

ETHICS REPORT FOR SENATOR JON TESTER

John C. Sheehy
825 North Rodney Street
Helena, Montana 59601
(406)443-1398

Exordium

I met Senator Jon Tester at his Montana Senate Office in Helena on February 28, 2008. I had never had a conversation with him before that time. He said that in the 2006 campaign, he had made a promise to the Montana electorate that he would open his records for an ethics examination after his first year in office. He asked if I would take on the duty, and I told him I would. No pay of any kind is involved, and I meet my own expenses. I was immediately given a box of copies of records from his office. I will describe the contents later.

I am at pains to describe the nature of this Report. It is not an "audit" as some have termed it. An audit would be a systematic examination of the Senator's office accounts, which of course I have not done. What I think Senator Tester is seeking, and what I have sought here, is an assurance for the people of this State, that his office and its procedures have been set up to operate ethically, and that in his first year of office, that has been achieved. This Report therefore is more in the nature of a review of the steps taken by the Senator to assure moral sensitivity by him and his staff in handling the public business, and the apparent results of those steps.

Senate Rules On Ethics

The power of the Senate to discipline itself derives from the Constitution(Art.1,§5,cl.2). Essentially the Senate Select Committee On Ethics is entrusted by law with jurisdiction to investigate and determine allegations of misconduct by Members, officers, or employees of the Senate. There exists the possibility, slight, that something missed in this Report could come before the Select Committee as a matter for its investigation. In that event, I would accede to its superior jurisdiction, and regard this Report as informational and not probative for the Select Committee.

Hiring Practices

Senator Tester has adopted an Office Policy Manual for employees of his Office, effective January 4, 2007, the first day he took office. The manual explains in detail the terms and conditions of employment, such as pay, office hours to be worked, leave policies, dress code, expenses reimbursements, use of office equipment, harassment policy, and benefits, ensuring always the preservation of an at-will employment. Other manual provisions relate specifically to ethics.

Senate rules permit a senator to designate two staff members to handle political matters. Both the designated and non-designated employees, under the manual and by Senate rule, are prohibited

from political activity on Senate time, in a Senate building, or using Senate resources or property. However, the employee may engage in limited campaign activities on off-duty time, if the regular duties of the employee are not neglected, and the activity does not create a conflict of interest. Volunteer political activity on behalf of a political campaign must first be cleared with the Senator's Chief Of Staff and State Director. Senate property may not be used in campaign activities.

Except for the political designees, no employee of Senator Tester's office may receive, solicit, hold, or distribute any fund in any campaign for federal office. In this and the above provisions, the Office Manual is in accord with the Senate Ethics Rules.

Gifts and Conflicts of Interest for Employees

Senator Tester's Office Policy Manual requires that all employees of his Office strictly comply with the Ethics In Government Act regarding outside income, gifts and personal finance disclosures, if required. He has adopted a policy for his office employees more strict than federal law and the Senate rules in some respects. His policy is referred to as the Tester Office Code of Ethics for Public Officials and Employees. Under the Tester Office Code the employees of his Office may not accept food, drink, transportation, lodging, employment or anything of pecuniary value from a lobbyist or an organization that employs a lobbyist. There are exceptions if the gifts are related to educational or informational programs relating to official Senate business, but those exceptions would still be subject to the ordinary Senate rules on reporting gifts.

The tests for application of the Tester Office Ethics Policy regarding gifts are (1) is the item provided by a lobbyist, an organization that employs lobbyists, or provided because of the recipient's official position? (2) Is there any exception (e.g., honorary degrees) that would make the acceptance permissible?

Regarding conflicts of interest, the employees may not engage in conduct that constitutes a conflict or potential conflict of interest, or in any activity or association by an employee that might compromise the integrity of the operations of the Office or the performance of the employee's duties (such as accepting gifts).

The ordinary Senate rule on gifts (Senate Rule 35) is much complicated, full of exceptions and provisos. Thus under ordinary Senate rules a staffer may accept a non-exempt gift other than cash from a single source of a value less than \$50(49.99), and from a single source an aggregate value of less than \$100 (99.99) in a calendar year. How that rule is applied in myriad situations is simply a maze. The Tester Office Manual avoids all that confusion by simply banning all gifts. If gifts arrive without opportunity for refusal, they are returned to the donor, or kept as a gift to the people of Montana by distribution to charity.

Even the Tester manual must have exceptions, such as expenses incurred or meals eaten in connection with participation in or attendance at public events, related to official business, but in essence the staffers are prevented from accepting gifts from lobbyists or organizations that employ lobbyists.

Senator Tester's Financial Disclosure Reports

Senator Tester has filed two U.S. Senate Financial Disclosure Reports, one as a candidate in calendar year 2006, and one as a Senator, also covering the year 2006. Copies have been given to me. Since the disclosures cover a period before Jon Tester became a Senator, I think it not necessary to burden this Report with any discussion about his income before he took office. As to his holdings, they relate to his ownership interests in his agricultural property near Big Sandy, much like any Montana rancher or farmer. None of his holdings would create a conflict of interest in agricultural legislation,

even as to farm bills directed in general to all farm operations, and not specifically to him or to a closed class to which he might belong.

Likewise financial disclosure reports for calendar year 2006 from William P. Lombardi and Stephanie A. Schriock have been filed with the Secretary of the Senate. They are the political designees on the Senator's staff. The reports appear to cover the period before they came on duty for the Senator. In each case their holdings (stock, etc.) do not conflict with their duties on the office staff, or they would be flagged by the committee receiving the disclosures.

Daily Schedules Posted

From the beginning of his tenure as a senator, Jon Tester inaugurated a policy of posting each day his schedule for the previous day. I have received and examined the schedules for each day of calendar year 2007, augmented by schedule reports of non-office days such as Sundays and holidays, and days when and where he was in Montana on personal or official/political activities.

I am informed that Senator Tester's practice of public account and publishing of his time and associations with others is new to the Senate. Some like it and some don't. The schedules show how the Senator's time was split up on those days, and the persons he met or the activities such as floor duties that he engaged in for those particular days.

One can see from the schedules how the Senator spent each day, in hearings on the floor, or Member meetings, and how the remainder of his day was split into quarter-hour segments in which he met constituents, other senators, or others interested in the Senate business. Staff assignments are listed. Even drop-by visitors are recorded.

I assume that all U. S. senators, if they want to keep their offices, must take on the same grueling and exhausting schedule of day-to-day grind. "Tomorrow and tomorrow and tomorrow creeps in this petty pace from day to day to the last syllable" of the term of office. Despite the glamour and the power of a senator, the daily schedules demonstrate that Senator Tester's life (as with any other senator) is now in the public domain. From the rising of the sun to the going down thereof, he is parceled out and pulled, importuned and driven by the force and weight of immense public issues, while at the same time he must try to serve constituent needs.

Then too, the public posting of his daily schedules gives acceptable evidence that Senator Tester and his staff are acting ethically.

Earmarks generally.

I begin by stating that before I undertook this task, I was ambivalent in my opinion about congressional earmarks. By "earmarks" I mean my concept of projects granted appropriations of federal moneys through the device of attaching such appropriations to more important bills treating larger issues, even non-budget bills, and thus riding through to the presidential signature.

Senator Tester's office provided me with a large number of copies of earmark records compiled in his office, reflecting his efforts for funding Montana projects. His reports show that for congressional Fiscal Year 2008, Montana projects for which he requested earmarks received federal funding through appropriations totaling \$117,604,726.

That seems a remarkable achievement for a freshman Senator. It undoubtedly helped that he was of the new majority party in the Senate, and the particular member whose election achieved that majority. If, as economists¹ tell us, that a new dollar injected into an economy produces a seven dollar increase in that economy, the beneficial effect of \$117+ millions to the Montana economy is

1. If all economists were laid together end-to-end, they would still not reach a conclusion, someone said.

immense. Whatever the true impact of new money may be, the fact most readily deduced is that because of the provisions of Senator Tester's earmarked funds. Montanans will not have to dig into personal resources in the form of additional taxes, drives or higher prices to produce like amounts to fund the same projects.

Yet, the foregoing *non obstante*, I am now convinced that the congressional system of earmarking, as now practiced, has grown out of proportion and out of control. My reasons are not important here, and I will not discuss them. My conclusion does not detract in the slightest from what Senator Tester has established from the viewpoint of ethics.

The Senator began his office on January 4, 2007, and found an entrenched system where constituents of probably every other Congress-person were seeking and obtaining funds through earmarks. The Senator faced a choice, either to stand alone to deny requests from Montanans for earmark consideration, or to pass the requests along to the proper Senate committees. He chose to act for his constituents. No ethics problem there.

Whether Senator Tester inherited earmark requests from his predecessor, or some were referred to him by other Congress persons, or he received requests as he took office, I cannot determine. What I do find is that on March 30, 2007, when he was about three months in office, he submitted to the Senate Appropriations Subcommittee on Interior, through its Chairman and Ranking Member, twenty different requests for earmarked funds, in total more than \$45,106,000. All of the requests appear laudable, coming from every corner of Montana, relating to wastewater, water quality, land acquisition, species preservation, forests, and so on.

Several of these requests were recurring, in that the projects had received federal appropriations through earmarks in previous years. Some recurring projects faced problems because their annual funding was not provided in FY2007, when Congress operated under a continuing resolution (CR) without a passed budget bill.

Earmark Procedures in Senator Tester's Office.

It should be understood that Senator Tester did not have the final say about earmark requests for FY2008. No matter how and from whatever source the Montana project requests may have come to his office for his attention, it was the Senate Appropriations Committee that had the final say as to Senate appropriation approval of the project, and the amount of funds to be appropriated for the project.

Thus each Tester request for an earmark was sent to the proper subcommittee with a cover letter signed by the Senator and addressed to the chairman and ranking member of the subcommittee, with included or attached statements as to the particulars of each project, and the amount requested as an appropriation for each project. One of Senator Tester's office staff was named on the cover letter to the subcommittee as a contact for the subcommittee to the Senator's office.

I have not counted the number of requests for earmarks submitted by the Senator to the various appropriation subcommittees. A large number of his requests, maybe a majority, did not make it through the Senate earmark process and received no funding. Of the requests that were successful, the amounts granted were usually lower in most instances than the amounts requested. I have attached sheets showing how units of our university system fared in amounts sought and amounts granted for FY2008. Even with those results, a good many of the university system's other submitted proposals were not granted.

From the viewpoint of ethics, it is important to know that in several letters addressed to the subcommittees, and to the Senate Appropriation Committee at large, Senator Tester certified that:

"I certify that neither I nor my immediate family has a pecuniary interest, consistent with the requirements of Paragraph 9 of Rule XLIV of the Standing Rules of the Senate, in any congressionally directed spending item that I requested

that is contained in the FY2008 Transportation, Housing and Urban Development and Related Agencies Appropriations Conference Report, Senate Report, or the accompanying Statement of Managers.”

The certification also shows compliance by Senator Tester with Senate Rule 37(4) prohibiting him from using his legislative power to advance his or his immediate family’s personal financial interest.

So we find with respect to the Senator’s ethics in the earmark procedures (1) acceptance by Senator Tester of the long-prevalent congressional system of seeking earmarks; (2) compliance by Senator Tester with Senate rules established to regulate earmarking in that body; (3) no evidence of improper efforts by his staff members for gain or otherwise to advance earmarks; and (4) certification by Senator Tester over his signature that neither he nor his immediate family would achieve pecuniary gain from any project he recommended for earmark funding.

Senator Tester Voting Record

Part of the documents I have examined consists of a chronological listing of all Senator Tester’s votes in the First Session of the 110th Congress, up to December 18, 2007. In that period he cast 442 votes on the floor, on bills, procedures, amendments, and final votes. In general it may be said that by comparison with the votes of others, his votes with some few exceptions were in accord with the positions taken by the majority party. Since this report is concerned with ethics only, no discussion is germane here with regard to his votes on politically divisive issues, except to note that in the first week of his tenure, he supported Ethics Reform (S.1), to strengthen the provisions of the Ethics And Government Act of 1978.

Miscellany

Office Expenses. Summaries of the financial status of budget items for Senator Tester’s office expenses, and the expenditures charged against such budget items were supplied, for FY2007 beginning in January, 2007, to February 28, 2008, in FY2008. Also supplied were analyses by vendors (payrolls, travel, office supplies, incidentals and payees) for the same periods. Since this is not an audit, but a report from the viewpoint of ethics, there is nothing to report in this category.

Franked Mail. Members of Congress are authorized to send matter under their signature or facsimile through the domestic mails without payment of postage, if the material relates to the business or duties of their offices. The “frank” does not include special services such as registered mail, postal insurance or return receipts, which must be paid for out of official office funds other than the franking allowance.. It is illegal to use the frank to avoid payment of postage on private letters or packages. “Inside mail” without the use of the Postal Service is not subject to the franking statute.

The Ethics Committee regulates use of the frank in the Senate by rule and by the determination of complaints. It is the personal responsibility of the Senator to see that the staff members do not abuse the frank. An improper use of the mails under the frank by a staff member would be imputed to the Senator, and be his personal responsibility.

Mass mailings are done with the frank, but the expense is charged to official office account funds especially appropriated for that purpose.

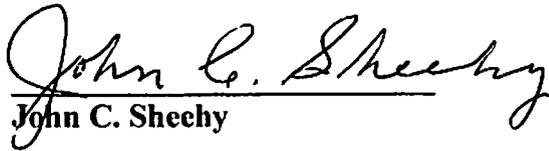
The subject of franked mail is covered in Senator Tester’s Office Policy Manual, referred to above. It prohibits absolutely use of the frank for an employee’s personal mail which may only be sent “using the employee’s own postage stamps, stationery and envelope.” The Tester Office Manual rule applies to “inside mail” as well, and is thus more strict than the federal law applying to the frank.

PACs. The Tester quarterly receipts and disbursements reports to the FEC for calendar year 2007 (post-election) reveal nothing beyond the ordinary. The reports cover two PACs, Montanans For Tester and Treasure State PAC. Donations to each PAC from individuals seem to range from \$250 to \$1000. Business associations that represent various segments of economic activity or professions routinely, it seems, donated sums mostly from \$1000 to \$1500. Disbursements are based on receipts from the recipients. All these reports are open to the public generally, and need no further comment here.

Conclusion

There may be other areas of the Senate business where the risk of ethics violations may exist. As I said at the beginning of this report, my impression of what the Senator was seeking here was an assurance for himself and for the people that in his first year of office his procedures for himself and all of his office staff are designed to handle ethically the public business. This report covers the rules Senator Tester established for himself and his staff in 2007 to assure propriety in the operation of his senate office in areas where the practices of other senate offices in other times have raised public concern. Those areas include such items as relations with lobbyists, the use of earmarks, or franked mail. There are undoubtedly other areas existing in the senate business where avarice could collide with human frailty. We can hope that conscience, absent specific rules, will then prevail. 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. Myself, I do not ask for more.

DATED This 19th day of April, 2008.


John C. Sheehy

| <u>PROJECT</u> | <u>REQUESTING ORGANIZATION</u> | <u>AMOUNT REQUESTED</u> | <u>APPROPRIATION</u> |
|------------------------------------------------|--------------------------------|---------------------------|----------------------|
| Aggriculture: | | | |
| Animal Bioscience Facility | MSU Bozeman | \$16,000,000 ¹ | \$ 1,809,819 |
| MSU-Montana Beef Network | MSU-Bozeman | 1,000,000 | 725,883 |
| MSU-Sheep Institute | MSU-Bozeman | 600,000 | 148,950 |
| MSU Barley for Rural Development | MSU-Bozeman | 750,000 | 547,143 |
| Rangeland Restoration | MSU-Bozeman | (Can't find) ² | 983,070 |
| Defense: | | | |
| MITech Extension Program | MSU-Bozeman | \$1,500,000 | \$1,500,000 |
| Ceramic, etc., Airfoil Enhancement Capability | MSU-Bozeman | (Can't find) ² | <u>800,000</u> |
| Total | | | \$6,514,865 |
| Commerce-Justice-Science: | | | |
| U of M Montana Youth Empowerment Project | U of M | \$1,300,000 | 312,550 |
| Labor-HHS-Education: | | | |
| U of M Methamphetamine Detection etc. Research | U of M | \$2,000,000 | 171,943 |
| Defense: | | | |
| Amelioration of Military Hearing Loss | U of M | \$1,000,000 | 800,000 |
| U of M Mansfield Center | U of M | 1,000,000 ³ | <u>1,000,000</u> |
| Total | | | \$2,284.493 |

P.2 (cont.)

**Commerce Justice Science:
Development Program For
Monana Women's Prison**

| | | |
|--------------|------------|------------|
| MSU-Billings | \$ 650,000 | \$ 267,900 |
|--------------|------------|------------|

**Labor-HHS-Education:
Montana Energy Workforce
Training**

| | | |
|--------------|-----------|---------|
| MSU-Billings | 1,000,000 | 123,799 |
|--------------|-----------|---------|

**Skilled Trades Workforce Program
Total**

| | | |
|--------------|-----------|-------------------|
| MSU-Billings | 1,000,000 | <u>153,275</u> |
| | | \$ 544,974 |

1. Probably the total cost of the facility.
2. Must have overlooked.
3. Mansfield name is still powerful.