NEWS

SECURITIES AND EXCHANGE COMMISSION
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SPEECH BEFORE THE
SECURITIES LAW COMMITTEE
FEDERAL BAR ASSOCIATION
AT THE
NATIONAL LAWYERS CLUB
WASHINGTON, D. C.
JUNE 16, 1978

"REFLECTIONS ON THE REVOLVING DOOR"*

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* PORTIONS OF THIS SPEECH WERE INCLUDED IN AN ARTICLE WHICH APPEARED IN THE LOS ANGELES TIMES ON MARCH 29, 1978.

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As a Commissioner of the Securities and Exchange Commission, I am deeply concerned about how my ethical standards, as well as my competence, are perceived by the public I was appointed to serve. I am concerned about the current negative view of government employment, and about the suggestion that outstanding leaders from the private sector will only enter public life for personal gain.

One of the lingering evils of the Watergate era is widespread public distrust of government officials. Limitations on the awesome power of government, directly by the electorate and indirectly by our system of checks and balances, are crucial to constitutional democracy. At the same time, in order for democratic government to work, the healthy distrust of government which is embedded in our constitution must not lead to an automatic distrust of our elected and appointed officials. We need a sense of community between members of the public and government officials who are, after all, members of the public in government service.

IN ORDER TO RESTORE CONFIDENCE IN THE GOVERNMENT AND THE PEOPLE WHO RUN IT, PRESIDENT CARTER HAS PROPOSED THE ETHICS IN GOVERNMENT ACT AND SPECIAL PROSECUTOR LEGISLATION.* THE LAUDABLE PURPOSE OF THESE STATUTES WOULD BE TO STRENGTHEN ETHICAL STANDARDS AND ESTABLISH SAFEGUARDS AGAINST CONFLICTS OF INTEREST WHICH LEAD TO ABUSE OF PUBLIC TRUST. THESE LAWS COULD, HOWEVER, HAVE A SIGNIFICANT, AND POSSIBLY ADVERSE, IMPACT ON THE COMPOSITION OF GOVERNMENT AT THE POLICY-MAKING LEVEL. I AM SURPRISED AND DISAPPOINTED THAT THESE PROPOSALS HAVE NOT ENGENDERED WIDESPREAD DEBATE.

I AM ALSO SURPRISED THAT THE ETHICAL PROBLEMS OF THE PRIVATE PRACTITIONER WHO ENTERS GOVERNMENT SERVICE HAS RECEIVED SO MUCH LESS ATTENTION THAN THE PROBLEMS OF THE GOVERNMENT LAWYER WHO ENTERS PRIVATE PRACTICE.

AN INCREASED SENSITIVITY TO CONFLICTS BETWEEN PUBLIC AND PRIVATE INTERESTS CAN ONLY BENEFIT THE CONDUCT OF OUR GOVERNMENT. WE SHOULD RECOGNIZE, HOWEVER, THAT SUCH CONFLICTS ARE INEVITABLE IN OUR SOCIETY, AND FOCUS UPON THE ETHICAL QUESTIONS INVOLVED IN THE RESOLUTION OF SUCH CONFLICTS. THERE IS NOTHING INHERENTLY WRONG OR UNETHICAL ABOUT A CONFLICT OF INTEREST WHICH IS PROPERLY RESOLVED BY ELIMINATING ONE OF THE COMPETING INTERESTS OR BY REGULATION. IN MANY SITUATIONS, FULL DISCLOSURE OF THE CONFLICT MAY MAKE REGULATION UNNECESSARY.

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* S. 555; H.R. 1.

THE VIEW HAS BEEN ESPOUSED THAT IN ORDER TO AVOID INHERENT CONFLICTS BETWEEN PUBLIC AND PRIVATE INTERESTS, GOVERNMENT POLICYMAKERS SHOULD NOT BE CHOSEN FROM THE RANKS OF THE REGULATED. WITH SPECIFIC REFERENCE TO THE AGENCY OF WHICH I AM A MEMBER, IT HAS BEEN SUGGESTED THAT THERE SHOULD BE A MORE ADVERSARIAL RELATIONSHIP BETWEEN THE BUSINESS COMMUNITY AND THE GOVERNMENT AND, IN PARTICULAR, BETWEEN REGULATED INDUSTRIES AND THEIR ACCOUNTANTS AND LAWYERS AND THE INDEPENDENT REGULATORY AGENCY. SOME BELIEVE THAT THE REGULATORY AGENCY WOULD BE SANITIZED BY LIMITING APPOINTMENTS TO PERSONS UNRELATED TO THE BUSINESS COMMUNITY OR THE REGULATED INDUSTRY.

PERSONALLY, I DISAGREE WITH THIS VIEW. THE PURPOSE OF BUSINESS REGULATION IN A DEMOCRATIC COUNTRY SHOULD NOT BE TO ALIENATE AND SHACKLE THE REGULATED, BUT RATHER TO ASSURE THE OPTIMUM USE OF OUR NATURAL, ECONOMIC AND HUMAN RESOURCES. THE SO-CALLED REVOLVING DOOR, BY WHICH INDIVIDUALS PASS FROM PRIVATE ENTERPRISE INTO THE GOVERNMENT, AND FROM PUBLIC SERVICE INTO PRIVATE BUSINESS, PROVIDES A CONSTANT RENEWAL OF TALENT FOR BOTH SECTORS.

I BELIEVE THAT CONFLICTS OF INTEREST ON THE PART OF PERSONS WHO MOVE BETWEEN THE PRIVATE AND PUBLIC SECTORS SHOULD BE RESOLVED BY REGULATION AND FULL DISCLOSURE, RATHER THAN BY PROHIBITIONS AGAINST SUCH MOVEMENT. FURTHER, SUCH REGULATION SHOULD NOT DISCOURAGE THIS MOVEMENT.

THE TERMS OF PASSAGE THROUGH THE REVOLVING DOOR SHOULD BE DISCLOSED AND THERE SHOULD BE REGULATION OF THOSE TERMS. HOWEVER, CLOSING THE REVOLVING DOOR WOULD HAVE A DELETERIOUS EFFECT ON OUR GOVERNMENT AND WOULD MAKE THE INDEPENDENT REGULATORY AGENCIES UNRESPONSIVE TO THE NEEDS OF THE NATION.

THERE ARE MANY REVOLVING DOORS INTO AND OUT OF GOVERNMENT. A MEMBER OF A CONGRESSIONAL OR PRESIDENTIAL STAFF WHO BECOMES A POLICY-MAKING AGENCY OFFICIAL HAS AS MUCH POTENTIAL CONFLICT OF INTEREST AS A BUSINESS MAN OR WOMAN WHO RECEIVES SUCH AN APPOINTMENT. I AM A GREAT ADMIRER OF COLLEGE PROFESSORS, AND I AM MARRIED TO ONE, BUT I RECOGNIZE THAT PROFESSORS, WHO OFTEN ACT AS CONSULTANTS TO BUSINESS AND TO GOVERNMENT, ALSO HAVE BIASES AND POTENTIAL CONFLICTS OF INTEREST. ATTORNEYS, ACCOUNTANTS AND OTHER PROFESSIONALS ARE SUBJECT TO POTENTIAL CONFLICTS OF INTEREST BETWEEN THEIR FORMER CLIENTS AND A REGULATORY AGENCY TO WHICH THEY MAY BE APPOINTED. POLITICIANS WHO USE AN AGENCY APPOINTMENT AS A PLATFORM FOR HIGHER OFFICE OR A SAFE HARBOR FOR RETIREMENT MAY BE FACED WITH CONFLICT PROBLEMS. EVEN CAREER CIVIL SERVANTS CAN BE ACCUSED OF THE BASIC CONFLICT OF INTEREST BETWEEN JOB PRESERVATION AND PROMOTION ON THE ONE HAND AND GOVERNMENT REFORM ON THE OTHER HAND.

IN SHORT, VIRTUALLY ANYONE WHO WOULD BE A QUALIFIED CANDIDATE FOR A HIGH-LEVEL POSITION IN A FEDERAL REGULATORY AGENCY COULD BE CAUGHT IN A CONFLICT BETWEEN THE SPECIFIC PUBLIC INTEREST HE OR SHE IS CHARGED TO SERVE AND SOME OTHER COMPETING INTEREST.

I BELIEVE IT IS IMPORTANT THAT QUALIFIED CITIZENS FROM ALL PARTS OF OUR SOCIETY, AND CERTAINLY FROM THE BUSINESS COMMUNITY AND THE PROFESSIONS, SERVE IN OUR GOVERNMENT. THE SEC FREQUENTLY LECTURES THE BUSINESS COMMUNITY ABOUT THE VIRTUES OF INDEPENDENT DIRECTORS. INDEPENDENCE ON THE PART OF AGENCY COMMISSIONERS IS EQUALLY VIRTUOUS. A REGULATOR FROM THE BUSINESS COMMUNITY IS NOT AUTOMATICALLY LESS INDEPENDENT THAN A CANDIDATE FROM ANOTHER REALM. INDEPENDENCE, LIKE OTHER ETHICAL NORMS, IS A PERSONAL QUALITY.

WE CANNOT HAVE EFFECTIVE AND RESPONSIVE GOVERNMENT AND REGULATION OF INDUSTRY WITHOUT THE EXPERTISE AND UNDERSTANDING OF PERSONS WHO HAVE WORKED IN AND KNOW THE PROBLEMS OF THE INDUSTRIES BEING REGULATED. OUR AGENCY HAS PROGRAMS TO ATTRACT EXPERIENCED ATTORNEYS, ACCOUNTANTS AND ECONOMISTS TO SERVE AS FELLOWS ON OUR STAFF. I BELIEVE THAT THE INSIGHTS OF THESE PROFESSIONALS ARE OF VALUE IN EXPANDING OUR VISION.

PROHIBITIONS AGAINST ACTUAL CONFLICTS OF INTEREST, WHICH HAVE LONG PREVENTED A FORMER GOVERNMENT OFFICIAL OR EMPLOYEE FROM APPEARING BEFORE AN AGENCY ON MATTERS AS TO WHICH THAT PERSON PREVIOUSLY HAD PARTICIPATED OR HAD OFFICIAL RESPONSIBILITY, ARE CONSISTENT WITH TRADITIONAL ETHICAL CONCEPTS. PRESIDENT CARTER REQUESTED FROM HIS APPOINTEES CERTAIN FURTHER COMMITMENTS. SOME OF THESE COMMITMENTS WOULD BECOME FEDERAL LAW BY ENACTMENT OF THE ETHICS IN GOVERNMENT LEGISLATION WHICH WOULD AFFECT NOT ONLY PRESIDENTIAL APPOINTEES BUT ALSO MANY OTHER HIGH-LEVEL FEDERAL EMPLOYEES.

THE ETHICS IN GOVERNMENT LEGISLATION, WHICH THE PRESIDENT HAS PROPOSED AND WHICH IS PENDING IN CONGRESS, CONTAINS TWO PROVISIONS WHICH I BELIEVE WOULD IMPOSE UNDULY HEAVY PENALTIES ON COMMISSIONERS OF INDEPENDENT REGULATORY AGENCIES, AND EVEN WORSE, ON HIGH-LEVEL STAFF EMPLOYEES, AND THEREFORE MAKE IT DIFFICULT TO RECRUIT THE TALENTS WHICH THESE POSITIONS REQUIRE. THESE PROVISIONS ARE A BLANKET PROHIBITION AGAINST ANY CONTACT WITH AN AGENCY FOR FINANCIAL REMUNERATION FOR ONE YEAR AFTER TERMINATION OF EMPLOYMENT, AND THE PUBLIC DISCLOSURE OF PERSONAL FINANCIAL INFORMATION.

BEFORE I WAS APPOINTED TO THE SEC I AGREED TO THE EMPLOYMENT RESTRICTION; THUS, THE FAILURE OF SUCH A RESTRICTION TO BECOME LAW WILL NOT BENEFIT ME PERSONALLY. I AGREED TO THIS RESTRICTION BECAUSE I BELIEVE IT IS A PRESIDENT'S PREROGATIVE TO IMPOSE HIS VIEWS OF GOOD PUBLIC POLICY ON HIS APPOINTEES. NEVERTHELESS, EMBEDDING CURRENT POLICIES AND RESTRICTIONS IN THE CONCRETE OF FEDERAL LEGISLATION MAY TRANSFORM A STANDARD WHICH IS APPROPRIATE AT THIS JUNCTURE IN OUR HISTORY INTO ONE WHICH OVER A LONGER PERIOD WILL NOT SERVE THE PUBLIC INTEREST. MOREOVER, ONCE ENACTED INTO FEDERAL LAW, IT WOULD BE A LEGISLATIVE MANDATE DIFFICULT TO REVERSE EVEN IF IT PROVED A DISINCENTIVE TO RECRUITING TOP TALENT FOR GOVERNMENT. A RESTRICTION WHICH PREVENTS AN EX-GOVERNMENT EMPLOYEE FROM EARNING A LIVING, FOR A PERIOD OF A YEAR, IN HIS OR HER CHOSEN FIELD, ELEVATES FORM OVER SUBSTANCE. IT INTERFERES WITH THE STAFFING OF THE GOVERNMENT FOR THE SAKE OF AVOIDING THE APPEARANCE OF IMPROPRIETY, WHEN IN FACT NO DIRECT OR ACTUAL CONFLICT OF INTEREST MAY EXIST.

IN MY OPINION, THE ENACTMENT OF THE ETHICS IN GOVERNMENT LEGISLATION WOULD HAVE A POTENTIALLY ADVERSE EFFECT ON THE COMPOSITION OF GOVERNMENT STAFFS. AT THE SEC IN PARTICULAR, DIRECTORS AND ASSOCIATE DIRECTORS OF THE DIVISIONS AND HEADS OF PRINCIPAL OFFICES, WHO LEAVE THE AGENCY, AS WELL AS DEPARTING COMMISSIONERS, WOULD BE UNABLE TO PRESENT THEIR VIEWS ORALLY OR IN WRITING TO THE COMMISSION ON ANY MATTER PENDING BEFORE THE AGENCY FOR A PERIOD OF ONE YEAR.

AS A RESULT OF THIS RESTRICTION, IT IS LIKELY THAT EMPLOYEES WOULD LEAVE THE COMMISSION BEFORE THEY REACHED THE AFFECTED SUPERVISORY LEVEL UNLESS THEY INTENDED TO MAKE THE GOVERNMENT A CAREER.

ANOTHER PROVISION OF THE ETHICS IN GOVERNMENT LEGISLATION WHICH COULD OPERATE AS A SERIOUS DISINCENTIVE TO GOVERNMENT EMPLOYMENT IS THE PUBLICATION OF PERSONAL FINANCIAL STATEMENTS. ALTHOUGH THERE IS VALUE IN REQUIRING THAT SUCH INFORMATION BE REPORTED FOR REVIEW BY APPROPRIATE AUTHORITIES, MAKING SUCH REPORTS PUBLIC, WITHOUT CAUSE, IS CONTRARY TO THE PUBLIC POLICY OF PROTECTING THE PRIVACY OF INDIVIDUALS. ONCE AGAIN, TO REQUIRE THE PUBLICATION OF FINANCIAL INFORMATION FOR THE SAKE OF AVOIDING THE APPEARANCE OF IMPROPRIETY, WHEN ALL OF THE INFORMATION HAS ALREADY BEEN REPORTED AND REVIEWED BY THE INTERESTED AUTHORITIES, ELEVATES FORM OVER SUBSTANCE AND IMPOSES AN UNNECESSARY IMPEDIMENT TO THE RECRUITMENT OF TOP TALENT FOR GOVERNMENT.

AS A RESULT OF INCREASED SENSITIVITY TO CONFLICTS OF INTEREST WHICH A NEWLY APPOINTED GOVERNMENT OFFICIAL MAY HAVE, THE CURRENT ADMINISTRATION HAS ALSO FOCUSED ON CIRCUMSTANCES UNDER WHICH DISQUALIFICATION BY A REGULATOR WOULD BE APPROPRIATE. AN ATTORNEY WHO LEAVES PRIVATE PRACTICE FOR GOVERNMENT SERVICE HAS SOME GUIDANCE IN RESOLVING THIS PROBLEM FROM THE CANNONS OF ETHICS APPLICABLE TO LAWYERS. HOWEVER, THE CANNONS DO NOT ANSWER ALL OF THE QUESTIONS WHICH MAY ARISE IN SUCH A SITUATION.

WHEN I WAS APPOINTED A COMMISSIONER OF THE SEC, BOTH THE WHITE HOUSE AND THE SENATE BANKING COMMITTEE WHICH HELD HEARINGS ON MY NOMINATION WERE CONCERNED ABOUT WHEN I WOULD DISQUALIFY MYSELF FROM COMMISSION BUSINESS. AT THAT TIME I WAS A PARTNER IN ROGERS & WELLS, A LARGE LAW FIRM WHICH REPRESENTS MANY CLIENTS BEFORE THE COMMISSION. I WAS ALSO CONCERNED BECAUSE I WAS CONSCIOUS OF POTENTIAL CONFLICTS BETWEEN MY FORMER LAW FIRM, MY FORMER CLIENTS AND THE AGENCY TO WHICH I WAS BEING APPOINTED. AS AN ATTORNEY, I WAS ALSO CONCERNED, AS ALL OF US ALWAYS SHOULD BE, OF MY OWN PROFESSIONAL INTEGRITY AND REPUTATION.

THE DISQUALIFICATION STATEMENT WHICH I PROPOSED AND WHICH WAS ACCEPTED BY THE WHITE HOUSE AND THE SENATE STATED MY INTENTIONS AS FOLLOWS:

> AS A COMMISSIONER I INTEND TO DISQUALIFY AND RECUSE MYSELF FROM MATTERS BEFORE THE COMMISSION IN THE NATURE OF A REQUEST FOR AN EXEMPTION FROM A RULE OR STATUTE OF GENERAL APPLICABILITY, OR MATTERS INVOLVING THE INSTITUTION OF ENFORCEMENT PROCEEDINGS, UNDER THE FOLLOWING CIRCUMSTANCES:
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> (A) WHERE ROGERS & WELLS REPRESENTS ANY PARTY; OR
> (B) WHERE I HAD ANY CONNECTION OR GAINED SIGNIFICANT KNOWLEDGE WHILE I WAS AT ROGERS & WELLS.
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> IN ADDITION, I INTEND TO DISQUALIFY AND RECUSE MYSELF, ON A CASE-BY-CASE BASIS, WITH RESPECT TO ANY MATTER, WHERE, IN ORDER TO AVOID THE POSSIBLE APPEARANCE OF IMPROPRIETY, IT APPEARS DESIRABLE TO ME TO DISQUALIFY MYSELF, DESPITE THE LACK OF ANY ACTUAL CONFLICT OF INTEREST.

AT THE TIME OF MY CONFIRMATION, THERE WAS SOME CONCERN AS TO WHETHER MY PROPOSED DISQUALIFICATION WAS OVERLY BROAD AND WOULD PREVENT ME FROM ACTING FULLY AND EFFECTIVELY AS A COMMISSIONER. I AM HAPPY TO REPORT THAT THIS DISQUALIFICATION HAS NOT PROVED ONEROUS OR UNDULY RESTRICTIVE, AND I HAVE BEEN VERY COMFORTABLE IN ADHERING TO IT. ON OCCASION I HAVE BEEN UNABLE TO PARTICIPATE IN A MATTER WHERE I HAD STRONG PHILOSOPHICAL VIEWS. HOWEVER, THE COMMISSION IS A COLLEGIAL BODY WHICH MEETS FREQUENTLY AND, TO THE EXTENT MY GENERAL THEORETICAL VIEWS WERE KNOWN TO THE OTHER COMMISSIONERS, I AM SURE THEY WERE TAKEN INTO ACCOUNT. MOST IMPORTANTLY, MY DISQUALIFICATION HAS NOT PREVENTED ME FROM FULLY PARTICIPATING IN RULEMAKING PROCEEDINGS.

AS MANY OF YOU MAY BE AWARE, A COMMISSIONER OF THE SEC WHO HAS BEEN ON THE STAFF AND PARTICIPATED IN THE INVESTIGATION OR PROSECUTION OF A CASE WOULD ORDINARILY BE DISQUALIFIED FROM PARTICIPATING IN THE CONSIDERATION OF THAT CASE. * I HAVE PROBABLY HAD TO DISQUALIFY MYSELF AS A COMMISSIONER FROM AS MANY SIGNIFICANT CASES FOR THE REASON THAT THE CASE WAS UNDER MY SUPERVISION WHEN I WAS A STAFF ATTORNEY AS FOR THE REASON THAT MY FORMER LAW FIRM REPRESENTED A PARTY.

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* AMOS TREAT & CO., INC. V. S.E.C., 306 F. 2D 260 (D.C.C. 1962).

NEVERTHELESS, ALTHOUGH I BELIEVE MY DISQUALIFICATION IS APPROPRIATE FOR ME, I DO NOT BELIEVE IT SHOULD NECESSARILY BE IMPOSED ON ALL PRIVATE PRACTITIONERS WHO BECOME COMMISSIONERS OF AN INDEPENDENT REGULATORY AGENCY. AND I WOULD STRONGLY OBJECT TO CODIFYING SUCH A DISQUALIFICATION.

THE OBJECTIVE WHICH WE ARE TRYING TO ACHIEVE IS GOVERNMENT INTEGRITY IN A DEMOCRACY. ACHIEVING THAT OBJECTIVE REQUIRES THAT WE CREATE INCENTIVES, RATHER THAN DISINCENTIVES, FOR PERSONS OF THE HIGHEST QUALITY TO SEEK GOVERNMENT SERVICE. A PERSON OF HIGH ETHICAL STANDARDS WHO HOLDS PUBLIC OFFICE WILL RESOLVE CONFLICTS OF INTEREST IN FAVOR OF THE PUBLIC INTEREST. CODES OF ETHICS CAN BE USEFUL, BUT ETHICAL STANDARDS ARE ONLY AS HIGH AS THE STANDARDS OF THE OFFICIALS EXERCISING THEM.

ONE OF THE PREMISES OF CURRENT EFFORTS TO CLOSE THE REVOLVING DOOR IS THAT GOVERNMENT EMPLOYEES ARE VULNERABLE TO IMPROPER ATTEMPTS TO INFLUENCE THEM. I MUST TAKE ISSUE WITH THAT CONCEPT AS APPLIED TO THE STAFF OF THE SECURITIES AND EXCHANGE COMMISSION WHICH HAS A WELL-DESERVED REPUTATION FOR INTEGRITY. INVULNERABILITY TO IMPROPER INFLUENCE CANNOT BE LEGISLATED. IT WILL BECOME AND REMAIN A FACT ONLY BY REASON OF THE TACIT AGREEMENT BETWEEN THE HEADS OF AN AGENCY AND ITS STAFF THAT ANYTHING LESS THAN ABSOLUTE PROBITY WILL NOT BE TOLERATED.

GOVERNMENT SERVICE SHOULD NOT BE A SOURCE OF PRIVATE GAIN AT THE EXPENSE OF PUBLIC GOOD. AT THE SAME TIME, RESTRICTIONS IMPOSED UPON THOSE IN GOVERNMENT CANNOT IMPEDE THE LONG-TERM PERSONAL GOALS AND THE GROWTH OF THE INDIVIDUAL ENGAGED IN SUCH SERVICE IF GOVERNMENTAL EMPLOYMENT IS TO BE ATTRACTIVE TO PERSONS OF ABILITY AND AMBITION. IF THE GOVERNMENT IS TO FUNCTION EFFECTIVELY, IT MUST ATTRACT THE MOST ABLE, AS WELL AS THE MOST ETHICAL, PEOPLE FROM ALL PARTS OF OUR SOCIETY. UNJUSTIFIABLE RESTRAINTS ON GOVERNMENT OFFICALS WILL ONLY DISCOURAGE OUTSTANDING MEN AND WOMEN FROM SEEKING SUCH EMPLOYMENT AND FROM SERVING THEIR COUNTRY, WHERE THEIR SERVICES ARE SORELY NEEDED.