

REVIEW OF ETHICS PERFORMANCE IN SENATOR JON TESTER'S OFFICE

Background

Senator Tester took the oath of office on January 4, 2007, and on that day he instituted an ethics program for his office based on his office manual, federal statutes and regulations and Senate rules. The program as established was reviewed by Hon. John C. Sheehy, retired justice of the Montana Supreme Court, who reported his findings in a report filed on April 28, 2008. In that report he reviewed the principles and procedures underlying and applicable to the program and how they were to be implemented, not only by the Senator's staff but by the Senator himself. Among the matters considered were hiring practices, gifts, conflict of interest, financial disclosures, earmarks, franked mail and elections. After discussion of these and other matters he concluded: "For the present we can find assurance in that Senator Tester has opened the business of his office to daily inspection and has provided rules of practice for his staff to assure ethical behavior." On April 25, 2010, a Washington law firm submitted a report on its examination of the ethics provisions of the office manual and their compliance with federal legal requirements and concluded: "the office is acting in compliance with Senate rules and federal laws *** to avoid the appearance of any conflict of interest or undue influence by private entities the office has adopted policies that are more restrictive than what is required by Senate rules and federal law."

These two reports having confirmed that Senator Tester has established both a credible and legal system of ethical compliance and control, I have been asked to re-examine and evaluate the actual operation of that system. I have done so and submit the following observations. With the full and frank cooperation of the Tester staff I have been enabled to review what I believe to be the routine and daily documentation of the system, to discuss the actual operation of that system with several staff members, principally Bill Lombardi, Aaron Murphy and Tom Lopach, to consider actual cases and to evaluate the system as a whole.

A problem

No ordinary employee of this or any other government office could possibly comprehend or develop a working knowledge of the infinite intricacies of the rules, regulations, laws, organizations and procedures of the ethics requirements of the United States Senate. To fight his or her way through that thicket the staffer would have to have a working knowledge of at least the following written guidelines: the Ethics in Government Act of 1978, the Honest leadership and Open Government Act of 2007, the Foreign Gifts and Decorations Act, the Senate Ethics Manuel (542 pages), the Senate Code of Professional Conduct, the detailed Rules of the Senate applicable to ethical conduct, the Regulations and Guidelines for Privately Sponsored Travel published by the Senate Select Committee on Ethics, the periodic publication of the Congressional Reporting Service: Campaign Activities by Congressional Employees and whatever other bulletins and advisories that might be published by the House or Senate special ethics committees such as regulations or guidelines for privately sponsored travel and the use of

mailing franks. In addition to mastering the details of these documents, in order to obtain clarification and opinions on them the staffer would be well advised to consult with the Senate Office of Education and Training or the office of the Senate Sergeant at Arms.

A solution

Apparently facing up to the utter impossibility of any staffer coping with, not to say mastering, this vast and inscrutable network of directives, Senator Tester created an office manual which sets forth relatively simple and usable guidelines for ethical conduct by his staff. These guidelines cover such matters as ethics training, financial disclosure, conflict of interest, lobbying contacts, gifts, travel, outside employment and use of the franking privilege. It is this reviewer's opinion that the gift exceptions are far too detailed and the travel provisions are so involved as to be self-defeating. With these two caveats, I believe these guidelines are for the most part concise, comprehensible and workable.

The other aid to understanding, following and enforcing his office's ethics regime is the placement of that regime in the hands of single person, Susan Cierlitsky, his administrative director, who I understand is not only a ramrod enforcer but a helpful guide and able counselor.

These two features, rules the staff can comprehend and follow and a reliable and accessible source of counseling on those rules, make adherence to the office's ethical requirements possible and appears to have succeeded in practice.

Office manual sections

There have been no substantial changes in the ethics provisions of the office manual (sections 2.7 o 2.17) since their inception. My observations, information and opinions on the operation of those sections are as follows.

The requirements for initial training and certification thereof set forth in sections 2.7 & 2.7.1 are being faithfully carried out as specified. I would suggest, however, that in addition to the certification, the employee be required to sign a form of contract that declares the employee fully understands his or her obligation to adhere to the basic ethical requirements set forth in the ethics training course, that he or she will stay current on significant changes or developments in those requirements and will adhere strictly to those requirements and be subject to discharge on failure to do so.

Section 2.7.3.2 of the office manual seems to blatantly endorse one of the most outrageous features of our capital city: the condoning of the spouses or close relatives of congressional members or staffers being employed as paid lobbyists. I personally realize and sympathize with the fact that it may well be necessary for spouses of members or their staffers to work to make ends meet in the expensive milieu of present-day D. C.. But I also recognize that a very substantial majority of the electorate is beset with the uneasy feeling that the Congress, and possibly the other two branches, have been taken over by or are unduly influenced by lobbyists. In point of fact, I believe that feeling on the part of the South Dakota electorate accounted for the defeat of the immediate past majority

leader of the Senate. It is enough for the members and their staff to be beset on every hand by lobbyists; it is not and should not be acceptable that they sleep or live with them.

Sections 2.7.3 – 2.7.3.3. The Senator's offices appear to be quite sensitive to what constitutes conflict of interest and what is required by the Senate rules and the office manual. This is exemplified by a February 2010 press release setting forth a clear public message to a staff member actually leaving the Washington office for a Washington lobbying position. The message was that he was leaving by a "one-way door" (presumably as opposed to a "revolving door") and would not be permitted to lobby Tester or anyone on his staff.

Section 2.74 . The profuse exceptions in this section to Senate Rule 35 on gifts just about nullifies both the office manual and Rule 35 or lends great confusion to their applicability. However that may be, there seems to have been little or no problem about gifts and there have been no sanctions applied.

Section 2.7.5. There has been one instance wherein this section was applied. The offending staffer made a contribution to the U. S. Treasury in an amount he or she considered appropriate to cover a donation in excess of the amount allowed by this section, even though it was allowed by the Senate rule. The amount of the donation may not have seemed to be significant and the violation may not have been flagrant but the fact that the rule was being enforced was probably beneficial.

Section 2.8. There have been no reports of foreign gifts and/or travel provided the staff or any enquiries with regard thereto.

Section 2.9. This section is somewhat ambiguous as to whether staff are forbidden to accept outside employment that conflicts with their official duties or whether they can accept such employment with the approval of the chief of staff or the state operations manager. Be that as it may, it appears the Tester staff regularly reports whatever outside employment they may obtain

Section 2.10. Political activity by permitted staff appears to be very sternly and effectively controlled by both the chief of staff and the state operations manager, as is required by the rule.

Sections 2.13 & 2.14. The only conclusion I can reach with regard to these sections is that the administrative requirements for privately sponsored travel are so complex and burdensome that no one on the staff ventures the use of such travel, and official travel is so tightly controlled the staff has little or no discretion and it also involves a forbidding amount of paper work. Whatever the reason or reasons, I understand there has in fact been very little, if any, privately financed travel and no significant problems with routine official travel. I perceive a small but bothersome loop-hole in sub-section 2.13.3 . It seems to me entirely possible that a good deal of lobbying could be accomplished by a 501 (c) (3) organization employing a lobbyist without running afoul of this sub-section. Sub-section 2.13.4 likewise seems to give lobbyists a bit of fresh air.

Finally there is no record or suggestion of violation of Section 2.15, controlling the misuse of the frank.

Uninvited reflections, conclusions and opinions

I would conclude this review with the opinion that Senator Tester has established an ethics regime for his offices that provides clear, comprehensive and workable guidance for his staff and that regime appears to be substantially adhered to and effectively enforced.

Having so concluded, I cannot resist imparting a presumptuous suggestion. Because I believe, as previously stated, the maelstrom of laws, rules, regulations, codes and other sources of opinions and guidance on what is and is not ethical conduct is forbidding and virtually incomprehensible to the ordinary government worker, and because I believe the subject is not essentially all that complicated or incomprehensible, I would suggest that a sign be placed in a prominent place in each office with substantially the following message: "A public office is a public trust. In carrying out the functions of this office, NEVER use your position to sell out our constituents, your fellow citizens, for personal gain of any kind and, above all, avoid the APPEARANCE of doing so."

Finally, I would venture that all the written directives and other guidance that can be conceived of will be mere wallpaper and an empty echo in the halls of Congress if the leadership - the members - fail to exemplify the highest ethical standards. If the members want their staffs to be paragons of ethical conduct, their own conduct must be above suspicion. As a concrete example, it is pointless to condemn and forbid the "revolving door" practice when the staff can, and does, observe ex-staffers returning from their private lobbying jobs to their previous positions to influence or actually write legislation that clearly affects or benefits their ex-lobbying employer.

As noted, I believe Senator Tester has demonstrated exceptional leadership and dedication in establishing a new and more effective system of ethics development and control for his offices. Realizing full well that of all good deeds for which people get punished in Washington, pushing ethics has to be at the top of the list, I would nevertheless encourage continuation of his effort as an example for the rest of the Senate.

A handwritten signature in black ink that reads "Gordon R. Bennett". The signature is written in a cursive style with a large, sweeping initial "G" and a stylized "B".

Gordon R. Bennett
8/12/10