

An Abbreviated History of Government Ethics Laws— Part II¹

By Mark Davies, Steven G. Leventhal and Thomas J. Mullaney

This is the second part of an article providing an abbreviated history of government ethics laws. In the first part, which ran in the previous issue of the *Municipal Lawyer*, we spanned the centuries and the globe, starting with the code of Hammurabi, promulgated by the King of Babylon in the 18th century B.C.E., and concluding with the Empire Public Officials Law of 1873 in Bismarck's Germany. In this part, we focus our attention on New York City and the United States, starting with municipal ethics laws and then turning to the relevant federal laws. And, as a reminder of the relative youth of the United States, our survey covers less than two centuries, as we start with a law imposing restrictions on New York City's Board of Alderman in 1830.

We reiterate a major caveat to this article: none of the authors is a historian, let alone a legal historian or philosopher or theologian. We therefore welcome any corrections or additions to the examples cited in this article, corrections and additions that they will seek to post on the Section's website.

NYC's Board of Alderman Restrictions of 1830

Starting with New York City in 1830, one notes the enactment of a law prohibiting members of the New York City Board of Aldermen and Board of Assistants from having any direct or indirect interest in any contract, the expense or consideration of which was to be paid under an ordinance of the Common Council.² The Board of Aldermen, together with the Board of Councilmen, formed the Common Council, the forerunner of the City Council.³

This provision was expanded over the years. By 1901, it included a prohibition on buying one's City office, in language virtually identical to today's N.Y.C. Charter §§ 2604(b)(10) and 2606(c).⁴ The 1938 revision to the Charter expanded the provision further to prohibit certain appearances before City agencies or against the interests of the City, the forerunner of current Charter §§ 2604(b)(6)-(8), as well as the acceptance of gratuities, the forerunner of Charter § 2604(b)(13).⁵



Mark Davies



Steven G. Leventhal



Thomas J. Mullaney

After a detailed study of the ethics provisions of the Charter in 1957 and 1958, the state legislature and the Council in 1959 enacted major changes to the City's ethics laws, including most of the substantive provisions of the City's current conflicts of interest law in Charter Chapter 68, and established the Board of Ethics to render advice to public servants on the provisions of the ethics code.⁶ That Board of Ethics consisted of the Corporation Counsel, the Director of Personnel, and three public members appointed by the mayor who were to serve without compensation.⁷ In the Charter amendments of 1975, these provisions were expanded and shifted to a new Chapter 68 of the Charter.⁸ Finally, in 1988 and 1989, Chapter 68 was amended to create the five-member Conflicts of Interest Board as an independent body and to add to that body's responsibilities conflicts of interest training, administration of annual disclosure, and enforcement.⁹

Moving from municipal government to the federal government, we see that the real watershed in ethics laws in the United States occurred at the federal level during the Civil War Era.

The Civil War

The Civil War caused a major procurement effort by the federal government and a corresponding amount of corruption by various providers. The word "shoddy" came into use during the Civil War to describe the many inferior and defective goods purchased by the federal government for use by Union soldiers. The term applied to everything from rifles and tents to shoes, blankets and uniforms.¹⁰

Revulsion against such fraud led to the passage of the False Claims Act on March 2, 1863.¹¹ The False Claims Act, also known at the time as the "Lincoln

Law,”¹² made it a criminal offense to submit any false or fraudulent bill or claim for the purpose of obtaining payment from the United States. Punishment was by fine or imprisonment as a court martial may adjudge, excepting only the death penalty. The law also contained a “*qui tam*” provision,¹³ which allowed any person to bring a suit in his own name, as well as that of the United States, to recover the amount of a false claim against the government. If the suit was successful, the plaintiff would receive half of the forfeiture and the other half would be paid to the United States.

Various other statutes enacted during or about the time of the Civil War also addressed the avoidance of fraud and conflicts of interest. On February 26, 1853, Congress enacted “An Act to Prevent Frauds upon the Treasury of the United States,” which forbade any officers of the U.S., and any members of Congress, from accepting any payment, or any share in a claim against the U.S., in exchange for aiding the prosecution such claims.¹⁴ The same statute also made it a crime to offer anything of value to a member of the Senate or House of Representatives with intent to influence his vote or decision on any question and also criminalized the acceptance of such a payment. The penalties included fine and imprisonment, as well as forfeiture of one’s public office and permanent disqualification from holding public office in the United States. In response to further ethical abuses during the Civil War, the statute was extended and applied to a wider range of matters and proceedings.¹⁵

On July 16, 1862, Congress enacted another statute that forbade any member of Congress from accepting anything of value in exchange for his aid to anyone in procuring any contract, office or place from the U.S. government. It provided for punishment by fine and imprisonment, and also provided that a contract so obtained may be declared null and void at the discretion of the President. Furthermore, that member of Congress or officer would be disqualified from holding any office under the U.S. government.¹⁶

From the Civil War to Watergate: The “Reform Era”

The Civil War era corruption in procurement and abuses of the spoils system led to a reform movement that continued through the middle of the 20th Century.

The assassination of James Garfield in 1880 by a disappointed office seeker rallied public support for civil service reform.¹⁷ Garfield’s successor, Chester Arthur, embraced the cause and the Pendleton Civil Service Reform Act was enacted in 1883.¹⁸ The Pendleton Act provided for merit appointment in federal employment based on competitive examinations. The

Act also prohibited retaliatory discharge or demotion of government employees for political reasons, and prohibited solicitation of campaign contributions on federal government property.

The Pendleton Act also created the United States Civil Service Commission. Initially, the Act applied to about ten percent of the federal civilian workforce. However, by 1896, a provision allowing outgoing presidents to protect their patronage appointees by converting their jobs to civil service positions led to most federal employees holding civil service titles. One such outgoing president was Arthur, who lost the support of his party due to his support of civil service reform.

In an 1887 essay entitled “The Study of Administration,”¹⁹ Woodrow Wilson said that:

...we must regard civil-service reform in its present stages as but a prelude to a fuller administrative reform. We are now rectifying methods of appointment; we must go on to adjust executive functions more fitly and to prescribe better methods of executive organization and action. Civil-service reform is thus but a moral preparation for what is to follow. It is clearing the moral atmosphere of official life by establishing the sanctity of public office as a public trust, and, by making service unpartisan, it is opening the way for making it businesslike. By sweetening its motives it is rendering it capable of improving its method of work.

In 1889, President Benjamin Harrison appointed Theodore Roosevelt as United States Civil Service Commissioner, based on Roosevelt’s support of the New York State Civil Service Act of 1883, as well as his enthusiasm and effectiveness in challenging political corruption in New York. After only one week in office, Commissioner Roosevelt recommended the removal of examination board members in New York for selling test questions to the public for \$50. Later, he had supporters of President Harrison arrested for buying votes in Baltimore.²⁰

The assassination in 1901 of another president, William McKinley, resulted in the elevation of then Vice-President Theodore Roosevelt to President of the United States. As President, Roosevelt significantly expanded the federal government and introduced reforms that evolved into the modern merit system. Roosevelt-era reforms included the adoption of a definition of “just cause” for dismissal, stricter enforcement of restrictions against political activities by federal officials, prohibitions against the payment of illegally

appointed civil servants, and the classification of positions based on their duties.²¹

Twenty-four years and a World War separated the presidencies of Republican Theodore Roosevelt and his fifth cousin, Democrat Franklin Roosevelt.

President Franklin Roosevelt's urgent focus at the time of his first inauguration in 1933 was economic recovery, which, in Roosevelt's view, was rooted in ethical considerations. After assuring Americans that the only thing to they had to fear was fear itself, Roosevelt said that material wealth was a false standard of success. He decried the false belief that public office and high political positions were to be valued only by "the standards of pride of place and personal profit." Roosevelt called for an end to conduct in the fields of banking and business that gave "a sacred trust the likeness of callousness and wrongdoing." Confidence, Roosevelt stated, "thrives only on honesty, on honor, on the sacredness of obligations, on faithful protection, on unselfish performance; without them it cannot live." Restoration of public confidence called for more than "changes in ethics alone." The Nation, Roosevelt said, called for "action, and action now."²²

Roosevelt sparked the Nation into action in the form of numerous government programs, collectively referred to as the New Deal. The implementation of the New Deal programs, the armament and wartime preparations, and the United States' subsequent entry into the Second World War dramatically expanded the size and role of the federal government, the military and American industry. In his famous farewell address of 1961, President Eisenhower warned of the dangers of concentrated power in the military-industrial complex.²³

On July 4, 1966, President Lyndon Johnson signed the Freedom of Information Act into law.²⁴ A signing statement by the President demonstrated that the legislation sprang from "one of our most essential principles: a democracy works best when the people have all the information that the security of the nation will permit" but noted the need for confidentiality in matters of national security and personal privacy.²⁵ The scope of the Freedom of Information Act has expanded through subsequent legislative enactments, including reforms enacted in 1974, following the Watergate scandal.

Watergate

The Watergate scandal resulted in two main categories of changes in the fields of ethics and government.

The first major change was a new and increased emphasis on the field of ethics and professional re-

sponsibility itself. The public and the profession took note of the fact that virtually all of the leading participants in the Watergate scandal were lawyers, including the President, the Attorney General, and many of their top assistants. By one count, twenty-nine lawyers were the subjects of disciplinary proceedings as a result of Watergate.²⁶

"The Watergate scandal resulted in two main categories of changes in the fields of ethics and government."

This scandal led to important reforms in the field of ethics by the profession itself. In 1974, the year when President Nixon resigned, the American Bar Association (ABA) amended its standards to require all accredited law schools to offer mandatory instruction in professional responsibility.²⁷ The ABA also started the process of revising what would become the Model Rules of Professional Conduct. Many state bar examiners added professional responsibility to the subjects tested on the bar examinations.²⁸ It should be noted that these changes were not enacted by the federal government, but by members of the legal profession itself through the ABA, state courts, and various state bar associations.

The second major category of changes resulting from Watergate involved federal legislation designed to remedy perceived abuses of governmental powers.²⁹ Such changes included the 1974 amendments to the Freedom of Information Act, the Privacy Act, the Ethics in Government Act (including its special prosecutor provisions), the Civil Service Reform Act (including its "whistleblower" provisions), the Tax Reform Act of 1976 (including its tax information disclosure provisions), and the Right to Financial Privacy Act.

Many of these changes dealt with perceived abuses with respect to the gathering or use (of both) of information by the government. The 1974 amendments to the Freedom of Information Act were designed to force the government to reveal more information about itself to the public.³⁰ They required *in camera* inspection of records sought to be withheld for national defense and foreign policy reasons, and also limited the bases for invoking the "investigatory records" exception. The Privacy Act of 1974³¹ controlled what the government could do with information that it gathered about private citizens, as did the disclosure provisions of the Tax Reform Act of 1976.³² The Right to Financial Privacy Act of 1978³³ limited the government's access to financial records held by banks and other institutions.

The Ethics in Government Act³⁴ required financial disclosure by public officials, limited their outside employment and lobbying, and created the Office of

Government Ethics. But the Act's most direct response to Watergate was that, in its original form, it subjected various government officials to mandatory investigation of any information received by the Attorney General regarding a violation of federal law. Prosecution by a special prosecutor would follow unless the Attorney General certified to a court that there were no grounds for proceeding. (These matters are now governed by 28 C.F.R. Part 600—General Powers of Special Counsel.)

“Conflicts of interest, corruption, and unethical conduct among government officials have haunted humankind since the dawn of government itself. And for almost as long, or so it would seem, laws, rules, regulations, and precepts have sought to contain such misconduct.”

Among other reforms of federal employment practices, the Civil Service Reform Act of 1978³⁵ protected federal employee “whistleblowers” who disclosed information that they reasonably believed provided evidence of “a violation of law, rule or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a specific and substantial danger to public health and safety.” This was obviously designed to increase the level of scrutiny on the operations of the federal government, and to maximize the chances that dishonesty would be revealed.

Conclusion

Some two decades ago, a story circulated at ethics and anti-corruption conferences about three world leaders who, upon dying, each posed a question to the Creator. President Kennedy asked if the United States would ever put a man on the moon. “Sooner than you think,” the Creator replied. Chairman Khrushchev asked if his nation would ever be able to feed itself. The Creator responded, “Yes, with time.” Finally, Prime Minister Gandhi asked when corruption would finally be eliminated. Shedding a tear, the Creator answered, “Not in my lifetime.”

Conflicts of interest, corruption, and unethical conduct among government officials have haunted humankind since the dawn of government itself. And for almost as long, or so it would seem, laws, rules, regulations, and precepts have sought to contain such misconduct. As municipal attorneys, we are called to continue that struggle.

Endnotes

1. This article is based on a panel conducted by the authors at the 19th annual Ethics in New York City Government Seminar, co-hosted by the New York City Conflicts of Interest Board and New York Law School on May 21, 2013.
2. Laws of 1830, ch. 122, § 11. For a history of Chapter 68 until 1975, see <http://www.nyc.gov/html/conflicts/downloads/pdf2/Old%20NYC%20Ethics%20Laws.pdf> and http://www.nyc.gov/html/conflicts/downloads/pdf2/Pre_January_1_1990_Chapter_68.pdf.
3. See D.T. Valentine, ORDINANCES OF THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, ADOPTED BY THE COMMON COUNCIL AND PUBLISHED BY THEIR AUTHORITY 9 (rev. 1859), available at <https://play.google.com/books/reader?id=S0s-AAAAYAAJ&printsec=frontcover&output=reader&authuser=0&hl=en>.
4. See Laws of 1849, ch. 187, § 19; Laws of 1873, ch. 355, § 101; Laws of 1882, ch. 410, § 59; Laws of 1897, ch. 378; Greater NYC Charter § 1533, enacted in 1901. Cf. current N.Y.C. Charter § 2604(b)(10) (“No public servant shall give or promise to give any portion of the public servant’s compensation, or any money, or valuable thing to any person in consideration of having been or being nominated, appointed, elected or employed as a public servant”) and § 2606(c) (“Any person who violates paragraph ten of subdivision b of section twenty-six hundred four, on conviction thereof, shall additionally be forever disqualified from being elected, appointed or employed in the service of the city.”).
5. 1938 N.Y.C. Charter §§ 886, 901. Cf. current N.Y.C. Charter § 2604(b)(6) (“No public servant shall, for compensation, represent private interests before any city agency or appear directly or indirectly on behalf of private interests in matters involving the city. For a public servant who is not a regular employee, this prohibition shall apply only to the agency served by the public servant”); § 2604(b)(7) (“No public servant shall appear as attorney or counsel against the interests of the city in any litigation to which the city is a party, or in any action or proceeding in which the city, or any public servant of the city, acting in the course of official duties, is a complainant.... This paragraph shall not in any way be construed to expand or limit the standing or authority of any elected official to participate in any litigation, action or proceeding, nor shall it in any way affect the powers and duties of the corporation counsel. For a public servant who is not a regular employee, this prohibition shall apply only to the agency served by the public servant.”); § 2604(b)(8) (“No public servant shall give opinion evidence as a paid expert against the interests of the city in any civil litigation brought by or against the city. For a public servant who is not a regular employee, this prohibition shall apply only to the agency served by the public servant.”); § 2604(b)(13) (“No public servant shall receive compensation except from the city for performing any official duty or accept or receive any gratuity from any person whose interests may be affected by the public servant’s official action.”).
6. 1959 N.Y.C. ADMIN. Code §§ 1106.1.0 (code of ethics), 1106-2.0 (board of ethics), and 1106-3.0 (post-employment); 1959 City Charter § 1106, enacted by the NYS Legislature, 1959 N.Y. LAWS ch. 532.
7. 1959 N.Y.C. ADMIN. Code § 1106-2.0(a). See generally Committee on Ethics and Standards of the City Council of New York, *The Board of Ethics of the City of New York: Council Report, Code of Ethics and Related Laws*, Feb. 3, 1959, at <http://www.nyc.gov/html/conflicts/downloads/pdf2/Old%20NYC%20Ethics%20Laws.pdf>.
8. Added at General Election, Nov. 4, 1975.
9. Adopted at General Election, Nov. 8, 1988, and Nov. 7, 1989 (increasing number of Board members from three to five and

- adding a prohibition on certain high level officials holding certain political party offices). See generally New York City Charter Revision Commission, THE REPORT: DECEMBER 1986-NOVEMBER 1988, vol. 1, pp. 26-30, vol. 2, pp. 148-185, at http://www.nyc.gov/html/conflicts/downloads/pdf2/charter_revision/Report%20of%20Charter%20Revision%20Commission%201986%20to%201988.pdf.
10. Ron Soodalter, *The Union's 'Shoddy' Aristocracy*, N.Y.TIMES OPINIONATOR, (May 9, 2011, 9:30 PM); see also DEP'T OF THE SECRETARY OF STATE: STATE OF MAINE, *Maine State Archives: Civil War Sesquicentennial* (describing Col. George L. Beal's letter to E.K. Harding, Nov. 12, 1861), available at <http://www.maine.gov/tools/whatsnew/index.php?topic=arcsesq&id=125216&v=article>.
 11. An Act to prevent and punish Frauds upon the Government of the United States, ch. 67, 12 Stat. 327 (1863).
 12. "Qui Tam A History." Whistleblower Info, <http://www.whistleblowingprotection.org/?q=node/69> Retrieved 7-10-13.
 13. The term is derived from, "*Qui tam pro domino rege, quam pro se ipso, in hac parte sequitur.*" "He who sues on behalf of the sovereign sues just as much for himself in this case."
 14. An Act to Prevent Frauds upon the Treasury of the United States, ch. 81, 10 Stat. 170 (1853).
 15. An Act Relating to Members of Congress, Heads of Departments, and other Officers of the Government, ch. 119, 13 Stat. 123 (1864).
 16. An Act to Prevent Members of Congress and Officers of the Government of the United States from taking Consideration for procuring Contracts, Office, or Place, from the United States, and for other purposes, ch. 180, 12 Stat. 577 (1862).
 17. Garfield was attacked on July 2, 1881 and had been president for about four months. He was "shot by Charles Guiteau as he was about to board a train at the Baltimore & Potomac Railroad Station in Washington, D.C....An unsuccessful lawyer, evangelist, and insurance salesman, Guiteau believed Garfield owed him a patronage position in the diplomatic corps, and that the president's political decisions threatened to destroy the Republican Party." See <http://americanhistory.si.edu/presidency/3d1d.html>.
 18. Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883).
 19. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. 197-222 (1887).
 20. UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, *Our Mission, Role & History: Theodore Roosevelt*, available at www.opm.gov/about-us/our-mission-role-history/theodore-roosevelt/.
 21. *Id.*
 22. Inaugural Address of the President, Washington, D. C., March 4, 1933, www.archives.gov/education/lessons/fdr-inaugural/images/address-1.gif.
 23. Farewell address by President Dwight D. Eisenhower, January 17, 1961; Final TV Talk 1/17/61 (1), Box 38, Speech Series, Papers of Dwight D. Eisenhower as President, 1953-61, Eisenhower Library; National Archives and Records Administration.
 24. 5 U.S.C.A. § 552 (West 2009).
 25. President Lyndon Johnson's Statement upon Signing the FOIA (Press Release, Office of the White House Press Secretary, "Statement by the President upon Signing S.1160."), dated July 4, 1966.
 26. *The Legacy of Watergate: Rethinking Legal Ethics*, STREET LAW, INC., available at http://www.streetlaw.org/en/Page/728/The_Legacy_of_Watergate_Rethinking_Legal_Ethics; see also *Professional Discipline for Watergate-Related Criminal Conduct* (Table) 51 HASTINGS L. J. 678, 682 (2000).
 27. See Peter K. Rofes, *Ethics and the Law School: The Confusion Persists*, 8 GEO. J. LEGAL ETHICS 981 (1995) (describing ways in which American law schools implement ethics courses into their curriculums).
 28. Mark Curriden, *The Lawyers of Watergate: How a '3rd-Rate Burglary' Provoked New Standards for Lawyer Ethics*, A.B.A. Journal, June 2012.
 29. See generally, Benjamin R. Civiletti, *Post-Watergate Legislation in Retrospect: Alfred P. Murrah Lecture on the Administration of Justice*, 34 S.W. L.J. 1043 (1980).
 30. 5 U.S.C.A. § 552 (West 2009); see *Freedom Of Information Act Source Book: Legislative Materials, Cases, Articles*, S. COMM. ON THE JUDICIARY, 93d Cong., 2d Sess. (Comm. Print 1974).
 31. 5 U.S.C.A. § 552a (West 2010); see *Overview of the Privacy Act Of 1974*, DEP'T OF JUSTICE, available at <http://www.justice.gov/opcl/1974privacyact.pdf>.
 32. I.R.C. § 6103 (West 2013); see *IRS Disclosure & Privacy Law Reference Guide*, INTERNAL REVENUE SERVICE, available at <http://www.irs.gov/pub/irs-pdf/p4639.pdf>.
 33. 12 U.S.C.A. §§ 3401-20, -22 (West 2011).
 34. Ethics in Government Act of 1978, PUB. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C.A. app.4 §101 (West 2006)).
 35. Civil Service Reform Act of 1978, PUB. L. No. 95-454, 92 Stat. 1111 (codified as amended at 5 U.S.C.A. §2302(b)(8) (West 2013)).

Mark Davies is the Executive Director of the New York City Conflicts of Interest Board, the ethics board for the City of New York, and Chair of the Section. Steven G. Leventhal is the former chair of the Nassau County Board of Ethics and is Chair of the Section's Ethics and Professionalism Committee. Thomas J. Mullaney and Steve are partners in the Roslyn firm of Leventhal, Cursio, Mullaney & Sliney, LLP. The views expressed in this article do not necessarily represent the views of any of the aforementioned entities.