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## ETHICS IN GOVERNMENT: THE CORNERSTONE OF PUBLIC TRUST

ARCHIBALD COX\*

### I. INTRODUCTION

For twenty years or more, extraordinary public attention has been focused upon the ethics of government officials. On the one hand, the years are marked by the promulgation of new and tightened codes often accompanied by new machinery for administration and enforcement. The West Virginia Governmental Ethics Act enacted under the leadership of Governor Caperton and Speaker Chambers is an example.<sup>1</sup> The Code of Ethics for Government Service promulgated by Joint Resolution of the Congress in 1958,<sup>2</sup> the Ethics in Government Act of 1978,<sup>3</sup> and a new law enacted in 1989<sup>4</sup> illustrate the federal measures.

At the same time, the record of abuses grows. About three years ago, the *New York Times* characterized the shameful record of officials in the Nation's Capitol: "Whether measured by the rank or the sheer numbers of officials who have come under ethical suspicion

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\* Carl M. Loeb University Professor Emeritus, Harvard University and Visiting Professor of Law at Boston University. The following article was presented as the Charles L. Ihlenfeld Lecture at the West Virginia University College of Law in March 1991.

1. For the text and an important commentary upon the law, see ROBERT T. HALL, *THE WEST VIRGINIA GOVERNMENTAL ETHICS ACT* (1989).

2. H.R. Con. Res. 175, 85th Cong., 2d Sess. (1958) (enacted) [hereinafter H.R. Con. Res. 175].

3. Pub. L. No. 95-521, 92 Stat. 1824.

4. Ethics Reform Act of 1989, Pub. L. No. 101-94, 103 Stat. 1716.

and criminal investigation the amount of sleaze is awesome.”<sup>5</sup>

The editor was thinking of the Under-Secretary of Commerce who negotiated for a highly paid executive office in the corporation with which he was simultaneously negotiating the price at which he would sell government satellites; of the Counselor to the President who pressed for high-level government office the names of men who had won his favor by bailing him out of personal financial difficulty; of the White House officials as well as former members of Congress who, upon leaving government service, rushed to trade their connections and influence for spectacular fees; and of the billions of dollars in defense contracts revealed to be tainted by corruption.

The sad revelations continued. The Speaker of the House of Representatives was forced by proof of his unethical practices to resign his seat. So was the majority whip. A Senator from Minnesota was admonished by the Senate for larding his expense account. The much publicized “Keating Five” Senators accepted financial favors totaling almost \$1,800,000 for their election campaigns from Charles Keating, the political and financial promoter, and brought their combined power and prestige to bear upon federal regulatory officials on his behalf. Here in West Virginia, the former Governor and five prominent members of the Legislature have been convicted of financial crimes. In Arizona, the public is watching videotapes of seven prominent members of the state legislature apparently accepting bribes.

The result is cynicism and indifference. Seventy-three percent of the public believes that the government is concerned only with the welfare of special interests — not the common good. More than half the people polled say that all Senators and Representatives are corrupt.

Representative government of, by, and for the people cannot survive such a loss of public trust. We are not powerless as citizens, but we do need to ask and work out answers to some hard questions:

(1) Why have the ethical standards actually practiced in Washington and in many state capitals so sharply declined?

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5. *A Year of Shame*, N.Y. TIMES, Jan. 3, 1988, § 4, at 14.

(2) What standards should we expect of our executive officials, Senators, and Representatives? Why?

(3) What contributions can laws and codes make, and what are their limits?

Being a law professor from the age in which we persistently pursued the case method, I propose to focus tonight on the specific case of the Keating Five in an effort to draw broader principles out of that case and its variants. I shall try to present the case fairly; but perhaps I should tell you at the outset that I regard the failure of the Senate Ethics Committee to discipline all the Keating Five as a spineless evasion in the face of an urgent need for moral leadership.

## II.

Let me first recall the facts.<sup>6</sup> Charles H. Keating, the dominant figure in Lincoln Federal Savings and Loan, was a high-flying promoter operating in both political and financial worlds. In 1980, for example, he was briefly the head of John B. Connally's unsuccessful Presidential campaign — the year before he was charged by the Securities and Exchange Commission with fraud in deals involving Ohio banks. In Ohio, he became the close friend of Senator John Glenn. When he went to Arizona, he took with him as his lobbyist Jim Grogan from Senator Glenn's staff. Keating and Senator Glenn kept up their friendship. Keating raised campaign contributions totaling \$34,000 for Senator Glenn's 1984 and 1988 political campaigns. In 1985 and 1986, he arranged two \$100,000 corporate contributions to one of Senator Glenn's political action committees.

In Arizona, Keating became a friend of Senator John McCain — enough so that the McCains would travel to the Bahama Islands in the airplanes of a Keating corporation and enjoy expense-free vacations at Keating's home. They were natural political allies: both vehemently conservative on both regulatory and social issues. Lin-

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6. The factual material and quotations in this lecture concerning the so-called "Keating Five" were taken from press releases and press reports upon the proceedings before the Senate Select Committee on Ethics.

coln Federal was promoting a boom in Arizona real estate, in which the Senator's wife and father-in-law had large investments. In the mid-1980s, Keating, his family, and his business associates contributed about \$112,000 to Senator McCain's political campaigns.

The links between Keating and Arizona's other Senator, Dennis DeConcini, go back to 1981 when Senator DeConcini sought Keating's help in winning reelection. Keating joined Senator DeConcini's finance committee; he also put together \$33,000 for the Senator from family and business associates. In the mid-1980s, Keating arranged further campaign contributions totaling another \$48,100. He and Senator DeConcini kept in close touch about the Savings and Loan (hereinafter S & L) business. The Senator pressed hard on President Reagan to appoint to the Federal Home Loan Bank Board a Keating ally who had received millions of dollars in loans from Lincoln Federal. Earlier, in 1981, he had sought to have Keating named Ambassador to the Bahama Islands.

Senator Cranston received the benefit of the largest sums from Keating's fund-raising. Speculative savings and loan associations were highly active in California. Lincoln Federal did business there. When Keating's chief lobbyist met Senator Cranston at a Democratic Party affair in 1984, the Senator said, "I've worked hard for California savings and loans. You all should really support me." Keating did. He produced \$10,000 for Senator Cranston's 1984 Presidential bid, \$39,000 for his 1986 reelection campaign, and \$850,000 for a "get out the vote" drive aimed at voters who would support Senator Cranston and other Democratic candidates. Later Senator Cranston requested, and Keating procured, a further \$850,000 in corporate support for voter education projects sponsored by the Senator.

By January 1987, Lincoln Federal was in serious trouble. Its solvency was uncertain, and the honesty and legality of some of its practices were in question. The Federal Home Loan Bank Board was pressing an investigation into Lincoln Federal that might well lead to the government's taking over control of it. So Keating set out to cultivate Senator Riegel, who was then due to become Chairman of the Senate Banking Committee. At a meeting with Senator Riegel and the Senator's top political operative, Keating offered to host a fund-raiser yielding \$125,000. (In fact, the affair raised

\$78,250.) Keating also arranged to have a managing partner in the large and highly regarded accounting firm, Arthur Young & Company, prepare a statement designed to persuade Senator Riegel and later Senators Glenn, McCain, and DeConcini that Lincoln Federal was strong, profitable, and the victim of unfair treatment by the regulatory officials. Perhaps it is not surprising that the Senators gave weight to the presentation. Accounting firms purport to take an independent hard-nosed look. But in this case, the supposedly independent auditor would shortly go to work for Lincoln Federal at an annual salary of about \$900,000, and it would become plain that the regulators were right. Lincoln Federal's insolvency would cost taxpayers \$10,000,000,000.

A few days later Senators Riegel and Keating were together in Phoenix on another fund-raising trip of Senator Riegel's. They discussed Lincoln Federal's problem with the Federal Home Loan Bank Board (FHLBB). Either then or shortly later the notion emerged that all five Senators should meet with Edwin J. Gray, the Board's Chairman, to see if they could not solve Keating's problem.

Senator DeConcini arranged a meeting on April 2, 1987. Senator Riegel was not present. Chairman Gray was told that he must come alone. Staff aides from the Senators' offices were excluded. The accounts of the meeting are contradictory, but the conclusion is inescapable that the meeting was designed to impress and did impress Chairman Gray with the amount of Senatorial power and prestige concerned with Keating's interests.

Two topics were discussed. One was the need for relaxation or nonenforcement of the FHLBB "direct investment" rule designed to limit certain highly speculative S & L practices. Lincoln Federal's plight was due to excessive speculation and further speculation barred by the rule offered the only hope of financial salvation. The second topic was the FHLBB investigation of Lincoln Federal's activities being conducted in San Francisco. When Gray proved ignorant of the details, plans were made to have the San Francisco examiners brought to Washington to face the five Senators.

At that meeting a week later, all five Senators were present. Senator DeConcini explained to the examiners, "We wanted to meet

with you because we have determined that potential actions of yours could injure a constituent." Five Senators with all their power and prestige were facing administrative staff. The Senators also specifically proposed that a lawsuit challenging the lawfulness of some of Lincoln Federal's investments be expedited, but that meanwhile "you grant them forbearance." The message is clear enough to anyone who knows Washington.

The Senators backed off a little when the examiners explained that they were considering referring the case to the Department of Justice for criminal prosecution. Senators McCain and Glenn did nothing more for Keating, but Senators DeConcini and Cranston kept on trying to help. The San Francisco examiners soon recommended that FHLBB take over Lincoln Federal, but almost two more years passed before the agency heads in Washington took action. That delay alone is estimated to have cost taxpayers \$1.3 billion.

So much for the facts. The Senate Ethics Committee found that only Senator Cranston might have violated the Senate's ethical standards, but we should think the case through for ourselves with both the particular instance and the more general questions in mind.

### III.

Let us start with an easy case, even though it is a little way apart. We all agree that it is corrupt for a public official, a judge, the head of a government agency, or a member of a local board of zoning appeals to accept money or other favors in return for a favorable decision. But why?

The reason, of course, is that the decision would then be influenced by a factor other than concern for the public good. In the *Federalist Papers*, James Madison stated the fundamental principle that should guide all our thinking about ethics in government: "The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and the most virtue to pursue the common good of society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold the public trust."<sup>7</sup>

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7. THE FEDERALIST NO. 57, at 383 (James Madison) (B. Wright ed., 1961).

We speak of public office as a “public trust” because the same principle lies behind the fiduciary obligations of all private trustees. The trustee has undertaken to act for the benefit of others; therefore, he must avoid any situation that would or might cause trust decisions to be influenced by anything other than the welfare of the beneficiaries. Because public officials have undertaken to act for the common good, they too must exclude conflicting concerns. The principle lies behind, and should govern the interpretation of, the key section of the recent West Virginia Governmental Ethics Act: “A public official or public employee may not intentionally use his or her office . . . for his or her own private gain or that of any other person . . . .”<sup>8</sup>

I fear that one explanation of the spread of unethical practices is the fading of belief, first, in what Madison called the “common good of society” and, second, in the quality that the Framers called “virtue” — the performance of the opportunity and duty of every citizen to pursue the common good. For much of our history, we Americans had a deep sense that we were engaged in a unique, common adventure binding us all together — binding each generation not only to its parents and grandparents from whom the adventure was inherited but also to its children and to their children to whom the torch would pass. Now, however, the idea of a common good and the citizen’s duty to pursue it grows weak.

To identify all the reasons would take a wiser man than I and more time than we have. One explanation may lie deep in the pragmatism, skepticism, and cynicism that make ours an age of disbelief, with little faith in ideas and ideals and lacking heroes because our gaze is riveted on human flaws. Our very numbers and the size, diversity, and complexity of modern society play a part. Furthermore, political scientists tell us that the public interest is no more than an aggregation of special interests — an analysis that makes it all too easy to serve one or another special interest including oneself. A third explanation may be the contemporary weakening and break-up of those personal bonds that once taught how much we depend upon others and how much they depend upon us: for

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8. W. VA. CODE § 6B-2-5 (1990); HALL, *supra* note 1, at 61.



example, the bonds of marriage, family, neighborhood, and church.

But even as we note such forces, surely we must hold to the sense of community and require our public officials to base their conduct and decisions exclusively upon an appraisal of the common good. Both a free society and a democratic government require a high degree of public confidence in the integrity of those chosen to govern. You cannot have freedom if there must be a policeman for every citizen to force his payment of taxes and compliance with the law. The public will not give the necessary trust to those who present government as the place where one feathers his own nest, exchanges favors with friends and former associates, and takes good care of those who will reward them.

We see the consequence of diminishing public confidence already in the polls I cited earlier, in the fierce opposition to increasing the compensation of public officials, in the declining interest in running for local office, and in participating/voting in elections.

#### IV.

Some of you may be thinking that what I have been saying is true enough for judges and possibly for all executive branch officials, but that it will not do for Senators, Representatives in Congress, and other legislators who must stand for election. It may be admirable, you might say, for a legislator to put principle ahead of votes in the next election as he performs his role, but we all know that many legislators make the speeches, render constituent services, and cast the votes that will win them support at the polls on election day, yet we do not tax them with ethical violations. What is the difference, you may ask, between those practices and frankly exchanging constituent services — the use of Senatorial prestige and power — for the money with which to win reelection, provided that the Senator does not line his own pocket?

In my opinion, failure to mark and enforce the difference is the second important source of public sleaziness and corruption. And this source is controllable. The difference has two parts. First, we cannot, and those charged with enforcing ethical standards should not, attempt to psychoanalyze our legislators sufficiently accurately

to separate (1) votes cast solely upon personal consideration of the common good, from (2) votes cast as a delegate to express the whole constituency's wishes, from (3) votes cast to win electoral support from a particular group. But as soon as money with which to pursue the legislator's personal self-interest is proven to be a factor, the lack of exclusive attention to the public interest becomes clear.

Second, and more important, exchanging a Senator's or any other elected representative's vote or the use of his power or prestige for the money with which to win reelection violates the basic democratic principle — we are to be equal before government as individuals, not favored according to the depth of one's purse. When governmental decisions come to be made and administered to meet the needs of the financially powerful, not according to judgments of the common good, loss of public confidence in government will inevitably follow and the society will decline.

## V.

We can now come closer to the actual case of the Keating Five. There was no direct evidence that any of the five consciously exchanged intervention in the FHLBB proceeding for Keating's financial aid. The five denied the link. The Senate Ethics Committee believed at least four of them, but was sharply critical of Senator Cranston. In dealing with Senators DeConcini, Riegel, McCain, and Glenn, the Committee stressed three points:

(1) They "violated no law of the United States or specific rule of the United States Senate."

(2) The campaign contributions they received were all made, received, and reported in accordance with the laws regulating campaign finance.

(3) "It is a necessary function of a Senator's office," the Committee said, "to intervene with officials of the executive branch and independent agencies on behalf of individuals when the facts warrant, and it is a Senator's duty to make decisions on whether to intervene without regard to whether they have contributed to the Senator's campaigns or causes."

The Committee noted that the conjunction of intervention and receipt of campaign funds might raise an appearance of impropriety, and went on to observe that Senators DeConcini and Riegel used "poor judgment" in giving the appearance of acting improperly. Nevertheless, the Committee said that no further action by it or the full Senate was warranted, and it could not bring itself to use any harsher words than "do not condone," apparently because the Senators had violated no law of the United States or specific Senate rule.

In reflecting on this decision, and more importantly on the ethical standards we should apply to our Senators and the Senate to its members, it is worth noting that the Ethics Committee rejected the appearance standard pressed upon it by its own Independent Counsel Robert S. Bennett and embodied in the codes of conduct of every branch of government except — we are now told — the United States Senate. The Code of Ethics for Government Service adopted by concurrent resolution of both Houses of Congress provides a good example: "Any person in government service should: 5. Never . . . accept, for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties."<sup>9</sup>

The Report of the Senate Committee on Post Office and Civil Service recommending the Code clearly states: "The committee understands and intends that this resolution apply to every servant of the public whether he be the President, a Member of Congress, a lifelong career employee . . . ."<sup>10</sup> The principle applies throughout the Executive Branch. The latest formulation states:

- (g) Employees shall not use public office for private gain;
- (h) Employees shall act impartially and not give preferential treatment to any private organization or individual;
- (n) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order."<sup>11</sup>

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9. H.R. Con. Res. 175, *supra* note 2.

10. S. REP. No. 1812, 85th Cong., 2d Sess. 2 (1958).

11. Executive Order No. 12,674, 54 Fed. Reg. 15,159 (1989).

Essentially the same rule is stated in every code of judicial conduct. The *Ethics Manual of the House of Representatives* states the principle: A general ethical standard recognized by the House notes that Members and employees should not accept favors or benefits for themselves or their families “under circumstances which might be construed by reasonable persons as influencing the performance of [their] governmental duties.”<sup>12</sup>

When the Statement of the Senate Ethics Committee is read in the context of the otherwise uniform rule, it can only mean “we will not reprimand or ask the Senate to reprimand a Senator for violating a principle applicable in both public and private life to everyone who is not a Senator.”

Unless used with care, the term “appearance standard” is misleading. In part, the term is a euphemism sparing those who violate the principle the full opprobrium heaped upon one who consciously takes a bribe. But the case is not simply one of deceptive appearances condemning one who appears to do wrong when in fact he is innocent. The judge or trustee who acts in a situation in which the decision may affect personal interests does wrong no matter how conscientiously he seeks rigidly to shut the self-interest out of his mind. He does wrong because he cannot be sure that the personal interest did not affect his judgment.

The case is the same with the public officials, including Senators and Representatives. If a Senator votes or performs what is called “constituent service” in a way that serves the interests of those who have conferred or will confer benefits upon him, neither he nor anyone else can know whether gratitude for the past, or hope of the future, benefit diverted him from the public duty of considering only the public good. Paul Douglas, one of the truly great Senators of the 1940s and 1950s, put the point so much better than I can that I ask your indulgence to read a passage:

What happens is a gradual shifting of a man’s loyalties from the community to those who have been doing him favors. His final decisions are, therefore, made in response to his private friendships and loyalties rather than to the public good.

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12. COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT, *ETHICS MANUAL FOR MEMBERS, OFFICERS, AND EMPLOYEES OF THE U.S. HOUSE OF REPRESENTATIVES* 23 (1987).

Throughout this whole process the official will claim — and may indeed believe — that there is no causal connection between the favors he has received and the decisions which he makes. He will assert that the favors were given and received on the basis of pure friendship unsullied by worldly considerations. He will claim that the decisions, on the other hand, will have been made on the basis of the justice and equity of the particular case. The two series of acts will be alleged to be as separate as the east is from the west. Moreover, the whole process may be so subtle as not to be detected by the official himself.<sup>13</sup>

Senator Douglas was speaking of entertainment, gifts, and other much smaller favors than those that have become common in the 1980s, but the point is the same.

Such conduct is wrong for another reason. Regardless of the official's state of mind, it undermines public confidence in government scarcely less than officials who are consciously corrupt. The public will not give the necessary trust to those who present government as the place where one feathers his own nest, exchanges favors with friends and former associates, and takes good care of those who provide money for the next election.

In thinking about the ethical standards to which we should expect all those in government to conform, it is important to digress for a moment from the case of the Keating Five in order to note that Senator Douglas's reasoning would condemn a number of other shabby practices that burgeoned in Washington in the 1980s and dulled the moral sensitivity of public officials.

The receipt of honoraria is one such practice. Former Representative Preyer has testified that in writing the House of Representatives Code of Conduct, "[w]e were naive and never envisioned [honoraria] as a supplement to income of congressmen with money from special interests with legislation before Congress, often for brief and not very substantive talks or appearances."<sup>14</sup> But the widespread belief that special interests with money for Congressmen could command special favors soon destroyed the illusion. In 1987 Members of Congress received a record-shattering \$9.8 million in hon-

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13. PAUL H. DOUGLAS, *ETHICS IN GOVERNMENT* 44 (1952).

14. R. Preyer, Statement to House Bi-Partisan Commission on Ethics (May 24, 1989) (Transcript on file with the *West Virginia Law Review*).

oraria, of which they pocketed \$7.5 million and gave the rest to charity. "It's the wave of the future," predicted an official of the American Trucking Associations, which alone distributed \$117,500. Paying honoraria is "sort of the way business is done," explained a defense contractor: "We're living at the government trough, so to speak, and we feel we've got to contribute back to it." Consider one specific example. On April 1, 1987, Oshkosh Truck Corporation, a maker of ten-ton trucks, paid \$2,000 to each of seven Representatives who were members of the House Armed Services Committee for attending a breakfast. Six of the seven were members of the Procurement Subcommittee. Within hours the six had voted to amend pending legislation to require the Army to purchase 500 more Oshkosh trucks than the Defense Department wanted. The price for the additional trucks was \$65 million.<sup>15</sup>

The Ethics Reform Act of 1989 abolished the honoraria system for members of the House of Representatives, their staff employees, and employees of the House. The Act also bars any official or employee of the Executive Branch from receiving any honorarium, any payment for a speech, book, magazine article, or like undertaking. The Senators clung to their honoraria, unwilling to give up so welcome a source of personal income even though they barred it to executive officials and saw the House Members surrender it. The 1989 Act does limit individual Senators to \$26,500 in honoraria kept for personal use and promises further reduction sometime in the future if and when their salaries are further increased.

The recent action of the Senate Ethics Committee declining either to judge or to ask the full Senate to judge fellow Senators by the appearance standard recommended by its Counsel seems to reflect a similar unwillingness of Senators to be guided by the standards applicable to private trustees and everyone else in government. The absence of a specific Senate Rule is not an adequate justification. The Ethics Committee's responsibility as stated in the Senate Rules is to "receive complaints and investigate allegations of: improper

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15. See Jim Carlton, *\$2,000 to Each From Supplier; Badham, 5 Colleagues Took Money Before Vote*, L.A. TIMES, June 11, 1988, at 201; *Cash Gifts Coincided With Vote*, CHI. TRIB., June 11, 1988, at C-3.

conduct which may reflect upon the Senate . . . .”<sup>16</sup> That responsibility was vested in the Senate with the explanation that the Ethics Committee “would not be limited to alleged violations of Senate rules, but it would take into account all improper conduct of any kind whatsoever.”<sup>17</sup>

Two groups of questions remain, both suggested by Senator Inouye’s defense of the Keating Five in which he argued, “If they are guilty, we all are.” One group goes to the particular case. Was the five Senators’ acceptance of huge sums of lawful campaign money from Keating with one hand and intervention into the FHLBB proceeding in his behalf with the other hand so typical of the behavior of Senators that it could not be fairly censured as “improper conduct reflecting upon the Senate?” The second, larger group of questions are those which we face as citizens: Should we say to Senator Inouye, “You all are guilty?” Is the raising of huge sums of campaign money with one hand while performing for the contributors what is euphemistically called “constituent service” with the other hand an acceptable practice for our elected representatives? Or is it a prime cause of the degradation of ethical standards in government?

## VI.

In my opinion, Mr. Bennett, the Ethics Committee’s Counsel, had compelling reasons for concluding that there were critical differences between the conduct of the Keating Five and the usual mine run of “constituent services” extended to campaign contributors. First, the financial benefits provided by Keating from family, friends, and business associates were extraordinarily large, and it was obvious that he was seeking to buy influence, as he himself has said. Second, the Senators were intervening into a specific regulatory investigation of the affairs of a particular savings and loan widely known for speculation and, at best, in shaky financial condition. Such contacts are unusual and, when made, are usually handled with caution.

Third, the Senators’ use of their prestige and power was extraordinarily heavy-handed. Bringing the FHLBB Chairman alone

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16. S. Res. 338, as amended by S. Res. 110, 95th Cong., 1st Sess. (1977).

17. 110 CONG. REC. 16933 (1964).

to face four Senators and the San Francisco examiners to face five Senators were extraordinary steps, calculated, regardless of what was said, to impress the Chairman and examiners with the amount of senatorial power and prestige friendly to Keating. No executive branch official or employee could fail to be aware that the favor or disfavor of any one of the five Senators could greatly affect the work of his agency and his own future in government.

The three differences called for sharp condemnation of all five Senators' conduct even though the present laws and the ethical norms actually practiced by many Senators and Representatives leave wide room to render what are called "constituent services" and otherwise to act and vote in the interest of those who make and gather campaign contributions.

## VII.

The differences look less important when we turn to such questions as: (1) Why have ethical norms in Washington so shockingly declined?; and (2) To what ethical standard should we hold our public officials, including elected legislators?

Senator Inouye's testimony points to the danger. Mr. Bennett, Counsel to the Ethics Committee, stated it explicitly:

More and more constituents are requesting the assistance of the Congressmen at the same time that those Congressmen must ask more and more of the same constituents for campaign contributions. I ask you this: how can our system of government maintain the appearance and the reality of integrity as these trends continue? Now none of this is an excuse for wrongdoing, if wrongdoing occurred. It is, however, I respectfully submit to you, a booming warning that unless these trends are recognized and dealt with, we will have more cases like this and the reputation of this body and its members will be in utter ruin.

A few facts and figures fill out Mr. Bennett's warning. For half a century, the role of government as tax-gatherer, as purchaser, as regulator, and as subsidizer has been expanding. Nearly all businesses are interested in some legislative measure of one sort or another. Nearly all are affected by procurement policies, or other executive and administrative rulings. An ever-increasing number are directly involved in proceedings before executive and administrative agencies. At the same time, the money cost of congressional election



campaigns has skyrocketed and continues to rise. The winners of House seats in 1988 spent an average of \$300,000 — more than double the expenditure ten years before. Senate winners spent an average of \$3 million in 1988 and about the same figure in 1990, even though there were no 1990 Senatorial elections in large states like New York and California. That means that the average Senator must raise \$10,000 each and every week of his entire six-year term unless he expects to retire.

What better way, then, for one of the ever-increasing number of special business interests affected by government to influence governmental decisions affecting them than to provide the \$10,000 in campaign money needed to a United States Senator for each and every week of his six-year term. True, the statutes limit individual contributions to \$1,000. But there is nothing to prevent, and everything to encourage, an individual to gather tens of thousands of dollars in individual contributions as Keating did, and there are also hosts of Political Action Committees. Rendering unlimited financial help that is technically outside the ceilings has also become easy. Witness the \$200,000 in Keating's corporate contributions to Senator Glenn's National Council on Public Policy and his two \$850,000 gifts to political groups controlled by Senator Cranston.

The method by which we finance political campaign is surely the most insidious of the influences generating the decline of ethical standards in Washington. Having accepted and watched one's colleagues intervene with executive agencies and vote in committee and on the floor in a way that advances the interests of those who have provided large sums in lawful campaign contributions, it is all too easy to slide over the line and accept other corrupt financial aid. Those with money become "actors," "players," political associates, and friends. At best, the Congressman fools himself because the psychological forces described by Senator Paul Douglas come into play — there is the subtle "shifting of loyalties from the community to those who have been doing the legislator favors" of which the legislator may not even be aware. Too often the shift will be accompanied by a conscious fear of losing the sinews of an expensive reelection campaign. At worst the money is consciously allowed to buy "constituent service" and even votes.

Even the defenders of the present system acknowledge that campaign money buys access to the recipient not available to other citizens. Buying access buys influence upon the use of a Senator's or Representative's prestige and power, and even his vote, not only for the reasons explained by Senator Douglas but also for another reason. No lawyer or litigant would believe that they had received justice if only the opposing party were allowed to present evidence and argument and only the lawyer for the opposing party were allowed to confer with the judge in chambers, even though no money passed. No one, party or bystander, would believe that hearing only one side and hearing that side in private would not shape the outcome in a large proportion of the cases. Yet this is the effect of our present Congressional practices. There are doctors' PACs, but no patients' PACs; used car dealers' PACs, but no car buyers' PACs; real estate dealers,' builders,' and bankers' PACs, but no PACs representing young families looking for affordable homes.

The huge sums of money involved and the dominant influence of Senators and Congressmen within the Capitol City affect the entire moral tone. If scores of Senators and Representatives are seen to be advancing their selfish political interests by seeking money from lobbyists willing to exchange money for influence upon their votes, why should a bureau chief or an Assistant Secretary refuse financial favor from the officer of a firm seeking government contracts or exemption from regulation or from an individual seeking an appointment which the official may influence or award? The morale of thousands of faithful government officials who would otherwise honor the public's trust is eroded. Bad, even dangerous as these consequences and the waste, shoddy performance, and favoritism may be, the greatest costs of both the sleaziness and the present method of financing political campaigns are the erosion of our sense of community purpose and the loss of public trust.

Conversely, the most effective step we as citizens can take to improve ethical standards and rebuild public confidence in government is to insist upon the enactment of strong campaign finance reforms at the present Congress. Effective legislation must comprise five elements:

*First*, the law must set voluntary ceilings on the total expenditures by a candidate for the Senate or House of Representatives. The race

to outspend opponents drives the race to get money. A reasonable Senate ceiling should be fixed for each state; perhaps \$950,000 for small states and several million for large states like California and New York.

*Second*, candidates who accept the voluntary ceilings should be eligible for federal assistance: either public financing or vouchers for television and radio broadcast time up to half the overall ceiling. This element is necessary for two reasons. First, because the Supreme Court has held that mandatory ceilings violate the First Amendment,<sup>18</sup> there is need for an incentive to induce candidates to agree to limit their spending.<sup>19</sup> Second, private campaign money flows so preponderantly to incumbents that incumbents were reelected to ninety-eight percent of the House seats in 1988 and 1990. Public financial assistance or TV vouchers would help restore meaningful elections. And the money spent is spent to ensure the integrity of government no less than that spent for police and watchers at the polls.

*Third*, PAC contributions must be either abolished or subjected to an overall ceiling on the total amount of PAC money a candidate can accept. The sum of \$100,000 for a House candidate seems a reasonable figure, if the legislation takes the second course.

*Fourth*, so-called "independent expenditures" in support of, or opposition to, a designated candidate must be restricted, and/or discouraged or both. In Presidential elections, the ban on spending in excess of the public funding has been circumvented since 1980 by setting up purportedly independent committees to raise and spend additional funds in ways which are by any common sense definition "coordinated" with the candidate's campaign.

*Fifth*, so-called "soft money" must be eliminated from the publicly funded Presidential elections and kept out of Senate and House races. In 1988, both the Bush and Dukakis campaigns egregiously

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18. *Buckley v. Valeo*, 424 U.S. 1 (1976).

19. The constitutionality of such induced limitations, as applied to Presidential election campaigns, was upheld in *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y. 1980), *aff'd*, 445 U.S. 955 (1980).

violated or circumvented the statutory plan for exclusive public financing in Presidential general elections by raising and having spent through the state parties tens of millions of dollars claimed to be exempt from federal law because the money went to "party building" or "the straight party ticket." Some individual and corporate contributions were reminiscent of Watergate; for example, the six \$100,000 contributions to President Bush from S & L executives, including Charles Keating.

The Senate passed such a bill last year. The House passed only an empty pretense. This year a strong bill will shortly come up for action in the Senate, and there is solid support for reform in the House. If the public raises its voice, true reform legislation will be on the President's desk by fall.

### VIII.

May I add a final thought. Earlier, in quoting James Madison, I spoke of the Framers' firm belief in the "common good" and the sense of duty, called "virtue," to pursue the common good. The theme, long dominant in American public life, runs back through the Framers to John Locke, St. Thomas Aquinas, the Stoic and Hellenic philosophers, and perhaps beyond. You will recall Plato's poignant description of the final hours of Socrates. His friends had urged him to escape; his jailor had deliberately left the door open so that he could escape. But Socrates stayed to drink the hemlock cup. "The Athenians have thought fit to condemn me," he explained to his friends, "and I have thought it better and more right to remain here and undergo my sentence," even though "these muscles and bones of mine would have gone off long ago . . . if they had been moved only by their own idea of what was best, and if I had not chosen . . . the better and nobler part." The civilized man put first his obligations to his community even above his own life. The civilized man would not cheat the law, even a law he knew to be wrong, because he also knew that, if Athens were to be governed and Athenians were to be free, the government must be by citizens whose better natures prevailed and who therefore put society's need above their own advantage. (It was the latter principle, which we lack time to discuss tonight, that was at stake in Watergate.)

The belief in the civilized man's duty to subdue the will of "these bones and muscles" in favor of the nobler part and to subordinate self-advantage to the common good gradually found more detailed expression in the ethical standards of the professions, the rules governing fiduciaries, and the obligations of individuals in public life. The ethical standards shaped their conduct by defining their expectations of themselves and also the general public's expectations of them. We need those professional codes, statutes, and executive orders, both to express our moral sense and to sharpen awareness of its applications.

But we cannot establish high ethical standards by legislation alone. The personal code by which each Senator, Representative, and other public official judges himself or herself — the code by which we individually judge ourselves — will do more to govern individual performance than all the statutes and executive orders on the books. And while our political history tells of frequent corruption, there were always enough prominent public figures who lived by the code and with the courage to speak when strong voices were needed to keep the ideal a reality, setting examples for their own and future generations.

Earlier I spoke of the "decline" or "fading" of this philosophy. Standing alone, the words are wrong. "Temporary" shall be added. For I am confident that the sense of common purpose and of dedication to the common good will again grow strong. Those who study the past can see that man moves ahead neither swiftly nor directly, but blundering along as in a swamp in the dark, two steps forward, then one and even two steps back before another step ahead. But the dark always lightens. Not full light of day — perhaps not ever. But we learn to walk straighter. It is always dawn.