Vanderbilt Journal of Transnational Law

Volume 12
Issue 2 *Spring 1979*

Article 1

1979

Regulating Conflict of Interest of Public Officials: A Comparative Analysis

Ross F. Cranston

Vanderbilt Journal of Transnational Law

VOLUME 12 SPRING 1979 NUMBER 2

REGULATING CONFLICT OF INTEREST OF PUBLIC OFFICIALS: A COMPARATIVE ANALYSIS

*Ross F. Cranston**

TABLE OF CONTENTS

I. INTRODUCTION

Conflicts between the public duties and private interests of government officials have received considerable attention and have produced a variety of legislative and executive actions. President Carter laid down high standards of behavior for his appointees; Congress tightened its financial disclosure requirements in 1977

* Research Fellow, Australian National University; Barrister of Gray's Inn (London), 1976. LL.B., 1971, Queensland, Australia; LL.M., 1973, Harvard; D. Phil., 1976, Oxford, England. The author acknowledges the assistance of Colin A. Hughes, Professorial Fellow, Australian National University, and Ann M. Pickering in the preparation of this article.

and the Ethics in Government Act of 1978[1] embodies some of these measures in legislation.[2] Britain established a register of Parliamentarians' interests in 1975 and a Royal Commission has made a report on the standards of behavior in public life.[3] An Australian Joint Parliamentary Committee recommended a register of Parliamentarians' interests in 1975,[4] and now a Committee of Inquiry[5] is determining whether principles for the resolution of conflicts between public duty and private interest can be developed for Ministers, Parliamentarians, public servants, and other public officials.

This article outlines the existing law and practice involving conflicts of interest in the United States, Britain, and Australia, each of which exhibits a high level of economic and industrial advancement. United States developments are important because these far-reaching measures have been adopted by other governments. Because many countries have adopted the Westminister model of Parliamentary government, Britain's enviable record of high standards in public life demands examination. Australia ostensibly adopted the Westminister model with certain modifications which provide Australia with a federal system and a written constitution granting its High Court the power to review and invalidate legislation.

II. THE CONTEXT OF CONFLICT OF INTEREST

A. *Background Variables*

The standard of behavior in public life is related to social, economic, and political factors. Corruption is prominent in many Third World countries because politicans and bureaucrats have not yet developed systems and norms by which behavior can be divorced from such factors as ethnic loyalty, nor have their economic systems developed to such a degree that minor public servants are paid enough to avoid the "need" for the petty corruption

1. *See* text accompanying note 111 *infra.*

2. Pub. L. No. 95-521, 92 Stat. 1824 (to be codified at 2 U.S.C. 701 & 5 U.S.C. app.).

3. ROYAL COMM'N ON STANDARDS OF CONDUCT IN PUBLIC LIFE, 1974-1976, CMND No. 6524 (1976) [hereinafter cited as SALMON REPORT].

4. JOINT COMM. ON PECUNIARY INTERESTS OF MEMBERS OF PARLIAMENT, DECLARATION OF INTERESTS (1975) [hereinafter cited as RIORDAN REPORT].

5. Headed by a federal judge, Chief Justice Bowen.

which exists. Third World bureaucracies are both elaborate and inefficient, it is said, so that "the provision of strong personal incentives to bureaucrats to cut red tape may be the only way of speeding the establishment of the new firm."[6]

Over the last century more electoral corruption has occurred in the United States than Britain. Contributing factors to this corruption include the greater dispersal of political power due to the north-south division, ethnicity, federalism, and the tripartite separation between the executive, legislative, and judicial branches. The American city boss developed as the political entrepeneur who integrated power and "got things done."[7] V.O. Key remarked that the political role of money in the United States has been to integrate the diverse interests and groups in American society.[8] In contrast, the level of electoral corruption has declined in Britain since the late nineteenth century. It has been suggested that political attitudes have grown more homogeneous so that since the nineteenth century it has become unprofitable to bribe voters on a large scale when the results in individual constituencies are dependent upon national trends determined by national campaigning.[9] Moreover, with the rise of the British Labour Party, elections took on a relatively ideological complexion as compared with the United States. In addition, the British civil service became a relatively rational and internally responsible bureaucracy after the Northcote-Trevelyan reforms of the 1850s.

Whatever the real level of corruption, whether it is "black" or "grey,"[10] it is certainly more highly publicized in the United States, primarily because society and government in the United States ar much more open than in Britain or Australia. Furthermore, political groups in the United States frequently raise moral issues to win political kudos which tends to escalate moral

6. Leys, *What is the Problem About Corruption?*, 3 J. MOD. AFR. STUD. 215, 223 (1965).

7. *See* Ford, Book Review, 19 POLITICAL SCI. Q. 673 (1904).

8. V. KEY, POLITICS, PARTIES AND PRESSURE GROUPS 395-98 (4th ed. 1964).

9. POLITICAL CORRUPTION 364 (A. Heidenheimer ed. 1970) (citing Stokes, *Parties and the Nationalization of Electoral Process*, in THE AMERICAN PARTY SYSTEM 191 (W. Chambers & W. Burnham eds. 1967)).

10. In this paper "black" corruption refers to bribery, patronage, graft and other traditional forms of corruption, whereas "gray" corruption refers to a conflict of interest.

stances.[11] The fact that certain individuals and organizations thrive on exposing shortcomings in public agencies also increases the likelihood of publicity of public corruption.[12] In comparison, public morality has never received much airing in British or Australian political debate, perhaps because of a more cynical public view of politics and politicians. In addition, Britain and Australia have never had the "muck-raking" tradition of American newspapers, the absence of which is reflected in the British deference toward politicans, and the fact that Australian newspapers which are highly monopolized provide few outlets for divergent and critical views.

Blatant forms of corruption such as vote buying and bribery ("black" corruption) seem to have declined in all three countries. The advent of the political party has already been mentioned as a deterrent to electoral corruption. The growth of bureaucratic structures and greater scrutiny by the press decreased political corruption. The development of a civil culture and the *embourgeoisement* of society gave birth to laws and administrative programs with resulting benefits which are regarded as rights rather than as discretionary political favors.[13]

While flagrant forms of corruption have declined, conflicts between the public duties and the private interests of public officials ("grey" corruption) have developed. The expansion of government activities in advanced industrial societies "produces many situations in which corruption can easily develop through favourites and the misuse of discretionary authority on the part of administrative officials, induced by such activities on the part of the corrupter as campaign contributions, gifts, and the like."[14] Implicit in this statement is the fact that the forms of "undesirable behavior" of public officials have thus become increasingly sophisticated over time. "Black" corruption with politicans is unnecessary when society tolerates generous contributions to party coffers and campaign funds. The greater complexity of society facilitates such "grey" corruption and at the same time makes it more difficult for public opinion to focus condemnation on particular transactions.

11. Manning, *The Purity Potlatch: An Essay on Conflicts of Interest, American Government, and Moral Escalation*, 24 FED. B.J. 239, 243-48 (1964).

12. *See* H. KAUFMAN, ADMINISTRATIVE FEEDBACK 10 (1973).

13. Wilson, *Corruption: The Shame of the States*, 2 PUB. INTERESTS 28 (1966).

14. C. FRIEDRICH, THE PATHOLOGY OF POLITICS 155 (1972).

B. *Defining Conflict of Interest*

A conflict of interest can be broadly defined as the use of public office to advance private interests at the expense of some public interest. Both of the terms "private interest" and "public interest" are admittedly vague. A "private interest" ordinarily concerns pecuniary considerations, although promotional or status gains may also be involved.[15] In addition, private interests may also involve non-pecuniary considerations such as nepotism or advancement of a political party interest. Public interest is a nebulous concept, but in this context it may be useful to think of it in terms of the opinions of the general public as expressed by elite groups, such as newspapers or political parties. Some authors view the terms "official duty" and "public interest" as overlapping, so that a conflict of interest exists when an official's conduct in office conflicts with his private economic affairs.[16] Other writers regard a conflict of interest as one involving any of the following acts: (1) accepting illegal rewards in exchange for action favoring those providing the reward; (2) accepting rewards for doing something that the public official is under a duty to do in any event; (3) accepting remuneration for an act that the official is under a duty not to do; or (4) exercising a legitimate discretion for improper reasons.[17] In summary, conflict of interest involves the use of public office in a manner which ignores the public interest in order to achieve personal advantage.

Certain differences exist between conflicts of interest and corruption in the traditional sense ("black" corruption).[18] Gibbons argues that in conflict of interest situations only one actor is involved; the conflict is between the actor's personal interest and his sense of obligation to the public interest.[19] This construct fails to take account, however, of the potential conflict of interest present in movements of public officials into the private sector where more than one party is clearly involved. Perhaps a more significant difference between "black" corruption and conflict of interest situations is that the latter often involves action which *might* further private interests at the expense of the public interest. A conflict

15. *See* PRIVY COUNCIL, MEMBERS OF PARLIAMENT AND CONFLICT OF INTEREST 3 (1973) [hereinafter cited as CANADIAN GREEN PAPER].

16. R. GETZ, CONGRESSIONAL ETHICS 3 (1967).

17. McMullan, *A Theory of Corruption,* 9 SOC. REV. 181 (1961).

18. *See* note 10 *supra.*

19. Gibbons, *The Study of Political Corruption,* in POLITICAL CORRUPTION IN CANADA 1, 11 (K. Gibbons & D. Rowat eds. 1976).

of interest does not necessarily involve actions which actually favor private interests; but the appearance that such a private interest may be favored is sufficient. Thus, a conflict of interest creates an additional problem because the mere appearance of a conflict undermines public confidence.

Conflict of interest involves more than policy differences. The distinction between conflict of interest and mere policy differences rests upon whether public opinion regards certain behavior as unacceptable or attaches less value to the continuance of such behavior than to the costs generated by condemning it. Public opinion may be swayed by such principles as maintaining the appearance of impartiality, even though this may be overridden by the need for expertise or commitment. For this reason, British Ministers have been required since 1952 to divest themselves of shares held in companies having close associations with their own departments.[20] Not only must Ministers appear to be impartial between companies, but it should also appear that they cannot personally benefit by their official decisions.[21] The principles against impartiality or enrichment are sometimes overshadowed by other factors such as expertise gained. For that reason, no question has been raised whether the British Minister for Agriculture, Fisheries, and Food owns a farm.

III. THE LEGAL HERITAGE

The laws regulating conflict of interest derive from a concern over traditional forms of corruption ("black" corruption).[22] Existing provisions are frequently inadequate and inconsistent and require revision in order to provide a firm basis for more expansive conflict of interest measures.

A. *Bribery and Corruption*

A statute enacted in the United States in 1853 made it a crime for members of Congress to accept bribes.[23] In the case of *United*

20. 496 PARL. DEB., H.C. (5th ser.) 702-03 (1952) (text of Official Report).

21. Avoiding the appearance of impropriety and preventing the possibility of undesirable activity, however slight, are of central importance in American conflict of interest cases. *See* United States v. Mississippi Valley Generating Co., 364 U.S. 520, 549-51 (1961).

22. *See* note 10 *supra.*

23. Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. 170 (current version at 18 U.S.C. §§ 201, 203 (1976)). *See also* 18 U.S.C. § 218 (1976) (a contract affected by bribery is voidable).

States v. Johnson,[24] the United States Supreme Court held that a member of Congress who had been paid for making a speech in the House of Representatives or the Senate was protected from criminal prosecution for bribery under the free speech and debate clause of the Constitution.[25] In *United States v. Brewster,*[27] the Supreme Court held that a Senator could be prosecuted for accepting a bribe to influence his vote on legislation before his committee. The Court held that the "speech or debate clause" prohibits inquiry "only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those."[28] Under the facts in *Brewster,* the Court further held that prosecution of a Senator was not constitutionally prohibited where the focus of the prosecution was upon the Senator's acts apart from his official actions "generally done in Congress in relation to the business before it."[29] The Court stated:

> [N]o inquiry into legislative acts or motivation for legislative acts is necessary for the Government to make out a prima facie case. . . . The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.[30]

The Court further held that the Constitution did not prohibit inquiry into incidentally related acts which were not part of the legislative process itself.[31]

The House of Commons gave as their opinion on May 2, 1695, that the offer of money or other advantage to a Member of Parliament for the promotion of any matter to be transacted in Parliament was a high crime and misdemeanor.[32] The House itself deals with behavior in breach of this rule.[33] Apart from the sanction of

24. 383 U.S. 169 (1966).

25. U.S. CONST. art. 1, § 6, para. 1. This clause is derived from the English Bill of Rights: An Act Declaring the Rights and Liberties of the Subject, 1689, 1 W. & M. 440, c. 2, art. 9, at 441.

27. 408 U.S. 501 (1972).

28. *Id.* at 512.

29. *Id.*

30. *Id.* at 525-26.

31. *Id.* at 528.

32. 11 H.C. JOUR. 331 (1695). In 1945 the Commons extended the resolution: "an offer of money to a [M.P.] in order to induce him to take up a question with a Minister would be a breach of privilege." SALMON REPORT, *supra* note 3, at 97.

33. *See* T. ERSKINE MAY, THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF

reprimand, the House can suspend or expel M.P.'s, and can also commit either M.P.'s and ordinary individuals to prison (although this has not been done in the last century). The courts have no jurisdiction in the area of conflicts of interest, since "neither the statutory nor the common law applies to the bribery or attempted bribery of [M.P.'s] in respect of [their] Parliamentary activities."[34]

Australian courts have held that bribery of M.P.'s is a common law misdemeanor punishable by fine or imprisonment.[35] In the case of *The King v. Boston*,[36] the High Court of Australia accepted that an M.P. could be charged with conspiracy for making an agreement to use his influence exclusively outside Parliament, and not by vote or speech therein, to put pressure on a Minister on a particular matter, even though it was beneficial to the public interest. The Court assumed that this decision was consistent with the English common law and failed to consider the question of Parliamentary privilege. Because the decision involved state Parliamentarians, however, the question remains whether the *Boston* decision is applicable to the national Parliament, since the Australian Constitution provides that Parliament should have the privileges of the House of Commons.[37]

For a number of reasons, the courts seem a more appropriate forum for dealing with bribery of legislators than the legislatures themselves. They have the expertise to ensure a fair trial, while in the legislature, political considerations might prevail.[38] History demonstrates that when left to act upon their own initiative, legislatures are unlikely to pursue charges of corruption of members.[39]

PARLIAMENT 142, 149 (19th ed. 1976).

34. SALMON REPORT, *supra* note 3, at 98. *See Ex parte* Wason, L.R. 4 Q.B. 573 (1869); SELECT COMM. ON THE CONDUCT OF MEMBERS, CMND. No. 490 at ix-x (1977) [hereinafter cited as MEMBERS REPORT].

35. The King v. Boston, 33 C.L.R. 386 (1923); The King v. Connolly, [1922] St. R. Queensl. 278; The Queen v. White, 13 S.C.R. (N.S.W.) 322 (1875). *See also* Speaker of the Legislative Assembly v. Glass, L.R. 3 P.C. 560 (1871) (Australian Parliament used its contempt power in a bribery case).

36. 33 C.L.R. 386 1923-24.

37. AUSTL. CONST. § 49.

38. *See* 73 COLUM. L. REV. 125, 151 (1973).

39. *See, e.g.*, G. GRAHAM, MORALITY IN AMERICAN POLITICS 93 (1952). Thus, the Salmon Report advocated legislation on the bribery of M.P.'s since bribers are immune and public obloquy will have little effect on them, and as for M.P.s, the absence of parliamentary action demonstrates that Parliament does not have investigative machinery comparable to that of a police investigation. SALMON REPORT, *supra* note 3, at 98-99.

The argument in favor of legislatures retaining internal sanctioning authority is based upon the belief that the independence of a legislature is threatened if bribery of members is under the jurisdiction of the courts.[40] The fear which originally gave rise to the exclusion of the courts on privilege matters—that the executive would use criminal prosecution to harass legislators—now appears to be unwarranted. The major problem which remains is how best to ensure that corrupt legislators do not escape the due processes of law.[41] The statutory delegation of authority to the judiciary of cases involving the bribery of legislators offers clear advantages to the retention of that authority by the legislatures themselves.[42]

In the common law of the three jurisdictions under consideration, it is illegal either to offer or accept a bribe for the purpose of influencing the performance of a public officer's duty.[43] Statutory law in the three jurisdictions also extends common law bribery to cover solicitation and receipt of bribes by someone other than the public official.[44] Bribery no longer involves only the payment of money directly to a public official, but may take the form of a gift, sponsored travel, or a contribution to campaign or party funds.

40. United States v. Brewster, 408 U.S. 501, 554-55 (1972) (White, J., dissenting). Justice White cautioned that 18 U.S.C. § 201 makes no distinction between campaign contributions and money for personal use. Thus, the Executive was given wide discretion to prosecute and had enormous influence on legislators. *Id.* at 558.

41. In the *Boston* case, the Australian court emphasized that acceptance of a bribe operates as an incentive to serve the paymaster regardless of the public interest. The King v. Boston, 33 C.L.R. at 393 (Knox, C.J.), 395 (Isaacs and Rich, JJ.), 409 (Higgins, J.).

42. Legislation has already been enacted in the United States, 18 U.S.C. §§ 201, 203 (1976), although it is subject to the free speech and debate clause, U.S. CONST. art. I, § 6. In United States v. Brewster, 408 U.S. at 529-63, the dissenters said delegation was unconstitutional. The bribery provision of the Australian Crimes Act, 1914, § 73, does not apply to federal Parliamentarians since they are not "Commonwealth officers." State Parliamentarians are subject to state bribery legislation, however, in those states with a criminal code. QUEENSL. CRIM. CODE §§ 59-60; TASM. CRIM. CODE §§ 71-72.

43. Public officer in this context clearly includes a cabinet minister, as illustrated by an old English case, The King v. Vaughan, involving the first Lord of the Treasury. 98 Eng. Rep. 308 (K.B. 1769). *E.g.*, The King v. Whitaker, [1914] 3 K.B. 1283; United States v. Worrall, 2 U.S. (2 Dall.) 384 (1798); The King v. Jones [1946] Vict. L.R. 300. There is also the common law offense of misbehavior in public office, but the offense is vague and rarely invoked.

44. *E.g.*, 18 U.S.C. §§ 201, 203 (1976); Secret Commissions Act, 1905, § 4 (Austl.); Prevention of Corruption Act, 1906, 6 Edw. 7, c. 34, § 1. *Cf.* Crimes Act, 1914, § 73 (Austl.).

Although no case law exists on this point in Britain or Australia, it has been held in the United States that the solicitation or receipt of funds by a public officer or employee for political campaign expenses constitutes bribery.[45] Gifts, sponsored travel, and contributions to campaign and party funds may be made in general terms to create a "favorable climate" for decision-making. The absence of any nexus between them and specific action by the public official makes it difficult to apply existing bribery law. Adequate control of these favors will require upgraded controls. For example, gifts and sponsored travel might be discouraged by public disclosure. Elections might be better funded by government grant, and individual campaign contributions being made illegal.[46]

Strong bribery statutes can be an immediate deterrent to misbehavior and a long-term method of inculcating ethical standards. Because any failure to take action against obvious violations will quickly undermine confidence, bribery law must be regularly reviewed to cover new forms of improper inducement and must be supported by adequate enforcement machinery. Perhaps the greatest gap in bribery law at present is the privilege afforded legislators, particularly in Britain. Although historically good reasons existed for the privilege, it can no longer be justified.

---

45. State v. Smagula, 39 N.J. Super. 187, 120 A.2d 621 (1956); Commonwealth v. Tonty, 178 Pa. Super. Ct. 447, 115 A.2d 833 (1955), *cert. denied,* 350 U.S. 1005 (1955). The British and Australian legislation covers payment of bribes as campaign contributions when it refers to consideration obtained by the official for himself or for any other person. Secret Commissions Act, 1905, § 4, para. 1 (Austl.); Prevention of Corruption Act, 1906, 6 Edw. 7, c. 34, § 1, para. 1. In Britain, Lloyd George extolled the sale of honors for campaign funds as a way of limiting bribery:

> In America, the steel trusts supported one political party, and the cotton people supported another. This placed political parties under the domination of great financial interests and trusts. Here, . . . a man gives L40,000 to the Party and gets a baronetcy. If he comes to the Leader of the Party and says I subscribe largely to the Party funds, you must do this or that, we can tell him to go to the devil.

J. DAVIDSON, MEMOIRS OF A CONSERVATIVE 279 (R. James ed. 1969). A Royal Commission in Queensland found corrupt conduct on the part of a Minister for Public Lands when he solicited a donation to party funds in return for favorable consideration in the grant of a Crown leasehold. ROYAL COMMISSION, ALLEGATIONS OF CORRUPTION RELATING TO DEALINGS WITH CERTAIN CROWN LEASEHOLDS IN QUEENSLAND 129 (1956).

46. The United States has already imposed stringent restrictions and reporting requirements upon individual and corporate contributions and has also provided for federal subsidizing of presidential elections. *See* Federal Election Campaign Act Amendments of 1976, § 112(2), 2 U.S.C. §§ 441a-441c (1976).

B. *Conflict of Interest Law*

As early as 1789, the Rules of the United States House of Representatives required disqualification of congressmen from voting on legislation concerning matters in which they had a personal or pecuniary interest.[47] The prohibition on voting in the British House of Commons for members with a direct pecuniary interest is embodied in the ruling of Speaker Abbott in 1811: "[T]his interest . . . must be a direct pecuniary interest, and separately belonging to the persons . . . and not in common with the rest of His Majesty's subjects, or on a matter of state policy."[48] Later Speakers have interpreted the ruling narrowly. Similarly, Speakers of the Australian House of Representatives have emasculated Standing Order 196, which is almost identical with Speaker Abbott's ruling.[49]

A rule requiring declaration of pecuniary interest or other benefit when speaking in the House of Commons and when communicating with Ministers and civil servants was adopped in 1974,[50] based on a conviction that a declaration was necessary "because hon. Members desire to be frank with their fellow Members and it is sometimes a matter of prudence, in case an hon. Member should be suspected of unavowed motives."[51] In practice, this rule was clearly ineffective because members failed to declare that their personal pecuniary interests were clearly affected. For this reason, support grew for a register of Parliamentarians' interest.[52]

---

47. House Rule VIII. *See* HOUSE RULES & MANUAL § 659 (1971). Unless specially excused, Senators were not disqualified in the case of a personal or pecuniary interest because otherwise their states would lose one of only two votes. Rulings of ineligibility have been rare.

48. 20 PARL. DEB., H.C. (1st Ser.) 1012 (1811).

49. *See* 105 PARL. DEB. 3380-83 (1923) (Austl.). *See also* 145 PARL. DEB. 1130 (1934) (Austl.); 17 PARL. DEB., H.R. 2447-49 (1957) (Austl.); 18 PARL. DEB., H.R. 478-79 (1958) (Austl.).

50. 874 PARL. DEB., H.C. (5th ser.) 391-544 (1974); 893 PARL. DEB., H.C. 735-804 (5th ser.) (1975). The rule was based on recommendations of SELECT COMM. ON MEMBERS' INTERESTS (DECLARATION), H.C. PAPER No. 102 (1974) [hereinafter cited as WILLEY REPORT].

51. 510 PARL. DEB., H.C. (5th ser.) 2040 (1953). A similar rule still exists for the Australian House of Representatives. 215 PARL. DEB., H.R. 2154 (1951) (Austl.). No such practice has ever existed in Congress. *See* K. BRADSHAW & D. PRING, PARLIAMENT AND CONGRESS 109 (1972).

52. MEMBERS' REPORT, *supra* note 34, at §§ 22-23. *See also* SELECT COMM. ON MEMBERS' INTERESTS (DECLARATION), H.C. PAPER No. 57, app. 10 (1969) (memorandum of Mr. Andrew Roth) [hereinafter cited as STRAUSS REPORT]. For Aus-

1. Office of Profit

Perhaps the oldest provision of relevance to conflict of interest is the English concept that those holding an "office of profit" under the Crown cannot sit in Parliament. The earliest English provisions were simply an attempt by the House of Commons in the early seventeenth century to assert its privileges, and thus judges were excluded from being members of the Commons because they were associated with the Lords. From the time of the Restoration in 1660, the aim was to exclude from Parliament those who might be servile to the Crown, which was attempting to use the considerable patronage at its disposal to win support for its policies.[53] The notion of office of profit was placed on a firm statutory basis by the Statute of Anne of 1707.[54] The concept was supported for the following reasons: to insulate certain offices, *e.g.*, judiciary, civil servants, members of public authorities, from being held by Members of Parliament engaged in political controversy; to maintain the principle of Ministerial responsibility by preventing civil servants, for whose decisions a Minister is responsible, from becoming Members of Parliament themselves; to eliminate the opportunity for Members of Parliament to pursue self-interest; and, to ensure that Parliamentarians devote their time to their Parliamentary duties.[55]

A variety of cases have arisen under the 1707 Act which have been considered by the House of Commons rather than the courts.[56] Over the years certain office holders such as the Postmaster General were statutorily excluded from the disqualification. In addition, specific acts of indemnity have been necessary to save

tralia see JOINT COMM. ON PECUNIARY INTERESTS OF MEMBERS, 70 (1975) [hereinafter cited as RIORDAN EVIDENCE].

53. The Managers of the Commons in Conference said in 1706: "A total repeal of that provision would admit such an unlimited number of officers to sit in their house, as might destroy the free and impartial proceedings in Parliament, and endanger the liberties of the Commons of England." 3 H. HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 193 (1863).

54. 6 Anne, c. 41 (1707).

55. *See* T. ERSKINE MAY, THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 209-10 (17th ed. 1964).

56. 24 HALSBURY'S LAWS OF ENGLAND 225 (2d ed. 1937). Viscount Palmerston accepted the honorary office of Constable of Dover Castle and Lord Warden of the Cinque Ports in 1861 for which a salary payable by the Crown had been withdrawn although the warrant granted the incumbent wrecks, fees, rewards, and commodities. It was decided that a new writ should issue for Palmerston's seat.

particular M.P.'s from possible penal consequences since under the statute, common informers could sue Members in breach of the Act.[57] With the growth of the state, the legislation developed a wide but uncertain ambit. To reduce statutory uncertainty and to avoid trivial appointments falling within the purview of the statute, Britain enacted the House of Commons Disqualification Act of 1957, which lists all disqualifying offices by schedule, alterable by statutory order.[58] In addition, the Act abolished monetary penalties and empowered the Commons to declare that a particular disqualification be disregarded.

The statutory counterpart to the British office of profit concept in the United States is article 1, section 6 of the Constitution. Article 1, section 6 provides that during a term of office, congressmen may not hold any other federal office, and upon resignation, they may not be appointed to any federal office which was created or whose salaries were increased during the preceding term of Congress. The clause was designed by the framers to maintain the separation of powers doctrine and to avoid a situation in the United States comparable to the compromise of Parliamentarians by the British Crown.[59]

The British office of profit concept was adopted in Australia at both the state and national level. Thus, section 44 of the Australian Constitution provides: "Any person who . . . (iv) Holds any office of profit under the Crown . . . shall be incapable of being chosen or if sitting as a senator or a member of the House of Representatives." The section also excludes ministerial appointments. Section 45 declares that if a Senator or Member of the House of Representatives becomes subject to section 44, his seat thereupon becomes vacant. Monetary penalties for breach of the

57. *E.g.*, Arthur Jenkins Indemnity Act, 1941, 5 Geo. 6, c. 1.

58. 5 & 6 Eliz. 2, c. 20. The present version is House of Commons Disqualification Act, 1975, c. 24.

59. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 379-82 (M. Farrand ed. 1911); 2 *id.* at 180; THE FEDERALIST No. 76 (Madison). *See also* Atkins v. United States, 556 F.2d 1028, 1070, *cert. denied,* 434 U.S. 1009 (1978). In 1971 an anti-war group attempted to invoke the clause against members of Congress in the Armed Forces Reserve. The Supreme Court ultimately denied the group standing, however. A favorable decision would have reduced to some extent the identification which some members of Congress have with the military—a non-pecuniary conflict of interest. *See* Reservists Comm. to Stop War v. Laird, 323 F. Supp. 833 (D.D.C. 1971), *aff'd,* 495 F.2d 1075 (D.C. Cir. 1972), *rev'd on other grounds,* 418 U.S. 208 (1974). Earlier examples are mentioned in 1 A. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, §§ 487-506 (1935).

section have recently been reduced, and are now limited to $200 unless a person continues to sit after having been served with the originating process.[60] Australia has witnessed several court cases involving office of profit, and Parliamentarians assuming even relatively minor and innocuous positions have been disqualified.[61] At the state level, consideration is being given to listing in the various state constitutions the offices for which a member may be disqualified.[62] Substantial barriers exist to amending the Australian Constitution although nothing in section 47 prevents the national Parliament from excluding the courts and dealing with possible disqualifications internally.[63]

2. Government Contractors

A 1782 Act regulating government contractors in Britain was based upon the same rationale as the legislation disqualifying individuals holding an office of profit, namely, to ensure that the independence of M.P.'s would not be undermined by the Crown's allocation of government business. The Act of 1782 provided that any person who either directly or indirectly held for his own use or benefit, in whole or in part, any "contract, agreement, or commission" with any person or persons for or on account of the public service, was incapable of being elected to, or of sitting or voting in the House of Commons.[64] The Act imposed a very heavy penalty

60. Common Informers (Parliamentary Disqualification) Act, 1975, c. 28 (Austl.). Parliamentary power to take this action comes from section 47 of the Australian Constitution.

61. *E.g., In re* The Warrego Election Petition (Bowman v. Hood), 9 Queensl. L.J. 272 (1899). *Cf.* Clydesdale v. Hughes, 51 C.L.R. 518 (1934) (Seat on Lotteries Commission). Recent "office of profit" cases in Queensland involved an M.P. accepting briefs as a barrister for the Crown and various M.P.s who had been appointed by the government to bodies such as a school board. *See* Legislative Assembly and Another Act Amendment Act, 1978, c. 5 (Queensl.).

62. WESTERN AUSTRALIA LAW REFORM COMM., DISQUALIFICATION FOR MEMBERSHIP OF PARLIAMENT: OFFICES OF PROFIT UNDER THE CROWN AND GOVERNMENT CONTRACTS (1971).

63. An example was the "Gair affair" in 1974. *See* 48 AUSTL. L.J. 221 (1974).

64. The House of Commons (Disqualification) Act, 1782, 22 Geo. 3, c. 45, § 1. *See also* 41 Geo. 3, c. 52 (1801). The preamble to 22 Geo. 3, c. 45 reads, "For further securing the Freedom and Independence of Parliament." In *In re* Samuel, [1913] A.C. 514, 524, Viscount Haldane, L.C. for the Privy Council, said: "This Act of Parliament itself declares that it was made to preserve the freedom and independence of Parliament; and the mischief guarded against is the sapping of that freedom and independence by members being admitted to profitable contracts."

of £500 for every day on which a disqualified person sat or voted in the House.[65] After 1931, the disqualification extended "only to contracts, agreements, or commissions for the furnishing or providing of money to be remitted abroad or wares and merchandise to be used or employed in the service of the public."[66] Section 3 of the original Act provided that it did not extend to incorporated trading companies where the contract was made for the general benefit of the company.

Both the Commons and the Courts have attempted to limit the effect of the 1782 Act. In 1855, a Select Committee of the Commons determined that a Member (Baron Rothschild) who lent money to the government was not in violation of the provision.[67] The Court of Common Pleas in *Royse v. Birley*[68] held that a Member was not disqualified, although the firm in which he was a partner had supplied goods for the public service of India. The goods were considered a "public service" because the contract was completely executed before the election, though the firm had not been paid as of that date. The Member's firm also had once supplied goods of small value for Broadmoor, since the firm did not know that it was a state lunatic asylum. Another instance of a narrow construction of the Act was the case of *Tranton v. Astor,*[69] which held that Hon. Waldorf Astor, sole proprietor of the *London Observer,* was not disqualified as an M.P. because of specific government advertising placed in that newspaper relating to war recruiting and war loans. Justice Low, no doubt influenced by the fact that the case was brought by a common informer claiming £29,000 for breach of the Act, applied *Royse v. Birley* to determine that the contract was

65. House of Commons (Disqualification) Act, 1782, 22 Geo. 3, c. 45, § 9.

66. House of Commons Disqualification (Declaration of Law) Act, 1931, 21 Geo. 5, c. 13.

67. T. ERSKINE MAY, THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 214 (14th ed. 1946).

68. L.R. 4 C.P. 296 (1869). Judge Willes with whom Chief Justice Bovill agreed, said that section 1 of the legislation "refers to the case of a man having a contract under which he is to derive some future benefit from dealing with the government, in respect of which they might control him; as, for instance, by directing their officers not to look too closely to the sort of goods he sent in, or the like." *Id.* at 311-12. Justice Montague Smith said: "[T]he legislature intended it to apply only to contracts of a continuing nature, such as contracts for the building of works, and contracts for a recurring supply of goods, though I do not say that a contract for a single supply of goods is not within the terms which are used." *Id.* at 317.

69. 33 TASM. L.R. 383 (1917).

executed at the time the Member was sitting and voting.[70] He also held that the contract was with an independent contractor acting for the government, and not with the government itself. In the course of the judgment, Justice Low made the following remarks: "[S]uch casual or transient transactions are not the kind of contracts covered by these statutes, but what are meant to be covered are contracts of a more permanent or continuing and lasting character . . . ."[71] In 1957, the judicial disqualification was abolished completely and the Commons was left to deal with disqualifications as a matter of privilege, following the recommendation of a Select Committee. In none of the cases over the years where the legislation was invoked had any suggestion of corruption been made.[72]

By Act of Congress in 1808, it became an offense for a member of Congress "directly or indirectly . . . [to] undertake, execute, hold or enjoy, in the whole or in part, any contract or agreement hereafter to be made or entered into" by the United States or any of its agencies.[73] Like the British statute, the language in the United States Act was broad, and in an early case it was applied to congressmen who had become assistant counsel to the Attorneys General of the United States.[74] *United States v. Dietrich*[75] involved a person who became a Senator while holding a contract of rental of a post office; the court held that the statute had to apply in this context with full vigor even though the contract was fairly obtained and reasonable in its terms. The court reasoned that it was advantageous to the United States:

70. Although Royse v. Birley, L.R. 4 C.P. 296 (1869), involved a contract which had been executed at the time of the *election.*

71. 33 TASM. L.R. at 386. *Cf. In re* Grenville Provincial Election (Payne v. Ferguson), 56 D.L.R. 122 (1920) (Canadian case holding that buying supporters dinner, tipping a band, and controlling a printing company that did ballot work does not disqualify candidate).

72. SELECT COMM. ON HOUSE OF COMMONS DISQUALIFICATION BILL, CMD No. 349 (1956) Memorandum Submitted by the Clerk of the House of Commons § 6. The Committee also highlighted the inconsistencies in the legislation. For example, contracts of service were excluded though in some cases they are covered by the office of profit doctrine. Thus a person might be disqualified for selling a little furniture to the government, but not for erecting a building.

73. Act of April 21, 1808, ch. 48, 2 Stat. 484 (current version at 18 U.S.C. § 431 (1976)). Exemptions were gradually grafted onto the provision, *e.g.*, 18 U.S.C. § 433 (1976).

74. Op. Att'y Gen. 574 (H. Gilpin ed. 1841). *See also* 4 Op. Att'y Gen. 47 (June 1, 1842) (partnership of which Congressman was partner).

75. 126 F. 671 (C.C.D. Neb. 1904).

> to preserve the independence of the legislative and executive branches of the Government, and to free each from that influence which might come to be exerted over it by the other if the officers of the executive branch, acting on behalf of the government, could freely contract with members of and delegates to Congress. The purpose of the statute is to effectually close the door to the temptation which is incident to contractual relations between the government and members of Congress.[76]

Yet in *United States v. McMillan*,[77] a United States district court held that an acquittal was warranted for a defendant who held a federal lease while he was a congressman, given that it was an ordinary transaction and that he had not concealed his position, had evinced no criminal intent, and was a person of high honor.[78] Under the Federal Election Campaign Act Amendments of 1976, contributions from a government contractor are now prohibited to any political party or candidate for federal office.[79]

The Australian Constitution provides that a person "shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives" if he "[h]as any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth other than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons.[80] The section was not invoked until 1975

---

76. *Id.* at 673.

77. 114 F. Supp. 638 (D.D.C. 1953).

78. The court pointed out that otherwise, Congressmen holding government bonds or securities would be in violation. *Id.* at 642.

79. The statute makes unlawful the making of a contribution by any person "who enters into any contract with the United States or any department or agency thereof either for the rendition of personal services or furnishing any material, supplies, or equipment to the United States . . . or for selling any land or building to the United States . . . if payment for the performance of such contract . . . is to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement of negotiations for and the later of (A) the completion of performance under; or (B) the termination of negotiations . . . ." Federal Election Campaign Act Amendments of 1976, § 112(2), 2 U.S.C. § 441c(a)(1) (1976).

80. AUSTL. CONST. § 44(v). Similar provisions in Australian state constitutions have been considered by the courts but have never been held to disqualify a member of Parliament. Most of the decisions seem justified in terms of legislative purpose. *See* Hobler v. Jones, [1959] Queensl. 609 (M.P. holding ordinary government lease); Proudfoot v. Proctor, 8 N.S.W.L.R. 459 (1887) (M.P. guarantor and assignee of contract). *But see* Miles v. McIlwraith, 8 App. Cas. 120 (1883) (a Queensland M.P., whose brother's firm chartered a ship to the government on

when the case of a Senator whose family company had certain contracts with the Australian public service was referred to the Court of Disputed Returns.[81] The Court effectively emasculated the provision as it related to conflict of interest situations. It held that the provision does not apply to casual and transient contracts. To be covered, a contract must be one in which the government could influence the contractor in his Parliamentary duties.[82]

3. Relevance of Old Law

The long-standing provisions regarding office of profit and government contractors are of limited application in present conditions. Nevertheless, they have some remaining value: for legislators might "pull their punches" if they thought that by attacking the Executive they might lose some type of government business or that they might not benefit from patronage in part-time appointments to government commissions or appointed agencies. Moreover, in the absence of such provisions, legislators might seek favors from the Executive, seeking to bnefit themselves improperly. The provisions do not necessarily lead to disqualification, however; the power to relieve an official from the consequences of a minor breach should be retained in the provisions. The determinations of what activities render an official subject to reprimand, discipline, or ultimately disqualification should be initially made in an atmosphere removed from partisan considerations.[83] Little

behalf of the owners, the M.P. being part-owner of the ship, was not disqualified). *See also* Tasmanian Members' Case, 6 AUSTL. L.J. 322, 365 (1933) (M.P.s borrowed from government bank and received loans under veterans' repatriation scheme prior to election).

81. 132 C.L.R. 270 (1975).

82. *Id.* at 280. Chief Justice Barwick, said that the purpose of the section was to prevent the Crown suborning Parliamentarians. *Id.* at 278-79. This is historically inaccurate because the Constitutional Conventions were equally concerned with preventing Parliamentarians from using their elected office for personal gain. *See* Hammond, *A Comment on the Webster Case,* 3 MONASH L.REV. 91, 97 (1976). Moreover, Barwick's suggestion, 132 C.L.R. at 287, that a shareholder in a company does not necessarily have a pecuniary interest in any agreement between the company and the public service, is inconsistent with the wide interpretation of pecuniary interest in English decisions. *E.g.,* Brown v. Director of Public Prosecutions, [1956] 2 Q.B. 369. The suggestion also flies in the face of AUSTL. CONST. § 44(v), which expressly excludes from the application of the provision shareholders in companies consisting of more than 25 members. Clearly, the exclusion was intended to prevent the corporate form from being used to avoid the constitutional provision.

83. Evans, *Pecuniary Interests of Members of Parliament under the Austra-*

evidence exists to support private actions for penalties by common informers. In serious cases, however, citizens should have the right to a court declaration that a legislator is disqualified where, for political reasons, the legislature itself is not prepared to act.

The older law yields a rich harvest of general principles governing the behavior of legislators and public officers, extending beyond offices of profit and government contractors. Some of the older principles are somewhat dated: party political government means that an M.P. in Britain or Australia may bind himself before election to follow the party line so that he does not serve the public as a whole as required by the old cases.[84] Nevertheless, many common law duties of M.P.'s are still pertinent: the duty to act according to judgment and conscience, without the influence of pecuniary considerations; the duty to act honestly; the duty to represent the needs and concerns of constituents; the duty not to fetter by pecuniary consideration their obligation of due watchfulness, criticism and censure of the Executive; the duty not to put themselves in a position of temptation; and the duty not to pursue private advantage.[85] The duties on public officers flowing from their position as trustees to the public include the duty to perform functions honestly, the duty to refrain from activities which interfere with the proper discharge of their functions, and the duty not to place themselves in a position where public duty conflicts with private interest.[86]

IV. CURRENT DEVELOPMENTS

Three broad approaches have been adopted in the last decade to deal with conflict of interest problems: disclosure, regulation, and divestiture. Under the first approach, legislators and public officers would be required to disclose their interests to allow a judgment on whether their public duty and private interests conflict. Under the second approach, the behavior of public officials

lian Constitution, 49 AUSTL. L.J. 464 (1975). One specific problem in the case of contracts is whether a legislator should be considered as having an interest through a shareholding in the contracting company. Control, involvement and benefit appear to be the relevant parameters.

84. Osborne v. Amalgamated Soc'y of Ry. Servants, [1909] 1 Ch. 163, 186-87, 196-97.

85. The King v. Boston, 33 C.L.R. 386, 393, 399-400 (1923); Horne v. Barber, 27 C.L.R. 494, 500-01 (1920); Wilkinson v. Osborne, 21 C.L.R. 89, 98-99 (1915); Attorney-General of Ceylon v. De Livera, [1963] A.C. 103, 125; Egerton v. Brownlow, 10 Eng. Rep. 359, 423 (1853).

would be regulated so that such conflicts are obviated. Under the last approach, the public official would be required to dispose of those interests which could conceivably conflict with his public duty. Supporting each approach is a variety of mechanisms including unenforceable codes of conduct, internal discipline, and criminal sanction.

The conflict of interest measures which have been adopted are justified on the ground of protection of public confidence.[87] Well-publicized examples in recent times of conflicts of interests have generated a crisis of confidence in representative institutions which can only be assuaged by positive action.[88] The question of whether these particular measures are restoring public confidence remains undetermined. Requiring legislators to disclose their private pecuniary interests may simply convince some members of the public that their worst fears are justified. The public now has higher expectations of legislators and public officials and the continued vitality of liberal democracy requires a reaffirmation that public duty is paramount to the pursuit of private interests.

A. *Disclosure*

Systematic disclosure by register on the part of legislators and public servants of their financial interests is the lynchpin of modern conflict of interest regulation in the three countries considered. It is preferred to divestiture since many persons would avoid public office if it meant abandonment of business involvements and personal investments. The advantages accruing from public financial disclosure include the following: it will increase public confidence in government; it will demonstrate the high level of integrity of the vast majority of government officials; it will deter conflicts of inter-

86. 63 AM. JUR. 2D, *Public Officers and Employees* §§ 275-83 (1972); Finn, *Public Officers: Some Personal Liabilities,* 51 AUSTL. L.J. 313 (1977). *See also* The Queen v. Llewellyn-Jones, [1967] 3 All E.R. 225, 228-29; The King v. Jones, [1946] Vict. L.R. 300 (misbehavior in public office); A. DICEY, THE LAW OF THE CONSTITUTION 327 (10th ed. 1959); O. HOOD PHILLIPS, CONSTITUTIONAL LAWS OF GREAT BRITAIN, THE BRITISH EMPIRE AND THE COMMONWEALTH 153 (6th ed. 1946).

87. *See generally* P. DOUGLAS, ETHICS IN GOVERNMENT 98-100 (1952); J. KIRBY, CONGRESS AND THE PUBLIC TRUST (1970).

88. Recent examples are the case of Maudling, Cordle, and Roberts in Britain, see MEMBERS' REPORT, *supra* note 34; South Korean bribes in the U.S., ECONOMIST, June 25, 1977, at 39; and the Victorian lands case in Australia, REPORT OF THE BOARD OF INQUIRY INTO CERTAIN LAND PURCHASES BY THE HOUSING COMMISSION AND QUESTIONS ARISING THEREFROM, VICT. PARLIAMENTARY PAPER NO. 6 (1978).

est because officials will realize that their actions will be scrutinized; it will deter persons who should not be entering public service from doing so; and finally, the performance of public officials will be more readily ascertainable.[89]

A public register now has wide acceptance among legislators as a means of achieving these aims. Both Britain and the United States have a register, and the matter remains under consideration in Australia. Legislators must expect thorough public scrutiny in the performance of their public duties. Moreover, public financial disclosure assists enforcement because private citizens and the press will be able to scrutinize legislators when they have the means.

It is argued that greater financial disclosure has significant drawbacks.[90] For example, it is arguably unfair to impose heavy reporting burdens on the honest majority because of the behavior of a minority. It has also been suggested that many conflict of interest situations are a gray area and thus intrusion into an individual's privacy and the threat of criminal sanctions cannot be justified. A further argument questions whether certain public officials should be subject to such requirements when similar disclosure requirements do not exist for other public officials or private sector officials.[91] The ease of evasion and the failure to highlight

89. *E.g.*, SENATE COMM. ON GOVERNMENTAL AFFAIRS & PUBLIC DISCLOSURE, PUBLIC OFFICIALS INTEGRITY ACT OF 1977, S. REP. No. 170, 95th Cong., 1st Sess. 21-22 (1977).

90. *E.g.*, COMMITTEE ON LOCAL GOVERNMENT RULES OF CONDUCT, CMND. No. 5636, § 56 (1974) [hereinafter cited as REDCLIFFE-MAUD REPORT]; STRAUSS REPORT *supra* note 52, at §§70-78.

91. The American courts have considered whether public disclosure is an inequitable imposition on higher public officials when others need not disclose. In Kenny v. Byrne, 144 N.J. Super. 243, 365 A.2d 211 (App. Div. 1976), *aff'd*, 75 N.J. 458, 383 A.2d 428 (1978), the court rejected the contention that an executive order mandating disclosure violated the equal protection clause of the fourteenth amendment because it was applicable only to a limited group of state officials. The clause was not offended by a mere difference in treatment. *See* Dandridge v. Williams, 397 U.S. 471 (1970) (some invidious discrimination would have to be shown); Morey v. David, 354 U.S. 457 (1957). The difference in treatment was not without a reasonable basis because the higher officials were more involved in decision-making than lower officials and hence more likely to become involved in conflicts of interest. Kenny v. Byrne, 365 A.2d at 219. *See* Chamberlin v. Missouri Elections Comm'n, 540 S.W.2d 876 (Mo. 1976). *Cf.* Illinois State Employees Ass'n v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9, (state employees unsuccessfully challenged financial disclosure requirements), *cert. denied* 419 U.S. 1059 (1974) (Douglas, J., concurring).

crucial interests are other objections to systematic disclosure.

Although legislative committees in Britain, the United States, and Australia have considered that for legislators the privacy argument is overridden by other considerations,[92] it remains the strongest argument against public financial disclosure. It is fair to add, however, that the Parliamentary registers suggested for Britain and Australia are such that the privacy of Members is hardly affected. United States courts have held that the privacy of legislators which is invaded by financial disclosure is not within the constitutionally protected zone of privacy which attaches to personal and family matters.[93] Thus the Supreme Court of New Jersey in *Kenny v. Byrne*[94] upheld a law requiring financial disclosure of certain appointed officials in the executive branch. Quoting from an earlier lower court decision, the New Jersey Supreme Court set out a convincing justification for ignoring privacy:

> By accepting public employment an individual steps from the category of a purely private citizen to that of a public citizen. And in that transition he must of necessity subordinate his private rights to the extent that they may compete or conflict with the superior right of the public to achieve honest and efficient government.[95]

Similarly, in *Klaus v. Minnesota State Ethics Commission,*[96] the

92. *E.g.*, HOUSE COMM'N ON ADMINISTRATIVE REVIEW, FINANCIAL ETHICS, H.R. DOC. NO. 73, 95th Cong., 1st Sess. 7 (1977) [hereinafter cited as OBEY REPORT]; RIORDAN REPORT, *supra* note 4, at 15; WILLEY REPORT, *supra* note 50, at § 10.

93. Paul v. Davis, 424 U.S. 693, 712-13 (1976); but note that some judges throw doubt on laws requiring public disclosure of an official's financial position in *obiter* remarks. *E.g.*, Buckley v. Valeo, 424 U.S. 1, 66 (1976); California Bankers Ass'n v. Schultz, 416 U.S. 21, 78-79 (1975) (Powell, J., concurring). *See also* Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965); Carmel-By-The-Sea v. Young, 2 Cal.3d 259, 263-68, 466 P.2d 225, 228-32, 85 Cal. Rptr. 1, 4-8 (1970). There is also the argument that disclosure might be in violation of the fifth amendment privilege against self-incrimination. Disclosure would, however, seem clearly to fall within the justification of being generally neutral, not directed at a selected group inherently suspect of criminal activities, and within a regulatory rather than criminal framework. *See* United States v. Sullivan, 274 U.S. 259 (1927).

94. 144 N.J. Super. 243, 365 A.2d 211, (App. Div. 1976), *aff'd,* 75 N.J. 458, 383 A.2d 428 (1976).

95. *Id.* at 252, 365 A.2d at 216, (quoting Lehrhaupt v. Flynn, 140 N.J. Super. 250, 262, 356 A.2d 35, 42 (App. Div. 1976)).

96. 309 Minn. 430, 244 N.W.2d 672 (1976). *See also* Illinois State Employees Ass'n v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9 (1974), *cert. denied,* 419 U.S. 1058 (1974); Montgomery County v. Walsh, 274 Md. 336 A.2d 97 (1975), *appeal dismissed,* 424 U.S. 901 (1976); Hunter v. City of New York, 88 Misc. 2d 562, 391

Supreme Court of Minnesota upheld a disclosure statute for candidates for the state legislature. The Court remarked that when a person stands as a candidate, he subjects himself to close scrutiny.[97]

Privacy becomes a more compelling objection to a public register if a legislator must register the interests of his spouse and children. A legislator may implicitly consent to disclose by virtue of seeking public office, but the same can hardly be said for his spouse and immediate family. The very practical issue of what punishment can be imposed on a legislator if a spouse refuses to divulge to him the necessary information must also be explored. For these reasons a British M.P. need not register the independently-held interests of his spouse or children. The Riordan Report in Australia found that Parliamentarians should register only those interests of their spouse or children of which they were aware.[98]

Powerful arguments do exist, however, in favor of requiring disclosure by a legislator of the interests of his spouse and immediate family. First, family assets are frequently intermingled so that it is unrealistic to treat them separately. Second, a person could circumvent disclosure requirements applying only to himself by conveying interests or directing income or gifts to his spouse. Finally, a person can be influenced by the interests of his family as well as by his own interests. For these reasons, congressmen and senators in the United States must publicly disclose certain interests of their spouses.

1. The British Parliamentary Register

Because of the number of M.P.'s who were paid either as consultants or by public relations firms, it was suggested that the House of Commons adopt a register of Parliamentarians' interests.

N.Y.S. 2d 289 (Sup. Ct. 1976), *modified,* 58 App. Div. 2d 136, 396 N.Y.S. 2d 186 (1977); Fritz v. Gordon, 83 Wash. 2d 275, 517 P.2d 911 (1974), *appeal dismissed,* 417 U.S. 902 (1974).

97. 309 Minn. at 436, 244 N.W.2d at 676.

98. Interests are said to be constructively controlled if enhancement would benefit the person reporting. OBEY REPORT, *supra* note 92, at 7. Similar provisions have been upheld at the state level, *e.g.,* County of Nevada v. MacMillen, 11 Cal. 3d 662, 522 P.2d 1345, 114 Cal. Rptr. 345 (1974); Montgomery County v. Walsh, 274 Md. 489, 336 A.2d 97 (1975); Fritz v. Gordon, 83 Wash. 2d 275, 517 P.2d 911 (1974), *appeal dismissed,* 417 U.S. 902 (1974). *Contra,* Carmel-By-The-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 255, 85 Cal. Rptr. 1 (1970). *See also* Dwyer v. Kahn, 88 Misc. 2d 73, 387 N.Y.S. 2d 535 (Sup. Ct. 1976).

The Strauss Committee in 1969 determined that a register would be ineffective, and for that reason recommended instead a stronger form of ad hoc declaration by Members applying to debate, question time, or correspondence with Ministers and civil servants.[99] Yet by 1974, following several notable improprieties by Members of Parliament, pressure for a register was strong enough to convince the Willey Committee, and ultimately the Commons itself, of the need for a register.[100]

The purpose of the Register as adopted is to provide information on any pecuniary interest or other material benefit which a Member may receive which might be thought to affect his conduct as a Member or influence his actions, speeches or vote in Parliament. Members must register their private interests under nine headings:

> (1) remunerated directorships of companies, public or private;
> (2) remunerated employments or offices;
> (3) remunerated trades, professions or vocations;
> (4) the names of clients when the interest referred to above includes personal services by the Member which arise out of or are related in any manner to his membership of the House;
> (5) financial sponsorships, (a) as a parliamentary candidate where to the knowledge of the Member the sponsorship in any case exceeds 25 per cent of the candidate's election expenses, or (b) as a Member of Parliament, by any person or organisation, stating whether any such sponsorship includes any payment to the Member or any material benefit or advantage direct or indirect;
> (6) overseas visits relating to or arising out of membership of the House where the cost of any such visit has not been wholly borne by the Member or by public funds;
> (7) any payments or any material benefits or advantages received from or on behalf of foreign Governments, organisations or persons;

99. STRAUSS REPORT, *supra* note 52, at §§ 76, 78. The Liberal Party began a voluntary register for its M.P.s in 1967. *See generally* Vijay, *The Declaration of Interests by M.P.s: An Analysis of the Current Campaign for Reform,* 44 POLITICAL Q. 478 (1973).

100. WILLEY REPORT, *supra* note 50, at §§ 9-11. The previous year a Royal Commission recommended a local authority register. REDCLIFEE-MAUD REPORT, *supra* note 90, at §§ 55-64.

101. T. ERSKINE MAY, THE LAW, PRIVILEGES, PROCEEDINGS, AND USAGE OF PARLIAMENT 1087-88 (19th ed. 1976).

(8) land and property of substantial value or from which a substantial income is derived;
(9) the names of companies or other bodies in which the Member has, to his knowledge, either himself or with or on behalf of his spouse or infant children, a beneficial interest in shareholdings of a nominal value greater than one-hundredth of the issued share capital.[101]

No reference is made in the Register to individual headings under which a Member has nothing to register. As a result of the wide exemption for interests held by Members' spouses and children, many entries read simply "Nil Return." The actual form of the British register is of a Parliamentary paper, printed each session and available for sale to the public.[102] The master copy held by the Registrar[103] is available to the public and is regularly updated by members within four weeks of a change in registered interests. The responsibility for registering falls upon the Members alone, although in cases of doubt a Select Committee on the Register of Members' Interests, established each session to act in a supervisory role, may become involved if necessary. Enforcement of the requirement to register lies ultimately in the House's penal jurisdiction to deal with contempt.

2. Congressional Disclosure

Existing disclosure provisions governing federal officials in the United States were recently under review, and various amendments have been made by the Congress.[104] A major criticism was that existing provisions were not uniformly applied. They did not cover the highest officials such as the President or Vice-President, and while public disclosure was necessary for members of the Congress, confidential disclosure was sufficient for officials in the Executive branch. Furthermore, congressional disclosure has been backed only by the sanctions Congress has been willing to impose upon itself.

Moves for financial disclosure by members of Congress began in

102. *E.g.*, MEMBERS' INTERESTS: REGISTER AS ON 1 NOVEMBER 1975 CMND. No. 699 (1975).

103. The Registrar is a member of the Clerk's Department of the Commons.

104. *See Public Officials Integrity Act of 1977, Blind Trusts and Other Conflicts of Interest Matters: Hearings Before the Senate Comm. on Governmental Affairs,* 95th Cong., 1st Sess. 458 (1977) [hereinafter cited as *Conflict of Interest Hearings.*]

the early 1950s, but it was only after the Bobby Baker and Dodd scandals that both the House and the Senate in 1968 passed resolutions requiring some form of disclosure. Both resolutions were strengthened in 1977.[105] For example, the House provisions had been vague in important areas: property dealings were excluded; no requirement was included to list shareholdings, even of corporations doing substantial business with the government; and the sources of honoraria to congressmen did not have to be stated. The Obey Committee concluded that the provisions "are perhaps now better known for what they did not require than for what they cause to be disclosed."[106]

On March 2, 1977, the House of Representatives amended Rule 44.[107] Congressmen and their staff must now publicly disclose:

> 1. Income and honoraria received during the preceding calendar year aggregating $100 or more in value, except that the amount of dividends and the like need be indicated only by categories (not more than $1,000, $1,000-$2,500, etc.);
> 2. Gifts from any source, transportation, lodging, food or entertainment, worth more than $250 or all other gifts worth more than $100 except those from a relative, personal hospitality or those worth less than $35; reimbursements from a single source aggregating $250 or more in value;
> 3. The identity and category of value of any property held in a trade or business or for investment or the production of income which has a fair market value exceeding $1,000;
> 4. The identity and category of value of the total liabilities owed to any creditor other than a relative which exceed $10,000 at any time during the preceding calendar year excluding mortgages on a personal residence or motor vehicle, household furniture or appliances;
> 5. The description, category of value and date of any transaction with anyone other than a spouse or dependent child during the preceding year involving securities or real property other than personal residences;
> 6. The identity of positions with corporations, businesses, and other organizations except religious, social fraternal, or political entities or for positions solely of an honorary nature;
> 7. Arrangements for future employment and existing links with previous employers;[108]

105. OBEY REPORT, *supra* note 92, at 3.

106. H.R. Res. 287, 95th Cong., 1st Sess. 123 CONG. REC. H1614 (daily ed. Mar. 2, 1977) [hereinafter cited as H.R. Res. 287].

107. *Id.*

108. The categories are as follows: Not more than $5,000; $5,000-$15,000;

As indicated, there is no need to specify the actual amount or value of some terms. All that is necessary is the category into which they fall. The rationale for categorizing the amount rather than specifying it is that the interest rather than the specific dollar amount is sufficient information upon which to determine the existence of conflicts of interest.

Reports must also contain information about a spouse's earned income exceeding $1,000, details about investment income, gifts and reimbursements which are not received independently of the spouse's relationship, and items listed under points three to five above other than items (i) which the reporting individual certifies represent the spouse or dependent child's sole financial interest or responsibility and which the reporting individual has no knowledge of, (ii) which are not in any way derived from activities of the reporting individual, and (iii) from which the reporting individual neither derives nor expects to derive any financial or economic benefit.[109] Members of Congress and their staffs must report the information listed above with respect to income from a trust or other financial arrangement from which income is received by, or in which a beneficial interest is held by the settlor, his spouse or dependent child. This disclosure requirement does not apply, however, to qualified blind trusts or trusts which were not created by the settlor, his spouse or dependent child and if they have no knowledge of the holdings or sources of income of the trust.[110] Matters thus disclosed are public records but may not be obtained or used for commercial purposes other than news.[111]

The United States congressional requirements go well beyond the British House of Commons register where Members need only disclose the source of any remuneration or benefits, and are not required to disclose, even within broad categories, the amount of the benefit. Members are further required only to state the general nature of their property interest rather than a detailed list of holdings. In addition, spouses' and children's interests need not be disclosed at all under the British system. It is also noteworthy that the reporting requirements adopted by the United States Congress have been further strengthened by the enactment of a provision of the Federal Election Campaign Act Amendments of 1976, which

$15,000-$50,000; $50,000-$100,000; $100,000-$250,000; greater than $250,000.

109. H.R. Res. 287, *supra* note 106 at H1614 (1977).

110. The manner in which blind trusts can be used to avoid these reporting requirements is discussed in text accompanying notes 165-168.

111. H.R. Res. 287, *supra* note 106 at H1614.

impose dollar limitations upon receipt of honoraria by elected or appointed federal officials. Under the Act, no single honorarium may be accepted which exceeds $2,000 plus actual travel and subsistence expenses, and honoraria may not exceed $25,000 in the aggregate for any calendar year.[112]

3. Executive Disclosure

Before 1978, limited non-public disclosure was required for United States executive branch agency heads, presidential appointees in the Executive Office of the President who are not subordinate to an agency head, and all full-time members of committees, boards, or commissions appointed by the President.[113] In addition, senior public officials engaged in activities such as contracting and procurement, the administration of grants and subsidies, and regulating or auditing private industry were required to disclose those activities to their respective agency heads.[114] Monitoring by the United States Comptroller General confirms that those financial disclosure provisions for the Executive did not operate satisfactorily. Agencies administering the rules either were not sufficiently diligent or had failed to resolve potential conflicts and numerous instances were encountered in which the ownership of stock in corporations by public officials might conflict with their public duty.[115] The Comptroller General concluded that a real need existed for an Office of Ethics which could give whole-hearted attention to the enforcement and compliance with disclosure law in the executive branch. President Carter went beyond existing legal provisions regarding his own appointees by requiring them to make financial disclosures which may become public.[116] Many state governments in the United States now have some form of public financial disclosure for state executive officials.[117]

112. Federal Election Campaign Act Amendments of 1976, §112(2), 2 U.S.C. §441; (1976).

113. Exec. Order No. 11,222, 3 C.F.R. 591 (1968). At least one recent statute requires public disclosure. *See* Energy Policy and Conservation Act of 1975, §522, 42 U.S.C. § 6392 (1976).

114. 5 C.F.R. 735, (1978).

115. Conflict of Interest Hearings, *supra* note 104, at 818-74 (statement of Comptroller General). *See also Conflict of Interest in Regulatory Agencies: Hearings before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce,* 95th Cong., 1st Sess. (1977).

116. *Ethics Statement,* 35 CONG. Q., 57 (1977).

117. OBEY REPORT, *supra* note 92, at 4; *See, e.g.,* Evans v. Carey, 53 App. Div.

The Ethics in Government Act requires public disclosure by the President, the Vice-President, candidates for these positions, certain Presidential appointees requiring the advice and consent of the Senate, senior members of the executive branch and armed forces, and other employees in the executive branch who are excepted from the Civil Services because of the confidential or policymaking character of their position unless a blind trust is used.[118] The Director of the Office of Government Ethics may exempt these officials from the disclosure requirements.[119] The interests which must be disclosed are identical to those which members and staff of the Congress must disclose, except that those in the executive must also list from whom and how they earned amounts in excess of $5,000 in any of the two calendar years prior to that in which they filed their first report.[120] Reports must be filed by reporting individuals with their agencies, and some reports must then be transmitted to the Director of the Office of Government Ethics.[121] If an official does not comply with applicable laws and regulations the Ethics Office can require him to divest himself of the interest, establish a blind trust, or resign.[122] Those government employees not in the above categories might be obliged to make confidential disclosure.[123]

Ministers in Britain who are Members of the Commons must disclose their financial interests publicly. Both the British and Australian cabinets require their Ministers to declare their interests in matters under discussion.[124] In addition, recent Australian Prime Ministers have required their Ministers to prepare a private written statement of their various financial interests.[125] By force of law, British and Australian civil servants are now required to disclose to superiors any interest in matters under consideration.[126]

109, 385 N.Y.S.2d 965 (1976), *aff'd*, 40 N.Y.2d 1008, 359 N.E. 2d 983, 391 N.Y.S. 2d 393 (1976).

118. Ethics in Government Act § 201(a)-(f), 5 U.S.C.A. app. I § 201(a)-(f), (1978-79 Supp.).

119. *Id.*

120. *Id.* § 202(a).

121. *Id.* § 122. *Id.* § 206.

122. *Id.* § 206.

123. *Id.* § 207.

124. 496 PARL. DEB., H.C. 702-03 (1952). For Australia, see 54 PARL. DEB., H.R. 593 (1967) (Austl.); RIORDAN EVIDENCE, *supra* note 52, at 403, 633.

125. RIORDAN EVIDENCE, *supra* note 52, at 619-20. For Australia, see Letter from Prime Minister to Ministers, Aug. 16, 1977, 106 PARL. DEB., H.R. 10 (1977) (Austl.) [hereinafter cited as P.M.'s Letter].

126. For Britain, see SALMON REPORT, *supra* note 3, at §§ 124, 135. For Aus-

Members of the boards of the nationalized industries and government agencies are often statutorily required to declare any interest in matters under consideration, and may be disqualified from taking part in the deliberations and decision if any such interest exists.[127] British and Australian corporate law makes the same requirement of government appointees to the boards of ordinary corporations in which the government holds shares.[128]

Members of only a few government agencies in Britain and Australia must publicly disclose their interests when the appearance of impartiality is of paramount importance.[129] Some moves in Australia are now being made to have a public register for senior public servants and members of government agencies, and for other persons in sensitive areas such as purchasing, allocating grants, and awarding contracts. Such persons arguably possess a greater degree of power, influence, and initiative in decision-making than back-bench M.P.'s.[130] A Royal Commission in Britain, however,

---

tralia, see PUBLIC SERVICE BOARD, DRAFT GUIDELINES ON OFFICIAL CONDUCT OF COMMONWEALTH PUBLIC SERVANTS § 3.5 (1978) [hereinafter cited as DRAFT GUIDELINES]; RIORDIAN REPORT, *supra* note 4, at 38.

127. *E.g.*, Broadcasting and Television Act, 1942-1974, § 38 (Austl.), Iron and Steel Act, 1975, c. 64, § 4, sched. 1.

128. H. FORD, PRINCIPLES OF COMPANY LAW 352-53 (1976), GORE-BROWN ON COMPANIES §§ 27-16 to 27-20 (43d ed. 1977).

129. When the National Enterprise Board was established in Britain, it was decided that board members should annually disclose in a manner similar to the Commons register because of the Board's important position in making loans to private corporatons and acting as the holding corporation for some of the government's commercial interests. Industry Act, 1975, c. 68 § 1(8), (3), sched.2. *See also id.* at § 13, sched. 1. In Australia, the Chairman of the Industries Assistance Commission must give the Minister written notice of all direct and indirect pecuniary interests in any corporation carrying on business in Australia. Commissioners must disclose to the Chairman interests which may conflict with their duties, and Commissioners must not exercise power in which they have a pecuniary interest unless the interest is recorded in the Minutes and disclosed in any report. Industries Assistance Commission Act, 1973, § 20. *See also* Trade Practices Act, 1974-1977, § 17. Some moves in Australia are now being made to have a public register for senior public servants and members of government agencies, and for other persons in sensitive areas such as purchasing, allocating grants, and awarding contracts. Such persons arguably possess a greater degree of power, influence, and initiative in decision-making than back-bench M.P.'s. A Royal Commission in Britain, however, found the idea or such disclosure by civil servants to be objectionable on two grounds: the first was that civil servants only advise and implement decisions made by politicians; the other was that while politicians choose to enter public life, civil servants do not. While the first of those grounds appears clearly fallacious, the second is much more cogent.

130. RIORDIAN REPORT, *supra* note 4, at 37-38. *Cf.* 1 ROYAL COMMISSION ON

found the idea of such disclosure by civil servants to be objectionable on two grounds: the first was that civil servants only advise and implement decisions made by politicians; the other was that while politicians choose to enter public life, civil servants do not.[131] While the first of these grounds appears clearly fallacious, the second is much more cogent.

B. *Regulating Behavior*

Senator Paul Douglas once remarked that gifts, sponsored travel, and similar gratuities begin as pure friendship but conclude as a purchase. "It is, therefore, common practice for an official to yield and to allow his private feelings of obligation and gratitude to sway his decisions. He comes to pay off his private debts by giving away public rights."[132] Most gifts or sponsored travel do not amount to bribery because specific intent to influence a particular decision cannot be proved. Similarly, rules governing the payment of fees to legislators for professional services do not reach most gifts or travel expenses.[133] Tentative moves have been made in each of the three countries under consideration herein to specifically regulate gifts and sponsored travel. Legislators in Britain and the United States must publicly disclose gifts and travel reimbursements, and congressmen are also prohibited from accepting gifts having "substantial value" from those "having a direct interest in legislation before the Congress."[134] By convention, Ministers in Britain may not accept gifts or services which would place them under any obligation.[135] An Australian Minister is expected to surrender any gift received unless he pays the government its valuation and may not accept any overseas travel from commercial sources for himself or his family.[136] Codes of conduct and regulations in Britain, the United States, and Australia regulate the acceptance of gifts and sponsored travel by civil servants.[137]

AUSTRALIAN GOVERNMENT ADMINISTRATION 235 (1976).

131. SALMON REPORT, *supra* note 3, at §§ 170, 181.

132. P. DOUGLAS, *supra* note 87, at 49.

133. T. ERSKINE MAY, *supra* note 233, at 142-44. *Cf.* AUSTL. CONST. § 45 (iii); E. CAMPBELL, PARLIAMENTARY PRIVILEGE IN AUSTRALIA 146-54 (1966); J. KIRBY, *supra* note 87, at 60-61; STRAUSS REPORT, *supra* note 52, at § 114.

134. MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, § 44; RULES OF THE SENATE, § 43. For the text of the rules, see text accompanying note 107 *supra.*

135. 850 PARL. DEB., H.C. (5th ser.) 86, 409 (1973).

136. PARL. DEB., H.R. 3343, 3348 (June 8, 1978) (Austl.).

137. Civil service Pay and Conditions of Service Code and Establishment Officers' Guide §§ 9882-85, 9892-93, *reprinted in* SALMON REPORT, *supra* note 3,

The use of official information for the pursuit of private pecuniary advantage has attracted criminal sanctions for some time. Unfortunately, existing law suffers considerable deficiencies: it applies mainly to disclosure of information and makes little provision for personal misuse, as when an official learns of government financial plans and buys stock in anticipation of its rise in value.[138] Although statutory inadequacies are supplemented by codes of conduct, the need for legislative revision remains.[139] Even if adequate legislation had been enacted, problems of enforcement would remain. Other legislative techniques thus become relevant: requiring divestment of assets where misuse of information might enhance their value, and limiting post-separation employment.

The movement of executives between public and private sectors—the "revolving door"—is not as great a problem in Britain and Australia as in the United States. Only isolated controversies have arisen involving British and Australian Ministers entering private industry, perhaps because no legal restrictions exist against post-separation employment.[140] While United States civil servants spend only a relatively short time in federal employment, government service in Britain and Australia is a lifetime career. One reason for the limited mobility in Britain and Australia is the fact that government employees accrue substantial superannuation benefits which they would lose by resignation or early retirement. Moreover, the British and Australian civil services provide ample promotion prospects, whereas many senior positions in the United States are political appointments and thus are effectively closed to career civil servants.[141]

Post-employment rules have been drafted for British civil serv-

---

at app. 11 [hereinafter cited as Esta Code]; *see also* Code of Ethics for Government Service, H.R. Con. Res. 175, § 5, 85th Cong., 2d Sess. (1958); Public Service Regulations, § 37 (Austl.); SALMON REPORT, *supra* note 3, at §§ 216-20; DRAFT GUIDELINES, *supra* note 126 at 19-20.

138. *See* 18 U.S.C. § 1905 (1976); Crimes Act, 1914-73, §§ 70, 79 (Austl.); Official Secrets Act, 1911, § 2 (Brit.); Public Service Regulations § 34(a) (Austl.); *See generally* SALMON REPORT, *supra* note 3, at §§ 182-93. Such misuse may be a breach of the common law duty of confidence. *See* P. FINN, FIDUCIARY OBLIGATIONS 139-41, 150 (1977).

139. 54 PARL. DEB., H.C. (5th ser.) 556-58 (1913) (Asquith's Ministerial Code); Esta Code, *supra* note 137, at §§ 4131, 9904; DRAFT GUIDELINES, *supra* note 126, at §§ 3.12, 4.24-4.26.

140. 854 PARL. DEB., H.C. (5th ser.) 11 (1973); 667 *id.* 999-1003 (1962).

141. *See generally* G. CAIDEN, THE COMMONWEALTH BUREAUCRACY (1967); R. CHAPMAN, THE HIGHER CIVIL SERVICE IN BRITAIN (1970).

ants in addition to the laws regarding the disclosure of official information. The rules require that senior British civil servants, members of the armed forces, and civil servants in sensitive positions must obtain government approval within two years of resignation or retirement before accepting offers of employment in any business which has received government contracts, subsidies, loans, or similar benefits, or in any other entity in which the government is a shareholder, with which departments or the services are in a special relationship, or which are semi-public organizations.[142] The rules are administered to avoid the appearance of impropriety:

> They aim at avoiding any suspicion—however unjustified—that serving officers might be ready to bestow favours on firms in the hope of future benefits. They also seek to guard against the risk that a particular firm might be thought to be gaining an unfair advantage over its competitors by employing an officer who, during his service, had access to technical information that those competitors could legitimately regard as their own trade secrets.[143]

Doubts have been expressed about the effectiveness of the rules, and a government White Paper has conceded the need for legislative amendment to strengthen the rules.[144] Australian guidelines, on the other hand, simply suggest that staff contemplating post-separation employment with business should consult their supervisors if any questions of impropriety might arise.[145] This system, however, may soon yield to a more formalized approach.[146]

A great deal of concern has recently been raised concerning the "revolving door" in the United States between government and private industry. Two major problems have been identified resulting from the "revolving door." First, businessmen appointed to government positions may be so business-oriented that they are unable to recognize the existence of a public interest conflict.[147] Second, the former public official has acquired not only a knowledge of policies, law, and procedures, but also may gain an intangi-

142. 894 PARL. DEB., H.C. (5th ser.) 495-96 (1975); SALMON REPORT, *supra* note 2 at §§ 199-209 & 15.

143. SALMON REPORT, *supra* note 3, at § 201.

144. THE CIVIL SERVICE, CMND. No. 7117, § 27 (1978).

145. DRAFT GUIDELINES, *supra* note 126, at § 3.21.

146. *See* COMMITTEE OF INQUIRY INTO GOVERNMENT PROCUREMENT POLICY H.C. Paper No. 124 at 98-100 (1974).

147. *E.g.*, Lanoette, *The Revoling Door - It's Tricky to Try to Stop It*, 10 NAT'L J. 1796 (1977).

ble influence by virtue of the network of friendships and moral obligations arising from his years in the service.

Former officials of the executive branch of independent agencies may not participate in or attempt to influence any judicial, departmental, or agency proceedings regarding matters in which the government has a direct and substantial interest and in which he "personally and substantially" participated.[148] Furthermore, for a period of two years after government employment ceases, a former official must not so act regarding matters which were actually pending under his official responsibility within one year prior to the termination of his employment. Former senior officials who, within a year after government employment, represent or assist others before their former agencies on matters in which such department has a direct and substantial interest may be subject to penalties.[149]

Problems of enforcement of these provisions may still exist, however, because of the lack of clear definitions of these offenses.[150] A recent survey showed that in 1976 the Public Integrity Section of the United States Justice Department investigated only 35 conflict of interest cases and prosecuted none, although six are pending.[151]

President Carter has seemed to recognize that existing provisions on employment subsequent to government service are inadequate. Presidential appointees have been required to make certain assurances regarding later employment in addition to the legislative requirements.[152] The Carter Administration's proposals to slow down the "revolving door" by legislation are embodied in the Ethics in Government Act 1978.[153]

The changes in this Act have been criticized on several grounds. The new law has been viewed as being too harsh for ordinary government employees even though it is indeed acceptable for high

148. 18 U.S.C. § 207 (1976).

149. *Id.*; 12 *id.* § 1812. The prohibition does not extend to bank holding companies. For an example of state provisions, *See* Note, *Remedies for Conflicts of Interest Among Public Officials in Iowa,* 22 DRAKE L. REV. 600, 611-12 (1973).

150. Rhodes, *Enforcement of Legislative Ethics: Conflict Within the Conflict of Interest Laws,* 10 HARV. J. LEGIS. 373, 384 (1973). *Cf.* United States v. Nasser, 476 F.2d 1111 (7th Cir. 1973) (prosecution of I.R.S. agent).

151. *Federal Ethics and Financial Disclosure: Hearings on H.R. 6954, H.R. 2733 and H.R. 3928 Before the Subcomm. on Employee Ethics and Utilization of the House Comm. on Post Office and Civil Service,* 95th Cong., 1st Sess. 78-79 (1977) (letter from Benjamin R. Civiletti).

152. *Ethics Statement, supra* note 116, at 57.

153. S. 555, 95th Cong., 1st Sess. (1977).

appointments by the President. Various government agencies have also complained that such a law would inhibit efficient operation. The Securities and Exchange Commission's operations affect many businesses, so that the one-year ban would affect most positions to which former officials might aspire. Moreover, younger officials in the SEC will be forced to make premature decisions concerning their careers.[154] A final criticism is that the proposals do not come to grips with enforcement difficulties. The law would still attempt to prohibit activities which are not easily identified, and the problem of satisfying the criminal standard of proof for establishing specific intent would remain.

The British administrative scheme may thus be a more attractive model for dealing with the post-government service employment problem. The British scheme allows situations to be handled in a flexible manner so that the post-employment ban could be waived in appropriate cases. The British scheme, however, needs guidelines which can be applied flexibly to ensure that discretion is exercised in a consistent and equitable manner. In addition, an administrative scheme needs legal review for cases where recommendations are ignored. Sanctions will be particularly effective if they are aimed at an employer who wrongly employs former government employees.

C. *Divestiture*

In recent years, disclosure rather than divestiture has been employed to remedy conflict of interest problems. Policy-makers have decided that divestiture would deter certain able people from filling public positions.[155] In general, legislators are not required to divest in any of the three jurisdictions considered.[156] British and Australian Ministers are expected to resign any corporate directorships except in family corporations which are not engaged in extensive trading. The rules governing the ownership of stock entreat a Minister to avoid the danger of conflict of interest, although in practice some Ministers actually divest stock in corporations

154. *Finance Disclosure Act: Hearings on H.R. 1, H.R. 9, H.R. 6954 and Companion Bills Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977).

155. *See* B. MANNING, FEDERAL CONFLICT OF INTEREST LAW 6 (1964).

156. Members of Congress may need to divest to stay within rules requiring that outside earned income not exceed fifteen percent of aggregate salary. *See* H.R. Res. 287, § 601, 95th Cong., 1st Sess. (1977); S. Res. 110, §101, 95th Cong., 1st Sess. (1977).

which are closely related to their departments.[157]

In the United States, some Presidents have taken a strict view of conflict of interest. President Kennedy, for example, invested only in government bonds. Senate committees veto presidential nominees for appointment to governmental positions for potential conflict of interest problems on an entirely ad hoc and inconsistent basis.[158] The Senate Armed Services Committee has required some nominees to high positions in the Defense Department to sell shares in corporations doing business with the Department. Secretary McNamara had to sell $1.5 million in Ford Motor Company stock of which he was president at the time of appointment.[159] When David R. Packard was nominated as Deputy Secretary of Defense in 1969, however, the Committee allowed him to place his large shareholdings in Hewlett-Packard in a special trust.[160] President Carter has not required divestiture from his appointees except in limited circumstances. Persons nominated to Levels I and II in the executive branch must divest their holdings if those holdings are broadly affected by government monetary and budgetary policy. Generally, exceptions from the requirement of divestiture are made for real estate interests, investment in government stock, and other diversified holdings, unless the particular position indicates conflicts arising in government service with respect to a particular interest.[161] The President regards the transfer of assets to a suitable blind trust as adequate divestiture.

A strong incentive to divest holdings exists for those in the executive branch or in government agencies in the United States because existing law prohibits an official from participating, personally and substantially, in a matter if he knows that he, his spouse, minor child, business associate, or any organization with which he is connected or is seeking employment, has a financial interest unless he makes full disclosure of his interest beforehand and receives written approval from a supervisor.[162] A civil servant is thus

157. 496 PARL. DEB. H.C. (5th ser.) 702-03 (1952); P.M.'s Letter, *supra* note 125. *See also* S. ENCEL, CABINET GOVERNMENT IN AUSTRALIA 139-40 (2d ed. 1974); I. JENNINGS, CABINET GOVERNMENT 97-100 (2d ed. 1951).

158. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND FEDERAL SERVICE 95-130 (1960).

159. *Hearings on the Nomination of Robert S. McNamara Before the Senate Comm. on Armed Services,* 87th Cong., 1st Sess. (1961).

160. N.Y. Times, Jan. 19, 1969, § 4, at 3 col. 6.

161. *Ethics statement, supra* note 116. *See also* Dwyer v. Kahn 88 Misc. 2173, 387 N.Y.S. 2d 535 (1976).

162. *See* 18 U.S.C. § 208 (1976). *Cf.* Prices Justification Acts, 1973, § 12

required to divest if he is constantly obliged to disqualify himself, although a blind trust may avoid infringement of the legislation.

Unfortunately, the provision is so vague as to be only inadequately enforceable. A study by the Comptroller General in 1977 revealed that the system of self-qualification embodied in the law had failed.[163] One solution which has been offered would expand to other departments and agencies the specific prohibitions on the ownership of shares.[164]

Blind trusts[165] are a possible way to resolve conflict of interest problems. Potential candidates may not be discouraged from seeking public office if it is unnecessary for them to permanently dispose of their interests. Officials would not have to excuse themselves from considering matters in which the trust has an interest. Blind trusts are an acceptable way in which members of the Congress and the Executive Branch can avoid public disclosure of their interests as required by the Ethics in Government Act 1978.

For the blind trusts to work, statutory guidelines or individualized approval by an appropriate body must exist.[166] If such safeguards are not provided, accusations will likely be made that the blind trust is a sham,[167] and the assets are such that the trustee has no intention of disposing of them. The Ethics in Government Act 1978 specifies the elements of a satisfactory blind trust and

(Austl.) (forbidding tribunal member to participate in any matter in which he has a pecuniary interest). The code of conduct for British civil servants cautions against shareholdings which might raise a conflict of interest problem. ESTA CODE, *supra* note 137, § 4062(e). However, appointees to some statutory authorities and nationalized industries are screened before appointment. *See, e.g.*, Iron and Steel Act, 1975, c. 64 §3 sched. 1. The Australian rules apply to a few statutory authorities. *See e.g.*, Insurance Acts, 1973, § 12 (2).

163. COMPTROLLER GENERAL OF THE UNITED STATES, FINANCIAL DISCLOSURE FOR HIGH-LEVEL EXECUTIVE OFFICIALS: THE CURRENT SYSTEM AND THE NEW COMMITMENT (1977).

164. *See, e.g.*, 49 U.S.C. § 1321(b) (1976) (Civil Aeronautics Board); 30 *id.* § 6 (Mines Department); 15 *id.*, § 2053(c) (Consumer Product Safety Commission).

165. *See generally Conflict of Interest Hearings, supra* note 104. For a history of blind trusts see White, *To Have or Not to Have - Conflicts of Interest and Financial Planning for Judges,* 35 LAW & CONTEMP. PROB. 202, 216 (1970).

166. The Civil Service Commission has established informal criteria, which apparently have not been adhered to. *See* COMPTROLLER GENERAL OF THE UNITED STATES, *supra* note 163, at 21-22. The Senate has also established standards. *See* S. Res. 265, 95th Cong., 1st Sess. (1977).

167. This has been said of President Carter's blind trust because no intention exists for the trustee to sell any portion of the peanut business. ECONOMIST, June 8, 1977, at 41.

also requires its approval by an appropriate individual. The trustee must be an independent financial institution, attorney, certified public accountant, or broker. Any asset transferred to the trust must be free of any restriction with respect to its transfer or sale unless such restriction is approved. Furthrmore, the trust instrument must contain the following prohibitions: The trustee may not consult or communicate with an interested party; the trust tax return must be prepared by the trustee and the information (other than trust income) kept confidential; the person, his spouse, or any dependent child with a beneficial interest in the trust must not receive any information about the holdings and sources of income of the trust, except information on the total cash value or the net income (or loss). Officials must publicly disclose the terms of the trust instrument and the nature of assets transferred to the trust.

Blind trusts do not necessarily build public confidence in government; they run counter to the strong current in favor of public disclosure. Public disclosure in excess of the identity and category of value of the interests initially placed in the trust, and perhaps of the trust document, would destroy the efficacy of the trust because the public official would know of its assets. A further problem is the cost and complications of establishing a blind trust.[168]

D. *Machinery*

Codes of conduct have some attraction as a method of implementing conflict of interest rules, whether they relate to disclosure, regulation, or divestiture. Codes are more flexible than criminal provisions; they clarify new or complex situations where basic moral principles are uncertain and it is too early to draft or apply law; they enhance the influence of progressive elements in an institution and thus tend to raise standards of the whole, and they furnish a basis for instructing new members of the group of their obligations.[169] The difficulty inherent in many codes is that they are vague and difficult to implement. They often contain ineffective and inadequate sanctions and enforcement machinery. The establishment of a committee or body charged with interpreting

168. *See generally* SENATE COMM. ON GOVERNMENTAL AFFAIRS, BLIND TRUSTS, S. Rep. No. 639, 95th Cong., 2d Sess. (1978).

169. *See generally* Kernaghan, *The Ethical Conduct of Canadian Public Servants,* 4 OPTIMUM 15 (1973); Monypenny, *A Code of Ethics as a Means of Controlling Administrative Conduct,* 13 PUB. AD. REV. 184 (1953); Note, *Practical Considerations in the Formulation of a Code of Ethics for Government,* 52 COLUM. L. REV. 113 (1952).

codes and vigorously applying their provisions would be a step toward ensuring adequate enforcement.[170]

Although the limits on the power of the British and Australian Parliaments to discipline Members for contempt have never been judicially determined, the House of Commons has claimed power to expel Members since the sixteenth century.[171] Dishonesty has been an element in most instances of expulsion, but corruption determined by parliamentary or official inquiry would probably be sufficient even where criminal guilt is not established.[172] Lesser improprieties, such as manipulating and transferring interests to avoid public disclosure, could be dealt with by reprimand or suspension for a limited period. The United States Supreme Court has upheld congressional power to expel or otherwise punish a congressman after he has been seated, but in the past the power has been exercised sparingly.[173] Legislative corruption and impropriety have ordinarily been exposed by the press rather than by the legislatures. Moreover, a marked incapacity of legislatures to establish effective machinery to unearth misbehavior of members has been frequently demonstrated. That these deficiencies may be the result of a "club spirit" or because the partisan political process overshadows the ethical concerns is irrelevant.[174] It is no answer that ultimately an errant legislator will be disciplined by the electorate. The electorate is often uninformed and incapable of making a proper assessment of impropriety. Even if rejection by the electorate does occur it will likely take a considerable period of time for the member to be totally discredited and disapproved.

Codes and rules can be enforced internally by disciplinary measures: civil servants can be reprimanded, fined, transferred, de-

170. Hence the proposal for an Office of Government Ethics. *See Conflict of Interest Hearings, supra* note 104, at 818-74 (statement of Comptroller General).

171. TASWELL & LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 583-85 (11th ed. 1960) British courts are reluctant to interfere. *See, e.g.,* Bradlaugh v. Gossett, 12 Q.B. Div'l Ct. 271 (1884).

172. Campbell, *Expulsion of Members of Parliament,* 21 U. TORONTO L.J. 15, 20-21 (1971). In Armstrong v. Budd, [1969] 1 N.S.W.R. 649, the New South Wales Court of Appeal held that state's Parliament could expel members to protect its high standing in the community where failure to do so would undermine public confidence and the relationship of trust and confidence among its members.

173. *See, e.g.,* Powell v. McCormack, 395 U.S. 486 (1969); Kilbourn v. Thompson, 103 U.S. 168, 204-05 (1880); *See generally* U.S. CONST., art. 1, § 5.

174. J. KIRBY, *supra* note 87, at 112. *See also* E. BEARD & S. HORN, CONGRESSIONAL ETHICS 25 (1975).

moted, and ultimately dismissed. Internal disciplinary sanctions are worthless, however, once a civil servant has resigned or has been dismissed. Ordinary law must then be applied. Furthermore, the following constraints can be adopted to encourage propriety: careful initial selection of civil servants, providing incentives for loyal service, and limiting unnecessary discretion for the official to fulfill the government's interest.[175] Clear evidence has shown that guidelines, particularly in the area of government purchasing, would have reduced the incidence of past impropriety through the inordinate exercise of discretion.[176] Oversight machinery for government decision-making such as the Freedom of Information Act in the United States and the Ombudsman concept in Britain and Australia have played a significant role in ensuring impartiality, fairness, and adherence to rules.[177]

Limitations upon the utility of codes of conduct and internal disciplinary measures suggest that statutory protections remain necessary. Frequently, criminal statutes are difficult to apply because of the hazy nature of offenses and because of the fact that penalties are disproportionate to the wrongdoing. Yet more imaginative use of legislative penalties can be suggested. A statutory right allowing the government to set aside an agreement with a business for impropriety in which the latter is implicated is one possibility.[178] Model standing orders concerning such a right have been promulgated for the Department of Environment in Britain and allow cancellation of a contract for bribery and the recovery of any resultant loss.[179] If a more severe penalty is needed, consideration might be given to depriving a business implicated in such a conflict of future government contracts for some time.

175. Banfield, *Corruption as a Feature of Government Organization,* 18 J.L. & ECON. 587, 588 (1975).

176. *See, e.g.,* P. DOUGLAS, *supra* note 87, at 40-43; SALMON REPORT, *supra* note 3, at 203-04. (Memorandum of evidence by *The Times*).

177. "Auditing compliance with the rules on standards of conduct should be given equal importance with auditing appropriate funds": Report of the Carter Task Force on Outside Income, Investments and Post-Service Employment, *reprinted in Proposal to Establish a Commission on Ethics and Financial Disclosure: Hearings on H.R. 3829 Before the Subcomm. On Employee Ethics and Utilization of the House Comm. on Post Office and Civil Service,* 95th Cong., 1st Sess. 125 (1977).

178. *Cf.* United States v. Miss. Valley Generating Co., 364 U.S. 520 (1961) (government refusal to enforce contract negotiated by consultant with conflicting interests).

179. SALMON REPORT, *supra* note 3, at 123.

V. CONCLUSION

The law and practice relating to conflicts of interest in the United States, Great Britain, and Australia vary in part because of the differences between the three nations. Members of the British and Australian Parliaments have little influence: for example, all financial grants and charges upon the public revenue must be initiated by Ministers.[180] By contrast, members of Congress initiate financial measures, and can exert much stronger pressure on government departments and agencies than their British and Australian counterparts. On this basis the more extensive disclosure required of members of Congress may be justified. Assuming the same amount of impropriety among legislators in the three countries, the mass media in the United States is much more probing than in Britain or Australia and uncover impropriety with far greater frequency.[181] Consequently, the legitimacy of United States institutions is challenged to a greater degree and stronger measures on conflict of interest are arguably needed to reassure public opinion.

Far fewer differences exist between the British and Australian systems. Parliamentary life in Britain requires less time and is less financially rewarding than in Australia. Conflicts are thus more likely to arise because of the outside interests of Members of Parliament, and their registration appears to have greater justification than in Australia.[182]

Criminal acts of bribery, as well as the ownership of and speculation in financial interests, subsequent employment, gifts, campaign contributions, and hospitality have been identified as the main sources of modern conflict of interest problems. Bribery law in the three countries plays only a limited role in controlling the more subtle forms of corruption. None of the three countries has come to grips with the question of subsequent employment of legislators and public officials by commercial interests with which they

180. Austl. Const. § 56; L. CRISP, AUSTRALIAN NATIONAL GOVERNMENT 288-94 (3d ed. 1973); I. JENNINGS, PARLIAMENT, 254-58 (2d ed. 1957); J. ODGERS, AUSTRALIAN SENATE PRACTICE 374, 388-89 (5th ed. 1976). *See generally* J. MACKINTOSH, THE BRITISH CABINET 594-99 (3d ed. 1977).

181. *See* Kernaghan, *Codes of Ethics and Administrative Responsibility* 17 CAN. PUB. AD. 527, 530 (1974).

182. This fact recognized by Parliamentary renumeration tribunals. REVIEW BODY ON TOP SALARIES, FIRST REPORT: MINISTERS OF THE CROWN AND MEMBERS OF PARLIAMENT CMND. NO. 4836, § 36 (1971); RENUMERATION TRIBUNAL ACT, § 10 (1978) (Austl.).

dealt in their official capacities. Such "revolving door" movement between public and private sectors is difficult to control because it is often viewed as beneficial for society. Australia has scarce managerial and professional resources and needs the expertise of businessmen and farmers to direct its regulatory agencies and commodity boards on a part-time basis. Critics argue, however, that the revolving door reflects the existence of a power elite in advanced industrial societies.[183]

Disclosure rather than regulation is the main tool used by the United States, Britain, and Australia for coping with conflict of interest problems. As explained previously, extensive public disclosure is only a partial solution because it leaves undefined what constitutes proper behavior. Some self-policing occurs when persons dispose of interests which they think the public or their superiors will recognize as conflicting, but as long as no standards exist as to what should be divested, those who are prepared to brave the criticism will remain.[184]

Corruption, as Lincoln Steffens argued, may be inevitable in capitalist systems which exalt power, wealth, and status, because these endowments are available to the individuals who seek them.[185] New opportunities for impropriety have arisen with the growth of government, its fragmentation, and its extensive links with industry. Yet public confidence would seem to be enhanced by machinery which enables those suspecting impropriety to be heard and which allows a matter to be quickly resolved. Adequate legal rules, proper procedures, and ethical guidelines are necessary to reduce the recurrence of conflict of interest problems.

183. *See,* R. MILIBAND, THE STATE IN CAPITALIST SOCIETY (1969); C. W. MILLS, THE POWER ELITE (1965); J. PLAYFORD, NEO-CAPITALISM IN AUSTRALIA (1969).

184. *See* S. WATZMAN, CONFLICT OF INTEREST 78-79 (1971).

185. J. STEFFENS, THE SHAME OF THE CITIES (1904).