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ETHICS IN GOVERNMENT: A VIEW FROM THE SENATE

Senator Ted Stevens*

Despite the general tenor of the another-scandal-rocks-Washington news accounts which seem to surface each week, I believe that current standards of personal and professional conduct within the three branches of the federal government are at their highest point in many decades, a fact which the public is slowly coming to understand. While the media reports upon and highlights the numerically insignificant number of cases of wrongdoing by high federal officials, we would do well to recall that there are about 1750 Presidentialy-appointed officials in the Executive Branch and that since January, 1981, more than 3500 individuals have served President Ronald Reagan as senior-level appointees. In addition, recent polling data leads to the conclusion that the public is developing an independent realization that such highly visible and well known exceptions to the rule do not prove that the general rule of honesty and morality in government is invalid.

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3. Id.

The thesis that standards of conduct within the federal government are at very high levels is based not upon anecdotal evidence or supposition, but on my nearly twenty-four years of service in the Executive and Legislative arms of the federal government and through my long-time involvement, as a Senator, with federal personnel issues. I say with a high degree of certainty that Americans can take pride in the achievements of their civil servants and legislative representatives. We need not fear that press accounts of isolated wrongdoing have replaced morality, dedication, and service to the nation as the accepted practice in Washington.

While I cannot lay exclusive blame for the public's oft-reported lack of confidence in government at the feet of the fourth estate, I am convinced that the press in America sets the tone by which all of the efforts of government are judged. Where only the negative view of government is illustrated and "the corruption angle" becomes the norm, public confidence must, by definition, become stretched to the breaking point. Indeed, the argument becomes circular. By that I mean, where public confidence in government is low, the media, in search of the controversial and negative, will illustrate the thesis that public confidence is low. But the press is not responsible for this turn of events. In fact, no single factor is responsible; any seeming lack of confidence stems from the cumulative impact of a number of interconnected factors. My experience on Capitol Hill tells me that interest groups and candidates for federal office share an equal amount of blame. Interest groups and lobbying organizations, growing in number each day, must escalate their rhetoric to attract attention and increase their influence. Politicians, as candidates, tend to over-promise their constituents and over-criticize their government in an appeal for electoral support. Left unchecked, this cause and effect relationship may prove disastrous to our future. If we fail to exercise a due measure of collective responsibility in this area, public confidence in government will begin an irreversible downward spiral. The Congress has recognized its responsibility to check this spiral and, over the last two decades, has taken a number of substantive

6. See Ignatius, The Decline of Public Service, Wash. Post, May 4, 1986, at C6, col. 1 (reporting that PACs increased more than six-fold, from 608 in 1974 to 3,992 in 1985, while the number of registered lobbyists more than doubled from 3,420 to 8,800 since 1976).
7. Adams, supra note 5, at 5-6.
8. Id.
9. Id.
stands to renew the public’s confidence in our democratic institutions.10 These first steps appear to be working.

I. GOVERNMENT ETHICS: THE POST-WAR PERSPECTIVE

Before beginning a review of the current state of ethics in the federal government, it is appropriate that we define, with as much precision as is possible, exactly what we mean when we use the phrase “ethics in government”. For purposes of this Article, a definition once put forward by Professor Albert J. Millus will suffice: “[T]he moral attitude of elected officials and employees of the federal government, toward actions, people and situations involving their personal and public life.”11 In other words, “ethics in government” is the dividing line adhered to by public officials with regard to government business and private business. In my experience, these are definitions which the vast majority of federal officials adhere to on a daily basis.12

Despite the evidence which suggests that actual ethical standards in government are far higher than we have been led to believe, some elements of the media and such “special interest” groups as Common Cause, report that there is a profound lack of respect for government in contemporary America.13 In my view, this perceived lack of public confidence in our governmental institutions results largely from the historical conflict between two basic American attitudes: on the one hand, a respectful view of government as a problem solver; on the other, a populist suspicion of government and big institutions in general.14 As Professor James McGregor Burns pointed out, Americans are uniquely able to both criticize their government as “inept, corrupt, and something to be feared” and, in the same breath, to proclaim that the American democratic experience is the best system in the world.15 Indeed, as public opinion pollster George Gallup demonstrated, Americans have always criticized the Congress, as an institution, while praising their own particular Representative or Senator.16 This dichotomy may help to explain the reason

10. See infra notes 111-42 and accompanying text.
16. See Adams, supra note 5, at 6-8.
why ninety-eight percent of incumbent members of the House of Representatives were returned to the Congress after the November, 1986, election.17

As we all must realize, there is a substantial “down side” to the public’s differentiation between Congress and the government, on the one hand, and members of Congress and federal officials, on the other. There is an even greater potential for disaster relative to the role of the press in illustrating this distinction if the result of press reporting is that the distinction becomes an accepted fact. Focusing on the negative in government will give rise to a negative attitude about government as a generalized stereotype. As former Yale University president Bart Giamatti has said “[i]f a society assumes its politicians are venal, stupid, or self-serving, it will attract to its public life as an ongoing self-fulfilling prophecy the greedy, the knavish and the dim.”18 I agree with this supposition and can attest to the difficulty we are currently experiencing finding interested and qualified candidates for executive positions in the federal service. Many otherwise interested individuals will turn down a high-level federal job offer because of the “fish bowl” which life in Washington has become19 and because of the low esteem in which federal employees appear to be held.20 Few reasonable people will wish to serve in an environment in which lack of appreciation is a hallmark.

Although much has been made of the existence of the purported “sleaze factor” in contemporary Washington, we would do well to recall that all recent administrations have been, to a greater or lesser degree, the subject of charges of improper conduct or “insider dealing.” During the last eight years of the Roosevelt Administration, numerous allegations of financial corruption within the government’s war effort were raised.21 Earlier, the Washington press corps raised questions concerning the potential for conflict of interest where the government utilized the services of “loaned” corporate executives to run various agencies and programs for the nominal sum of $1 per

18. Adams, supra note 5, at 12 (quoting A.B. Giamatti, The University and the Public Interest 168 (1981)).
20. Adams, supra note 5, at 5; James, supra note 19, at 19.
year.\textsuperscript{22} These charges were taken with sufficient seriousness by the Senate that a select investigating committee, the Special Committee to Investigate the National Defense Program, was created in March 1941, to review these allegations.\textsuperscript{23} The Special Committee, chaired by the junior Senator from Missouri, Harry S. Truman, conducted hundreds of days of hearings and published a several thousand page, multi-volume report in 1948 which outlined its findings of corruption in government defense contracting.\textsuperscript{24} It is interesting to recall that Senator Truman's expressed purpose in conducting this investigation was not only to weed out waste, favoritism, and lack of direction in the American war effort, but also to ensure that Missouri received its "fair share" of lucrative defense contracts.\textsuperscript{25}

Truman, who assumed the Presidency in 1945 upon the death of Franklin Roosevelt, suffered a series of major conflict of interest scandals throughout his term. For example, in the summer of 1949 allegations appeared which implicated the President's chief military advisor and long-time (since their service at Fort Sill, Oklahoma, in 1917) confidant, Major General Harry H. Vaughan.\textsuperscript{26} Vaughan was accused of participating in a scheme to secure government contracts for companies which were represented in Washington by his friends.\textsuperscript{27} A special investigating subcommittee of the Senate reviewed these charges and found that Vaughan had accepted many valuable gifts from various corporate executives and so-called "5% consultants" in return for his assistance in securing favorable Department of Defense contracts.\textsuperscript{28}

Between the spring of 1947 and mid-1952, the Truman Administration was also rocked by a series of allegations which centered on the conduct of high-level White House officials and friends of the President who had secured employment with various government agencies. From April, 1947, to June, 1949, three close friends of President Truman were investigated by a Congressional committee.

\begin{itemize}
\item \textsuperscript{22} Id. at 3182-84 (testimony of Donald M. Nelson, Chairman, War Production Board, before U.S. Senate Special Committee investigating the National Defense Program).
\item \textsuperscript{23} Id. at 3115.
\item \textsuperscript{24} See id. at 3124. Between 1941 and 1948, the Truman Committee held 432 public hearings and 300 executive sessions. Additionally, 51 reports, totalling 1,946 pages, were published. Id.
\item \textsuperscript{25} Id. at 3120.
\item \textsuperscript{26} W\textsc{eiss} & D\textsc{onnelly}, Other A\textsc{ides} Have E\textsc{mbarrassed} Presidents, 35 C\textsc{ong.} Q. W\textsc{k.} R\textsc{ep.} 1997 (1977).
\item \textsuperscript{27} Id.
\item \textsuperscript{28} A. D\textsc{unbar}, The T\textsc{ruman} S\textsc{candals} and the P\textsc{olitics} of M\textsc{orality} 29-34 (1984).
\end{itemize}
chairied by Senator J. William Fulbright of Arkansas which was looking into allegations of corruption within the Reconstruction Finance Corporation (RFC). 29 The three Missouri friends of the President, Donald Dawson, Special Assistant to the President, E. Merle Young, an RFC loan examiner, and William M. Boyle, Jr., Vice Chairman of the Democratic National Committee, were investigated by the Fulbright committee for accepting cash and other favors in return for securing favorable treatment on loan applications which were pending before the RFC. 30

From early 1951 until mid-1952, the Truman White House faced additional allegations of wrong-doing by political appointees, specifically friends of the President who worked within the Internal Revenue Service. A Senate investigation of these charges found that James P. Finnegan, Collector of Revenue in St. Louis, had failed to report $103,000 in income. 31 After Finnegan’s subsequent conviction for income tax fraud, nine other senior political appointees in the IRS were indicted or resigned in the face of fraud allegations. 32 Caught up in this scandal were the Commissioner of Internal Revenue, George J. Schoenman, the head of the Justice Department’s Tax Division, Theron Lamar Caudle, and the President’s appointments secretary, Matthew H. Connelly, all of whom were forced to resign from the Administration. 33 As a result of these investigations and resignations, “ethics in Washington” became a major campaign issue during the 1952 general election.

Less than a decade later, the Eisenhower Administration was the subject of two major allegations of scandal. During the summer of 1955, Secretary of the Air Force Harold E. Talbott was accused of conducting private business from his Air Force office. Talbott resigned on August 1, 1955, after a statement by the President that actions of officials in his Administration would have to be “impeccable” from the standpoint of ethics. 34 A scant two years later, in 1958, the Chief of Staff to President Eisenhower, Sherman Adams, was accused of accepting gifts from a Massachusetts textile manufacturer, Bernard Goldfine, in return for Adams’ assistance to a

30. Id. at 603.
31. Id. at 604.
32. Id. at 604-05.
33. Id. at 605.
Goldfine company which was being investigated by the FTC and the SEC. Adams was the subsequent target of an investigation by a committee of the House of Representatives. Despite his assertions of innocence to the allegation that the acceptance of gifts from Goldfine was the "quid pro quo" for his assistance with the SEC and FTC, Mr. Adams was forced to resign in September, 1958.35

Although in office for a brief three years, the Kennedy Administration was also touched by a major scandal. On March 29, 1962, news broke about the arrest in Texas of Billie Sol Estes for fraudulently selling farm fertilizer tanks to farmers in return for chattel mortgages which were then resold to twelve Texas finance companies for $22 million.36 It was alleged that Estes had the cooperation of political appointees in the Department of Agriculture to further his scheme.37 Hearings conducted by the Senate's Permanent Investigations Subcommittee and the House of Representatives' Government Operations Committee from May through September, 1962, revealed that the substance of the allegations was true, though Estes did not testify before either committee. He was thereafter convicted of fraud in Texas on November 7, 1962.38 Implicated in the Estes scheme were eight senior Department of Labor and Department of Agriculture officials including Jerry R. Holleman, Assistant Secretary of Labor, who resigned after having admitted that he took a $1000 gift from Estes; Charles S. Murphy, Under Secretary of Agriculture; and Dr. James T. Ralph, former Assistant Secretary of Agriculture, who was dismissed from the agency on May 15, 1962. Also named in the investigation were two members of the House39 and one Senator40 who had personal financial or campaign contribution dealings with Estes.

Less than one year after assuming the White House in November 1963, President Lyndon Johnson was faced with a scandal within his own office. On October 14, 1964, long-time aide and then Assis-

35. Id.
39. Representatives Carl Andersen (R-Minn.) and J.T. Rutherford (D-Texas) were implicated in the Estes case. CONGRESS AND THE NATION, supra note 36, at 1761.
40. Senator Ralph Yarborough (D-Texas) was implicated in the Estes case. Id.
tant to the President Walter Jenkins was arrested in Washington on a morals charge. Despite Jenkins' resignation, the episode became a major campaign issue in the general election of 1964 because of Senator Barry Goldwater's emphasis on the "specter of immorality in Washington."41 Several years later, President Johnson again faced allegations of moral laxity when, on June 26, 1968, he nominated Associate Justice Abe Fortas for elevation to Chief Justice of the Supreme Court.42 During the hearings on the nomination, it became clear to the Senate that while he had been on the high court, Fortas had continued to advise President Johnson on matters of domestic politics. In addition, it was discovered that Fortas had taught, for substantial fees, a series of summer seminars for a foundation chartered by his long-time friend Louis Wolfson.43 The arrangement appeared to be designed to supplement Fortas' salary and in the face of continuing charges of impropriety, Fortas withdrew his nomination on October 2, 1968.44

The Nixon years are largely remembered for the trauma of the Watergate episode and the forced resignation of Vice President Spiro Agnew, who faced several allegations of fraud, extortion and bribery stemming from his days as Governor of Maryland.45 During the Presidency of Nixon's successor, Gerald Ford, Secretary of Agriculture Earl Butz was forced to resign after admitting that he had told a racially insensitive joke and the Chairman of the Ford reelection committee, Howard H. Callaway, resigned on March 30, 1976 in the face of a Justice Department investigation into reports that Calloway, while Secretary of the Army, was alleged to have used improper influence with various federal agencies on behalf of a family-owned ski resort in Colorado.46

During the Carter Administration, several serious allegations of

44. See Graham, Fortas Abandons Nomination Fight; Name Withdrawn, N.Y. Times, Oct. 3, 1968, at A1, col. 8; CONGRESSIONAL QUARTERLY ALMANAC, supra note 42, at 531.
46. Id.
impropriety by individuals closely associated with the President were investigated by the Office of the Attorney General, Congressional committees, and Independent Counsels under the Ethics in Government Act of 1978.47 The first investigation involved the alleged role of Mr. Bert Lance, a long-time confidant of President Carter, in using assets and loans from the National Bank of Georgia, which he had controlled prior to his service in the Carter Administration, for his own personal benefit.48 These charges were investigated by the Senate's Committee on Governmental Affairs. As a result of this Congressional inquiry, Mr. Lance resigned from his position as Director of the Office of Management and Budget on September 21, 1977.49 However, Lance's resignation did not put to rest allegations concerning the financial dealings of the National Bank of Georgia. In March, 1979, Special Counsel Paul Curran was empowered by Attorney General Griffin Bell to investigate allegations that the National Bank of Georgia, then controlled by Lance, had made illegal campaign contributions to the 1976 Carter for President committee through "loans" to the Carter Peanut Warehouse in Plains, Georgia.50 These allegations were found to be without merit.51 Lastly, at the end of his term, two of President Carter's most senior advisors, Hamilton Jordan and Tim Kraft, were investigated by Independent Counsels who had been instructed to review allegations that both Mr. Jordan and Mr. Kraft had used illegal drugs.52 Neither allega-


52. Arthur H. Christy was appointed in 1979 to investigate allegations that Hamilton Jordan, President Carter's Chief of Staff, had used cocaine. Schwartz, Independent Counsels: A History, Wash. Post, Jan. 23, 1988, at A8, col. 3. Gerald J. Gallinghouse was appointed in
tion was ever substantiated and the investigations were terminated in 1980 and 1981 respectively without a grand jury indictment.  

In the last several months, press accounts have focused on the indictments and trials of two high-ranking former Reagan Administration officials, Michael Deaver and Lyn Nofziger. These individuals were prosecuted for violations of federal conflict of interest and perjury statutes. In the case of Mr. Deaver, the Independent Counsel had apparently initially planned to seek an indictment under the "post-employment" lobbying restrictions of the Ethics in Government Act of 1978. However, prosecution under this provision was not attempted and Mr. Deaver was instead successfully prosecuted for providing false testimony before a Congressional committee. In the case of Mr. Nofziger, however, the Independent Counsel obtained a conviction under the "post-employment" lobbying restriction of the Act, the first such prosecution under this provision.

Recently, some editorial writers and reporters have made the point that the convictions of Messrs. Deaver and Nofziger are proof of the very existence of the Washington "sleaze factor" itself. However, these two isolated convictions are, in my view, the exception to the rule. In fact, they illustrate just the contrary — the press

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54. In May 1986, Whitney North Seymour Jr. was appointed to investigate allegations of improper lobbying by former White House aide Michael Deaver. Id.; see In re Deaver, No. 86-2 (D.C. Cir. Independent Counsel Division).


56. Schwartz, supra note 52, at A8, col. 3.

57. 18 U.S.C. § 207 (1982 & Supp. IV 1986). Independent Counsel Seymour was instructed to examine whether Deaver had violated federal conflict-of-interest laws in representing Canada, Puerto Rico, and other clients after resigning as White House deputy chief of staff and creating a consulting firm. Schwartz, supra note 52, at A8, col. 4.

58. Schwartz, supra note 52, at A8, col. 4. In re Deaver, No. 86-2 (D.C. Cir. Independent Counsel Division). Deaver was found guilty of three counts of perjury. Marcus, Court Overturns Statute Creating Special Counsels, Wash. Post, Jan. 23, 1988, at A8, col. 3.

59. In re Nofziger, No. 87-1 (D.C. Cir. Independent Counsel Division); Marcus, supra note 58, at A8, col. 1. Nofziger was indicted on six counts of violating federal ethics laws and lobbying the Reagan Administration on behalf of Wedtech, Fairchild Industries, and a maritime union. Id.

is reporting upon activities that are called into question by the existence of heightened ethical standards which face all federal officials and which were imposed by Congress in the decades of the 1970's and 1980's. While the argument can be made that the plight of Messrs. Deaver and Nofziger proves that there is widespread corruption in the Reagan Administration and within federal agencies, we would do well to remember that the Reagan Administration is the first to serve a second term since the Eisenhower era and, more importantly, is the first administration to serve under the very broad "conflict of interest" and "post-employment" lobbying restrictions found in the Ethics in Government Act. Times have changed with respect to standards of conduct within the federal government and Congress has recognized that change in attitude and reacted accordingly.

Interestingly enough, while the focus of recent events has been upon the Deaver and Nofziger convictions, we seem to have forgotten the even more compelling fact that the vast majority of Reagan Administration officials who have been accused of wrongdoing by the press have either been subsequently vindicated at trial or never indicted in the first instance. For example, President Reagan's first National Security Advisor, Richard V. Allen, was driven from office in 1982 when it was alleged that he had accepted a watch from a former client. The revelation caused Mr. Allen to resign, although the allegation was never reduced to a civil or criminal charge; two investigations by the Department of Justice and a separate White House inquiry determined that the allegations of influence-peddling were entirely without substance. Accused and convicted without benefit of due process or trial, Richard Allen was forced from government service, not by the courts but by public perception.

Allen's fate was shared by Joseph Canzeri, a former special assistant to President Reagan in the early days of the Administration. In early 1982, the Washington media reported that Mr. Canzeri had received a sizable personal loan from the brother of his former employer, Governor Nelson Rockefeller, which was to be used to purchase a Georgetown house. Mr. Canzeri admitted that

64. Id.
the loan had been solicited and accepted and he thereafter resigned from the Administration in the face of a barrage of news accounts about the "propriety" of the loan. At its most sinister, the allegation was viewed as confirmation that high Administration officials were being influenced improperly by outside interests. In reality, the incident was explained by Mr. Canzeri as a straight-forward business proposition, a commercial loan arranged between friends at a rate of interest between nine and twelve percent. The "allegation" caused Mr. Canzeri to resign from his position, but it was never seen by the Justice Department to be of sufficient merit to justify a civil or criminal investigation.

To a contemporary observer, it might appear that there are few Reagan Administration officials who have escaped some allegation of conflict of interest. For example, Assistant Attorney General William F. Baxter, head of the Antitrust Division of the Department of Justice, was accused in 1983 by his critics of failing to notify the Justice Department of his previous relationship with the IBM Corporation. Baxter had acted as outside counsel for IBM at the time the Antitrust Division decided to drop a review of antitrust allegations which had been made against the company. An intensive investigation was thereafter carried out by the Justice Department into the allegations surrounding Mr. Baxter. Although this investigation did not turn up any information which would have substantiated the charge which had been made against the Assistant Attorney General, Mr. Baxter was placed under a cloud of suspicion during the pending inquiry and his effectiveness as the Administration's senior enforcement official over antitrust violations was substantially reduced. In 1985, a worse fate befell Mr. James Beggs, the former Administrator of NASA. Beggs was indicted on charges that he had assisted a former employer, a major defense contractor, in defrauding the government on millions of dollars of military procurement contracts. Coupled with the Challenger space shuttle trag-

65. Id.
66. Pound, White House Aide Resigns in Aftermath of Loans, N.Y. Times, February 11, 1982, at A21, col. 1 (reporting that two loans of $200,000 were made to Mr. Canzeri: one at nine percent and another at twelve percent).
67. Gerth, supra note 61, at A24, col. 3.
68. Id.
69. Id.
70. Rewriting Antitrust Rules, NEWSWEEK, August 29, 1983, at 50.
the news of the Beggs indictment sent NASA reeling. Months later, after substantial pretrial publicity and Beggs's forced resignation from NASA, the Justice Department suddenly dropped the indictment when it became clear that the evidence in hand would not support a conviction. While this was good news for Mr. Beggs, the morale of thousands of NASA workers had suffered an irreversible blow and NASA had lost, without cause, the services of a dedicated leader. In fact, as a result of the Beggs resignation, the nation may have suffered a reversal, the extent of which can only be the source of speculation. I am of the belief that had Mr. Beggs been NASA Administrator in January 1986, the Challenger launch would have been postponed because of adverse weather conditions.

Another recent example of this phenomenon was the case of former Secretary of Labor Raymond J. Donovan. Secretary Donovan was investigated on two occasions by Independent Counsel Leon T. Silverman concerning unsubstantiated allegations brought forward by individuals who were said to have organized crime connections. These individuals went to the New York newspapers with a story that Mr. Donovan's former employer had engaged in a scheme to defraud local governments in New York and New Jersey through the use of so-called "ghost" employees and the utilization of sham minority sub-contractors. Moreover, it was charged that these minority contracting firms had been established by white businessmen, including Mr. Donovan's former employer, to compete for federally-mandated minority set-aside construction projects. Despite the formidable resources of the Independent Counsel and the nearly unlimited investigative work done by New York and Washington newspapers, Mr. Silverman subsequently determined that the allegations were not sufficient to warrant a prosecution. Nevertheless, Bronx...
District Attorney Mario Merola did proceed against Mr. Donovan, and after a nine and one-half month trial during which the defense did not call a single witness, Mr. Donovan was acquitted. As Vice President George Bush has noted, Mr. Donovan had established his innocence, but he could never have his name or honor restored.

It is interesting to me that while many allegations of wrongdoing are made by the media in Washington, it is the exception to the rule when such an allegation actually bears fruit and substantial wrongdoing is uncovered. In that context, I suggest that we often pay a substantial price as our reward for eternal vigilance into public corruption. While it is clear that public corruption does exist and must be eradicated, I would hope that in investigating allegations of governmental wrongdoing, we keep the Constitutionally presumed innocence of the "accused" firmly in the forefront as any investigative efforts move forward.

II. THE HISTORICAL RECORD

Today, I would argue, we enjoy a very high level of expectation for the ethical conduct of our elected and appointed federal officials. Has such a high standard been the case historically? To answer that question, we would do well to recall that Americans have always prided themselves on having a government which is grounded in fairness and honesty. It has been a matter of faith that the "founding fathers" were above reproach. For example, every school child learns about George Washington's honesty and the cherry tree episode. While he was unquestionably a giant among men and a national hero without peer, it is also said that only a few short years after the conclusion of his Presidency, Washington persuaded the Congress to purchase the sandstone needed to complete the East and West facades of the new Capitol building from an Acquia Creek, Virginia quarry which was located in Stafford County adjacent to the Washington family's ancestral home. Was George Washington just another "insider" who used his government contacts for the financial benefit of a business back home? Of course he wasn't. But he was a

N.Y. Times, Sept. 14, 1982, at A1, col. 4; Schwartz, supra note 52, at A8, col. 3.
81. Church, supra note 78, at 31.
82. Hoffman, Bush Declines to Comment on Meese Probe, Wash. Post, Jan. 31, 1988, at A6, col. 1. After the verdict was read, Mr. Donovan publicly asked to what office he should go to get his reputation back. Church, supra note 78, at 31.
sophisticated eighteenth century politician and businessman who ac-
ted in what he obviously considered a moral and ethical manner.

As a paragon of virtue, George Washington could be matched
by few other politicians. One, whose reputation for integrity survives
to this day, was Senator Daniel Webster of Massachusetts. History
notes, however, that while serving in the Senate, Webster made it a
practice to represent many private legal clients, both before commit-
tees of the Senate and the Supreme Court. In fact, Webster was
serving as counsel to the Bank of the United States, in December
1833, when the charter of the Bank was up for reauthorization by
the Senate. In a letter to bank president Nicholas Biddle of Philade-
phia, Senator Webster stated that in return for help on the
reauthorization legislation, he would require that his “usual re-
tainer” with the Bank be “refreshed.” The letter became a source
of much criticism for the Bank and eventually helped in the defeat
of the re-authorization bill, though Senator Webster appears to have
suffered no undue outrage at the hand of his loyal constituents. Was
Webster, one of the true giants of the Senate, a venal, self-serving
politician? Of course not. He acted out of a clear understanding of
the measure of morality which was demanded of politicians of his
day.

A scant forty years later, conflicts of interest standards for
members of Congress had been “relaxed” to a point where Speaker
of the House of Representatives James Blaine would formally rule,
in response to an April 11, 1874, parliamentary inquiry, that mem-
bers of Congress were in no conflict of interest where they voted
upon a measure which directly related to a private interest affecting
the member, as long as the Congressman was a member of a “class”
of individuals similarly affected. Such a view seems consistent with
the historical record of public morality in the era of the Grant Ad-
ministration. It also seems consistent with the level of ethical con-
duct which the average voter of 1875 would have demanded of his
government. Indeed, these historical incidents illustrate that while
Americans have generally thought of their forbearers in government
as embodying the very essence of public virtue, their conduct while
in public office was sometimes less than exemplary when judged by
the standards applicable today.

84. Baker, The History of Congressional Ethics, in Hastings Center Institute of
Society, Ethics and Life Sciences, Representation and Responsibility 8 (1986).
85. 5 Hinds, Precedents of the House of Representatives of the United States
§ 5952, at 503-04 (1907).
Historically, whether there has ever been a record of high public opinion regarding government service is very debatable. One might argue that government service has been, throughout our history as a nation, the source of ridicule. For example, the pens of writers such as Henry Adams and Mark Twain and cartoonists such as Thomas Nast were kept busy throughout the early nineteenth century commenting upon the actual and perceived sins, large and small, of a succession of Presidents, cabinet officials and members of Congress. The record clearly demonstrates that the early nineteenth century was a period where government service was fair game for even the most strident of social commentary. In the twentieth century, the social commentaries of Will Rogers and Mark Russell followed apace.

In the face of such a record, I am compelled to question if one can be forgiven for wondering about the long term effect of such cynicism on the body politic. Indeed, some political scientists have suggested that the remaining decade of this century will see the development of a level of skepticism in the value of government which will make the management of government even more difficult. For example, Daniel Yankelovich has pessimistically concluded that the high point of public confidence in government may have occurred as long ago as the late 1950's.86 I trust that Yankelovich and his colleagues are unduly pessimistic or incorrect. In fact, I believe that the relatively high standards of conduct applicable to the public lives of our earliest federal officials have not slipped or been diminished in recent years. If anything, reports of the public’s perceived lack of confidence in government have caused the Congress to mobilize a major, ten-year effort towards addressing the confidence issue.

III. BALANCING PUBLIC DISCLOSURE AND INDIVIDUAL RIGHTS

Among the most important legislative responses developed by Congress during the early seventies have been statutes which mandate that government be open to the press and to the public. Such “sunshine” laws are a factor whose importance cannot be underestimated, distinguishing public service and the role of the federal government in the 1980’s from that of previous decades and generations. From my own first-hand experience, the opening of the processes of government to the inspection and participation of the public has had

the most profound effect upon the way in which the federal government works. Meetings are open, discussions are carried out in the light of day, and decisions are appealable through staggering levels of administrative due process. Public accountability has become the new totem in Washington. Where once a handful of powerful Congressional committee chairmen made decisions which bound their 535 colleagues and the entire federal government, now there are 535 co-equals who must explain and defend their decisions to a generally skeptical audience of voters, the media and the "interest groups." Among the most positive results of this new phenomenon has been a small yet discernible rise in public confidence in government.87

The "opening" of the federal government during the decades of the 1970's and 1980's also resulted in an unprecedented explosion in the number of "public interest" and conventional lobbying organizations which came to Washington seeking to influence both the direction of government and the decisions of federal officials.88 According to a 1986 study by the Foundation for Public Affairs, there are now more than 2500 "public interest organizations" in Washington.89 These groups have, in turn, been very successful in making sure that their members and clients have an ever-increasing degree of access to governmental decision-making at lower levels. Thus, having opened the processes of the federal government at the national level, special interest groups have been successful at opening the process of government at state and local levels as well. By way of illustration, it is interesting to note that the United States Advisory Commission on Intergovernmental Relations has determined that over the last two decades at least 155 separate federal grant programs were enacted by Congress which mandated public/citizen participation with respect to meetings and the decision-making process.90 Such "open meeting" or "sunshine" legislation has provided the media and interest groups with new avenues and opportunities to find and expose defects in the processes of government. The exposure of defects in government, however, may lead to an unintended undercutting of public confidence in government. In addition, open meetings sometimes result in the negative consequences of more meetings, meetings which require more time to complete and which are duplicated in

87. See supra note 4 and accompanying text.
88. See supra notes 6-7 and accompanying text.
89. FOUNDATION FOR PUBLIC AFFAIRS, THE PUBLIC INTEREST PROFILES, preface (1986).
layers of bureaucracy. The inevitable result is substantial delays in the decision-making process. Consequently, the status quo is preserved and this serves the interests of those who represent only a small segment of society, rather than society at large. In my view, "openness" in government generally serves a positive purpose by more often than not promoting confidence in the institutions of government. But accountability as an end in itself is not the only answer. Accountability must be balanced with effectiveness. It must be balanced as well with originality, experimentation, inventiveness, and some degree of risk-taking. If that delicate balance is not present, the vital life of government will be reduced to bureaucratic inertia.

That the clarion call to reform, higher ethical standards, and "openness in government" has been heard by the Congress cannot be disputed. In the decade from 1968 to 1978 alone, Congress enacted the following substantive "reform" measures: the first public financial disclosure rules for members of Congress;91 the first limits on outside earned income by members of Congress;92 the Federal Election Campaign Act of 1971;93 reform and strengthening of the Freedom of Information Act;94 the Government in the Sunshine Act;95 the Tax Reform Act of 1976, which provided for increased confidentiality of tax records;96 the Foreign Corrupt Practices Act of 1977;97 new Codes of Official Conduct for each House of Congress;98 the Ethics in Government Act of 1978;99 the Foreign Intelligence Surveillance Act of 1978;100 and the Civil Service Reform Act of 1978.101 Each of these measures was intended to increase popular confidence in government. In addition, I would argue that the passage of ten major provisions for governmental reform in a ten-year span is an enviable record for an institution which some, in the 1960's, had argued was incapable of producing meaningful reform. Congress also acted to further reform internally. In fact, applying

92. Id. § 702(a).
similar "openness" standards to itself, the Senate has voted forty-six times, since 1974, on substantive, non-procedural measures involving outside income restrictions, honoraria limitations and salary increases. During that same period, the House voted on such issues a total of twenty-one times. In a major move to increase public access, committee meetings were ordered to be held in open session as a general rule, unless national security matters intervene. Clearly, the process of legislating has been opened to the light of day.

While opening the process of government to public view and participation has had a positive effect on the confidence level of the electorate, one discordant note has been sounded. In addition to paying a potential price with respect to lost originality, experimentation, and inventiveness, openness has inevitably infringed on the privacy rights of some high-level federal officials. The recent cases of former SEC Director of Enforcement John Fedders and former Senator Gary Hart illustrate the potential for harm attending a system in which every action, no matter how personal, is "on the record" and subject to press comment and speculation. The case of former Senator Hart might be less troubling in degree, but only for the reason that as an active candidate for his party's nomination for President at the time he was alleged to have had an extramarital affair, he invited the press to follow his personal life if they did not believe his public statements. While critics charged that such conduct was reprehensible and could not be countenanced in an American President and leader of the free world, the candidate responded that his personal life was not an issue in an election campaign. In fairness to Senator Hart, one may wonder about today's standard of public morality, a standard which maintains that public officials give up all rights of privacy when seeking high federal office. In addition, one might well wonder about the application of such a strict standard to those previous Presidents about whom we have more than hearsay evidence of moral indiscretions. This year, the termination of the candidacy of Senator Hart, as the result of the discovery of a "character flaw," has meant the end to a candidacy which, in the view of the candidate, was attempting to address many of the profound public policy problems facing contemporary society. No matter your

103. Id.
104. Id.
view of the solutions offered by candidate Hart, one has to ask whether society has examined the trade-off between these two eventualities with enough of a concern for the future?

The 1985 case of John Fedders poses an equally troubling issue. In that case, Fedders was involved in a complicated and acrimonious divorce action with his wife of many years. During the trial, the media became aware of accusations, apparently circulated by opposing counsel, that Fedders had been abusive to his spouse. News stories focused on his fiery temper and on the allegations of cruelty made by his wife. Such accounts multiplied by the day and after several weeks, Fedders was forced to resign from the Securities and Exchange Commission. No one had alleged that he had behaved improperly while at the SEC and no one had accused him of betraying a public trust. His admitted wrongdoing was clearly and exclusively personal and apparently unrelated to his professional life or his government service. However, this distinction did not preclude his forced resignation.

The question of the relevancy of and our right to know about the private conduct of public officials is fraught with uncertainty. Clearly there must be a balance between the two if ever we hope to have qualified private citizens volunteer for federal service or election to Congress. I trust that we all will understand this delicate balance. As Stewart Pinkerton of the *Wall Street Journal* was quoted as saying, "Generally we don't think we ought to be writing about public officials' private lives when there is no indication that whatever is going on is affecting their performance of their public duties." Such a formulation begs the question of just who it is that determines whether an incident in a private life has adversely affected an official's public responsibilities. It appears that Pinkerton would respond that such a judgment can only be made by a reporter and his editor, but leaving that judgment to the reporter or editor is often far from satisfactory. As Professor Bruce Payne has said:

> We are really uncertain about the whole area of the private in American life. On the whole I think we ought to keep private lives of public people as private as is reasonably possible. But when they do things that by their standard and by the mass public's standard

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106. *Id.*
107. *Id.*
108. *Id.* at A7, col. 2.
are deeply wrong, it may be inappropriate for them to remain in high position.109

A different point of view has been expressed by the noted media critic Ben Bagdikian, who has made the point that the press sometimes goes too far and misplaces its priorities in covering the private lives of public officials, emphasizing private lives when there is little evidence of serious effect on public performance.110

Whatever one's position on this troubling issue, there is general agreement that in three instances, the personal conduct of a public official does warrant press coverage: where there is substantiated evidence that an official has committed a serious criminal or moral offense, where the official's conduct has impaired his ability to perform his duty, and where an official has abused his office for personal gain. Unfortunately, the easy cases are rare. In the majority of instances, a media editor must make the difficult threshold determination that information about an official's private life is relevant to his public conduct or position. In such cases, we can only hope that the editor balances the public's "right to know" with the official's equally important right to privacy. I have never believed that simply because one comes to Washington to serve the public good, one, by definition, gives up the right to personal privacy.

IV. STRICT ENFORCEMENT OF ETHICAL CODES WITHIN THE SENATE

Within Congress, we have struggled with this dilemma and have attempted to address the delicate balance between a Congressman or Senator's personal life and his public life.111 Congress has accord-

109. Id. at A7, col. 1 (Payne is a professor of ethics and public policy at Duke University).

110. Id. at A7, col. 3 (Bagdikian is a professor of journalism at the University of California).

111. The authority of Congress to judge the qualifications of members and to punish those who behave improperly rests on two clauses of the constitution. See U.S. CONST. art. I, § 5, cl. 2 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."); id. cl. 1 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."). In an early decision the Supreme Court upheld the right of Congress to punish its members. Kilbourn v. Thompson, 103 U.S. 168, 189 (1880) (stating that "[t]he Constitution expressly empowers each House to punish its own members for disorderly behavior."). In a later case, the Court defined the circumstances under which either chamber might expel one of its own members. In re Chapman, 166 U.S. 661, 670-72 (1897) (extending the right to expel to any case where the offense is inconsistent with the trust and duty of the position). See generally CONGRESSIONAL QUARTERLY, INC., HOW CONGRESS WORKS: SEATING AND DISCI-
ingly adopted a dual system of specific rules of professional conduct, on the one hand, and public financial disclosure on the other.\textsuperscript{112} In that way, members of Congress know, from the onset, the parameters of the rules which will guide or circumscribe their institutional conduct. These rules, when viewed together with the annual public financial disclosure statement, which the member of Congress discloses to the public and to the media,\textsuperscript{113} are intended to make clear to our constituents that there is a high level of ethical behavior expected of Congressmen. The annual financial disclosure statement is intended to supplement the rules of conduct and provide the public enough detailed financial information about a member of Congress to allow an informed conclusion as to the possibility that any given financial holding or liability might pose a conflict of interest with the member's conscientious performance of official duties.

The current "Code of Official Conduct" for members of the Senate was adopted in April 1977 after several weeks of vigorous debate.\textsuperscript{114} The circumstances which gave rise to the adoption of the Code are quite interesting. Beginning in 1968, the Senate had operated under a code which contained four principal rules of conduct and which required that a sealed financial disclosure report be filed each year by a Senator with the General Accounting Office.\textsuperscript{115} That report was not made available to the public and could only be opened by action of the Senate's Ethics Committee.\textsuperscript{116} For ten years this code and its sealed financial report had worked quite well. However, in mid-1976, allegations surfaced that a Korean rice dealer, Tong Sun Park, had engaged in a systematic scheme to bribe influential members of the House and Senate to enable his company to export vast quantities of American rice overseas.\textsuperscript{117} Those allegations, which were the subject of weeks of coverage in the Washington...
ton and New York newspapers, resulted in the creation of special investigating committees in both Houses of Congress. In the House of Representatives, the allegations proved to be true on a very limited scale. As a result, several Congressmen were disciplined by the House.

With respect to the Senate, the allegations of bribery and influence-peddling by Park were thoroughly investigated over an eighteen-month period and were shown to be without substance. Nevertheless, it was felt by the leadership of the Senate that a new code of conduct, with accompanying annual public financial disclosure, was necessary to reassure the public that the Senate was taking its ethical obligations seriously.

A select committee chaired by former Senator Gaylord Nelson held public hearings on the proposed new code during March of 1977. After much debate, the proposal was adopted by the Senate on April 1, 1977. This new Code contained rules which restricted the acceptance of gifts from lobbyists, foreign nationals, and political action committee executives; placed limitations upon the receipt of honoraria; instituted seven substantive restrictions on outside professional employment; post-employment lobbying of current Senators and staff; and other “conflict of interest” considerations; placed limitations on the use of the Congressional franked mail privilege and the Senate's television studio during the sixty days immediately prior to any federal election in which a Senator was a candidate; restricted foreign travel after a Senator had announced an intention not to seek reelection to the Senate; and forbid discrимi-

118. See Babcock, House Unit Asks $530,000 for S. Korea Probe, Wash. Post, Feb. 1, 1977, at A3, col. 3.
119. How Congress Works, supra note 111, at 190.
121. See B. Jennings, The Institutionalization of Ethics in the U.S. Senate 5, 8 (1981).
124. Id. at Rule XXXVI, ¶ 2(a).
125. Id. at Rule XXXVII, ¶ 1-7.
126. Id. at Rule XXXVII, ¶ 8.
127. Id. at Rule XXXVII, ¶ 9.
128. Id. at Rule XXXVIII, ¶ 1-2 (prohibiting the use of unofficial office accounts).
129. Id. at Rule XL.
130. Id. at Rule XXXIX.
nation in employment by Senators and Senate offices. This new Code was administered by a newly constituted Select Committee on Ethics, a committee which is evenly split, with respect to membership, between the majority and minority parties represented in the Senate.

The Select Committee on Ethics has, since its creation in 1977, taken its responsibilities very seriously. In practice, it has come to serve several roles within the Senate. For example, it responds to inquiries from the Senate community, the public, and the press, for rulings on the application of specific rules of the Code to factual situations. From the more than three thousand ruling requests which the Select Committee has received, it has published more than 425 which were deemed to have wide application and general interest to the Senate and to the public. In addition, the Select Committee serves as an investigative arm of the Senate which reviews allegations that provisions of the Code have been violated. In this capacity, the Select Committee reviewed charges that former Senator Edward Brooke had engaged in improprieties with respect to Medicare and Medicaid reimbursements for his mother-in-law; that former Senator Herman Talmadge had falsified Senate expense reimbursement vouchers; and that former Senator Harrison Williams had been engaged in bribery and conspiracy with respect to the FBI undercover operation known as ABSCAM. In all three instances, the Select Committee investigated the allegations and reported upon its conclusions and recommendations to the full Senate. In the case of former Senator Brooke, the investigation was terminated by the Senator's defeat in the Republican primary of 1980. Former Senator Talmadge was denounced by the Senate and was thereafter de-

131. Id. at Rule XLII.
132. B. JENNINGS, supra note 121, at 7. The original bipartisan committee established by the Senate in 1964 was called the Select Committee on Standards and Conduct. Id.
138. S. Res. 249, 96th Cong., 1st Sess., 125 CONG. REC. 27,767 (1979) (finding that the conduct of Senator Talmadge . . . [was] reprehensible and tends to bring the Senate into
feated for reelection in the general election of 1980. Former Senator Williams was recommended by the Select Committee for expulsion from the Senate and resigned in 1983.

I take personal pride in the serious and dedicated efforts of the Select Committee as a result of my service as its Chairman from 1984 through 1986. During that period, the Select Committee carried out several important investigations and maintained a studied, non-partisan approach towards the many difficult tasks which it was asked to undertake. My experience with the Select Committee has, however, led me to one inescapable conclusion. Having had to review far too many requests for interpretations of the rules of the Code of Conduct and having approved nearly one hundred of the Select Committee’s 425 published rulings, I can say without hesitation that an all-inclusive form of public disclosure is a far better system for guiding ethical conduct than is a narrowly defined, yet ambiguous, series of rules. In my view, no matter how one attempts to craft such rules in a very narrow fashion, there will always be efforts to test the limits of the rules and to find ways to “work around” the limitations. I would replace these rules with an expanded public disclosure requirement which would set forth for the public all relevant information about a Senator’s personal financial position and expand upon existing public reports about the operation of the Senator’s office. I would couple this disclosure requirement for Senators with a similar disclosure scheme for all non-incumbent Senate candidates. Under this plan, a candidate would file a disclosure report which would cover the major financial aspects of the last six years of his or her life. With such information in the public domain, the media and the public could make reasoned judgments about the life, standards, and behavior of a Senator or candidate. Based upon this information, the electorate could make an informed choice of either the Senator or candidate in the next election. If the people are given adequate information, they will make a sound judgment. This is the heart of the democratic experience. In that regard, I second the views of my colleague, Senator Lowell Weicker who has said that:

we must fashion a code of ethics which provides the media, the voters and political opponents with every significant fact which

dishonor and disrepute and is hereby denounced.”).

141. Arieff, FBI Probe Itself Now Target: Williams resigns Senate Seat to Avert a Vote to Expel Him; Chapter on ABSCAM Is Closed, 40 CONG. Q. Wk. REP. 555 (1982).
bears on the conscientious performance of official duties of an incumbent or candidate. Compelling each member, candidate, and key staff member to reveal to public scrutiny a complete history of financial dealings is the most credible and legitimate role we can play.

If the question of ethics hinges on a faltering public trust in its elected officials, there is one best way to restore confidence: let the American people police their own politics. Let them go ahead and do the job. There is an inherent conflict of interest just in the fact that we are going to be policing ourselves. Give the public the facts and let the voters decide what is a conflict and what is proper.\textsuperscript{142}

Public disclosure, on a greatly expanded basis, should be the future direction of institutional Congressional reform efforts. In my view, the electorate is the best and should be the final judge of the ethical standards of a Member of Congress.

V. CONCLUSION

Have the efforts of Congress over the last two decades to address the public's purported lack of confidence in government been successful? Recent public opinion polls appear to suggest that our efforts are bearing fruit.\textsuperscript{143} As indicated previously, the conventional wisdom has been that public confidence in government has been on a downward course since the mid-1950's.\textsuperscript{144} Clearly, the decade of the 1960's raised lack of confidence in government to an art form. For example, in a 1967 poll, the Gallup organization found that sixty percent of those asked held the view that "shady conduct" among members of Congress was "fairly common."\textsuperscript{145} In 1971, Louis Harris found that between 1965 and 1971, the percentage of the public which gave the Congress a positive rating had declined from sixty-four to twenty-six percent.\textsuperscript{146} Similarly, a November 1971 Harris survey found that sixty-three percent of those questioned believed that politicians were "out to make money."\textsuperscript{147} This figure was up from fifty percent for those who answered the same question in 1967.\textsuperscript{148} The November 1971 Harris survey also found that fifty-nine percent of those queried believed that "most politicians take

\begin{footnotes}
\item[142] 123 CONG. REC. 8817 (1977).
\item[143] See supra note 4.
\item[144] D. YANKELOVICH, supra note 86, at 184.
\item[146] Id.
\item[147] Id.
\item[148] Id.
\end{footnotes}
An October 1972 Harris poll found that not one of the three branches of the federal government could generate more than a thirty percent confidence rating among those queried.

While those results are dismal, the trend over the last decade has become positive with respect to public confidence in government. More positive polling data was included in a January 4, 1987, Opinion Research Corporation poll of 1,014 interviewees. In that nation-wide poll, sixty-eight percent of the survey said that federal officials rate fair, good, or excellent with respect to "their ethical and moral practices."

These poll results tell me that the public's long held views that their government lacked popular confidence and that "ethics in government" was a contradiction in terms are finally being turned around in the decade of the 1980's. Congress has taken the lead in this effort, and the hard work which we engaged in over the years is coming to fruition. In my view, we are restoring America's confidence in its institutions and leaders.

The evidence before us supports the thesis that the confidence of the public in their government and in their elected officials is on the upswing. This positive result has occurred because of the role played by the Congress in adopting legislative solutions and internal reforms. However, we cannot be content to rest on our laurels. We must remain vigilant to the attitudes of the public. Confidence in government is essential to a functioning and responsive democracy. Public confidence rests solely on the public's perception that government officials serve only the public good. Ours is a system within which ethical considerations must be at the core of all actions by government. In giving direction to and support for such ethical considerations, the Congress is fulfilling the expectation of the public. Members of Congress understand that Congress cannot do less.

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149. Id.

150. Id.

151. See G. Gallup, supra note 4. For example, the poll released on November 27, 1986, found the following results in answers to the question: "Do you think the overall level of ethics and honesty in politics has risen, fallen or stayed the same during the past ten years?":

<table>
<thead>
<tr>
<th></th>
<th>1986</th>
<th>1983</th>
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<tbody>
<tr>
<td>Risen</td>
<td>17%</td>
<td>10%</td>
</tr>
<tr>
<td>Stayed the same</td>
<td>33%</td>
<td>26%</td>
</tr>
<tr>
<td>Fallen</td>
<td>42%</td>
<td>59%</td>
</tr>
<tr>
<td>No opinion</td>
<td>8%</td>
<td>5%</td>
</tr>
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Id.
