal legislative decisions. Probate, negligence, real estate, and state trial work are said by some practicing Members to pose no conflicts with their Congressional duties. This overlooks the fact that it is not the nature of the practice, but the mere existence of the lawyer-client relationship with its duty of loyalty, which risks conflicts. These result from the pervasive scope of Congressional power. All clients are interested in the legislative work of Congress. As in our conclusions on financial disclosure, we can delineate no Federal nexus for separating interests which create avoidable conflicts of interest. Just as we decided earlier that Federal legislative jurisdiction is so broad that no asset or activity is insulated from it, the same must be said of clients and law practice.

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Preferably, all Members should terminate practice upon taking office. On balancing the equities, however, it must be conceded that a junior Member's personal circumstances sometimes cause the economic advantages to him of briefly continuing practice to outweigh the advantages to the public which would accrue from total and immediate termination. A short period of transition between careers is tolerated in many other circumstances and appears to be both reasonable and normal for newly elected Members of Congress.

Our recommendation that Members voluntarily refrain from law practice accordingly excepts Senators filling a vacancy for an unexpired term and Representatives in their first two terms. This strikes a reasonable balance and approximates the behavioral norm of the great majority of lawyer-Members.<sup>9</sup>

I find it difficult to reconcile this recommendation with the ethical and conflict of interest abuses involved. As there are no degrees of honesty, a law practice cannot be ethical for the first four years of a Congressman's service and unethical thereafter. Both the Congressman and the Senator knew before being elected, or appointed, that participation in a law practice after entering Congress would raise conflict of

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<sup>9</sup> Pp. 107-11.

interest and ethical problems. I believe that the public interest calls for a rule that all Senators and Representatives should, while members of Congress, totally refrain from any form of law practice including the continuation of an association with a law firm.

Chapter IV, Campaign Financing, relates to what I consider to be the number one cause of corruption in American politics. One great disillusionment during my years in the Senate was to observe, far too often, that the independence of judgment of Senators on particular legislative issues was destroyed because of what they considered to be overriding political obligations growing out of campaign contributions from parties interested in the legislation. Though they would be aghast at the suggestion that they were bribed, in a very real sense they allowed their votes to be bought.

The authors put the problem very succinctly:

The potential of large contributions for corruption of the political and legislative process is aggravated by the secrecy, subtlety, and subterfuge surrounding present campaign-financing practices. Nonetheless, it is a matter of public record that many millions of dollars are contributed to Congressional campaigns. Our grossly inadequate Federal laws on reporting of campaign costs and a scattering of more effective state laws produce enough figures to establish a disturbingly high level of total spending.<sup>10</sup>

Throughout the book the authors recognize the direct relationship between ethical political conduct and freedom of a member of Congress to exercise an independence of judgment. Inherent in any consideration of rules for governing political conduct is the age-old philosophical question: "What is the primary obligation owed to the public by an elected official in a parliamentary body?"

It has always been my view, following Edmund Burke's statement on this issue to his Bristol electors, that the primary obligation a member of Congress owes to the public is to exercise an honest independence of judgment on the merits of each issue tested by the question: "What do the facts seem to show the public interest to be?" Once he answers that question to his own satisfaction then his vote should be automatic in support of the public interest as he sees it. If partisan politics are not going in the same direction with the facts, then that is just too bad for partisan politics.

Substantial campaign donations made directly to individual candidates or to campaign fund-raising committees of the major political

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<sup>10</sup> P. 119.

parties at both the state and national level are too frequently made with an expectation of a legislative pay-off in Congress. In the post election legislative process, far too many members of Congress find they have sacrificed independence of judgment and the public interest by helping block good legislation or by voting for bad legislation involving the special interests of campaign contributors.

The Committee points out:

The Corrupt Practices Act is ineffectual. Hardly anyone has ever been prosecuted for not complying with it, in spite of the fact that virtually every candidate has been forced to circumvent the law with one subterfuge or another. This situation breeds hypocrisy, conceals vitally important information, and fosters public cynicism.<sup>11</sup>

The Committee's recommendations for reform in the laws regulating campaign financing would help remove the curse of the dollar that now taints too many votes in Congress: a direct public subsidy of campaign expenses for congressional candidates, a \$1,000 limitation on individual contributions, postal benefits to candidates limited to one mailing to registered voters, a limit of \$25,000 a congressional candidate may spend in any calendar year on his own campaign, reduction of political broadcast rates, and a requirement of full reporting of contributions and spending by all primary and general election candidates for Congress and all committees supporting them.

In the chapter conclusion, the Committee comments:

For many years the campaign-finance laws have given committees and candidates a powerful incentive to withhold information. The proposed election-reform bills remove much of the incentive for dishonest or incomplete reporting by removing spending limits. Accurate reporting should enable the new Federal Elections Commission to accumulate heretofore unavailable election-finance information and share it with the electorate. Even with the enactment of a comprehensive Election Reform Act, only careful monitoring of elections and election reports will yield this information.<sup>12</sup>

There is one very important area of campaign financing which the Committee did not discuss in its Report but which is a source of abuse calling for greater governmental surveillance. I refer to campaign-deficit financing. A very large percentage of congressional campaigns, particularly for the Senate, end with a financial deficit. Often the candidate

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<sup>11</sup> Pp. 148-49.

<sup>12</sup> P. 153.

himself is unaware of the amount of the deficit until the campaign is over. Most candidates, while campaigning, devote full time to a grueling speaking and travel program. The details of organizing, financing, and administering a campaign are usually left to a campaign manager and committees under his direction. The finance committee is, in a sense, the political power-generator of the campaign. Frequently, adverse developments or unexpected exigencies arise in a campaign, especially in its closing weeks or days, which cause a campaign manager and his finance committee to "go overboard" by authorizing expenditures in excess of available campaign funds. In raising money to make good this deficit, political abuses can arise.

Financial contributions made prior to the election, which are subject to public disclosure under federal and state pre-election disclosure laws, are more easily traced than financial contributions to campaign deficits. Any reform requiring full public disclosure of campaign contributions should apply as well to contributions to pay off campaign deficits. This reform would check the practice of planning deliberately for a large campaign deficit in order to conceal from public disclosure the names of contributors, or to arrange for substitution of names of others for the names of actual contributors.

It is through the back door of campaign deficits that the lobbies of some foreign countries have funneled money to "go-betweens" in the United States to be contributed to the campaign deficits of their supporters in Congress. Here again, tougher disclosure laws dealing with campaign deficits would help check this foreign lobby source of corruption in campaign financing.

In Chapter V the authors discuss a related problem—the need of adequate salaries and allowances for members of Congress. They state:

Our interest in Congressional allowances stems from the assumption that adequate allowances make it less likely that Members will incur obligations to special interests in order to meet the expenses of the office. The question of adequacy of allowance differs with each Member, depending, as noted by the Senate Ethics Committee, on such factors as his methods of communicating with his constituents; his personal habits of frugality; and the distance, population density, and degree of urbanization of his constituency.<sup>13</sup>

They offer a series of recommendations for increasing staff and travel allowances, and for tax benefits. The Committee fully supported the 1969 increase in congressional salaries to \$42,500.

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<sup>13</sup> P. 176.

Chapter VI sets forth the Committee's views on gifts, supplemental funds, and honoraria and their potential influence on congressional conduct. The 1967 censure case of Senator Dodd brought to a head the issue of whether a Senator should accept, for his personal use, the proceeds of a testimonial fund-raising program. In the Dodd case, the amount was \$116,000 and his acceptance of the money was a chief cause of his being censured by the Senate. Very rightly, the Committee concurred that both houses of Congress, by rule, should forbid a member to conduct, or permit to be conducted, any fund-raising events to provide money for his personal uses.<sup>14</sup>

As to direct individual gifts to a member of Congress the Committee recommends a rule that "[n]o Member shall accept a substantial, personal gift from anyone except a relative," and all personal, non-family gifts worth more than \$25 shall be publicly disclosed.<sup>15</sup> The Committee's disapproval of members of Congress who accept gifts is quite appropriate. Until very recently, accepting valuable gifts has been a serious behind-the-scenes scandal in both Congress and the executive branch. If Congress would pass laws, and demand vigorous enforcement requiring full public disclosure of the sources and amounts of income, gifts, and gratuities received by federal officials, the level of honesty and trustworthiness of public officials would increase substantially.

Honoraria constitute another source of income for which full public disclosure should be required. The Committee writes:

The term "honorarium" is defined by the Senate Ethics Code to encompass fees received not only for speeches but also for "written articles, television appearances, participations in discussion groups, and similar paid services."

83.3 percent of the Senators and 77.3 percent of the Representatives whom we interviewed reported earning honoraria income. A number of Members apply their honoraria to pay for intra-term political expenses of the sort borne by other Members' office expense funds.<sup>16</sup>

The Committee makes two recommendations concerning public disclosure of honoraria:

Recommendation 6E. The House of Representatives should adopt the Senate rule requiring public disclosure of each honorarium of \$300 or more, as provided in the Model Disclosure Rules . . . .

Recommendation 6F. The Senate should adopt the House

<sup>14</sup> P. 184.

<sup>15</sup> Pp. 187-88.

<sup>16</sup> P. 197.

rule prohibiting acceptance of an honorarium "in excess of the usual and customary value for such services."<sup>17</sup>

I would suggest a further report on the manner in which honoraria are spent. It is true that many members of Congress have heavy office expenses, in excess of the funds supplied by the federal government, and they find it necessary to supplement office costs out of personal funds. Some of these excess office costs involve items like extra secretarial help, research assistance, telephone, telegraph, postage and travel costs. They are costs of performing the official work of the member, separate and distinct from any political expenditures.

The rules requiring public disclosure of honoraria should provide for an itemization of the honoraria income showing the amounts spent for specific office expenses and the amounts that were retained by members for personal income. Also, if any of the honoraria were turned over to nonpolitical charities or public service agencies, these should be itemized in the disclosure report.

Chapter VII, Congressional Self-Discipline: Ethics, Codes and Committees, deals with the exercise of the constitutional authority of Congress to discipline its members:

Article I of the Constitution of the United States provides in Section 5, Clause 1, that each house of Congress "shall be the Judge of the Elections, Returns, and Qualifications of its own Members." Clause 2 then confers additional powers:

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.<sup>18</sup>

The three constitutional sanctions for congressional self-discipline are expulsion, exclusion, and punishment. The Committee calls attention to the historical reluctance of Congress to indulge in self-discipline of its members, particularly with respect to its power of expulsion:

Except during the passions generated by the Civil War, when 22 Senators were expelled for disloyalty, the Senate has expelled only one duly elected Member. This occurred in 1797, when Senator William Blount of Tennessee was expelled for his extra-Congressional activities in scheming with British agents and dealing with Indians. . . .

The House has used the power of expulsion even more guardedly. All three expulsions of Representatives were on

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<sup>17</sup> P. 201.

<sup>18</sup> P. 202.

grounds of treason and occurred at the beginning of the Civil War.<sup>19</sup>

The exclusion power has been used on rare occasions to reject members-elect who were found to be unfit to serve in Congress. The Adam Clayton Powell exclusion is the most recent such incident. The Resolution of Censure has been a more common form of punishment for disorderly behavior; the cases of Senator Joseph McCarthy, in 1954, and of Senator Thomas Dodd, in 1967, are the most recent examples of Senate censure.

The Committee discusses the Powell and Dodd cases in some detail and points out their role in the creation of Senate and House committees and codes. The Committee suggests that the very existence of the two ethics committees and their respective codes evidences a substantial increase in the level of ethical sensitivity among members of Congress.

Surprisingly, the authors give the standards of congressional conduct today a high rating in comparison with earlier days:

Despite our general conclusions that ethical standards of Members of Congress are generally much higher than the public realizes, the contents of this Report show that we nonetheless find significant room for improvement. If all Members came up to the standards of the great majority, there would be little problem. Most of our recommendations simply urge that a minority of Members emulate the self-imposed standards of the majority. Above all, our recommendations are also designed to enhance public confidence in the Congress and to show the people that their representatives are actually adhering to the highest standards.<sup>20</sup>

From its labors of the past two years, this Committee is convinced that standards of Congressional conduct have probably never been so high as they are today. Public awareness of this fact is lower than it might be, and to the extent that this Committee can do so, it hopes to educate the public to a greater appreciation of the demands and pressures of Congressional service.<sup>21</sup>

It is doubtful that the cogent analysis of congressional practices discussed under the several chapter headings justify this generous accolade

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<sup>19</sup> P. 204.

<sup>20</sup> P. xxvi.

<sup>21</sup> P. 3.

to present-day standards of congressional ethics and conduct. The authors quote with approval the preamble to the Senate Ethics Code:

“The ideal concept of public office, expressed by the words, ‘a public office is a public trust,’ signifies that the officer has been entrusted with public power by the people; that the officer holds this power in trust to be used only for their benefit and never for the benefit of himself or a few; and that the officer must never conduct his own affairs so as to infringe on the public interest.”<sup>22</sup>

Unfortunately, the 1968 Ethics Code is breached far too often to excuse the majority for not adopting reforms, such as those recommended in this book, that would bring the unethical conduct of the minority under effective surveillance and control. This reviewer would point out that the Congress, as a branch of our constitutional system of self-government, belongs not to the members of Congress, but to the American people. Members of Congress are, indeed, the trustees of a legislative public trust.

The book buttresses the view of those of us who have urged congressional reforms on the ground that, in a democracy, there is no substitute for the full, public disclosure of the public’s business. Procedures and practices which conceal legislative business from the full light of public scrutiny encourage violations of the public trust that are inherent in congressional service.

There are many political malpractices that cry out for reform. The trend toward government by secrecy in both the legislative and executive branches is a threat to our constitutional system of checks and balances. We see a manifestation of this wrongdoing in the congressional habit of conducting Committee hearings behind closed doors in executive sessions. Full public disclosure is denied in these sessions, and public accountability for actions not in keeping with their public trust can be side-stepped by members of committees, and by Administration witnesses. It happens.

Likewise, the unchecked exercise of arbitrary discretion by some committee chairman frequently thwarts the Congress in fulfilling its public trust. A few of the many other political practices that are conducive to unethical conduct are the trading of votes, the surrendering to political expediency at the cost and loss of intellectual honesty, the double-talk of many politicians who talk one way and vote the opposite, and the substitution of partisanship for statesmanship.

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<sup>22</sup> P. 37.

Although the book does not deal specifically with these examples of congressional conduct which raise serious questions of political ethics, it does stress the importance of public disclosure. Only with full disclosure can the performance of each member of Congress be scrutinized carefully enough to prevent and detect violations of the public trust. In the last analysis, the most effective enforcer of ethical conduct of government officials is an informed public opinion.

*Congress and the Public Trust* is a valuable, objective, research study of the many ethical problems inherent in serving the public trust by members of Congress. The problem now is to arouse sufficient public demand to cause the political party organizations in Congress to cleanse congressional procedures at all levels and to enforce higher ethical standards for the members of Congress.