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Association of the Bar of the City of New York: Conflict of Interest and Federal Service

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edition is worthy of the master himself. We of the legal profession owe Walter Jaeger a lasting debt of gratitude for a job well done.

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Conflict of Interest and Federal Service. By the Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Laws. Cambridge: Harvard University Press, 1960, pp. xvi, 336. $5.50.

Ever since it was pronounced by the Highest Authority[1] there has probably been little disposition to quarrel with the proposition that, "No man can serve two masters." But, even in the God-and-mammon context in which it was originally stated, the principle has been one whose applicability in specific factual situations is frequently most difficult to determine.

That the principle has applicability in contexts other than the theological has been underscored in recent years by widespread publicity over "five-percenters," influence peddlers, gifts to government officials, investment portfolios of nominees to Cabinet and sub-Cabinet positions, and the like. That some government servants have improperly (in the ethical sense) served two masters, there can be no doubt. But where the line between propriety and impropriety (in the legal sense) is drawn is a matter of at least considerable uncertainty; where it should be drawn is a matter of more than the semantics of the Scriptural text.

With characteristic concern for the public interest the Association of the Bar of the City of New York in 1955 established a special committee of distinguished lawyers,[2] with a staff under the direction of two university professors,[3] to make a study and report on the federal conflict of interest laws. This volume is the result.[4]

At the outset, the Committee wisely eschews the function of providing remedies for all the shortcomings of the operations of government. It confines its concern to the activities of employees and ex-employees in the executive branch, and in this category its study is limited to the matter of

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[1] Matthew, 6:24. The parallel recital in Luke, 16:13 occurs immediately after the Parable of the Unjust Steward. Luke, 16:1-9.

[2] Roswell B. Perkins (Chairman) of New York; Howard F. Burns, of Cleveland; Charles A. Coolidge, of Boston; Paul M. Herzog, of New York; Alexander C. Hoagland, Jr., of New York; Everett L. Hollis, of New York; Charles A. Horsky, of Washington; John V. Lindsay, John E. Lockwood and Samuel I. Rosenman, all of New York.

[3] Professor Bayless Manning, of Yale University Law School, Staff Director, and Professor Marver H. Bernstein, of Princeton University, Associate Staff Director.

[4] A companion volume embodying the Committee's research into, and evaluation of, the existing conflict-of-interest laws is scheduled for publication in 1961.

conflicts between an employee's official duty and his personal interest. Other ethical problems, such as the propriety of having the president of the AFL-CIO or of the National Association of Manufacturers serve as a member of the National Labor Relations Board, are beyond the scope of the Committee's study.

A chapter is devoted to a brief analysis and criticism of the existing statutes. Most of these, enacted in the period from 1853 to 1864,[5] came into being as *ad hoc* remedies for specific episodes which were regarded as scandalous. They prohibit, under criminal sanctions, such things as assisting in prosecution of claims against the Government, procuring a Government contract for another for compensation, representing the Government in transacting business with an outsider in which the employee has a pecuniary interest, and receipt of compensation for services in matters in which the Government is a party or is directly or indirectly interested. A fifth statute, of more recent vintage,[6] forbids payment to, or acceptance by Government employees of, compensation from outside sources for, or in connection with, official duties. Finally, there are the statutes[7] limiting, or purporting to limit the activities of former employees in handling claims against the Government.

The Committee points out that, although the ostensible purpose of the various statutes is laudable, their language is ambiguous, obscure, inadequate, unduly repressive and outdated. For example, the civil post-employment statute[8] covers only prosecution of claims pending in a *department* while the employee was employed, but does not extend to the perhaps more important area of matters pending in the independent agencies.[9] The criminal post-employment statute,[10] by construction,[11] disqualifies the ex-employee only from prosecution of *monetary* claims against the Government, leaving him free to act against the Government in matters in which he had participated in exercise of the Government's licensing, regulatory, or other power. Again, the double-compensation statute[12] does not, at least clearly, recognize the legitimate economic interest of the modern non-career employee. Literally, for example, an employee in private industry, upon entering Government service, may risk a jail term unless he terminates his rights under stock option agreements, retirement or pension plans, and the like.

The Committee has concluded, wisely, I think, that in the light of the complexity of the organization of modern government, industry and society,

[5] 10 Stat. 170 (1853), 18 U.S.C. § 283 (1958); 12 Stat. 577 (1862), 12 Stat. 696 (1863), 18 U.S.C. § 434 (1958); 13 Stat. 123 (1864), 18 U.S.C. § 281 (1958).

[6] 39 Stat. 1106 (1917), 18 U.S.C. § 1914 (1958).

[7] 17 Stat. 202 (1872), 5 U.S.C. § 99 (1958); 41 Stat. 131 (1919), 58 Stat. 668 (1944), 18 U.S.C. § 284 (1958).

[8] 17 Stat. 202 (1872), 5 U.S.C. § 99 (1958).

[9] The statute also goes too far in that it disqualifies the ex-employee even with respect to matters that were pending in a department in which he was not employed.

[10] 18 U.S.C. § 284 (1958).

[11] United States v. Bergson, 119 F. Supp. 459 (D.D.C. 1954).

[12] 18 U.S.C. § 1914 (1958).

and of the interminable ramifications of the interrelations among the units thereof, it would be impossible to draft a code adequately covering the problems posed by all of the imaginable real and colorable conflicts between public and private economic interests. Patterns of conflict of interest will vary in different areas of government operation, and the Committee recommends that the details of subjecting conflicts to legal control should be accomplished by individual agencies through exercise of their rule-making powers.[13]

The Committee proposes enactment of a statute carefully redefining those basic areas of conflict of interest which experience has shown to be universally possible in government, and either forbidding or permitting them in various categories of cases. (For example, the general principle that a Government employee should not receive salary in addition to his official compensation need not force General Electric to remove Scientist X from its payroll for the day, or week, he spends at Cape Canaveral at the request of the Army or the Air Force helping remove the "bugs" from a rocket operation.) The general provisions of the statute would be supplemented by regulations to adapt them to the specific needs of particular agencies, and many of them could be suspended upon administrative determination that, in the circumstances of a particular case, the national interest is better served by permitting an otherwise prohibited conflict of interests on the part of an employee or ex-employee.

One might cavil at some of the minutiae of the Committee's recommendations,[14] but it is impossible to say less than that the present volume is a most valuable contribution towards a solution of a very difficult problem in governmental operation. The analysis of the problem is realistic, not plati-

[13] The Committee points out (Chapter IV) that some agencies have handled the problems of conflict of interest (or some of them) by regulation, but activity of this sort is sporadic. The Committee recommends the establishment of an office in the Executive Office of the President with responsibility for coordination and supervision of agency regulations on this subject. The Committee (p. 192) confidently predicts that Parkinson's Law would not operate to make such an office a "giant super-bureau." The basis of its confidence is not disclosed.

[14] For example, in dealing with the subject, not presently covered by statute, of gifts to employees, the Committee puts the case of the official conference which runs into the lunch hour, the conferees lunching together, and the non-government conferee picking up the check (p. 220). I am not sure that the problem is satisfactorily solved by § 6 of the proposed statute which forbids acceptance of any "gift, gratuity or favor" which would not be given "but for such employee's office or position within the government." Nor am I sure that the rigor of the blanket prohibition is alleviated by § 6(c), which authorizes exceptions to the prohibition by regulations effective in circumstances where the inference is not open that the gift was intended to influence official judgment. I would guess that most agency heads, allergic to criticism of Congressional headline hunters, would be over-conservative in exercising such authority. On the other hand, I have no alternative to suggest for this sticky problem by way of defining categories of gifts which are, and those which are not permissible. And I am sure that the Committee is right in its position that regulation of gifts to government employees should go beyond the bribery statutes, for the purpose of the proposed legislation is more than simply to ensure that employees are not thieves.

tudinarian, as is too often the case in this area. The proposed remedial statute is a model of careful draftsmanship, studiously defining a maximum of prohibited areas of conflict of interest while avoiding areas where conflict of interest can be made to appear only by a specious process of verbal logic. The over-all plan of the proposal goes far towards achieving a balance between preserving the public interest against probably countervailing private interests of employees, and preventing frustration of the public interest through discouragement of government service by those who justly feel that over-rigorous conflict-of-interest prohibitions demand too great a sacrifice of their personal economic interests. And, while the proposal of the Committee satisfies the test of realistic pragmatism, it is also quite apparent that the purpose and aim of the proposal is the idealistic one of achieving, by legal machinery, the establishment and maintenance of an optimum ethical standard of conduct for government officials.

It is to be hoped that the inherent excellence of this report, coupled with the prestige of its sponsors, will persuade the Congress to take action, at an early date, in this long-neglected field.

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Legal Reasoning, The Evolutionary Process of Law. By William Zelermyer. Englewood Cliffs: Prentice-Hall, Inc. 1960, pp. ix, 174.

In this brief and readable book, Prof. Zelermyer gives us a glimpse of what goes on in the judicial mind in formulating an opinion. He demonstrates that, despite the doubts of some laymen and most first year law students, there *is* logic and reasoning behind the decisions that appear in the various reporters and casebooks. In the opening section of the book, we are introduced to the seven categories of legal research material which the author compares to the seven seas. This wealth of material demonstrates that there is no such thing as "the law" from which instant and easy decisions may be made. Indeed, when we see the vastness of the seas that must be explored in arriving at the decision in one case, we might wonder that decisions are given as quickly and clearly as they are. The opinion, incidentally, that is given by way of illustration is one in a case involving two rival dancing schools and it is well and wittily written, showing that the law need not always be dull and that judges can, and often do, see the humorous side of problems they are called upon to decide.

In the conluding pages of this first chapter it is shown that even in applying a statute, which perhaps comes closer than anything else to conforming to the popular idea of "the law", a great variety of factors outside the statute itself must be taken into account—so many indeed that quite often a court's interpretation of a statute seems directly opposite to what the words used by the legislators appear to mean. This result may puzzle