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NOTES

Conflicts of Interest and the Changing Concept of Marriage: The Congressional Compromise

The number of women, including married women, seeking prominent positions in American business and government has increased rapidly in recent years, and this development raises serious questions regarding potential conflicts of interest between spouses who work either in related areas of the public and private sectors or solely within the public sector. Specifically, when one spouse is a member of Congress, conflicts of interest can occur if the other spouse occupies a high-level position in private industry or in the executive branch of the government. This Note examines the potential dangers in these employment arrangements of members of Congress and their spouses to determine whether special constraints are warranted to combat potential conflicts of interest.


2. During the nation's formative years, few women held influential roles in government. E. JAMES, NOTABLE AMERICAN WOMEN, 1607-1950, at xviii-xxii (1974). No women held seats in the First (1789-1791), Twentieth (1827-1829), Fortieth (1867-1869), or Sixtieth (1907-1909) Congresses, and only eight women, all in the House, were members of the Eightieth Congress (1947-1949). Despite increased political activity by women, they are still a small minority in Congress. The Ninety-third Congress (1973-1975) included fourteen women, and the Ninety-fifth Congress (1977) has eighteen. At least one source contends that women still are "barely represented in the public life of the nation." CENTER FOR THE AMERICAN WOMAN AND POLITICS, WOMEN IN PUBLIC OFFICE xix (1976).

3. For example, in January 1976, Marion Javits resigned from a lucrative position with an advertising agency for which she handled the account of the government-owned airline of Iran. Her action was apparently in response to concerns raised by the press about potential conflicts of interest between her employment and the position of her husband, Sen. Jacob Javits (R-N.Y.), the ranking Republican on the Senate Foreign Relations Committee. N.Y. Times, Jan. 28, 1976, § 1, at 1, col. 6.

4. For example, Elizabeth Hanford Dole, wife of Sen. Robert Dole (R-Kan.), is a member of the Federal Trade Commission. Commissioner Dole has stated that she perceives no conflict of interest in this arrangement. N.Y. Times, Oct. 28, 1976, § 1, at 48, col. 1. However, Rep. John E. Moss (D-Cal.), Chairman of the House Commerce Oversight Committee, and Rep. Joe L. Evins (D-Tenn.), Chairman of the House Small Business Committee, called on Commissioner Dole either to resign from the Commission or to refrain from participating in her husband's 1976 vice-presidential campaign. [1976] ANTITRUST & TRADE REG. REP. (BNA) No. 782 at A-5. In a speech on the floor of the House, Rep. Evins stated, "I am sympathetic with Mrs. Dole to the situation confronting her—loyalty to her husband or loyalty to the Commission." Id. at A-6.

5. It should be noted that, although this Note specifically deals only with con-
it scrutinizes the degree to which our society views marital partners as autonomous, the interests protected by current conflict-of-interest regulations, and the extent to which the rigor of general conflict provisions has been mitigated with respect to the marital relationship. Concluding that safeguards against conflicts of interest are necessary in husband-wife employment situations involving a member of Congress, the Note examines the possible forms such regulation could take and recommends the creation of an independent ethics commission.

I. THE AMERICAN CONCEPT OF MARRIAGE

The effort to determine the present societal view on the degree of autonomy of spouses is aided by a brief examination of the historical evolution of the marital relationship. At English common law, unmarried women, although subject to some unequal treatment, had property and contractual rights almost coextensive with those of men. It was the rite of marriage that resulted in the loss of many rights and privileges for the woman. Because the English common
law was generally adopted in the territories that later became the United States, marriage converted American women of the late eighteenth century into "legal cipher[s]." For example, the doctrine of coverture resulted in numerous disabilities for married women with respect to their property. At marriage the husband could assume managerial control of the wife's real property with no duty to account for any rent or other income. A married woman thus generally lost the power to convey her land. Most "tangible personality" held by a woman at marriage instantly became her husband's property, as did any personality that later came into her possession during the marriage. Under curtesy principles, if a child was born of the marriage, the husband received a life estate in all of his wife's realty obtained prior to or during the marriage.

Beginning in 1839, all states enacted statutes that somewhat ameliorated the common-law limitations on a married woman's legal rights. These laws generally allowed her to manage and control property held by her prior to the marriage. The attempts at change often met with fierce opposition, and the victory for the rights of married women was by no means absolute. Many of the statutes were enacted in piecemeal fashion over extended periods of time and as a result were not comprehensive. Furthermore, courts often strictly took control of all the wife's personal property, he gained considerable power over the disposition of her real property, and she lost the ability to make contracts. H. CLARK, LAW OF DOMESTIC RELATIONS § 7.1, at 219-20 (1968). For a further outline of British common-law disabilities, see P. BROMLEY, FAMILY LAW 758-61 (P. Webb ed. 1974); W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 520-33 (3d ed. 1923). The woman's subservient role in the marital relationship is also proclaimed in the Old Testament, where she is viewed as a piece of property comparable to the man's house or oxen. See Exodus 20:17.


10. Johnston, supra note 9, at 1046. It is probable that even in the late eighteenth century a married American woman had virtually no independence from her husband. Id. at 1059. Statements on this point must be tentative because of the dearth of reliable research. Id. at 1057-58. Marriage imposed on the husband certain obligations such as support and dower and made him liable for the wife's torts, but it did not directly constrain him. See L. KANOWITZ, supra note 7, at 36-37.

11. L. KANOWITZ, supra note 7, at 36.

12. Id. The husband could convey only his interest in the property (known as jure uxoris), which entitled him to sole possession and control during the marriage. Johnston, supra note 9, at 1045.

13. Id.

14. Id.


16. L. KANOWITZ, supra note 7, at 40.

17. See Johnston, supra note 9, at 1063-67.

18. See id.
construed the legislation to limit greatly any effects in derogation of common-law principles. Generally, however, the pre-1900 legislative activity featured, as one court put it, "unjust rules slowly giving way before advancing civilization." The gradual recognition of the property rights of the married woman is now widely viewed as virtually complete, and this development might suggest a general acceptance of the autonomy of each partner in the marital relationship.

A similar process of gradual reform has given the married woman the right to contract, including the ability to obtain credit independent of her husband, and the right to retain separately any income she earns during the marriage. In other areas, however, the trend toward autonomy has not been completed. For instance, there is a long-standing custom that a woman will assume her husband's surname after marriage. Although this convention does not affect the woman's legal or financial status, it stands as a symbol of the wife's lack of separate identity from her husband and might therefore be viewed as an extension of common-law coverture policies. Despite a growing number of deviations, the legal en-


20. Whiton v. Snyder, 88 N.Y. 299, 303 (1882). One rule that proved to be highly resistant to change was the restriction on a married woman's power to convey her own land. In 1913, twenty states required the involvement of the husband in such real-property transactions, and eight states still followed the rule in 1935. Johnston, supra note 9, at 1078. Today only Alabama retains the rule. Ala. Code § 30-4-12 (1977). For a relatively recent application of the statute, see Daniel v. Haggins, 286 Ala. 409, 240 So. 2d 660 (1970).


22. A decreasing number of jurisdictions retain common-law provisions limiting the right of a married woman to contract or to conduct a business. In 1935 sixteen jurisdictions (including the District of Columbia, Alaska, and Hawaii), thirteen of which were non-community property jurisdictions, restricted the contracting ability of married women. Johnston, supra note 9, at 1076. At the same time, eleven states, seven of which were non-community property jurisdictions, placed restrictions on a married woman's ability to engage in business. Id. By 1965, twelve states, seven of which were non-community property states, still limited the ability of married women to contract. United States v. Yazell, 382 U.S. 341, 351 (1966). As of 1972, there were still nine states with such restrictions, Johnston, supra note 9, at 1076 n.179, despite the Supreme Court view that the principles supporting these constraints are "peculiar" and "obsolete." 382 U.S. at 351.

23. See Note, supra note 15, at 77.

24. It appears that by 1943 all non-community property states recognized this right. Johnston, supra note 9, at 1070. Nevertheless, it is noteworthy that married women have no enforceable right against their husbands for the value of their labor in domestic activities.

25. See L. KANowitz, supra note 7, at 41.

26. Iowa, for example, once did not allow a married woman to retain her maiden name, even through use of the state's name-changing process. Iowa Code Ann. § 674.1 (West 1947). This restriction has since been removed. See Iowa Code § 674.1 (1975).

State courts in Ohio and Maryland have held that their state common law does
Enforcement of this tradition clearly retains some vitality. A similar reluctance to change traditional views of the marital relationship characterizes the law of support and the legal presumption that spouses share a common domicile.

Much of the rationale for the disabilities imposed on married women is found in legal theory based on the Biblical notion that spouses are “one flesh.” Marriage was seen as the union of man


27. See Hughes, And Then There Were Two, 23 Hastings L.J. 233 (1971). A United States district court found that an Alabama requirement that a woman “assume her husband’s surname upon marriage has a rational basis and seeks to control an area where the state has a legitimate interest.” Forbush v. Wallace, 341 F. Supp. 217, 222-23 (M.D. Ala. 1971). This ruling was affirmed without opinion by the Supreme Court. 405 U.S. 970 (1972). The Sixth Circuit relied on Forbush to affirm an unwritten Kentucky requirement that a married woman use her husband’s surname in applying for a driver’s license despite a showing that for all other purposes the woman had continued to use her maiden name. Whitlow v. Hodges, 539 F.2d 582 (6th Cir.), cert. denied, 429 U.S. 1029 (1976).

28. At common law, one of the few compensations the wife received in exchange for the legal disabilities she incurred through marriage was the guaranteed financial support of her husband. Johnston, supra note 9, at 1046. It is still the general rule that the primary obligation for family support rests on the husband. L. Kanowitz, supra note 7, at 69-70. Although some states assert a wifely duty to support the husband under certain circumstances, see id., such as when the husband is poor or disabled, see id. at 69 nn.219 & 220, these provisions are not meant to create egalitarianism in the marital relationship. This legal philosophy regarding the husband's financial duty, expressed most often in alimony determinations, reflects a view that marriage relationships are asymmetrical. So long as there is discrimination against women in the job market and substantial numbers of traditional marriages exist, there are practical justifications for this policy.

It should be noted that “duty to support” laws may restrict the freedom to use interspousal contracts to redefine marriage. See Note, Marriage as Contract: Toward a Functional Redefinition of the Marital Status, 9 Colum. J.L. & Soc. Prob. 607, 619 (1973). See generally Note, supra note 6.

29. The statutes or common law of many states have perpetuated the idea that a married woman assumed the domicile of her husband irrespective of her own wishes. See Restatement (Second) of Conflict of Laws § 21, Comment a (1971). See also Landry v. Landry, 192 So. 2d 237, 239 (La. Ct. App. 1966): “It is too well settled to require citation of authority that a married woman can have no other domicile than that of her husband except in those cases where the husband’s misconduct compels or justifies her in leaving him and establishing a separate domicile elsewhere.”

There has recently been increased recognition that the wife may acquire a separate domicile if special circumstances make it unreasonable for husband and wife to share the same home. See Restatement (Second) of Conflict of Laws § 21, Comment d (1971). Nevertheless, courts generally follow the presumption that a husband and wife share a common domicile, although some are reducing the standards for rebutting that presumption. For example, in Ashmore v. Ashmore, 251 So. 2d 15, 17 (Fla. Dist. Ct. App. 1971), cert. dismissed, 256 So. 2d 513 (Fla. 1972), the court held that, based on the dictates of “common sense,” a woman could retain her own domicile. The wife’s forced acceptance of the husband’s domicile has also been modified in some states. See Weitzman, Legal Regulation of Marriage: Tradition and Change, 62 Calif. L. Rev. 1169, 1177 (1974).

and woman into one "person," legally recognizable as the man. 31

One curious result of this concept is the doctrine that a married couple cannot be guilty of conspiracy between themselves because they are legally a single entity. 32

The Supreme Court has indicated that it is dissatisfied with the perception of a married couple as one "person." In Eisenstadt v. Baird, 33 which involved a ban on the distribution of contraceptives, the Court stated that a married couple "is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." 34 In United States v. Dege, 35 involving a criminal conspiracy, the Court, in an opinion by Justice Frankfurter, stated that it refused "to be obfuscated by medieval views regarding the legal status of woman and the common law's reflection of them." 36 Justice Frankfurter found the assertion that "a wife must be presumed to act under the coercive influence of her husband" to imply "a view of American womanhood offensive to the ethos of our society," 37 and he asserted that the legal submission of wife to husband no longer existed. 38 Similar recognition of the independence of spouses has also occurred in state cases. 39 There thus seems to be a clear judicial preference

31. I W. BLACKSTONE, COMMENTARIES *441-43. Several variations on this theory exist. Some commentators explain that the husband is the wife's guardian, casting the man as the "protector" of his wife. See 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 406, 414 (2d ed. 1898). Others have viewed marriage as a contractual relationship in which the husband's protection and support are tendered in return for the general services of the wife. See Johnston, supra note 9, at 1047-48. Under a male-dominance theory, some have seen married women as properly subject to the control of their husbands. See M. RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 524 (1936). This theory holds that one partner must lead—and the man is better groomed for that role. J. BENTHAM, PRINCIPLES OF THE CIVIL CODE, in 1 WORKS OF JEREMY BENTHAM 355-56 (J. Bowring ed. 1838).


33. 405 U.S. 438 (1972).
34. 405 U.S. at 453.
36. 364 U.S. at 52.
37. 364 U.S. at 53.
38. 364 U.S. at 54. This development is not recent: Justice Holmes' opinion for the Court in Williamson v. Osenton, 232 U.S. 619, 625 (1914), rejected the marital unity doctrine.

39. See, e.g., Gates v. Foley, 247 So. 2d 40, 44 (Fla. 1971):

So it is that the unity concept of marriage has in a large part given way to the partner concept whereby a married woman stands as an equal to her husband in the eyes of the law. By giving the wife a separate equal existence,
that only minimal impairment of marital partners’ autonomy should exist.

Several current governmental policies create a special status for marital partners. The taxation structure of the Internal Revenue Code differentiates between married and single persons. This distinction presumably exemplifies Congress’ view that financial interdependence is a part of marriage and warrants different treatment by the taxation statutes. Assistance programs of the Department of Health, Education, and Welfare sometimes have assumed that a family is dependent on the earning ability of the male, with the female cast in a stereotypical “mother’s” role. Guidelines for the development of state assistance plans under Title IV of the Social Security Act have in recent years expressed concern about the proper certification of “unemployed fathers” and have assumed that the “mother or caretaker relative” is to make the choices about certain types of child care. A statutory presumption that spouses are highly interdependent can also be found in the laws governing some state assistance programs. Similar role stereotypes have been prevalent in other governmental programs as well.

the law created a new interest in the wife which should not be left unprotected by the courts. Medieval concepts which have no justification in our present society should be rejected. Similarly, the California Supreme Court has rejected the “assumption that a wife invariably acts under the compulsion of her husband, particularly in view of the advanced status of married women.” People v. Pierce, 61 Cal. 2d 879, 881-82, 395 P.2d 893, 895, 40 Cal. Rptr. 845, 847 (1964) (Traynor, C.J.). Chief Justice Traynor, with tongue in cheek, observed that the “fictional unity of husband and wife has been substantially vitiated by the overwhelming evidence that one plus one adds up to two, even in twogetherness.” 61 Cal. at 880, 395 P.2d at 894, 40 Cal. Rptr. at 846.

40. If ratified, the Equal Rights Amendment may alter many governmental policies, but many of the ramifications for marital partners are not yet known. See generally Lecsen, supra note 6.

41. See, e.g., I.R.C. §§ 1, 141.

42. For example, the system of joint returns allows married couples in common-law states to pay the same low rates already permitted for couples in community property states, where state law reflected this concept of shared income within the marital unit. See B. Bittker & L. Stone, Federal Income, Estate, and Gift Taxation 346-48 (4th ed. 1972).


44. 45 C.F.R. § 220.35(b)(5) (1975). See note 45 infra.


47. 42 U.S.C. § 402(f)(1)(D) (1970) conditioned a widower’s receipt of Old Age, Survivors, and Disability Insurance (OASDI) benefits on proof that he received at least one-half of his support from his spouse prior to her death. A widow, however, was not required to provide such proof. 42 U.S.C. § 402(e)(1) (1970 & Supp. V 1975). Noting that this scheme of benefit distribution was in part based on a
There are, of course, limits to the usefulness of measuring society's view of a subject by reference to its laws. First, there is nearly always a "time lag" between the point at which a societal trend develops and the point at which the legislature responds to it. Second, because current trends tend to regard the marital relationship as being jointly designed by largely independent marital partners, it may be that the subject does not lend itself to specific legislative action. In any event, commentators have differed on whether the law has kept pace with the rapid evolution of the societal concept of marriage. The only safe statement is that the current trend is toward greater independence of each marital partner

presumption that wives are usually dependent, the Supreme Court struck down this regulation in Califano v. Goldfarb, 97 S. Ct. 1021 (1977). The Court said that "[t]he only conceivable justification for writing the presumption of wives' dependency into the statute" was based on assumptions that "do not suffice to justify a gender-based discrimination in the distribution of employment-related benefits." 97 S. Ct. at 1032.

48. See Johnston, supra note 9, at 1072.

49. One contemporary source states that [m]arriage bonds are loosening under the strains of broad social and economic shifts in the nation at large—among them the quest of women for equality in the home and 'fulfillment' in outside careers." The American Family, supra note 1, at 30. H. CLARK, supra note 8, § 7.2, at 223, also notes these trends, citing nonlegal materials such as B. FRIEDAN, THE FEMININE MYSTIQUE (1963); S. DE BEAUVIOIR, THE SECOND SEX (1953); and M. MEAD, MALE AND FEMALE (1955).

Opinions differ on whether contemporary laws reflect this changing societal view of marriage. A task force on family law and policy has stated that the laws of the United States hold marriage to be a partnership in which each spouse makes a different but equally important contribution. Report of the Task Force on Family Law and Policy to the Citizens' Advisory Committee on the Status of Women (1968), reprinted in WOMEN AND THE "EQUAL RIGHTS" AMENDMENT 408 (C. Stimpson ed. 1972). Other commentators, however, have maintained that the laws have failed to keep pace with the status of women in society. One writer noted that [t]he succinct comment of the 1848 Seneca Falls Declaration—"He has made her, if married, in the eye of the law civilly dead"—still has weight when applied to such matters as division of property after marriage, restrictions on use of a woman's maiden name, choice of legal residence, etc. Such discriminatory laws have deprived women of equal status in a number of ways.

I. MURPHY, PUBLIC POLICY AND THE STATUS OF WOMEN 15 (1973) (footnote omitted). This viewpoint was reiterated in a resolution adopted by the National Organization of Women (NOW):

Whereas, woman's position in society rises no higher than woman's position in the marital relationship, and
Whereas, it is within the home and family that children first learn sex-role and identity from observation and training, and it is in the family that long-range changes must be initiated, if there ever is to be equal partnership of men and women in society, and
Whereas, marriages are based on unwritten contracts, many of which fail to insure equality of the marriage partners, and
Whereas, many of the inequities we are combatting in employment, education, etc. are based on the inequalities existent in the marriage relationship,
Therefore, be it resolved
That, NOW sets as one of its highest priorities in 1974-75 equality in the marriage relationship.

Do It Now, October 1974, at 8.
and greater equality in the marriage. It seems that, if this trend should reach the status of a societal goal, the chances are good that it will thereafter be reflected in the laws of the nation.

II. THE AMERICAN CONCEPT OF CONFLICT OF INTEREST

Conflict of interest regulation is designed to identify and prevent the occurrence of those situations conducive to improper decision-making by public officials. Such situations are commonly considered to exist when the public official finds it difficult if not impossible to devote himself with complete energy, loyalty, and singleness of purpose to the general public interest. The advantage that he seeks is something over and above the salary, the experience, the chance to serve the people, and the public esteem that he gains from public office. 50

A further purpose of regulation is to prevent situations from arising that increase the appearance of likely impropriety. 51

Although it is fairly easy to define "conflict of interest" in the abstract, identifying conflicts in specific situations is more difficult. 52 Nevertheless, there is steady political pressure at various governmental levels for increased scrutiny and regulation of possible improprieties. 53 In determining whether husband-wife employment combinations require regulation, it is necessary to analogize from existing constraints on conflicts, since detailed attention has not been given to the marriage partner-conflicting employment problem. In so doing one must first identify the public interests promoted by such policies.

A. The Doctrine of Incompatible Offices

Perhaps the most specific conflict of interest doctrine provides

50. MINN. GOVERNOR'S COMMN. ON ETHICS IN GOVERNMENT, ETHICS IN GOVERNMENT 17 (1959).
52. See 70 W. VA. L. REV. 400, 400 (1968), which states: "In describing a 'conflict of interest' one is faced with a very difficult task. Much like 'sin,' few can define a conflict of interest, yet all are against it." Recently, executive and legislative bodies of government have been primarily responsible for developing definitions of conflict of interest.
53. In the early 1960s, Professor Bayless Manning saw conflict of interest considerations as a major concern of American society:

Conflicts of interest have become a modern political obsession in this country, first, because American politics is highly susceptible to morality escalation and, second, because we are living in an era of unparalleled honesty in public administration when we can afford the luxury of worrying about public harms before they happen.

that it is improper for one person to hold simultaneously two public offices deemed to be "incompatible." Although traditionally the doctrine has been applied only when the two positions were held by the same person, its underlying rationale arguably would extend to a husband and wife holding the positions, at least if the spouses were viewed as an entity. Under federal law, article I of the Constitution recognizes the doctrine by including the prohibition that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." This provision reflects four basic concerns of the framers. First, they feared that if officials held state and federal office simultaneously the inevitable preference for one or the other would create a threat to federalism. Second, the fundamental concept of separation of

Politicians as well as political groups and commentators have expressed concern over conflicts of interest. President Kennedy, in an April 1961 message to Congress, stated:

No responsibility of government is more fundamental than the responsibility of maintaining the highest standards of ethical behavior by those who conduct the public business. There can be no dissent from the principle that all officials must act with unwavering integrity, absolute impartiality, and complete devotion to the public interest.

17 Cong. Q. 918 (1961). President Carter, too, is concerned with limiting conflicts of interest in his administration. See N.Y. Times, Jan. 5, 1977, § 1, at 1, col. 6. Earlier, Common Cause, the public-interest lobbying group, had called for a fundamental overhaul of existing conflict of interest regulations after it had charged that the integrity and objectivity of decisions made by many federal agencies are seriously undermined by actual or potential conflicts of interest among agency officials and consultants. N.Y. Times, Oct. 21, 1976, § 1, at 22, col. 3.

Three factors explain the heightened interest in conflict of interest problems. First, the problem of conflicts of interest has become a political issue. Many observers once felt that conflicts of interest created "situations in which the behavioral norms are not self-evident; campaign issues are, by contrast, normally gross and easily understood." Note, supra note 51, at 1213. Accord, Note, Conflicts of Interest of State and Local Legislators, 55 Iowa L. Rev. 450, 451 (1969). In recent years, however, conflict of interest allegations have been viewed as potent political weapons. See Comment, Public Officials: The Constitutional Implications of Mandatory Public Financial Disclosure Statutes, and a Proposal for Change, 1971 Law and Soc. Ord. 104, 104-05 (1971).

Second, the press has scrutinized potentially conflicting situations with increasing vigilance. Id. at 104. Because there is no generally accepted definition of "conflict of interest," the press can often supply not only the relevant facts but also the standards by which the public is expected to judge a possible conflict of interest, as illustrated by the Marion Javits episode. See note 6 supra.

Third, legislatures, particularly at the state level, have been prolific in their production of conflicts of interest legislation. Especially noteworthy are the laws passed by several states that require substantial financial disclosure by candidates and officeholders. See, e.g., Ill. Stat. Ann. §§ 604A-101 to -107 (Smith-Hurd 1975); Cal. Govt. Code §§ 87200-87202 (West 1975).

54. There is little doubt that the incompatible-office doctrine is a form of conflict of interest regulation. See Note, Conflict of Interests: State Government Employees, 47 Va. L. Rev. 1034, 1075 (1961). For example, United States v. Brown, 381 U.S. 437, 453 n.28 (1965), refers to incompatible office provisions as being conflict of interest laws.


56. See 1 J. Story, Commentaries on the Constitution of the United States
powers would be endangered if a person could hold positions in more than one branch of government.\textsuperscript{57} Third, there was concern that legislators holding other positions might not act in the general public interest.\textsuperscript{58} Finally, the provision manifests a view that corruption could result from allowing one person to hold too much power.\textsuperscript{59}

These general principles survive, but, even though the paucity of cases under the incompatibility clause makes generalization difficult, today most emphasis is probably placed upon the concerns involving corruption and separation of powers. In \textit{Reservists Committee To Stop the War v. Laird},\textsuperscript{60} a federal district court concluded that the incompatibility clause prevented members of Congress from holding commissions in the armed forces reserves during their terms of office.\textsuperscript{61} On appeal, the Supreme Court reversed on the ground that plaintiffs had no standing to challenge the alleged violation, and it therefore did not reach the merits. Justice Douglas, in dissent, stated that concerns about corruption are the foundation of the clause which in his view provided a "specific bulwark against . . . potential abuses."\textsuperscript{62}

Many states also have constitutional provisions proscribing incompatible offices for legislators. These prohibitions generally cover offices within the state government,\textsuperscript{63} offices in other state

\begin{enumerate}
\item \textsuperscript{57} James Madison asserted that the incompatibility clause established a crucial guard against "the danger of executive influence upon the legislative body." \textit{The Federalist} No. 76, at 476 (H. Lodge ed. 1888).
\item \textsuperscript{58} \textit{See J. Story, supra note 56, at 635.}
\item \textsuperscript{59} \textit{C. Warren, The Making of the Constitution} 618 (1947); \textit{Watson, supra note 56, at 1038.}
\item \textsuperscript{61} "The interest in maintaining independence among the branches of government is shared by all citizens equally, and . . . this is the primary if not the sole purpose of the bar against Congressmen holding executive office." 323 F. Supp. at 841. On the Court's concern with incompatible offices, see \textit{Buckley v. Valeo}, 424 U.S. 1, 124 (1976). \textit{Cf. O'Donoghue v. United States}, 289 U.S. 516, 530 (1933) (stressing the importance of separation of powers, especially an independent judiciary).
\item \textsuperscript{62} 418 U.S. at 232 (quoting \textit{Flast v. Cohen}, 392 U.S. 83, 104 (1968)).
\item \textsuperscript{63} A relatively recent report indicates that 37 states have constitutional provisions stating that persons may not be seated in the state legislature if they hold certain other positions in the state government. \textit{Legislative Drafting Research Fund of Columbia University, Index Digest of State Constitutions}, 662-63 (2d ed. 1959 & Supp. 1971) (hereinafter cited as INDEX). \textit{See, e.g., Ill. Const. art. IV, § 3; Tex. Const. art. III, § 19.}
\end{enumerate}

The constitutions of 24 states bar the appointment of a member of the legislature
governments, and offices in the federal government. Although it is often difficult to ascertain the purpose of these provisions, they probably were motivated by concerns similar to those that led to the adoption of the Constitution's incompatible-office clause.

The common law also prevented a person from holding incompatible offices. Although the courts have established no clear rules on what constitutes an incompatible office, a variety of tests to other offices created by or given salary increases by the legislature. INDEX, supra, at 663-64. See, e.g., N.D. Const. art. II, § 39.

64. Twelve state constitutions generally prohibit legislators from holding positions in the government of another state. INDEX, supra note 63, at 666. See, e.g., Tex. Const. art. XVI, § 12; S.C. Const. art. III, § 24.


66. For example, in commenting on the convention that drafted the separation of powers provisions in the Virginia constitution, Thomas Jefferson stated: "[T]hat convention . . . laid its foundation on this basis, that the legislative, executive, and judicial departments should be separate and distinct so that no person should exercise the powers of more than one of them at the same time." T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA, 1781-1785, ch. 13, reprinted in S. PADOVER, THE COMPLETE JEFFERSON 649 (1943). Note, however, Baker v. Hazen, 133 Vt. 433, 437, 341 A.2d 707, 710 (1975), where the court stated that it was forced to construe the state constitutional provision on incompatible offices "[w]ith an uncertainty of the measure of the mischief sought to be prevented."

Jefferson's incompatible-duties doctrine has been followed in many cases. Monaghan v. School Dist. No. 1, 211 Ore. 369, 315 P.2d 797, 804 (1957), construed state constitutional provisions that focused, as Jefferson did, on separation of duties, as proscribing a public school teacher from simultaneously serving as a state legislator, since he was charged with "functions of another department of government."

With almost equal frequency, state courts view incompatible-office restraints as intended to prevent the accumulation of too much power in the hands of a single person. In McCutcheon v. City of St. Paul, 298 Minn. 443, 447, 216 N.W.2d 137, 139 (1974), the Minnesota court expressed concern about individuals put in the position of being able to make policy decisions not subject to supervision. Similarly, in State ex rel. Harris v. Watson, 201 N.C. 663, 161 S.E. 215, 216 (1931), the North Carolina court interpreted the state constitution's incompatible-office provision as intended to prevent the accumulation by a single person of offices of public trust.

Some courts have viewed potential for corruption as another concern underlying incompatibility clauses. For example, the Arizona court in State ex rel. Pickrell v. Myers, 89 Ariz. 167, 359 P.2d 757, 759 (1961), held that the Arizona constitution's incompatibility clause is intended to prevent legislative control over an office that a legislator might hold.


68. This situation is best explained in Lilly v. Jones, 158 Md. 260, 265, 148 A. 434, 436 (1930):

The courts, because of the difficulty in laying down any clear and comprehensive rule as to what constitutes incompatibility of offices, have evaded the formulation of any definition, and as a rule have contented themselves with the discussion of the facts of the case under consideration, in connection with similar and analogous facts in other cases. See also Knuckles v. Board of Educ., 272 Ky. 431, 435, 114 S.W.2d 511, 514 (1938).
have been suggested. Some courts apply the doctrine of incompatibility if one position is subordinate to the other. Others consider whether one office holds the power of appointment to the other or whether one position is responsible for auditing the accounts of the other. Increasingly, however, courts are applying a more general conflict of interest standard by determining whether the functions of the offices are inherently inconsistent and repugnant. Regardless of the test used, the underlying concerns are generally the same: the interest in deterring corruption, the interest in the undivided loyalty of the officeholder, and the interest in maintaining public confidence in the legitimacy of government.


72. See People ex rel. Chapman v. Rapsey, 16 Cal. 2d 636, 641-42, 107 P.2d 388, 391-92 (1940). But see Reilly v. Ozzard, 33 N.J. 529, 166 A.2d 360 (1960), where the court attempted to distinguish conflicts of interest from conflicts of duties. In Reilly, the court maintained that conflicts of duty occur when incompatibility inheres "in the very relationship of one office to the other and is contemplated by the scheme of governmental activities, albeit the occasions may be rare." 33 N.J. at 549, 166 A.2d at 370. Conflicts of interest, however, arise from specific circumstances. In short, conflicts of interest are thought to require case-by-case consideration, while conflicts of duty arise from the nature of the offices themselves regardless of the particular situation. 33 N.J. at 549-50, 166 A.2d at 370. This distinction may, however, be academic. See Note, supra note 54, at 1075.

73. The common law seemed only minimally concerned with separation of powers. In Poynter v. Walling, 54 Del. 409, 415, 177 A.2d 641, 645 (1962), the court took notice of the fact that the doctrine of separation of powers had not been "adhered to with theoretical rigor." Noting constitutional changes in several states, the court said that "the inference may be drawn that partial relaxation of the doctrine of separation of powers is not repugnant to the will of the people." 54 Del. at 415, 177 A.2d at 645 (quoting In re Opinion of the Justices, 47 Del. (8 Terry) 117, 136, 88 A.2d 128, 138 (1952)). See also Jewett v. Williams, 84 Idaho 93, 369 P.2d 590 (1962), where the court maintained that a state constitutional provision required only that "the basic powers of the sovereignty . . . must remain separate, [and] not subsidiary activities" such as the ascertainment of fact, investigation, and consultation. 84 Idaho at 100, 369 P.2d at 594. This position should be contrasted with the federal constitutional concerns about separation of powers evidenced by the incompatible-office clause. See note 57 and accompanying text and note 61 supra.

74. See Lilly v. Jones, 158 Md. 260, 266, 148 A. 434, 436 (1930), where the court supported a presumption under the incompatible offices doctrine that a dual officeholder might be incapable of executing both responsibilities honestly. In State ex rel. Hover v. Wolven, 175 Ohio St. 114, 116, 191 N.E.2d 723, 725 (1963), the court referred to the danger of one office being used to accomplish purposes and duties not otherwise possible for the other office.


In summary, the incompatible office doctrine identifies and protects at least five societal interests. First, it seeks to guard the separation of powers among the three branches of the federal government. Second, it aims to prevent a concentration of undue power in one public official. Third, it is designed to discourage corruption. Fourth, it attempts to foster the undivided loyalty of officeholders to the public interest. Finally, it hopes to maintain public confidence in the integrity of government.

B. Regulation by Statutes and Codes of Ethics

Federal statutes and codes of ethics, like the incompatible office doctrine, seek to restrain possible conflicts of interest. Congress enacted legislation in 1962\(^77\) designed to strengthen and consolidate the existing conflicts regulation.\(^78\) These statutes are important to the present inquiry not so much for their substantive content as for the aid they give in identifying the general interest protected by typical conflicts legislation. The two statutes directly applicable to members of Congress\(^79\) merely prohibit them from representing private parties in agency matters in which the United States is a party or has a substantial interest\(^80\) and from practicing as attorneys in the Court of Claims.\(^81\) The legislative history of predecessor statutes of the section involving agency matters demonstrates congressional concern about possible corruption and about the exercise of undue influence in public decisionmaking.\(^82\) and, according to one source,

81. 18 U.S.C. § 204 (1970). Neither the legislative history nor subsequent judicial interpretation clearly indicates what interests are to be protected by § 204. In perhaps the most helpful statement on the subject, the Supreme Court found the purpose of a predecessor statute to be “to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service.” Ex parte Curtis, 106 U.S. 371, 372 (1882).
82. The general provisions of the current § 203 originated in a statute approved in 1864. 13 Stat. 123 (1864), noted in Manning, supra note 53, at 239 n.8. 18 U.S.C. § 281 (1958) left this section essentially unchanged.

In Burton v. United States, 202 U.S. 344, 366 (1906), the Supreme Court cited corruption and undue influence as the dangers sought to be avoided by enactment of the predecessor to § 203:

[The statute has for its main object to secure the integrity of executive action against undue influence upon the part of members of that branch of the Government whose favor may have much to do with the appointment to, or retention in, public position of those whose official action it is sought to control or direct.
the provision "is broadly worded in order to cover all the multifarious forms of influence peddling whereby a member of Congress accepts compensation for acts and decisions made in his official capacity." In commenting generally on the 1962 legislation, the House Judiciary Committee provided an excellent summary of the interests it intended to protect:

The proper operation of a democratic government requires that officials be independent and impartial; that Government decisions and policy be made in the proper channels of the governmental structure; that public office not be used for personal gain; and that the public have confidence in the integrity of its government. The attainment of one or more of these ends is impaired whenever there exists, or appears to exist, an actual or potential conflict between the private interests of a Government employee and his duties as an official. The public interest therefore, requires that the law protect against such conflicts of interest and establish appropriate ethical standards with respect to employee conduct in situations where actual or potential conflicts exist.

Congressional interest in neutrality in decisionmaking and in freedom from corruption is also indicated by the House rule prohibiting members of Congress from voting on matters in which they have private interests.

The various codes of ethics that Congress has adopted over the years provide further examples of that body's attitude on conflicts

The Court goes on to note that the attending evils are increased when financial reward is involved. 202 U.S. at 368.

In United States v. Reisley, 35 F. Supp. 102 (D.N.J. 1940), the district court asserted that prevention of corruption was the major concern of the same statute. The court, in referring to several conflict of interest statutes, stated: "Congress has enacted numerous statutes with the purpose of safeguarding the integrity of the public administration and has made penal many actions by public officers which would result in corruption in government." 35 F. Supp. at 104. In United States v. Anderson, 509 F.2d 312, 333 (D.C. Cir. 1974), the court construed new § 203 as embodying these same concerns.

83. Krasnow & Lankford, supra note 79, at 272.
85. H.R. REP. No. 748, 87th Cong., 2d Sess. 5-6 (1961). A similar report from the Senate Judiciary Committee, less specific in pinpointing the interests to be protected, mentioned preventing "unethical conduct," S. REP. No. 2213, 87th Cong., 2d Sess. (1962), reprinted in [1962] 2 U.S. CODE CONG. & AD. NEWS 3852, 3853, and preserving "integrity." Id. at 3856. At least one other statute regulates conflicts of interest involving members of Congress. 46 U.S.C. § 1223(e) (1970) makes it unlawful for a contractor or charterer operating under the Merchant Marine Act to employ a member of Congress as "an attorney, agent, officer, or director."
86. "Every Member . . . shall vote on each question put, unless he has a direct
of interest. The first code,\(^\text{87}\) passed in 1959 after Congress had felt considerable pressure to provide guidelines,\(^\text{88}\) is applicable to all federal employees.\(^\text{89}\) Its rather general provisions reveal the desire to prevent corruption,\(^\text{90}\) to retain undivided loyalty to the public interest,\(^\text{91}\) and to maintain public confidence in government.\(^\text{92}\)

In 1968, the Senate and House passed resolutions that established separate, stringent ethics codes for each chamber and required financial disclosure by members of Congress.\(^\text{93}\) The codes of both houses stressed the need to prevent corruption and to maintain loyalty to the public interest.\(^\text{94}\) These same themes are evidenced in numerous 1977 amendments that create more stringent ethics

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The prohibition is traced to Thomas Jefferson's manual on parliamentary practice, which states:

> Where the private interests of a member are concerned in a bill or question, he is to withdraw. And where such an interest has appeared, his voice has been disallowed, even after a division. In a case so contrary, not only to the laws of decency, but to the fundamental principle of the social compact, which denies to any man to be a judge in his own cause, it is for the honor of the House that this rule, of immemorial observance, should be strictly adhered to.

U.S. CONGRESS, CONSTITUTION OF THE UNITED STATES (CONSTITUTIONAL MANUAL RULES) 78 (1860-1861).


89. The code's legislative history indicates that the code applies to members of Congress. S. REP. No. 1812, 85th Cong., 2d Sess. 2 (1958).

90. This interest is most visible in the prohibition on taking “favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of . . . governmental duties.” Further, government employees are commanded to “[e]xpose corruption wherever discovered” and to “[n]ever use any information coming . . . confidentially in the performance of governmental duties as a means for making private profit.” H.R. Con. Res. 175, 85th Cong., 2d Sess., 72 Stat. 1312 (1958).

91. H.R. Con. Res. 175, 85th Cong., 2d Sess., 72 Stat. 1312 (1958), manifested concern about the “dispensing of special favors or privileges to anyone” and engaging in business with the Government “inconsistent with the conscientious performance of . . . governmental duties.”

92. The code contains a general admonition to “[u]phold these principles, ever conscious that public office is a public trust.” H.R. Con. Res. 175, 85th Cong., 2d Sess., 72 Stat. 1312 (1958).


codes and require more complete financial disclosure. Both houses of Congress now require that members report personal financial information, which is subsequently disclosed to the public, indicating congressional concern for the interest in maintaining public confidence in the integrity of the government.

The many interests identified thus far as meriting protection in conflicts of interest regulation may be refined into three broad societal norms. First, the regulation should assure that the government functions in a manner representative of the people it is designed to serve. This category thus includes the public interest in promoting undivided loyalty of officeholders to the public interest and in preventing officials from using their positions for personal gain or for similar private purposes. Second, the citizenry should have faith in the efficient and ethical operation of its government. In order to promote a high level of public confidence, conflict of interest provisions regulate situations in which the appearance of governmental impropriety is present. Third, the conflicts of interest regulation

97. Commentators have generally cited "undivided loyalty" as a concern underlying conflict of interest regulation. As phrased by one author, "[a]n officer whose private interests would prevent him from exercising impartial judgment in matters of public concern should not be allowed to serve." 70 W. Va. L. Rev. 400, 400 (1968). Kaufman and Widiss noted that the California conflict of interest statutes sought "to insure that public officers in the discharge of their responsibilities are absolutely free from any influence other than that which flows directly out of their obligations to the public at large." Kaufman & Widiss, The California Conflict of Interest Laws, 36 S. Cal. L. Rev. 186, 186-87 (1963). Some of these "undivided loyalty" concepts are drawn from common-law theories that viewed public officials as trustees who were not to be pecuniarily involved in the affairs or interests of the beneficiary because of the danger that the trustee would "act to enhance his own interests rather than those of his cestui que trust." Note, Conflict-of-Interests of Government Personnel: An Appraisal of the Philadelphia Situation, 107 U. Pa. L. Rev. 985 (1959). The cestui que trust may be identified as the government, id., or the public, Note, supra note 54, at 1034. This fiduciary principle has been invoked where no specific statute covered a potential conflict of interest situation. See United States v. Carter, 217 U.S. 286, 306 (1910).
98. One author noted that "[h]onesty of government officials, whether elected or appointed, is essential to the American political system." Comment, supra note 53, at 104. Another commentator expressed the concern that "public officials should not have a personal interest in the business transactions in which they are engaged for government, nor should they exploit their influence or acquaintances with persons who conduct their transactions so that businesses in which they have a personal interest are profited." Eisenberg, supra note 88, at 686. See also Note, supra note 53, at 450; Note, supra note 54, at 1045.
99. Many commentaries indicate that conflict of interest provisions generally serve to protect the image of government, commonly referring to the need to maintain "public confidence" in the integrity of public officials. See, e.g., Comment, Legislative Conflicts of Interest—An Analysis of the Pennsylvania Legislative Code of Ethics, 19 Vill. L. Rev. 82 (1973); Note, supra note 53, at 450.
should help ensure that certain processes are followed in governmental decisionmaking—those that transform public desire into public policy through compliance with the policymaking designs established in the Constitution and subsequent legislation. This societal notion is particularly concerned with preventing the accumulation of power in the hands of one person, with preserving the separation of powers among the three branches of government, and with promoting economy and efficiency in government.100 Any effective conflict of interest legislation must be consistent with these three norms.

III. CONFLICTS OF INTEREST IN THE MARRIAGE CONTEXT

The 1977 revisions of the codes of conduct in both houses provide the one direct example of members of Congress considering potential conflicts of interest in both their activities and the activities of their spouses.101 Members of the House are now required to report information regarding income,102 gifts,103 reimbursements,104 property,105 securities,106 and liabilities.107 Information on these

Others stress the related, but perhaps more superficial, concern with the appearance of impropriety. See Note, supra note 51, at 1209. Freilich and Larson asserted that "we would contend . . . that a concern for 'appearances' is not ill-founded. The public is entitled to the services of men who are intelligent enough to know at least what appears to be improper. It is bad enough to appear incompetent; there is no reason to appear dishonest." Freilich & Larson, supra note 53, at 376.

100. Concerns about accumulation of power and separation of powers are seldom mentioned as interests protected by conflict of interest legislation not dealing with incompatibility. When separation of powers is mentioned, it is usually in the context of the need for the branches of government to police themselves, in order to avoid infringement on powers by imposing conflict guidelines on each other. See Eisenberg, supra note 88, at 696.

The promotion of governmental efficiency is in large part a corollary to the concern about preventing corruption, since a "corrupt government is an inefficient government." SPECIAL COMM. ON THE FEDERAL CONFLICT OF INTEREST LAWS, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND FEDERAL SERVICE 6 (1960).


102. Members must report the source and amount of all "[i]tems of income (including honorariums) from a single source aggregating $100 or more." H. Res. 287, 95th Cong., 1st Sess. § 101(a) (1977).

103. With certain exceptions, reports must be made of gifts from a single source aggregating $100 or more in value. H. Res. 287, 95th Cong., 1st Sess. § 101(a) (1977). The most significant exception is that only gifts of "transportation, lodging, food or entertainment from a single source (other than from a relative of a member reporting) aggregating $250 or more in value" need be reported. H. Res. 287, 95th Cong., 1st Sess. § 101(a) (1977).

104. Direct or indirect reimbursements from a single source for expenditures aggregating $250 or more must be disclosed. H. Res. 287, 95th Cong., 1st Sess. § 101(a) (1977).

105. Reports must be made of "any property held, directly or indirectly, in a trade or business or for investment or the production of income and which has a fair market value of at least $1,000." H. Res. 287, 95th Cong., 1st Sess. § 101(a)
matters also must be supplied for "the spouse of the [member] reporting [if such] information relates to items under constructive control of" the member.\textsuperscript{108} However, the constraints placed on House members regarding the acceptance of gifts\textsuperscript{109} and the accruing of outside earned income\textsuperscript{110} appear to have no direct impact on a member's spouse.

The Senate's new financial disclosure regulations are quite similar to those of the House: indeed, the requirements for reporting income, gifts, property, securities, and liabilities are virtually identical.\textsuperscript{111} The Senate rules, however, require less complete disclosure for interests of a member's spouse.\textsuperscript{112} Another new Senate rule explicitly prohibits a member's spouse from accepting gifts with annual aggregate value over $100 if the donor has a direct interest in legislation before Congress.\textsuperscript{113} But, like the House rules, the Senate regulations on outside earned income place no specific constraints on the income of a member's spouse.

One new Senate provision does address conflicts of interest arising from the employment of a member's spouse. It states that

\begin{quote}
[n]o Member . . . shall knowingly use his official position to intro-
\end{quote}
duce or aid the progress or passage of legislation, a principal pur-
pose of which is to further only his pecuniary interest, only the
pecuniary interest of his immediate family, or only the pecuniary
interest of a limited class of persons or enterprises, when he, or his
immediate family, or enterprises controlled by them are members
of the affected class.\textsuperscript{114}

It is apparent that only rather egregious conflicts of interest are con-
trolled by this section. More subtle conflicts, such as those con-
templated by this Note,\textsuperscript{115} go unregulated.

In dealing with conflicts of interest, Congress has indicated that
it sees substantial financial and legal interdependence between
members and their spouses. This view is expressed by the rule in
both houses that requires extensive disclosure of the financial condi-
tion of each member's spouse. The ethics codes of both houses,
however, do little to restrict the employment or financial activities
of members' spouses. Thus, the ethics regulations of each house
indicate that, when faced with the competing interests of the public's
demand for stricter conflict of interest regulation and society's in-
creasing recognition of autonomy for marital partners, Congress has
chosen to give weight to the conflict of interest considerations.
However, the failure of Congress to put major restraints other than
financial disclosure on members' spouses might be viewed as at
least some compromise between these competing interests.\textsuperscript{116}

Several conflicts of interest problems that occur outside the con-
gressional area may provide useful analogies. Conflicts that arise
because both spouses are practicing attorneys are occurring more
frequently, "for it is a fact of modern society that women are
entering the profession in increasing numbers and that increasing
numbers of these women are married to lawyers."\textsuperscript{117} In a formal
opinion concerning a hypothetical situation in which both husband
and wife were lawyers who did not practice in the same firm, an
American Bar Association committee found no impropriety where
one spouse represented a party adverse to one represented by the
other spouse's firm so long as full disclosure of the potential conflicts
in this employment arrangement was made to the client.\textsuperscript{118} This

\textsuperscript{114} S. Res. 110, 95th Cong., 1st Sess. \S 101 (1977).
\textsuperscript{115} See text at notes 132-34 infra.
\textsuperscript{116} Irrespective of possible congressional intent to strike a compromise, the fi-
nancial disclosure regulations may have the indirect effect of greatly restricting the
employment activity of a member's spouse. \textsuperscript{See note 183 infra.}
\textsuperscript{117} ABA STANDING COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 340, at
2 (1975).
\textsuperscript{118} The committee believed that a husband-wife team was "not necessarily pro-
hibited from representing different interests or from being associated with firms rep-
resenting different interests." \textit{Id.} at 1. It stated that "the situation should be fully
explained to the client and the question of acceptance left to the client for decision." \textit{Id.}
result demonstrates a compromise between the emerging concept of spousal independence and the prevention of conflicts of interest. The committee viewed the marriage partners as sufficiently independent to exercise professional judgment unaffected by the other's opinion, and therefore it rejected a complete prohibition of spousal representation of conflicting interests. Recognizing, however, that the closeness of the marital relationship might lead to inadvertent improper conduct,\(^\text{119}\) the committee did not consider the spouses as entirely independent practitioners, and therefore it required disclosure to the client.\(^\text{120}\)

Employees in the executive branch are also bound by conflicts of interest provisions that regulate spouses. Federal employees are, for instance, generally prohibited from holding personal financial interests in governmental matters in which they are substantially involved,\(^\text{121}\) and the prohibition specifically includes interests of the employee's spouse.\(^\text{122}\) This approach indicates a perception of an interrelationship in marriage that could preclude independent judgment by the employee.\(^\text{123}\) Similarly, Executive Order 11,222,\(^\text{124}\)

\(^{119}\) The committee stated:

[It] also must be recognized that the relationship of husband and wife is so close that the possibility of an inadvertent breach of a confidence or the unavoidable receipt of information concerning the client by the spouse other than the one who represents the client (for example, information contained in a telephone message left for the lawyer at home) is substantial. Id.

\(^{120}\) Within the past several years, regulatory groups in Arizona, Colorado, Illinois, and Virginia have produced opinions limiting husband-wife attorney activity. Note, Legal Ethics—Representation of Differing Interests by Husband and Wife: Appearances of Impropriety and Unavoidable Conflicts of Interest?, 52 DEN. L.J. 735, 735-36 (1975). These rulings—if still meaningful after the later ABA opinion discussed in the text—would severely restrict the ability of husband-wife attorney teams to seek jobs in the same geographic area. Id. at 737.


\(^{123}\) These provisions are less stringent than they might seem at first glance. If the employee fully discloses a potential conflict and the government official who was responsible for his appointment renders a written determination "that the interest is not so substantial as to be deemed likely to affect the integrity of the services" of the employee, the prohibitions of the statute will not apply. 18 U.S.C. § 208(b) (1970).

The regulations of the Civil Service Commission express few concerns about potential "incompatible office" problems arising out of the hiring of agency employees. The only specific limitation is that not more than two persons from the same immediate family can be employed in the competitive branch of the civil service program. 18 U.S.C. § 3319(a) (1970). Under the regulations, both husband and wife may be employed in the civil service provided no regulations of the individual agency are violated. The Commission's regulations are primarily concerned with problems of nepotism or favored employment status for members of one family, since few civil service positions involve the sort of policymaking to which issues of judgmental independence are relevant.

\(^{124}\) 3 C.F.R. 306 (1965).
which is directed at federal agencies and departments, requires that the financial interests of a spouse or other family member\textsuperscript{126} be considered part of the interests of the employee.\textsuperscript{128}

Finally, a few state courts also have considered the issue, usually when participation by a public official in a decision is challenged because a spouse or other relative of the official allegedly had an interest in the result. Courts have generally held that the interest of a relative is not a disqualifying factor.\textsuperscript{127} If the relationship is marital, however, the courts have been more likely to disqualify the official.\textsuperscript{128} Those courts finding no direct conflict of interest when both husband and wife are somehow involved in a decision tend to rest their opinions on the ability of both to make contracts and to retain their own earnings.\textsuperscript{129} Cases finding an improper interest under these circumstances are based on the belief that each spouse inevitably benefits from the other's individual income and financial transactions. For example, in \textit{Githens v. Butler County},\textsuperscript{130} the Supreme

\begin{itemize}
\item \textsuperscript{125} The interests of any other member of the employee's immediate household also are considered to be an interest of the employee. \textit{See id.}
\item Individual departmental and agency regulations have emulated these provisions. \textit{See, e.g.}, 22 C.F.R. \textsection 10.735-405(c) (1977) (Department of State). More extensive reporting of a spouse's holdings and business affairs is required under 28 C.F.R. \textsection 45.735-52 (1975) (Department of Justice).
\item President Carter's proposal for a new executive order on this subject apparently would continue to require disclosure of personal finances by both governmental employees and their spouses. \textit{N.Y. Times}, Jan. 5, 1977, \textsection A, at 17, col. 1.
Intra-family gifts, on the other hand, are excepted from the restrictions on the receipt of gifts or favors by federal employees. Exceptions are made where "obvious family or personal relationships rather than the business of the person concerned . . . are the motivating factors—the clearest illustration being the parents, children or spouses of federal employees." Executive Order 11,222, \textsection 201(b), 3 C.F.R. 156 (1974). Similar exceptions are made in individual departmental and agency regulations. \textit{See, e.g.}, 16 C.F.R. \textsection 0.735-11(b)(1) (1976) (Federal Trade Commission); 24 C.F.R. \textsection 0.735-203(b)(1) (1977) (Department of Housing and Urban Development). The regulations of the Department of Agriculture define this exception to the gifts and favors rule as employee acceptance of "courtesies in an obvious family or personal relationship" when it is clear that the relationship is the "motivating factor." 7 C.F.R. \textsection 0.735-12(b)(1) (1976).
\item Annot., 74 A.L.R. 790, 792 (1931). The rule has been generally followed in more recent cases.
\item Arkansas, Maryland, Michigan, and Ohio decisions indicate no conflict, \textit{see} note 129 \textit{infra}; Idaho, Missouri, and West Virginia cases take the opposite position. \textit{See} notes 130-31 \textit{infra} and accompanying text. Because of their age, some of these cases are of questionable validity.
\item \textit{See Thompson v. School Dist. No. 1}, 252 Mich. 629, 630-31, 233 N.W. 439, 439-40 (1930). Other cases finding no improper interest are based on determinations that the accused spouse received no pecuniary benefit. \textit{See Brewer v. Howell}, 299 S.W.2d 851, 855 (Ark. 1957); \textit{Beshore v. Town of Bel Air}, 237 Md. 398, 408-09, 206 A.2d 678, 683 (1964). In \textit{Board of Educ. v. Boal}, 104 Ohio St. 482, 485-86, 135 N.E. 540, 541 (1922), the Ohio court made an unusual statutory interpretation that would allow public officials to be involved in making a public contract with their spouses but not with their fathers, mothers, brothers, or sisters.
\item 350 Mo. 295, 299, 165 S.W.2d 650 (1942).
\end{itemize}
Court of Missouri noted that, "[t]hough the husband may have no present interest in his wife's separate estate[,] there can be no question but that because of the relationship he does have such a beneficial interest in her property and affairs as to be 'indirectly' interested in any contract to which she is a party."

In summary, to date the governmental policies developed on conflict of interest arising out of marriage have tended to treat spouses both as individuals and as persons whose interdependence might impair their personal judgment. To avoid overbroad regulations, however, and perhaps to avoid undue impairment of employment possibilities for each spouse, disclosure has been the primary means of setting standards for conflicts situations. Whether this scheme is a necessary or adequate safeguard for Congress remains to be considered.

IV. Necessity of Congressional Regulation

In designing legislation or other regulatory devices to control conflicts of interest arising out of the relationship between members of Congress and their spouses, the basic policy question is whether marriage can affect the decisions of a member of Congress in ways contrary to the public interest. In analyzing this question, personal relationships should be viewed as a continuum. At one extreme of the continuum, people are mere acquaintances with no strong personal ties. At the other extreme are those relationships in which two persons are bound together by close kinship combined with strong legal, financial, and emotional connections, all of which result in a near identity of interests. In between, of course, fall myriad relationships of varying degrees of intimacy—close relatives, close personal friends, individual members of common interest groups, and the like. In determining the need for regulation in any of these situations, one must examine the extent to which the relationship endangers the basic norms previously identified as protected by conflicts of interest regulation: protection of popular representation, protection of public

113. 350 Mo. at 299, 165 S.W.2d at 652. See also Clark v. Utah Constr. Co., 51 Idaho 587, 8 P.2d 454 (1932); Nuckols v. Lyle, 8 Idaho 589, 70 P. 401 (1902). At least one court found an indirect interest of the husband even in the face of the married women's property acts:

Giving to the various statutes guaranteeing to married women control of their separate estates, and free from the control of the husband, and with recognition of the many legal refinements which may be drawn therefrom, we are still of the opinion that either a husband or wife, living together as such, has pecuniary interest in a contract of employment of the other . . . . [T]here is still a relation existing between husband and wife, and mutual liabilities growing out of the family relation, which creates, on the part of each, an interest in the contracts of the other, out of which compensation arises, and the proceeds of which are used directly or indirectly in the family circle.

confidence in government, and protection of proper decisionmaking processes. And affecting the level of danger to these norms are three aspects of personal relationships—the financial, the domiciliary, and the emotional.

Close financial ties particularly endanger the representative nature of government. A person with financial responsibility to another might be tempted to deviate from undivided loyalty to the public interest in order to avoid monetary harm to, or create tangible benefits for, the other person. Furthermore, regardless of whether it creates an actual constraint on independent judgment, a financial interrelationship creates a public impression of divided loyalty that can decrease confidence in government. Also, a financial interrelationship between a member of Congress and an employee of either the public or private sector could generate doubts about the validity of governmental decisionmaking. The simplest example of this problem is where the financial ties between a member of Congress and an employee in the executive branch threaten the separation of powers and the accompanying checks and balances deemed important by society. This particular combination of interests also tends to result in the accumulation of more power than would be available to the individual acting alone. The separation of powers problem does not apply if the second party is employed in the private sector, but major concern would still exist over improper influence on governmental decisionmaking.

The second aspect of personal relationships that may raise a conflict of interest problem is the sharing of a domicile.132 A public servant might have considerable difficulty maintaining impartiality in matters involving a person with whom he lives. Such an interrelationship may also impair public confidence in government because its visibility enhances the inference of impropriety. Perhaps most important, a shared domicile may infringe upon the societal interest in the validity of governmental decisionmaking. Presumably, persons sharing a household communicate on a full range of subjects, and this exchange of information may inadvertently or intentionally include confidential matters. This communication could be a source of corruption if one person is a member of Congress and the other works in the private sector, or it could endanger the separation of powers if the second person works in a different branch of the government.133

132. Similar concerns might arise about people who share an office or who habitually work in close proximity to each other.

133. The domiciliary relationship has been subject to prior regulation in the conflict of interest area. The financial disclosure requirements in Executive Order 11,222 § 403(a), 3 C.F.R. 306 (1965), state that "[t]he interest of a spouse, minor child, or other member of his immediate household shall be considered to be an
Finally, an emotional relationship between a member of Congress and an employee in the public or private sector may constrain the former's ability to have undivided loyalty to the public good when the interests of the other person are inconsistent with those of the public. 134 This arrangement potentially compromises the "representative" role of a public official and will give the appearance of impropriety should the relationship become generally known. As with financial interrelationships, the existence of emotional ties between such individuals might create a joinder of interests sufficient to raise doubts about the validity of the governmental decisionmaking in which one or both are involved due either to infringement of the separation of powers or to the undue concentration of power.

In applying to marriage the three aspects of personal relationships identified above, the inquiry is not necessarily narrowed. Not every married couple maintains a substantial financial interrelationship; 135 spouses do not always share a domicile; 136 and, within its legal definition, marriage does not require an emotional attachment of partners. 137 It does appear, however, that the large majority of American marriages do create a "community of interests" that includes at least one of these interrelationships. 138 Furthermore, re-

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134. Scrupulous persons, of course, presumably can adequately separate their public and private lives. In the Javits controversy, see note 3 supra, Senator Javits stated, "In our respective professional activity, my wife and I lead independent lives. I do not attempt to direct her as to choices and attitudes in her work and she does not influence me in mine." N.Y. Times, Jan. 15, 1976, § A, at 4, col. 3.

135. The law still generally presumes such relationships. See note 24 and accompanying text supra.

136. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 21(d) (1971). The U.S. Senate's recent amendments to its financial disclosure rules recognize the separate domicile situation by not requiring disclosure "with respect to the interests of a spouse living separate and apart from the reporting" Senator. S. Res. 110, 95th Cong., 1st Sess. § 101 (1977).


138. The law itself, through probate provisions, creates some financial interdependence within all marriages, and few married couples can keep current earnings completely separate. These financial interrelationships are a particularly potent threat to the interests protected by conflict of interest legislation. It can reasonably be assumed that an emotional relationship exists in most marriages that includes some sense of loyalty to the other spouse. If this loyalty were to conflict with the undivided loyalty a government official is supposed to have to the public, one could not expect the official always to choose the public's interests over those of the spouse.
Regardless of the true state of affairs, at present the general public surely perceives that these important ties do exist between spouses. And that perception indicates that society sees danger in spouses having the employment combinations discussed above.180

This analysis suggests that the actual or presumed closeness of the marital relationship poses a serious threat to the interests protected by conflicts legislation. Recent congressional action to regulate the activities of members' spouses140 is consistent with the general principles of conflicts of interest theory and the trends of regulation in this area.141 But, in utilizing disclosure as the primary regulatory device, it is not clear that Congress has chosen the most effective safeguard.

V. MODES OF REGULATION

Many methods of regulating conflicts of interest might seem appropriate to guard against the dangers identified in this Note, as well as against numerous other conflicts situations.142 Six possible regulatory approaches are (1) legislative self-regulation, (2) regulation by the electorate, (3) regulation by the executive department, (4) statutory regulation, (5) a code of ethics with internal enforcement, and (6) a code of ethics with an independent ethics commission.

Legislative self-regulation would probably be based upon an "honor system" under which each member of Congress would

139. It might be helpful to illustrate this conclusion with hypothetical situations portraying the dangers that warrant protective action. If a member of Congress had a spouse in a policymaking position on a regulatory commission, even inadvertent collusion could result in special treatment of a particular case by that commission to the political benefit of the member of Congress, a result that would be particularly plausible if a constituent's interests were involved. This possibility of special treatment raises questions concerning the undivided loyalty of the regulatory official involved. Furthermore, the ability of that governmental employee to give the spouse certain agency or departmental information might give the member of Congress undue power to accomplish goals by working within the system. Lastly, the potential influence of the governmental employee over the spouse in Congress on departmental funding and other matters raises questions about the separation of powers.

Many of these dangers also exist where the spouse is employed in the private sector. For example, the member of Congress could be influenced to support certain legislation favorable to the private employer, which raises questions about the preservation of undivided loyalty to the public interest. Also of grave concern is the access—and potential misuse for personal gain—of the private-sector spouse to information meant for use solely by the member of Congress. For a discussion of this problem, see Kalo, Deterring Misuse of Confidential Information: A Proposed Citizen's Action, 72 Mich. L. Rev. 1577 (1974). In either of these situations, the mere existence of the marriage-employment relationship may lead to public cynicism and mistrust about governmental operations.

140. See notes 101-15 supra and accompanying text.
141. See section II supra.
monitor his or her own actions and inform the Congress whenever a conflict arises. Because no specific disclosure requirements would fit into such a scheme, however, no explicit sanctions could be designed for members who failed to disclose a conflict.

Members of Congress might perceive two principal motivations for compliance with this system. First, at least if the public is aware of the self-regulatory scheme, members of Congress would be induced to try to gain political advantage by demonstrating compliance. Second, legislators would be encouraged to avoid the most blatant breaches. A principal fault of this approach, however, is that, without the application of pressure to comply by an external agency, some members of Congress will almost certainly not abide by whatever conflict standards are established. The individual discretion inherent in self-enforcement would also allow each member to make independent and possibly self-serving interpretations of existing standards.

Under a second method of regulation, the electorate could determine when unethical conflict of interest situations have arisen by voting out of office individuals whom they deem to have violated the norms. This approach would make it unnecessary to define formally society's view of the marital relationship and the conflicts of interest resulting therefrom. It would also provide a democratic solution to a politically volatile issue. Despite these advantages, however, this solution is deficient because it would produce unequal and sporadic enforcement. This method fails to guarantee any rational standards by which legislators could review their projected actions and a member of Congress often could not knowingly comply with standards until his or her job was jeopardized. Furthermore, voters seeking to identify appropriate standards of ethics by which to measure the performance of an incumbent could be greatly influenced by battling political forces.

143. There is precedent for such an approach. The Mont Const. of 1889, art. V, § 44, stated that a "member who has a personal or a private interest in any measure or bill proposed or pending before the legislative assembly, shall disclose the fact to the house of which he is a member, and shall not vote thereon." The 1972 Montana Constitution deleted this provision, but it did provide for the establishment of a code of ethics for state officials. Mont Const., art. XIII, § 4.

144. If a conflict were discovered that had not been self-disclosed, the failure of the member of Congress to report it would create an impression of conscious wrongdoing. Thus, in this regard, self-regulation is similar to enforcement through the electorate.

145. See Note, supra note 51, at 1211-12. Stronger regulation is called for even if only a few would violate the standards.

146. Note, supra note 51, at 1214.

147. Id. at 1213. Furthermore, this procedure does not allow the immediate enforcement of ethical standards that might be desirable in dealing with members of Congress. See Note, supra note 53, at 455.
These problems, along with the importance of a public perception of honesty in government, indicate the need for including specific standards of performance in conflicts of interest regulations. Because of the great public concern about the operation of government, a relatively innocent act by an official can lead to public uproar.\textsuperscript{148} Definitive standards of conduct should allow a public official to avoid these minor indiscretions and the accompanying perceptions of scandal and trials by the press.\textsuperscript{149} Furthermore, the existence of explicit standards might increase public confidence in the integrity of government by encouraging the public official to recognize that his or her position is a public trust.\textsuperscript{150}

In a third method of regulation, the executive branch would serve as a watchdog for conflicts of interest arising in the legislative branch.\textsuperscript{151} Although this approach might be useful at state and local levels of government, it is of dubious constitutional validity and political legitimacy at the federal level.\textsuperscript{152} Informal enforcement devices are now used occasionally by the executive branch,\textsuperscript{153} and these "policing" efforts should be encouraged to the extent that their purpose is more honorable than mere political gain. This fear of misuse—that political infighting will masquerade as ethical regulation—is the primary drawback to the method. The power of an executive official to challenge conduct of a legislator creates many of the same problems that conflicts of interest regulation is designed to remedy. In effect, this scheme would simply transform public doubt in legislative officials to public doubt in executive officials. And, when the perceived potential for misuse of power by the regulators is combined with the lack of specificity in standards that would result from this scheme, it becomes apparent that this enforcement scheme must be rejected.

Controlling conflicts through statutory regulation would avoid the

\textsuperscript{148} See Freilich & Larson, supra note 53, at 374; Manning, supra note 53, at 247-48.

\textsuperscript{149} In the Marion Javits episode described in note 3 supra, no official body raised questions about Mrs. Javits' employment and her husband's concurrent service in the Senate. The questions were raised and, in large part, the standards were set by the press.

\textsuperscript{150} As stated in one commentary, "[t]he conscience of each individual provides one of the most effective guides for the conduct of most public officials. However, even public servants acting in good faith need an ascertainable standard as a basis for evaluating their conduct." Kaufman & Widiss, supra note 97, at 206.

\textsuperscript{151} See Note, supra note 53, at 453-54.

\textsuperscript{152} For example, this scheme would raise questions about interference with the separation of powers.

\textsuperscript{153} The executive branch can refuse to grant favors to any legislator whose conduct has been questionable. See Note, supra note 53, at 453-54. The executive department can also suggest an investigation of a member of Congress. See Note, supra note 51, at 1218.
problems of lack of specificity. One potential objection to this scheme asserts that statutes create inflexible constraints and that these rigid restrictions on officeholders might discourage competent individuals from seeking the positions. Some commentators now qualify their demands for conflicts of interest legislation with the notion that the statute must produce the least possible deterrence to those considering public sector employment. The failure to consider this factor would probably tend to have a disproportionate impact on women, since more often than not the husband is the public officeholder.

Probably a stronger objection to regulation by legislation is the difficulty of drafting a statute to cover all situations involving conflicts of interest. A statute that governed a reasonable range of spousal conflict situations would tend either to be so vague that it

154. Some commentators have supported the statutory mode of enforcement, at least for readily definable conflicts. See, e.g., Note, supra note 53, at 456.

155. Justice Holmes once stated that “[u]niversal distrust creates universal incompetence.” Graham v. United States, 231 U.S. 474, 480 (1913). However, another commentator has said that, “[w]hile every citizen has a right to become an officeholder, at times one must subordinate this right to the public good.” 70 W. Va. L. Rev. 400, 400 (1968).

156. See Note, supra note 53, at 450; Note, supra note 99, at 986. There is evidence that these countervailing considerations played a major role in the drafting of the existing federal conflict of interest statutes (18 U.S.C. §§ 201-219 (1970)). A report of the House Judiciary Committee noted:

It is also fundamental to the effectiveness of democratic government that, to the maximum extent possible, the most qualified individuals in society serve its government. Accordingly, legal protections against conflicts of interest must be so designed as not unnecessarily or unreasonably to impede the recruitment and retention by the Government of those men and women who are most qualified to serve it. An essential principle underlying the staffing of our governmental structure is that its employees should not be denied the opportunity, available to all other citizens, to acquire and retain private economic and other interests, except where actual or potential conflicts with the responsibility of such employees to the public cannot be avoided.

H.R. REP. NO. 748, 87th Cong., 1st Sess. 6 (1961). The Senate Judiciary Committee praised the bill for properly balancing these interests:

In the interest of facilitating the Government's recruitment of persons with specialized knowledge and skills for service on a part-time basis, it [the legislation] would limit the impact of those laws on the persons so employed without depriving the Government of protection against unethical conduct on their part.


Robert Kennedy, then the Attorney General, saw the Congress as intending the statutes to bolster the government's recruiting power in areas where overly onerous restrictions had prevented an expansion of talent. MEMORANDUM OF ATTORNEY GENERAL ROBERT KENNEDY REGARDING CONFLICT OF INTEREST PROVISIONS OF PUBLIC LAW 87-849, 28 Fed. Reg. 985 (1963), reprinted in 18 U.S.C. § 201, at 4169 (1970).

157. Over-regulation could discriminate against women because men tend to finish their education and enter the job market prior to their spouses. See The Carnegie Commission on Higher Education, Opportunity for Women in Higher Education 83-85 (1973). Thus, inflexible regulation could severely limit the job choices for wives of Congressmen.
would be of little use in actually regulating conduct or so overbroad that the chilling effect of over-regulation might occur. 158 Perhaps more important, both the concept of marital roles and the concept of conflict of interest are inherently vague, and thus any workable plan of regulation would need to be flexible. Because statutes by their very nature tend to be rigid, this form of regulation would ignore some of the relevant variables in the conflict of interest-marital role milieu. 159 In the final analysis, this inability to deal with the


Other cases indicate some willingness on the part of the courts and prosecutors to enforce the federal statutes more strictly against employees of the executive branch. See United States v. Bailey, 498 F.2d 677 (D.C. Cir. 1974), where two federal employees enrolled in part-time legal studies were barred from entering an appearance on behalf of indigent criminal appellants under 18 U.S.C. § 205 (1970) (prohibiting federal employees from appearing as agents or attorneys on behalf of anyone in a proceeding to which the United States is a party).

There are two explanations for this hesitancy to enforce the statutes against members of Congress. Some see the Justice Department as extremely reluctant to press charges against a member of Congress unless the misconduct is very grave. See, e.g., Krasnow & Lankford, supra note 79, at 271. Others attribute the lack of enforcement of conflict of interest statutes to the inability to derive clear standards from them. See, e.g., Note, supra note 97, at 986.

In general, the difficult definitional problems facing a governmental body trying to enforce ethical restrictions can eviscerate conflict of interest legislation. Professor Eisenberg has observed that the "existing criminal statutes dealing with conflict situations either are applicable to clearly repugnant behavior or phrased so generally as to exclude a host of activities that form the real core of the problem." Eisenberg, supra note 88, at 671. Some commentators see this definitional problem as intractable. See, e.g., Note, State Legislative Conflicts of Interest: An Analysis of the Alabama Ethics Commission Recommendations, 23 ALA. L. REV. 369, 373 (1971):

There is a growing belief that criminal statutes, and the whole legal apparatus that must be brought into play to enforce and give vitality to such [conflict of interest] statutes may be incapable of coping with the complexity and subtlety of conflict of interest situations. . . . [I]t is virtually impossible to specifically define every legislative conflict of interest that may conceivably arise. Other commentators are more optimistic. Even the vague definition of conflicts of interest in the Code of Ethics of Government Service, H.R. Con. Res. 175, 85th Cong., 2d Sess. (1958), was viewed as a breakthrough of sorts in Krasnow & Lankford, supra note 79, at 277.

159. It has been argued that overly stringent conflict of interest restrictions place an unconstitutional burden on the right to marry. See Note, supra note 120, at 756-58. Another possible constitutional challenge—based on equal protection—focuses on the right to work, since statutes might unnecessarily circumscribe the career of a young professional. See id. at 758-59. Yet another argument asserts that the restrictions create an unconstitutional conclusive presumption about the ethical nature of the husband-wife employment. See id. at 761-64.
nuances of the problem requires rejection of this regulatory method.

A fifth regulatory scheme, which would be designed to avoid the rigidity of a statutory plan, would be based on a code of ethics or code of conduct to be enforced by internal ethics committees in each house of Congress. Both the House and the Senate now employ this method of regulation. The lack of rigidity in this type of plan has led to frequent criticism that such codes are by nature too vague. However, by approaching the provisions in the same sense as professional canons to be interpreted by an authoritative group to which the officeholder can submit questions, a code could establish reasonably specific standards. The problem with this approach is not with the standards but rather with the enforcement. Placing the regulatory responsibility on an internal legislative committee creates what has been called "the conflict within the conflict of interest laws," a reference to the unwillingness and perhaps incapacity of legislators to enforce their own rules of ethical behavior. So long as public confidence in the integrity of legislators remains low, this approach has little to recommend it.

162. See Note, supra note 53, at 453.
164. Codes of ethics may be contained in statutes. Rhodes, Enforcement of Legislative Ethics: Conflict Within the Conflict of Interest Laws, 10 Harv. J. Legis. 373, 384 (1973). The congressional tendency, however, has been to approve ethical standards by legislative resolution.
165. Id. at 381.
166. Id. This phenomenon has been attributed to at least two behavioral patterns among legislators. Id. at 379-80. The first is legislative courtesy, a tendency to treat one's colleagues with considerable deference. D. Matthews, U.S. Senators and Their World 97-99 (1960). The second is legislative reciprocity, a policy of mutual assistance among colleagues. Id. at 100.
167. In a recent nationwide Lou Harris survey commissioned through the House Commission on Administrative Review, only 22 per cent of those surveyed gave Congress a favorable rating, while 64 per cent gave it an unfavorable rating. In the survey's review of perceived ethical standards, those polled rated Congress below consumer action groups, television newscasters, the White House, governors, state legislators, farm organizations, and local government officials. Only corporation executives and organized labor received lower ethical ratings. N.Y. Times, Feb. 4, 1977, § A, at 11, col. 1.
168. Since a major objective of conflict of interest legislation is the maintenance
Combining the flexibility of the code of ethics system with a different enforcement mechanism yields the most promising solution to the problem of regulating conflicts of interest. Under this scheme, enforcement would be placed in an independent ethics commission authorized to respond to all potential conflict situations.\(^{169}\)

The commission would, of course, conduct hearings in order to determine the propriety of a specific legislator's activities.\(^{170}\) More important, it would monitor various disclosure documents detailing the activities of members of Congress and their spouses\(^{171}\) in order to identify potential conflicts before any actual impropriety occurs or public confidence is affected.\(^{172}\) Although some guidance for the commission's decisionmaking could be provided in the code itself or in the enabling legislation for the commission, probably the best system would allow the issuance of formal opinions, or even rules,\(^{173}\) to serve as standards for the future activities of public officials.\(^{174}\)

This approach is superior to the regulatory plans previously considered for dealing with congressional conflict of interest in the context of marriage. The code and the "collection of ethical principles"\(^{175}\) generated by the commission would provide specific standards by which the general public, as well as those directly affected, could measure ethical performance. Questions from members of Congress could be resolved by advisory opinions.\(^{176}\) Because a case-by-case method would be used, there would be less danger of a chilling effect on activities, the major drawback of the statutory approach. The individual attention given to each member of Con-

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\(^{169}\) Several sources have suggested this approach. See Note, supra note 51, at 1231; Note, supra note 53, at 457-58. One commentator has called the concept of the independent commission the "most promising" enforcement tool at the state level. Rhodes, supra note 164, at 392. He has suggested that the commission should be composed of both legislators and nonlegislators. Id. at 396-97.

An independent congressional ethics commission was proposed as early as 1951. S. Con. Res. 21, 82d Cong., 1st Sess., 97 CONG. REC. 2938 (1951), proposed the formation of an independent advisory commission on ethics in the federal government.\(^{170}\)

\(^{171}\) See Note, supra note 53, at 457.

\(^{172}\) See Note, supra note 51, at 1232.

\(^{173}\) Id.

\(^{174}\) Note, supra note 53, at 457. Because there are a myriad of potential marital employment combinations, each having a very different impact on conflict of interest considerations, standards of conflict of interest should be developed by the commission rather than be set out in detail in the statute or code. Empowering the commission to give advisory opinions and make rules would eliminate any problems of fair notice caused by the statute's lack of specific definitions of unethical activity.

\(^{175}\) Id.

\(^{176}\) For an explanation of the current use of advisory opinions, see note 182 infra.
gress would help define and detect more subtle conflicts, which now escape notice.\textsuperscript{177} Consistency of action—a major goal of any regulatory plan—should result from the use of the same group of regulators to review every potential conflict over a period of time. Because of its superior efficacy, as well as its primary characteristic of freedom from political influence, one commentator has viewed the independent ethics commission as providing the “strongest potential for impartial and objective administration of legislative codes of ethics.”\textsuperscript{178}

Because of its relative freedom from influence, the independent commission approach would also resolve a major problem found in Congress’ current internal regulation procedure. At present, both houses of Congress require considerable public financial disclosure by members and their spouses.\textsuperscript{179} At the same time, ethical pronouncements beyond the vague standards articulated in the codes of conduct of both houses are generally derived from case-by-case review by the ethics committees.\textsuperscript{180} There is grave danger in this arrangement. As previously noted,\textsuperscript{181} these internal ethics panels have been exceedingly hesitant to act.\textsuperscript{182} If this pattern continues, much information will be made available to the public with little accompanying analysis from the committee on whether ethical standards have been violated. Absent this analysis, much of the newly disclosed information will make spouses of members of Congress

\textsuperscript{177}. See Note, supra note 53, at 458. The incompatible-office cases use a similar case-by-case approach. See, e.g., Lilly v. Jones, 158 Md. 260, 265, 148 A. 434, 436 (1930).
\textsuperscript{178}. Rhodes, supra note 164, at 396.
\textsuperscript{179}. See notes 101-13 supra and accompanying text.
\textsuperscript{180}. The Senate’s Select Committee on Ethics, however, is now “authorized to issue interpretative rulings explaining and clarifying the application of any law, the Code of Official Conduct, or any rule or regulation of the Senate within its jurisdiction.” S. Res. 110, 95th Cong., 1st Sess. § 206 (1977). In light of its traditional hesitancy to act, see note 166 and accompanying text, it is unclear whether the committee will avail itself of this power.
\textsuperscript{181}. See note 166 supra and accompanying text.
\textsuperscript{182}. In fairness, it must be noted that Congress has attempted to remedy this problem. For example, the Senate’s ethics committee now must render “an advisory opinion, in writing within a reasonable time, in response to a written request” by a Senate member “concerning the application of any law, the Senate Code of Official Conduct, or any rule or regulation of the Senate within its jurisdiction to a specific factual situation pertinent to the conduct of proposed conduct of the person seeking the advisory opinion.” The advisory opinion is to be published in the Congressional Record, though the identity of the person who requested the opinion is to be kept confidential. S. Res. 110, 95th Cong., 1st Sess. § 206 (1977). However, in spite of these provisions for confidentiality, members of Congress will probably not desire to subject themselves to scrutiny by their colleagues. Thus, it is not clear whether the advisory-opinion procedures as utilized by the internal ethics panel will be at all effective in promoting the regulation of conflicts of interest.
quite vulnerable to a standardless "trial by press." The independent commission would be less hesitant to provide the analysis necessary to vindicate society's interest in regulating conflicts of interest.

Furthermore, the independent commission appears to be the most responsive body to the changing societal view of the marriage relationship and of the evolving independence of marital partners. Many of the current societal conclusions regarding the dangers of conflict situations resulting from marriage are based on a belief that the relationship entails a degree of interdependence that impairs the judgment of the persons involved. Although this view seems to describe accurately many marriages today, it is undesirable to create inflexible restrictions tailored to current views that might be eroding rapidly. Of all the institutions discussed in this Note as potential regulators of conflicts of interest, the independent commission, as an administrative body with an adequate staff, is in the best position to make accurate judgments on this type of rapidly evolving social issue.

It may be that changing mores about the independence of spouses make regulation of marital conflicts of interest less necessary. On the other hand, the increasing tendency for both spouses to be employed creates more potential conflicts of interest that need analysis by a body charged with upholding the public interest. In any event, although Congress has recognized the need for conflicts of interest regulation in the context of marriage, the modes of regulation adopted by each house are clearly inadequate to deal with this complex issue effectively.

183. See note 149 supra and accompanying text.

As previously noted, see text at note 116 supra, the congressional decision to limit ethics regulation largely to just financial disclosure may have been a compromise between the desire for stringent conflicts regulation and the increasing recognition of the autonomy of marital partners. In reality, however, the failure to regulate seemingly unethical activities by members of Congress may result in greater restraints on the conduct of members and their spouses because of the fear of a "trial by press" for any questionable activities. In this manner, the compromise may create a formidable, unintended restraint on spousal activity.

184. So long as the public perceives the marital relationship as being sufficiently close to create possible conflicts of interest, corrective regulation may be needed even where the actual danger of unethical behavior is small, since one purpose of such regulation is to avoid even the appearance of impropriety.

185. See The American Family, supra note 1, at 35.