The Supreme Court and the Law of Public Service Ethics

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Abstract

The subject of public service ethics has attracted a great amount of interest over the past three decades. This article argues that the Supreme Court has played a major role in defining the nature of the law of public service ethics by using an individual responsibility model of official accountability. Decisions defining the (1) liability of public officials for constitutional violations, (2) the authority of public agencies to require public employees and officials to comply with strict ethics codes, (3) and the scope of public corruption statutes reflect a consensus on the Court that holding public officials and employees individually responsible for their actions constitutes an important way of protecting citizens from unconstitutional conduct by officials and in deterring public servants from violating the public trust.

Since the Watergate scandal of the 1970s, good-government groups, political commentators, and public service scholars have searched for ways to rebuild trust in government and to help public servants resolve ethical dilemmas that arise in the performance of their official duties (Bowman, 1991). This article argues that the Supreme Court has adopted an individual responsibility model of official conduct in an effort to deter public officials and employees from engaging in conduct that a majority of the Court believes reduces public trust in government.

Three lines of cases provide the clearest evidence that the Court has adopted an individual responsibility model when examining public integrity issues. First, the Court has issued a series of cases sharply limiting the absolute immunity from civil suit once enjoyed by the vast majority of public servants and replaced it with limited qualified immunity (Rosenbloom, 1991, pp. 129-142). Second, it has upheld the authority of public employers to issue broad standards of conduct rules and regulations designed to protect public confidence in the objectivity and impartiality of public employees and officials. Third, the Court has broadly construed a number of federal criminal statutes to provide significant penalties for violations of ethical standards.

The Evolution of Public Service Ethics

Beginning in the 1970s, the subject of laws governing the conduct of public officials has become a central issue in the political landscape of the United States. This trend has been fueled by the Watergate scandal, which exposed widespread corruption and unethical behavior within the federal government. As a result, Congress and state legislatures have passed a flurry of ethics reform laws, many of which have been challenged in the courts, particularly those that impose significant penalties for violations.

The Supreme Court has repeatedly applied a strict scrutiny standard of review to these laws, emphasizing the importance of individual accountability. This approach has been reflected in a series of cases that have upheld state and federal laws against public service ethics violations. These decisions have had a significant impact on the way in which public officials are held accountable for their actions.

Interestingly, the Court's emphasis on individual responsibility has not been without criticism. Some argue that this approach overlooks the collective nature of public service and the need for collective action to prevent corruption. Others contend that it places an unfair burden on public officials, who may lack the resources or support to comply with ethical standards.

Despite these challenges, the Court's approach has helped to establish a framework for understanding the role of ethics in public service. By emphasizing individual responsibility, the Court has signaled its commitment to ensuring that public officials act with integrity and honor. This has provided an important foundation for ongoing efforts to strengthen ethics standards and hold public servants accountable for their actions.
federal criminal statutes that have permitted federal prosecutors to hold accountable large numbers of possibly corrupt local, state, and federal officials.

Today public officials and employees find themselves subject to an unprecedented level of scrutiny. Comprehensive ethics codes now apply to the vast majority of local, state, and federal employees (Huddleston and Sands, 1995, pp. 141–145). Only a handful of officials enjoy the protection of absolute immunity from suits alleging violations of constitutional and statutory rights. And an increasing number of public officials find themselves subject to criminal corruption investigations.

Recent years have seen increased criticism that public integrity rules make it difficult to recruit individuals to serve in government, that constitutional tort suits against public officials may “cause conscientious officials to shrink from making difficult choices” (Crawford-El v. Britton, 1998, p. 5), and that prosecutors sometimes turn minor indiscretions by public officials and employees into major criminal cases (Maass, 1993, pp. 17–21). Despite the criticism, a majority of the Court shows little evidence of backing away from the individual responsibility model. From their perspective, the benefits of the model outweigh the cost to public officials and institutions. The strongest supporters of the individual responsibility model on the Court see it as a way to help protect the role of government in American society, not as a way to make it impossible for officials to do their jobs. The model is a type of life insurance for the administrative state.

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The Evolution of the Individual Responsibility Model

Beginning in the 1950s, local, state, and federal public institutions found themselves the subject of lawsuits alleging that the institutions violated the constitutional rights of clients or citizens (Brennan, 1986, p. 535). For instance, the Court in Brown v. Board of Education, decided in 1954 that school districts that operate separate schools for white and black students violate the right to equal protection under the law guaranteed by the Fourteenth Amendment. Despite decades of litigation, federal courts continue to monitor the progress of school systems in reducing the impact of prior discriminatory educational policies (Missouri v. Jenkins, 1995, p. 70).

The lack of hard empirical data makes it difficult to evaluate the impact of court involvement on the long-term operations of state and local institutions. On the one hand, court-imposed mandates have forced some state and local governments to spend tens of millions of dollars to bring public institutions into compliance with constitutional standards (Missouri v. Jenkins, 1995, p. 75). On the other hand, institutional reform litigation has not turned out to be the solution for poorly run government institutions that violate the rights of their clients or the general public.

Interestingly, in the same period a number of scholars forcefully argued that public administrators and officials have a moral obligation not to take actions that violate the fundamental constitutional rights of those they serve. In his landmark book, Ethics for Bureaucrats, John Rohr stressed the importance of public officials’ ac-
cepting personal responsibility for their actions or nonaction. He strongly recommend-
that administrators and officials look to the Constitution and the Bill of
Rights for guidance when faced with serious ethical problems (Rohr, 1978, p. 182).
David H. Rosenbloom and James D. Carroll made a similar argument in Toward
Constitutional Competence: A Casebook for Public Administrators (Rosenbloom
and Carroll, 1990, pp. 1–10). “Just as public administrators need to know how to in-
terpret statistical regression and cost-benefit analysis,” wrote Rosenbloom and
Carroll, “they must often have knowledge of the constitutional rights of their subordi-
nates and the individuals on whom their official actions bear directly” (1990, p. 2).

The Rise and Fall of the Absolute Immunity Doctrine

During the late nineteenth century and the first half of the twentieth century, the rise
of the administrative state transformed the relationship of citizens to public officials
and employees (Rosenbloom, 1994, pp. 3–36). Despite the growth of government,
public confidence in the ability of government to solve the nation’s problems re-
mained high through the 1960s. To free officials from the threat of civil suit for their
actions, the Court recognized the doctrine of absolute official immunity (Warren,

The Absolute Official Immunity Doctrine

In the 1896 case of Spalding v. Vilas, the Court granted the postmaster absolute im-
munity from civil suit for damages related to official communications involving his
duties as postmaster general. Writing for the majority, Justice Harlan argued that
permitting such civil suits for damages to go forward “would seriously cripple the
proper and effective administration of public affairs as intrusted to the executive
branch of the government” (Spalding v. Vilas, 1896, p. 499). The Court seemed to
say in the Spalding case that civil suits against high-level executive branch officials
threatened the efficient operation of agencies and departments.

Between the Spalding decision and the 1959 Court decision in Barr v. Matteo, the
Court witnessed a massive growth in the size and power of government. Despite con-
cern over the abuse of power by public officials, the Court in Barr v. Matteo effectively
bestowed absolute immunity on all administrative officials with respect to matters re-
lated to the performance of official duties (Warren, 1996, p. 471). In defending the ab-
olute immunity doctrine, the Court repeated the argument that such suits “would con-
sume time and energies which would otherwise be devoted to governmental service and the
threat of which might appreciably inhibit the fearless, vigorous, and effective administration
of policies of government” (Barr v. Matteo, 1959, p. 570).

By the end of the 1960s, the civil rights revolution helped to persuade the Court that the
absolute immunity doctrine had outlived its usefulness. In the 1971 case of Rives v. Six Unknown Named Federal
Narcotics Agents, the Court sent shock waves through the halls of public agencies.
Writing for the majority, Justice Brennan pushed aside the contention that federal
courts did not have the authority to hold officials liable for monetary damages for their unconstitutional conduct. "That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition," stressed Brennan (Bivens v. Six Unknown Named Federal Narcotics Agents, 1971, p. 396).

The Qualified Immunity Doctrine and Municipal Liability

The Bivens decision ushered in an era in which the Court gradually stripped local, state, and federal executive branch officials of absolute immunity from civil suits alleging violations of constitutional rights (Rosenbloom, 1991, pp. 129–142). Instead, it granted only executive branch employees qualified immunity from constitutional tort suits.

In the 1974 case of Scheuer v. Rhodes, the Court held that the qualified immunity rule applied to state governors. In the 1975 case of Wood v. Strickland, it held that public school officials were entitled to qualified immunity only from suits alleging that they violated the constitutional rights of students. By the early 1980s, the Court gave the green light for the award of punitive damages for certain types of constitutional torts by public officials (Rosenbloom, 1991, p. 135). In the 1983 case of Smith v. Wade, the Court ruled that "a jury may be permitted to assess punitive damages when the defendant's conduct involves reckless or callous indifference to the plaintiff's federally protected rights, as well as when it is motivated by evil motive or intent" (Smith v. Wade, 1983, p. 31).

During the late 1970s, the Court authorized suits for monetary damages against local governments for violations of constitutional rights by their employees. In the 1978 case of Monell v. New York City Department of Social Services, the Court allowed suits against local governments for actions taken by local government employees or officials that violated established constitutional rights. Since the vast majority of public officials have limited resources to pay damage awards, it seemed reasonable to require local governments to assume the burden of civil rights judgments. Yet the Monell decision indicated the unwillingness of the Court to hold a local government liable for any constitutional torts committed by its employees under the doctrine of respondent superior, which holds that employers may be held liable for injuries caused by their employees.

In the 1986 case of Pembaur v. City of Cincinnati, the Court held that a county was potentially liable for the actions of the county prosecutor because county prosecutors are policymakers (Pembaur v. City of Cincinnati, 1986, p. 469). However, it made clear that plaintiffs must prove that a municipal policy or custom caused the injury (Pembaur v. City of Cincinnati, 1986, pp. 480–481).

The Court in the 1989 case of Jett v. Dallas Independent School District made its position even clearer on the issue of municipal liability by constitutional torts committed by public employees and officials. "Since our decision in Monell, the Court of Appeals has unanimously rejected the contention ... that the doctrine of respondent superior is available against a municipal entity under a Bivens-type action implied directly from the Fourteenth Amendment" (Jett v. Dallas Independent School District, 1989, p. 701). In other words, federal courts could not automatically hold local governments liable for the conduct of their employees and officials.
To the surprise of many constitutional experts, the Court found that no precedent existed under the Constitution that affords the "president temporary immunity from civil damage litigation arising out of the events that occurred before he took office".

—Clinton v. Jones, 1997

Executive Privilege and the Individual Responsibility Model

There is no better evidence of the impact of the individual responsibility model on Court decisions than the 1997 case of Clinton v. Jones. The case provided the Court the opportunity to provide additional protection to high-level public officials from suits alleging violations of constitutional rights under 42 U.S.C. & 1983 (Clinton v. Jones, 1997, p. 945). Paula Jones had brought suit against President Bill Clinton for allegedly violating her constitutional rights, under 42 U.S.C. & 1983, while he served as governor of the State of Arkansas and especially that Governor Clinton had used the power of his office to punish her after she had rebuffed his sexual advances in a hotel room. Clinton requested that the federal district court delay her suit until after he left the presidency.

To the surprise of many constitutional experts, the Court found that no precedent existed under the Constitution that affords the "president temporary immunity from civil damage litigation arising out of the events that occurred before he took office" (Clinton v. Jones, 1997, p. 945). Although U.S. District Court Judge Susan Webber Wright subsequently dismissed the case on the grounds that the quid pro quo and hostile work environment sexual harassment claim of Paula Jones was without merit ("Excerpts from Clinton-Jones Ruling," 1998, p. 1), the Jones decision demonstrated the great reluctance of the Court to shield presidents from judicial oversight of their private conduct.

Protecting Public Servants from the Burden of Litigation

The distinction made by the Court between the liability of public employees and officials and the liability of government organizations has troubled some scholars. "From the perspective of governmental officials," writes Kenneth Warren, "it seems only fair that the government should extend a form of basic liability insurance to its employees. After all, it is argued, these officials are working for our benefit" (Warren, 1996, p. 479).
Even though many federal agencies, state governments, and local governments do provide liability coverage for employees and officials for actions taken within the scope of the performance of official duties (Cole, 1995, pp. 789–811), no uniform policy exists for providing public officials and employees liability coverage from suits alleging violations of constitutional rights. The uncertainty created by different liability insurance or indemnification policies greatly complicates the implementation of the individual responsibility model. More important, the model does not adequately address the issue of compensating individuals for injuries resulting from the conduct of public officials or employees, the vast majority of whom do not have deep pockets.

The burden placed on public servants by civil rights litigation has not gone unnoticed by the federal courts. The 1998 case of Crawford-El v. Britton provided the Court the opportunity to endorse a strategy for lessening the burden. Not surprisingly, the Court turned back the initiative put forward by the Court of Appeals for the District of Columbia.

The case involved a suit by an “outspoken prisoner in the District of Columbia’s correction system” (Crawford-El v. Britton, 1998, p. 1). As the direct result of overcrowding in the district prisons, the plaintiff found himself being transferred to a number of state prisons from Washington State to Florida. Instead of sending the belongings of Crawford-El to the appropriate prison, a district correctional officer gave the plaintiff’s possessions to his brother-in-law. The plaintiff inmate claimed the officer took the step to punish him for making critical statements regarding prison conditions and for filing numerous lawsuits related to conditions in D.C. prisons.

During the course of the litigation, the Court of Appeals for the District of Columbia ruled that “in order to prevail in an unconstitutional-motive case, the plaintiff must establish that motive by clear and convincing evidence” (Crawford-El v. Britton, 1998, p. 3). In other words, the appeals court raised the amount of evidence plaintiffs must present before being permitted to proceed with suits alleging that public officials acted in violation of clearly established constitutional rights. By a five-to-four vote, the Supreme Court ruled that the appeals court had erred in requiring the plaintiff inmate to meet this higher evidentiary burden.

Writing for the majority, Justice Stevens recognized that this type of claim caused major headaches for public servants and their public agencies. However, Stevens found the rule much too sweeping for the problem the appeals court sought to address. “The new rule established in this case is not limited to suits by prisoners against local officials, but applies to all classes of plaintiffs bringing damage actions against any government officials, whether federal, state or local,” states Stevens (Crawford-El v. Britton, 1998, p. 5). Instead of requiring such a sweeping rule to deal with the problem, the majority put its faith in federal trial judges to use their discretion to manage the problem. “Given the wide variety of civil rights and ‘constitutional tort’ claims that judges confront,” comments Stevens, “broad discretion in the management of the fact finding process may be more useful and equitable to all the parties than the categorical rule imposed by the Court of Appeals” (Crawford-El v. Britton, 1998, p. 12). Again the individual responsibility model carried the day.
Regulatory Ethics and the Court

Besides sharply limiting the immunity of public officials, employees, and administrators from civil suits alleging violations of constitutional rights, the Court has used the individual responsibility model to provide public employers broad discretion to fashion codes of ethics or standards of conduct designed to protect confidence in the integrity of public servants (Roberts, 1994, pp. 485–498). "Virtually all units of government have enacted some sort of code, either on a jurisdiction-wide basis or organization by organization" (Hudleston and Sands, 1995, p. 141).

At the same time, the nation has seen a proliferation of public ethics units responsible for ethics education and enforcement. Public ethics scholars Carol Lewis and Stuart Gilman reported in 1995 that "members of the Council on Government Ethics Laws now number 38 state ethics offices and 12 local ethics commissions" (Gilman and Lewis, 1996, p. 521). Lewis and Gilman also reported the existence "of almost 15,000 full- and part-time ethics officials in the federal executive branch" (Gilman and Lewis, 1996, p. 521).

The vast majority of codes or standards of conduct focus almost exclusively "on conflict of interest and financial disclosure" (Hudleston and Sands, 1995, p. 141). For instance, standard of conduct rules covering millions of federal executive branch employees deal with (1) gifts from outside sources, (2) gifts between employees, (3) conflicting financial interests, (4) impartiality in performing official duties, (5) seeking other employment, (6) misuse of position, (7) outside activities, (8) honoraria, (9) postemployment, (10) representation to government agencies and courts, (11) supplementation of salary, and (12) financial disclosure.

The Court has used the individual responsibility model to provide public employers broad discretion to fashion codes of ethics or standards of conduct designed to protect confidence in the integrity of public servants.

The expansion of public ethics codes has forced the Court to balance the constitutional rights of public officials and employees with the need of their employers to protect public confidence in their workforce. Even though the provisions of ethics codes interfere with the private affairs of public servants, the Court has experienced few problems in upholding the authority of public institutions to issue and enforce such regulations, including comprehensive public financial disclosure laws (Gilman, 1995, p. 72). From the perspective of the Court, protecting public trust in government may require that public employees and officials accept certain restrictions on their private as well as public lives.

Codes of Ethics and the Appearance of Impropriety

Through the first half of the twentieth century, public employees had few grounds to challenge the scope of on- or off-the-job conduct rules established by their employers. From the early 1960s through the 1980s, the Court issued numerous opinions sharply limiting the authority of public employers to interfere with the exercise of constitutional rights by public officials and employees (Rosenbloom, 1995, pp.
These included the right to freedom of speech, freedom of association, privacy, liberty, equal protection, and procedural due process.

But the recognition that public servants have constitutional rights did not persuade the Court to seriously reconsider its traditional policy of providing public employers broad discretion to permit them to issue and enforce rules of conduct directed at maintaining confidence in the impartiality and objectivity of public servants. In their 1986 edition of Personnel Management in Government: Politics and Process, Jay Shafritz, Albert Hyde, and David Rosenbloom argued that public financial disclosure and restrictions on lobbying by former public officials raised serious constitutional issues. “Clearly,” wrote the authors, “the government will have to be able to supply a rationale for broad applications of financial disclosure requirements” (Shafritz, Hyde, and Rosenbloom, 1986, p. 253). “At some point,” continued the authors, “postemployment restrictions may be found to interfere with the constitutional liberty to work in a field of one’s choice” (Shafritz, Hyde, and Rosenbloom, 1986, p. 253). Like many other scholars, Shafritz, Hyde, and Rosenbloom underestimated the impact of the individual responsibility model on the willingness of the Court to uphold a new generation of public ethics restrictions.

Decades before the Court required public employers to disclose their financial assets, prohibited them from lobbying their former agencies, and required them to comply with much stricter public ethics codes (Huddleston and Sands, 1995, p. 141), it ruled on the constitutionality of restrictions on the political activity of public employees. Congress passed the Hatch Act because it believed requiring political neutrality by civil service employees would help to protect public confidence in actions taken by federal officers and employees.

In the 1947 case of United Public Workers of America v. Mitchell, the Court found that the Hatch Act of 1939 did not violate the First Amendment rights of classified employees by prohibiting them from participating in certain types of political activities. “When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service,” stressed the Court, “legislation to forestall such danger and adequate to maintain its usefulness is required” (United Public Workers of America v. Mitchell, 1947, p. 103).

To the surprise of many constitutional scholars, the Court in the 1973 case of United States Civil Service Commission v. National Association of Letter Carriers again upheld the authority of Congress and the Civil Service Commission to regulate the political activities of classified federal employees. Five years earlier, the Court in Pickering v. Board of Education held that public employees had a First Amendment right to speak out on “matters of public concern.” Yet the Court found a strong public policy interest in the government’s preventing the appearance that politics may influence the behavior of classified civil servants. The willingness to uphold restrictions on the political activities of public employees foreshadowed the approach the Court would take with respect to standards of conduct restrictions.
Because of the vast expansion in the size and power of the federal government, strong incentives existed for special interests to attempt to influence decisionmakers in the legislative and executive branches of government (Douglas, 1952). Conflict-of-interest and influence-peddling scandals did considerable damage to the reputation of a number of Truman administration officials (Dunar, 1984). To the consternation of President Eisenhower, conflict-of-interest controversies created serious problems for a number of high-level officials (Frier, 1969). The ethics problems experienced by high-level officials who worked for Presidents Truman and Eisenhower helped to build support for much stronger codes of ethics. Supporters of the new codes believed these codes would help to prevent employees and officials from becoming involved in situations that might lead members of the public to question their objectivity or impartiality (Gilman, 1995, pp. 69-70). Consequently, officials and employees needed to avoid even the appearance of impropriety when they conducted public business (Roberts, 1985, p. 183). Equally significant, in the 1950s critics of the policies of both Truman and Eisenhower attempted to make use of allegations of official misconduct to discredit or build opposition to policies or programs both presidents supported (Roberts and Dos, 1997, pp. 33-59). Avoiding politically embarrassing scandals became a key factor in the expansion of ethics regulation (Gilman, 1995, pp. 69-71). A Court decision would play an important role in providing legal support for new external ethics restraints.

Not until the early 1960s did the Court have the opportunity to examine the authority of the federal government to enforce broad conflict-of-interest policies designed to protect confidence in the actions taken by officials and their agencies. Critics of anticipatory integrity rules argued that these rules were making it much more difficult to recruit private-sector executives to serve in policymaking positions in federal agencies (Manning, 1964, p. 313). A 1960 report by the Association of the Bar of the City of New York, entitled Conflict of Interest and Federal Service, urged Congress to update criminal conflict-of-interest prohibitions to eliminate confusion surrounding their enforcement and to supplement criminal prohibitions with administrative sanctions (Association of the Bar of the City of New York, 1960). The 1961 case of United States v. Mississippi Valley Generating Co. sent a clear message that Congress and government agencies had broad discretion to enforce conflict-of-interest prohibitions.

Early in President Eisenhower's first term, the federal government entered into a contract with the Mississippi Valley Generating Company for the construction of a $1 billion steam plant in Memphis, Tennessee. The Atomic Energy Commission (AEC) agreed to purchase a large amount of power produced by the plant. Prior to the agreement, the AEC had purchased most of its power from the Tennessee Valley Authority (TVA). President Franklin Roosevelt had convinced Congress to establish the TVA as part of his efforts to bring economic growth to one of the poorest regions of the United States. The Eisenhower administration saw the contract as a way to show that growing power demands could be met without increasing the size of the TVA.

To help the government with its negotiations with the Mississippi Valley Generating Company, the Bureau of the Budget employed the services of Adolphe H. Wenzell, vice president and director of First Boston Corporation, a large financial institution with a history of underwriting public power projects. Critics of the contract argued that Wenzell’s involvement constituted a conflict of interest prohibited by federal law. The subsequent uproar ultimately led Eisenhower to order the federal
government to cancel the contract. Mississippi Valley Generating Company sued for the wrongful termination of the contract and the U.S. Court of Claims awarded the company $1,867,545.56 in damages.

Writing for the majority, Chief Justice Earl Warren found that Wenzell's actions constituted a violation of 18 U.S.C. 434, one of a number of federal conflict-of-interest statutes. According to the Court, this unlawful conduct provided grounds for the federal government to cancel the contract. It is important to note that the Justice Department had declined to prosecute Wenzell for violating the same statute. “The statute is directed at an evil which endangers the very fabric of a democratic society,” wrote Justice Warren, “for a democracy is effective only if the people have faith in those who govern, and the faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.” (United States v. Mississippi Valley Generating Co., 1961, p. 562). As Warren explained, “The statute is more concerned with what might have happened in a given situation than with what actually happened” (United States v. Mississippi Valley Generating Co., 1961, p. 550).

Anticipatory Public Integrity Restraints and Public Integrity Reform

Through the 1960s, Congress and the Kennedy and Johnson administrations succeeded in updating criminal conflict-of-interest prohibitions and putting in place the foundations for a new executive branch ethics program (Roberts, 1988, pp. 93–130). In the aftermath of the Watergate scandal of the early 1970s, anticipatory ethics restraints proliferated at the federal, state, and local levels (Huddleston and Sands, 1995, pp. 141–144). Common Cause, the national good-government advocacy organization, used the Watergate scandal to demand the enactment of much stricter public integrity prohibitions, including financial disclosure for high-level officials and campaign finance reform (Roberts, 1994, p. 489).

As noted earlier, campaign finance and financial disclosure requirements raised serious constitutional privacy issues. Did such requirements constitute an unconstitutional governmental intrusion into the private lives of campaign contributors and public officials? In the 1976 case of Buckley v. Valeo, the Court found that the Constitution did not prohibit requiring candidates for federal offices from having to disclose the names of political contributors and the amounts contributed. The Court found that “disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity” (Buckley v. Valeo, 1976, p. 67). From the perspective of the Court, the financial disclosure requirements constituted an effective way of reassuring the public about campaign finances.

Relying on the same reasoning, the Court of Appeals for the Fifth Circuit upheld the constitutionality of provisions of the Ethics in Government Act of 1978 that re-
quired high-level officials in the three branches of the federal government to file annual public financial disclosure statements. The Fifth Circuit found the existence of a strong public policy interest in having high-level officials disclose their financial holdings and those of immediate family members (Duplantier et al. v. United States, 1979, p. 654). And the Supreme Court refused to overturn the decision. The individual responsibility model of public service provided the Court the justification for letting stand a number of federal and state court decisions upholding financial disclosure requirements.

Close to three decades after its Mississippi Valley Generating decision, the 1990 case of Crandon v. United States gave the Court another opportunity to place limits on the scope of ethics prohibitions. Congress in 1917 passed legislation prohibiting nonpublic sources from supplementing the salaries of federal employees. After the 1980 election victory of Ronald Reagan, a number of Boeing Corporation executives agreed to accept positions with the Department of Defense. Boeing made substantial payments to the executives in order to compensate them for their much lower government salaries. In 1986 the Justice Department brought suit against Boeing, alleging that the payments violated the supplementation prohibition.

Although the Court found the federal supplementation of salary prohibition did not cover payments made to individuals before they became federal employees or officials, the Court reaffirmed the authority of Congress to enact broad conflict-of-interest prohibitions. "Congress appropriately enacts prophylactic rules that are intended to prevent even the appearance of wrongdoing and that may apply to conduct that has caused no actual injury to the United States," stressed the Court (Crandon v. United States, 1990, p. 165). "Legislation designed to prohibit and to avoid potential conflicts of interest in the performance of governmental service is supported by the legitimate interest in maintaining the public’s confidence in the integrity of the federal service," continued the Court (Crandon v. United States, 1990, p. 165).

In the 1995 case of United States v. National Treasury Employees Union, the Court again faced an unconstrained challenge to an anticipatory public integrity rule. In 1989 Congress passed the Ethics in Government Reform Act, which included a provision prohibiting all federal employees from accepting any compensation for making speeches or writing articles (Roberts and Doss, 1997, p. 138). An effort to stop members of Congress from accepting honoraria motivated the ban. Prior to the passage of the law, standards of conduct rules had prohibited high-level officials from accepting certain types of honoraria.

In a carefully worded opinion, the majority upheld part of the decision of the Court of Appeals striking down the across-the-board honoraria ban on the grounds the ban unreasonably impinged on the freedom of speech rights of lower-level federal employees. However, the Court left in place the honoraria ban for high-level executive branch employees and presidential appointees. Simply, the Court found that the government failed to demonstrate a problem with lower-level executive branch employees accepting honoraria for articles or speeches. If the government could demonstrate a problem, the Court gave every indication it would uphold a ban.

"The Government’s underlying concern is that federal officers not misuse or appear to misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities," wrote Justice Stevens (United States v. National Treasury Employees Union, 1995, p. 9). "This interest is undeniably powerful, but
the Government cites no evidence of misconduct related to honoraria in the vast rank and file of federal employees below grade GS-16" (United States v. National Treasury Employees Union, 1995, p. 9).

The language of the decision provided little comfort to the critics of anticipatory public integrity restraints. It reaffirmed the authority of governments to issue and enforce anticipatory ethics rules as long as they could establish a nexus between a rule and a perceived harm. The Court refused to abandon the individual responsibility model as the basis for judging the legality or constitutionality of public integrity restraints placed on public servants.

Administrative Investigations of Official Misconduct

Constitutional challenges to the methods public employers use to investigate allegations of official misconduct have given the Court the opportunity to apply the individual responsibility model to official misconduct investigations. As with its treatment of anticipatory ethics rules, the Court has narrowly construed the privacy rights of employees and officials to permit public employers to conduct workplace searches without a warrant and without probable cause. In a series of important cases, the Court has found that the need of public employers to uncover misconduct must be given as much weight as the privacy rights of employees. The Court has applied the same reasoning in constructing the Fifth Amendment self-incrimination and procedural due process rights of public servants.

In O'Conor v. Ortega (1987), the Court found that the Fourth Amendment protection against unreasonable searches and seizures applied to searches of the offices of public employees by employers investigating allegations of official misconduct. However, the Court held that public employers may search the offices of their employees without first obtaining a search warrant for "work-related materials or to investigate violations of workplace rules," if the employer has reason to believe relevant material will be found in the office (O'Conor v. Ortega, 1987, p. 711).

The Court, in the 1989 case of National Treasury Employees Union v. Von Raab, upheld the constitutionality of random drug testing for certain types of public employees (National Treasury Employees Union v. Von Raab, 1989, p. 656). Specifically, the Court upheld random drug testing of public employees applying for positions involving the acquisition of illegal drugs. Prior to the Von Raab decision, federal courts generally limited random drug testing to public transportation employees and national security personnel. In addition, the Court authorized random drug testing for individuals required to carry firearms as part of their official duties (Rosemblom, 1995, p. 27).

Besides limiting the privacy rights of public employees and officials, the Court has shown considerable reluctance to expand the right of employees to disciplinary hearings prior to dismissal or suspension. During the early 1970s, the Court ruled that public employees with more than an expectation of continued public employment have a property interest in their public positions protected by the Fifth and Fourteenth Amendments to the Constitution. The 1972 Court decision in Board of

... the Court has narrowly construed the privacy rights of employees and officials to permit public employers to conduct workplace searches without a warrant and without probable cause.
Regents v. Roth seemed to usher in a new period where the Court would grant most public employees broad pretermination hearing rights.

In the 1985 case of Cleveland Board of Education v. Loudermill, the Court held that public employers must provide employees some type of pretermination hearing in order to establish whether reasonable grounds existed to support the complaint or charge against the employee (Rosenbloom, 1995, p. 33). However, the Court refused to require all public employers to implement identical pretermination procedures. Instead, it ruled that the extent of the pretermination hearing depended upon the “opportunity for more elaborate posttermination hearings” (Rosenbloom, 1995, p. 33).

Then in its 1997 decision in Gilbert v. Homar the Court appeared to exempt suspensions without pay from the pretermination hearing requirement. The case involved the arrest of a policeman employed by East Stroudsburg University for a drug felony. University officials suspended the individual without pay as soon as they learned of the arrest. Insufficient evidence led the police to drop the charges. Two weeks after the charges were dropped, university officials held a hearing to provide Gilbert the opportunity to give his side of the story and to challenge the university’s action of placing him on unpaid leave. The university subsequently demoted him to groundskeeper (Gilbert v. Homar; 1997, p. 1). Gilbert brought suit, alleging that the university’s suspending him without first providing him some type of hearing violated his procedural due process rights under the Fifth and Fourteenth Amendments.

Writing for the majority, Justice Scalia emphasized the difference between suspending and firing an employee for misconduct. “We think, however, that the government does not have to give an employee charged with a felony a paid leave at taxpayer expense. If his service to the government is no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him” (Gilbert v. Homar; 1997, p. 2).

The Gilbert decision appears significantly to reduce the protection afforded to public employers by the pretermination hearing decision in Cleveland Board of Education v. Loudermill. More important, the decision reflects another example of the influence of the individual responsibility model on the reasoning of the Court. Again, a majority of the Court found a compelling public interest in permitting public employers to remove employees placed under a cloud after a felony arrest. It will take time to determine whether the Court will allow employers to take such action with respect to much less serious offenses.

Finally, Court decisions have given public employers considerable discretion to question their employees with respect to acts of official misconduct without violating the rights of employees to keep from incurring themselves. For instance, in the 1998 decision of LaChance v. Erickson, the Court made it much easier for public employers to punish employees for making false statements related to an ongoing investigation of official misconduct. The Court ruled that “neither the Fifth Amendment’s Due Process Clause nor the Civil Service Reform Act . . . precludes a federal agency from sanctioning an employee for making false statements to the agency regarding his alleged employment-related misconduct” (LaChance v. Erick-
In reversing the finding of the Court of Appeals for the Federal Circuit, the Court rejected the argument that because the employees had not taken an oath to tell the truth when they made false statements, their agencies could not bring an adverse action against them for lying.

Delivering the majority opinion, Chief Justice Rehnquist rejected the argument that the due process clause requires a distinction between statements made under oath and statements made before public employees took an oath to tell the truth. "While the Court of Appeals would apparently permit the imposition of punishment for the former, but not the latter," stressed Rehnquist, "we fail to see how the presence or absence of an oath is material to the due process inquiry" (LaChance v. Erickson, 1998, p. 3). Rehnquist emphasized that the decision did not deprive public employees of their Fifth Amendment right to remain silent "if answering an agency's investigatory question could expose an employee to a criminal prosecution" (LaChance v. Erickson, 1998, p. 4). The Supreme Court had previously ruled that public employers "may not fire a public employee solely for invoking his right to remain silent" (O'Neil, 1993, p. 80).

Recent Court decisions defining the privacy, procedural due process, and self-incrimination rights of public employees and officials provide strong support for the argument that the Court has used an individual responsibility model to grant public employers broad discretion to enact and enforce anticipatory ethics rules and to investigate allegations of official misconduct. The trend has sharply limited the right of public servants to challenge integrity rules and methods their employers use to look into allegations of official misconduct.

**Political Corruption Prosecutions and the Court**

Cases dealing with the application of federal public corruption statutes to local, state, and federal public officials and employees constitute the third line of Court decisions applying the individual responsibility model to public integrity issues.

Prior to the 1970s, the Court issued relatively few decisions dealing with the prosecution of public officials on public corruption charges. State and local courts handled the vast majority of public corruption allegations. As Arthur Maass explained, "Until the 1970s, with few exceptions, the repeated campaigns against state and local political corruption had been led by citizens' committees, state legislative committees, and county and state prosecutors" (Maass, 1993, p. 17).

Largely because of creative use of a number of federal criminal laws after 1970, federal prosecutors, with the assistance of the Federal Bureau of Investigation, became heavily involved in prosecuting state and local public officials on political corruption charges (Roberts and Doss, 1993, pp. 6–16). Specifically, prosecutors made extremely effective use of the federal Hobbs Act, mail fraud statute, and Racketeer Influenced and Corrupt Organizations Act (RICO). Between 1974 and the end of 1993, prosecutors convicted 6,824 federal officials, 1,195 state officials, 3,706 local officials, and 4,186 other individuals on federal public corruption charges (U.S. Department of Justice, 1993, p. 35).

**The Hobbs Act and Public Corruption**

"Congress enacted the Hobbs Act in 1946 in response to the United States Supreme Court decision in United States v. Local 807 International Brotherhood of Teamsters,
decided in 1942," which limited the use of the Anti-Racketeering Act of 1934 to stop labor unions from using extortion to obtain payments for union members (Yarbrough, 1996, pp. 783–784). According to one commentator, if Congress had intended the Hobbs Act “to serve as a means to prosecute public officials for extortion, such intent went unnoticed by prosecutors for at least twenty-five years after the Hobbs Act was passed” (Yarbrough, 1996, p. 783). The act makes it a violation of federal law for anyone to engage in conduct that obstructs interstate commerce (18 U.S.C. 1951).

In the 1978 decision of United States v. Culbert, the Court accepted the broad definition of the term “racketeering” included in the statute and made clear that the statute also prohibited a wide variety of “corrupt” acts, including corruption involving public agencies. In the case, federal prosecutors charged the defendant and his accomplice with attempting “to obtain $100,000 from a federally insured bank by means of physical violence made to the bank's president” (United States v. Culbert, 1978, p. 371). The U.S. Court of Appeals for the Ninth Circuit reversed the conviction of the defendant on the grounds that his conduct did not constitute racketeering under the Hobbs Act. The Court rejected this narrow interpretation of the scope of the Hobbs Act, which gave federal prosecutors the green light to continue using the statute in public corruption cases. Through the first half of the 1980s, federal prosecutors routinely used the Hobbs Act to prosecute state and local officials for accepting bribes for the performance or nonperformance of official duties (United States v. Wright, 1986, p. 245).

Proof of the existence of a quid pro quo often turns out to be the most difficult part of public bribery prosecutions. Public prosecutors must show that a public official took some action or declined to take an action as a direct result of receiving something of value from an individual or organization. Emboldened by the successful use of the Hobbs Act in public corruption prosecutions, federal prosecutors began to argue that the act did not require proof of a quid pro quo arrangement. It simply required proof that the official who received something of value took an action favorable to the interests of the source of the thing of value. If the Court accepted this interpretation of the Hobbs Act, federal prosecutors would have a much easier time obtaining Hobbs Act convictions.

In the 1991 case of McCormick v. United States, the Court rejected this broad interpretation of the Hobbs Act but reaffirmed the use of the act when prosecutors can prove the existence of a quid pro quo agreement. A federal jury had convicted McCormick, a former member of the West Virginia House of Delegates, of extorting money from a group of doctors interested in obtaining passage of legislation that would permit graduates of foreign medical schools to practice in West Virginia, even though they failed to pass state licensing exams (McCormick v. United States, 1991, p. 257). The Court held that Congress did not intend to make it a violation of the Hobbs Act for legislators to take action on behalf of their constituents “shortly before or after they solicit or receive campaign contributions from those beneficiaries” (McCormick v. United States, 1991, p. 257).

A year later, in Evans v. United States, the Court issued a decision that made it easier for federal prosecutors to satisfy the quid pro quo element of the Hobbs Act. The case involved a Federal Bureau of Investigation (FBI) political corruption sting. An FBI agent posed as a real estate agent developer who wanted to develop a tract of land in a way that required the rezoning of the property (Evans v. United States, 1992, p. 255). The undercover agent approached a member of the Board of Commissioners for
DeKalb County, Georgia, and discussed his problem. The agent subsequently gave the official "$7,000 in cash, which Evans failed to report on his state campaign-financing disclosure form or on his federal income tax return" (Evans v. United States, 1992, p. 235). However, the government did not have a statement from the officials agreeing to support the rezoning in return for the payment or contribution.

The defendant sought to have the conviction overturned on the grounds that the trial judge had improperly instructed the jury that it did not have to find that the official "had demanded or requested the money" as a condition of helping to obtain the rezoning or that the official had actually taken any action on behalf of the developer in order to convict the official of a Hobbs Act violation (Evans v. United States, 1992, p. 255). In upholding the finding of the Court of Appeals that the trial court had properly instructed the jury that "passive acceptance of the benefit" was sufficient for a Hobbs Act violation "if the public official knew that he was being offered the payment in exchange for a specific requested exercise of his official power," the Court reduced the impact of the McCormick decision on public corruption prosecutions.

The Mail Fraud Statute and the Intangible Rights Doctrine

Much as with the evolution of the Hobbs Act, federal prosecutors succeeded in persuading the federal courts to permit use of the mail fraud statute to prosecute public officials on political corruption charges. Prosecutors argued that when officials used the mail to further a scheme to defraud the public, they deprived the public of the "intangible right" of honest government ("Intangible Rights," 1980, p. 562). Prosecutors argued that the mail fraud statute was intended to protect the public from just such actions.

Those prosecuted under the mail fraud statute held a very different opinion. They argued that Congress did not permit prosecutors to charge officials with depriving the public of "honest government." In the 1987 case of McNally v. United States, the Court rejected this broad interpretation of the mail fraud statute by ruling that federal prosecutors could use the statute against officials only when their corrupt activities deprived specific individuals or organizations of money or property rights. It did not extend to depriving the public "of the intangible right of citizenry to good government" (McNally v. United States, 1987, p. 350). However, nothing in the opinion indicated that Congress did not have the authority to make such conduct a violation of the statute. In 1988 Congress passed legislation amending the language of the mail fraud statute to make it a federal crime to defraud the citizens of "honest government" (Kurland, 1991, p. 400).

The Federalization of Bribery

Besides upholding the authority of federal prosecutors to use of the Hobbs Act and mail fraud statute to prosecute officials on public corruption charges, the Court has also made a number of key decisions permitting federal prosecutors to charge state and local officials with violation of federal bribery statutes. In the 1984 case of Dixon v. United States, the Court ruled that federal prosecutors could prosecute state and local government employees and officials for violating the federal bribery statute if the state or local government employee "is responsible for carrying out tasks delegated by
a federal agency, who is subject to substantial federal supervision, and who is in a position of responsibility, acting for or on behalf of the Federal Government in administering expenditure of federal funds" (Chakrabarti, Dausses, and Olson, 1997, p. 591).

Federal courts subsequently applied the federal bribery statute to "an Army private, a building services manager for a Federal Reserve Bank, an intake official for a federal employment program, and an executive director of a city housing authority who administered federal funds, a U.S. Customs official, and postal employees" (Chakrabarti, Dausses, and Olson, 1997, p. 591).

In 1984 Congress passed section 666 of title 18, United States Code ("Section 666," 1990, p. 673). The new criminal law subjected employees and officials of organizations receiving federal funds to criminal penalties for theft or bribery if the organization employing the individual received more than $10,000 in benefits annually from the federal government (Roberts and Doss, 1993, p. 12). Federal prosecutors quickly interpreted section 666 as prohibiting the acceptance of bribes by any state and local official who worked for an agency receiving more than $10,000 annually from the federal government (United States v. Westmoreland, 1988, p. 572).

In the 1997 case of Salinas v. United States, the Court affirmed this broad interpretation of the scope of section 666. The case involved federal prosecution of a Texas county sheriff and deputy sheriff for accepting payment "in exchange for permitting women to make so-called 'contact visits'... [to] a federal prisoner housed in the county jail pursuant to an agreement with the Federal Government" (Salinas v. United States, 1997, p. 358). The federal government paid the county more than $900,000 a year to house federal prisoners. The defendant in the case argued that section 666 required proof that the bribe "had a demonstrated effect upon federal funds" and that prosecutors failed to show how his alleged conduct had any impact upon the federal funds received by the county.

The Court rejected this narrow interpretation of the scope of section 666. "Section 666(a)(1)(B) does not require the Government to prove the bribe in question had a demonstrated effect upon federal funds," stressed the Court (Salinas v. United States, 1997, p. 358). Moreover, it found the application of section 666 "not confined to transactions affecting federal funds" (Salinas v. United States, 1997, p. 358). It applied to bribery involving any state or local official working for an organization receiving more than $10,000 annually from the federal government. Because the vast majority of state and local organizations receive more than $10,000 in federal funds annually, section 666 applies to millions of local and state government employees.

The Independent Counsel Law and Court

Finally, the Court in the 1988 landmark case of Morrison v. Olson upheld the constitutionality of the independent counsel law. Passed as part of the Ethics in Government Act of 1978, the Ethics Act delegated to the attorney general and a special federal judicial panel responsibility for appointing independent counsels to investigate allegations of criminal conduct by very high-level executive branch officials, including the president and vice president of the United States. The Court found that the requirement that the attorney general ask for the appointment of each independent counsel satisfied the separation of powers the Constitution required (Carroll and Roberts, 1988–1989, pp. 437–438).
Interestingly, Congress refused to extend the life of the independent counsel law in 1992. It took the election of Bill Clinton and the Whitewater scandal to persuade Congress to put the law back on the statute books (Roberts and Doss, 1997, pp. 92–93). The *Morrison* decision made clear that the Court did not want to interfere with congressional efforts to investigate official misconduct by high-level executive branch officials.

**Hard Lessons and Public Service Ethics**

A 1998 survey provides a glimmer of hope that the attention paid to government ethics might be having an impact upon citizen perceptions of public employees and officials. Although 74 percent of those surveyed agreed with the statement that “government does a fair or poor job managing programs and providing services” (Pew, 1998a, p. 7), 67 percent of those surveyed trusted civil servants to do the right thing (Pew, 1998b, p. 21). In sharp contrast, only 16 percent trusted politicians to do the right thing (Pew, 1998b, p. 21). James Bowman and Russell Williams found a consensus among those responding that “government has an obligation to set an example for society” (1997, p. 525). The survey also found that the few managers believed that the focus on government ethics constituted a passing fad.

By applying the individual responsibility model to cases involving public service ethics, the Court has put public servants on notice that it expects them to set an example for society.

By applying the individual responsibility model to cases involving public service ethics, the Court has put public servants on notice that it expects them to set an example for society. A strong likelihood exists that the Court will continue applying the individual responsibility model to cases raising public integrity issues. Consequently, public servants who believe that the preoccupation with ethics makes it more difficult for them to do their jobs should not look to the Court for relief. In contrast, supporters of vigorous enforcement of integrity rules will continue to find the Court a strong ally.

A quick examination of opinion polls would lead some to conclude that the decisions of the Court have done little to raise public trust in government and its officials. A closer examination of the polls reveals something very different. The public wants their servants to avoid even the appearance of impropriety. Throughout the twentieth century, the Court has rejected efforts to limit the scope of integrity rules and laws. Little evidence exists to support the argument that the Court will abandon the individual responsibility model anytime in the near future. Public employers and their employees will need to double their efforts to understand the integrity rules and policies of the public service individual responsibility revolution.

**Notes**

1. For a discussion of the public law litigation model and its role in reforming public institutions, see Chayes, 1976; Cooper, 1997.

2. The U.S. Office of Government Ethics maintains a home page (http://www.usoge.gov/) that provides those inside and outside the federal executive branch comprehensive information on the executive branch ethics program.
3. For an excellent overview of the constitutional rights of public employees and officials, see Rosenbloom, 1995.

4. For a comprehensive look at this period in public personnel management, see Rosenbloom, 1971.

5. In early 1993 President Clinton signed into law legislation significantly relaxing the provisions of the Hatch Act.


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