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Model Act for Controlling Public Corruption Through Financial Disclosure and Standards of Conduct

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A MODEL ACT FOR CONTROLLING PUBLIC CORRUPTION THROUGH FINANCIAL DISCLOSURE AND STANDARDS OF CONDUCT

Alan E. Staines*

I. Introduction

Few can doubt, in the wake of Watergate and related scandals, that confidence in government has reached a low ebb. Public confidence and participation in government are vital to maintenance of the democratic system; and, therefore, government at all levels must creatively seek to revive the public trust. A first order of business is to prevent further scandals by controlling the conduct of elected and appointed public officials. The popular view, of course, is that politics is inseparably involved with corruption; and, indeed, it may be fair to ask if public conduct, with all its inherent temptations, can ever be effectively controlled.

Such a pessimistic conclusion is premature, however; criminological research suggests that a carefully drawn, effectively enforced statute could have a substantial positive result. Criminal sanctions attached to such a statute could significantly deter the white-collar crime of public officials. To be effective, such sanctions must be applied in conjunction with clearly defined standards of conduct for public officials in matters which involve the possibility of personal gain, such as government contracting and outside income.

Comprehensive financial disclosure can provide another important check on self-dealing by public officials. If the electorate is periodically apprised of the personal financial interests of legislators and administrators, they at least can know when public officials act for their own gain. This knowledge in itself is a deterrent to politicians mindful of their reputations. Further, if such disclosures are required prior to elections and appointments, the public can carefully scrutinize the candidates and, at least theoretically, elect officials who are free from financial ties creating potential conflicts. Financial disclosure provisions enacted in some states have not cleared constitutional review, however, and any such requirements must be carefully limited to avoid overly intruding on individual privacy. An overly enthusiastic statute can inhibit good candidates from seeking office.

A model act constructed to reflect all of these concerns is included in this article as Appendix B. Several model constitutional amendments, necessary in most states to effectuate the objectives of the act, are included as Appendix A. The article itself explores the theoretical and legal bases of the act in some detail. Throughout the article, references are made to the statutory sections and con-

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The views expressed herein are those of the author and do not necessarily reflect those of any government agency.
II. Fundamental Considerations in Developing a Statute for the Control of Public Corruption

Before examining specific provisions of the model act, it is worthwhile to consider some of the premises from which the act derived. Why is it necessary to exercise legislative control over the conduct of public officials? Doesn't the public franchise provide sufficient check on the activities of the unscrupulous? Perhaps even prior to these questions are questions about the efficacy of legislative sanctions for white-collar crime. Is it reasonable to expect that a statute can have any effect on public corruption, and what type sanctions—criminal, civil, or a combination—would best accomplish the objective? Furthermore, what are public expectations in regard to the effectiveness of the criminal justice system?

A. Criminological Research and Theory

1. Punishment Theories

Various studies of the theoretical basis for punishment of criminals have reached differing conclusions. Acton notes the existence of some eleven theories of punishment while Middendorff reduces the list to five. Sutherland and Cressey list the three theories of retribution, deterrence, and reformation. Grupp recognizes these three and adds the integrative theory. Grupp's model will be used throughout this discussion. It should be noted, however, that each theory is an ideal which is only approached in reality.

a. Retribution

The primary purpose of retribution is to vindicate the violated law and to show that such violations will cause the infliction of a penalty on the offender. A societal member's acts are representative of the community unless the acts are repudiated publicly by the infliction of punishment. Such repudiation helps unify society against crime; it is desirable that the repudiation be orderly and

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1 Acton, H. B. Acton, in PUNISHMENT: FOR AND AGAINST 45-46 (H. Hart ed. 1971).
4 Id.
5 Id. at 328.
7 Id. at 9.
8 Id. at 5.
9 Callard, Punishment by the State — Its Motives and Form, 10 BR. J. DELINQ. 36, 37 (1959).
10 Id.
collective. Individuals must not assume this duty.

This vindication by repudiation occurs with the offender’s loss of freedom and with an official state body’s acquisition of jurisdiction over the offender and the exercise of this power. If society’s desire for retribution is not satisfied, public confidence in the criminal justice system may be weakened.

Retribution is an aspect of the vindication of the criminal law necessary to endow such laws with greater status than a mere request. Retribution also re-establishes the authority of the state which was flouted by the offender.

Finally, retribution establishes the limits beyond which state coercion may not be exerted for reformation or deterrence.

b. Deterrence

A distinction must be made between the effects of punishment on the recipient of the punishment and the effects of punishment on societal members in general. The former is designated “individual prevention” or “special prevention,” and the latter is known as “general prevention.” “Individual prevention” or “special prevention” is also known as “specific deterrence,” and “general prevention” is also known as “general deterrence.” “Special prevention” and “specific deterrence” are also known as “rehabilitation” or “reformation.”

Rehabilitation (specific deterrence) will be discussed in the following section, and general deterrence is the topic of this section where it will be designated as “deterrence.” This designation generally will be utilized throughout the remainder of this article.

The objective of deterrence is to deal with the criminal in a manner which will deter potential criminals from the commission of crimes. Punishment must not exceed that amount necessary to deter potential criminals. In short, any rational approach to crime prevention cannot ignore the deterrence theory of punishment.

One criticism of the deterrence theory is that the criminal is punished, not

12 Grupp, supra note 6, at 5.
13 Coddington, Problems of Punishment, 46 PROCEEDINGS ARISTOT. SOC’Y (n.s.) 155, 160 (1946).
14 Middendorf, supra note 2, at 12.
15 Coddington, supra note 13, at 164.
16 Callard, supra note 9, at 39.
19 Id.
21 Chambliss, supra note 20, at 704 n. 3; Chiricos and Waldo, supra note 20, at 215.
22 Andenaes, supra note 18, at 949.
23 Grupp, supra note 6, at 7
for his act, but for the tendency of others to commit the same act. However, this is one of the unavoidable costs of an adequate system of social control. Social order would be weakened if, in the determination of the amount of punishment to be inflicted, the deterrence of potential criminals were ignored.

c. Rehabilitation

One authority has stated that individualized treatment of criminals is indispensable in the modern criminal justice system. Another states that "it is universally agreed that rehabilitation has an important place in any civilized system of criminal justice.

The goal of rehabilitation is to treat the criminal in such a manner that he engages in noncriminal behavior upon his release from state authority. Rehabilitation depends in part on a deterrent that strongly impresses the criminal, but the offender's self-respect must not be shattered so that he no longer has any hope of self-improvement. The ideal of rehabilitation is to create in the criminal new values and a desire to contribute favorably to society's development.

It must be remembered, however, that any substantial and involuntary deprivation of liberty is always punitive and must be scrutinized closely. But, as the term implies, individualized treatment of the criminal cannot be based on a set of detailed rules.

d. Integrative Theory

The integrative theory maintains that punishment should perform all three functions of retribution, deterrence, and rehabilitation. The objective is the integration of the three separate functions. Society demands that the criminal be treated in such a manner as to mitigate the desire for retribution. Society also expects that the criminal should receive treatment which will deter potential criminals. Finally, it is desirable that after punishment the offender be re-
assimilated into society.\textsuperscript{40} In short, none of the theories of punishment can be excluded if society is to receive full protection as a result of the infliction of punishment.\textsuperscript{41}

Because of its comprehensiveness, the integrative theory will guide the determination of the appropriate punishment for corruption and conflicts-of-interest behavior.

2. Corruption and Conflicts of Interest as White-collar Crime

White-collar crime is the violation of criminal law in the course of legitimate occupational activity by an individual having high socioeconomic status.\textsuperscript{42} Only behavior punishable by law qualifies,\textsuperscript{43} but violations of administrative regulations are included.\textsuperscript{44} White-collar crime includes crimes committed by politicians\textsuperscript{45} in connection with that occupation,\textsuperscript{46} and, more specifically, it includes governmental corruption (the acceptance of bribes),\textsuperscript{47} influence peddling,\textsuperscript{48} vote selling,\textsuperscript{49} and conflicts of interest.\textsuperscript{50}

The basic characteristic of all white-collar crime is the violation of trust.\textsuperscript{51} Consequently, white-collar crime theory and research are relevant to the behavioral foundation of a statute controlling corruption and conflicts of interest behavior.

a. Retribution and Deterrence as Factors in the Control of Corruption and Conflicts of Interest Behavior

Oliver Wendell Holmes stated that "[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."\textsuperscript{52} In determining the appropriate punishment for corruption or conflicts of interest, a discussion of the attitudes of both

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\textsuperscript{40} Grupp, supra note 6, at 9; Grupp, supra note 11, at 75.
\textsuperscript{41} Middendorff, supra note 2, at 11.
\textsuperscript{43} Quinney, supra note 42, at 210.
\textsuperscript{44} D. Gibbons, Changing the Lawbreaker 111 (1965).
\textsuperscript{45} Clinard, Sociologists and American Criminology, 41 J. CRIM. L.C. 549, 552 (1951).
\textsuperscript{48} A. Morris, Criminology 155 (1st ed. 1934); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in A Free Society 47 (1967) [hereinafter cited as Commission]; Sutherland & Cressey, supra note 3, at 44.
\textsuperscript{49} Commission, supra note 48, at 47.
\textsuperscript{50} Commission, supra note 47, at 104; Note, Remedies for Conflicts of Interest Among Public Officials in Iowa, 22 Drake L. Rev. 600, 601 (1973).
\textsuperscript{51} Sutherland, Crime and Business, 217 ANNALS 112, 112 (1941); Sutherland, White-Collar Criminality, 5 AM. SOC. REV. 1, 3 (1940).
\textsuperscript{52} O. Holmes, The Common Law 36 (M. Howe ed. 1963).
the public and the regulated class regarding criminal actions and civil proceedings is in order.

Schwartz and Skolnick have studied the effects of legal stigma. They examined the subsequent effects on a doctor's practice resulting from his being a defendant in a private, civil malpractice action. No widespread harm to the doctors' practices was noted, and some doctors reported that their medical income from private practice increased after their involvement in the malpractice actions. These results occurred even when the doctor lost the malpractice action.

When the party bringing the civil action is the state and not a private party, different results occur. Hartung's study of the Detroit meat black market noted the degree of disapproval of the public and the regulated class toward criminal and civil actions initiated by the Government for violation of federal price-control laws. Hartung concluded that the public tends to disapprove equally of the civil and criminal cases. He suggests that the public fails to make the distinction between civil and criminal cases made in the law. The subject cases all involved the Government as the plaintiff, and it is submitted that this is the reason for the public's equal disapproval of these civil and criminal cases. In the study conducted by Schwartz and Skolnick, no stigma resulted from a private civil action, but the equivalent stigma of a criminal trial attaches in a civil action when the Government initiates it. The public apparently attaches equal stigma to any defendant subjected to any Government-initiated action.

Hartung also concluded that the public and the regulated class tend to disapprove equally of the criminal cases while they differ significantly in their disapproval of the civil cases; the public consistently disapproves more strongly than does the regulated class. The regulated class was discovered to be significantly more disapproving of criminal cases than of civil cases. Its judgment of the criminal cases is harsh while that regarding the civil cases is relatively mild. This indicates that a statute providing criminal penalties will have a stronger deterrent effect against white-collar crime than one establishing civil penalties. For maximum deterrence, then, a corruption and conflicts-of-interest control statute should establish criminal penalties.

Despite the public's equal disapproval of government-initiated civil and

54 Id. at 138-39.
55 Id. at 138.
56 Id. at 138-39.
57 Id. at 139, 142.
59 Hartung, supra note 58, at 330; Values, supra note 58, at 15.
60 Hartung, supra note 58, at 316; Values, supra note 58, at 16.
61 Hartung, supra note 58, at 300; Values, supra note 58, at 9.
62 Hartung, supra note 58, at 316, 331; Values, supra note 58, at 16.
63 Hartung, supra note 58, at 317, 331; Values, supra note 58, at 17.
64 Hartung, supra note 58, at 331.
65 Id. at 317; Values, supra note 58, at 17.
66 Hartung, supra note 58, at 331.
criminal cases, Gardiner's study of political corruption reveals that an overwhelming majority of the subjects interviewed favored the criminal prosecution of officials engaging in corruption. An even greater majority favored a fairly long period of imprisonment as punishment for such misconduct. Briefly, if a statute controlling corruption and conflicts of interest is to reflect public desires, it must establish criminal penalties for its violation.

Punishment as a deterrent is related to the type of act committed and to the meaning attached to the punishment by the actor. Deterrence is likely to operate against crimes involving rational considerations and intellect. A former director of the Federal Bureau of Prisons has stated that imprisonment effectively deters the commission of white-collar crime.

Clinard's study of the black market discusses the deterrence of this type of crime. It should be noted that black market operations reflected unpatriotic and selfish activity similar to that of corruption and conflicts of interest. For example, gasoline dealers were trustees of a scarce commodity, just as government officers and employees are trustees of the public welfare. Thus, participation in the black market and government corruption and conflicts of interest are quite similar white-collar crimes. Clinard's conclusions regarding the deterrence of black market operations are applicable to the deterrence of corruption and conflicts of interest.

Government control of rental charges was quite effective. One reason for this was the complete registration of base-period charges, which allowed more effective policing of landlords. Adequate disclosure allowed effective policing which deterred violations. Disclosure is a means of deterring corruption and conflicts of interest and will be discussed in greater detail in a subsequent section.

Imprisonment, even if only of short duration, was the punishment most feared by businessmen engaging in black market operations. In areas where prison sentences were adequate, regulations were obeyed, but inadequate sentences were associated with violations. For example, gasoline-rationing violations, which involved infrequent imprisonment, were extensive. Because of 67 J. Gardiner, The Politics of Corruption (1970) [hereinafter cited as Gardiner]; Gardiner, Wincanton: The Politics of Corruption, in Task Force Report: Organized Crime 61 (President's Commission on Law Enforcement and Administration of Justice ed. 1967) [hereinafter cited as Wincanton]; Gardiner, Public Attitudes Toward Gambling and Corruption, 374 Annals 123 (1967) [hereinafter cited as Attitudes].

68 Id. at 128.

69 Gardiner, supra note 67, at 50-51; Wincanton, supra note 67, at 76.

70 Id. at 56, 76; Chamblis, The Deterrent Influence of Punishment, 12 Crime & Delinq. 70, 75 (1966).

71 Id. at 128.

72 M. Clinard, supra note 46; Clinard, Criminological Theories of Violations of Wartime Regulations, 11 Am. Soc. Rev. 258 (1946) [hereinafter cited as Theories].

73 See M. Clinard, supra note 46, at vii, 127, 160.

74 See the discussion in the text accompanying notes 195-220 infra.

75 258 supra note 46, 243-44; Theories, supra note 73, at 263.

76 Id. at 203.

77 Id. at 204.

78 Id. at 206.

79 See J. Chambliss, Social Research 14, 69 (1959) [hereinafter cited as Social Research].

80 Id. at 176.

81 Id. at 127.

82 Id. at 203.

83 Id. at 204.

84 Id. at 206.

85 See the discussion in the text accompanying notes 195-220 infra.

86 Id. at 176.

87 Id. at 203.

88 Id. at 204.

89 Id. at 206.

90 See the discussion in the text accompanying notes 195-220 infra.

91 Id. at 206.

92 Id. at 176.
their reputations, businessmen considered imprisonment a more effective deterrent than the payment of a fine since the latter could easily be paid from profits.

Hartung's study of the Detroit meat black market also concluded that imprisonment was more feared than a fine or monetary settlement. Adverse newspaper publicity regarding enforcement actions also served as a deterrent. This is reflective of the white-collar criminal's concern with the preservation of a good reputation.

Another effective deterrent against black market operations was the suspension of the offender's license to sell certain commodities. The removal of an official or employee from public office or position for engaging in corruption or conflicts of interest behavior should have the same deterrent effect. This remedy forms an integral part of the model constitutional amendments and model act.

One legal study of conflicts of interest in government contracts found that the size of government operations permits the concealment of corrupt practices. A severe deterrent is recommended. Another study concluded that removal from office, with the accompanying publicity, is a sufficiently severe penalty to deter such misconduct.

In conclusion, available research indicates that corruption and conflicts of interest may be deterred. Imprisonment satisfies both deterrence and retributive objectives. Removal from office and the mandatory filing of financial disclosure statements, discussed in more detail later, also are valuable deterrents.

b. Rehabilitation of Those Engaging in Corruption or Conflicts of Interest Behavior

Not every criminal needs rehabilitation. Those who do should be enrolled in programs providing special treatment for special types of criminal behavior. White-collar criminals, in general, do not need reformation or rehabilitation, nor do they need resocialization. Although incarceration, therefore, is not

82 Id. at 244; Theories, supra note 73, at 263, 264.
83 M. Clnard, supra note 46, at 151; Theories, supra note 73, at 263.
84 M. Clnard, supra note 46, at 244; Theories, supra note 73, at 264.
85 Hartung, supra note 58.
86 Id. at 215.
87 M. Clnard, supra note 46, at 79.
88 Id. at 255
89 Appendix A, Model Constitutional Amendment I, § 3; Model Constitutional Amendment III, §§ 2 & 3; Appendix B, Model Act § 8(c).
91 Id. at 366.
92 Id.
94 Id. at 143.
95 See the discussion in the text near notes 195-220 infra.
98 Middendorf, supra note 2, at 19.
99 D. Gibbons, supra note 44, at 270.
necessary for purposes of rehabilitation, it has important deterrent effects,\textsuperscript{100} and, as discussed, at least short-term imprisonment should be inflicted for the commission of white-collar crimes.\textsuperscript{101} Furthermore, such sentences will help eliminate the white-collar criminal's noncriminal self-image.\textsuperscript{102}

For governmental corruption, the primary purpose of imprisonment is the deterrence of others from the commission of similar acts.\textsuperscript{103} Thus, while it is possible for a criminal to be rehabilitated before beginning to serve any part of his criminal sentence,\textsuperscript{104} deterrence and retribution may still require that a prison sentence be served.\textsuperscript{105} This is true for individuals engaging in corruption and conflicts of interest behavior. They are not in need of rehabilitation, and they present no danger to society requiring their isolation. But, as discussed previously,\textsuperscript{106} the public desires a fairly long period of imprisonment as punishment for such misconduct. Retribution requires incarceration. And deterrent effects, as noted earlier,\textsuperscript{107} are created by imprisoning such offenders. Thus, retribution and deterrence considerations require imprisonment for those committing corruption and conflicts of interest.

The next section discusses work-release programs and the general outlines of the sentence that should be imposed for official misconduct.

c. Work-Release Programs

A community-based corrections system, including work-release programs, encourages the inmate to become involved with the community.\textsuperscript{108} Whenever possible, the correctional system should utilize such a program.\textsuperscript{109} Those selected for participation in such programs should be of sufficient stability that no security problems are created by their participation.\textsuperscript{110} Certainly, those convicted of corruption and conflicts of interest qualify for such programs.

The purpose of furlough from prison under work-release programs is to allow private employment.\textsuperscript{111} The prisoner is employed outside the prison during his hours of employment and returns to prison at the end of his workday.\textsuperscript{112} His wages go to the program administrator who reallocates them.\textsuperscript{113}

Work-release programs serve the various objectives of punishment. The deterrence function is served by the stigma of being labelled a criminal.\textsuperscript{114} In addition, the individual is isolated from society during the major portion of each

\begin{itemize}
\item \textsuperscript{100} See \textit{Commission}, supra note 47 at 108.
\item \textsuperscript{101} Middendorff, supra note 2, at 32-33.
\item \textsuperscript{102} D. Gibbons, supra note 44, at 272.
\item \textsuperscript{103} See Andenaes, supra note 18, at 971-72.
\item \textsuperscript{104} Mueller, supra note 71, at 80.
\item \textsuperscript{105} \textit{Id}.
\item \textsuperscript{106} See the discussion in the text accompanying notes 67-69 supra.
\item \textsuperscript{107} See the discussion in the text accompanying notes 71-72, 79-86, 88-89 supra.
\item \textsuperscript{109} K. Menninger, supra note 26, at 265.
\item \textsuperscript{110} Release, supra note 36, at 269.
\item \textsuperscript{111} Grupp, supra note 11, at 65.
\item \textsuperscript{112} Callanan, \textit{Thomas J. Callanan}, in \textit{Punishment: For and Against} 98 (H. Hart ed. 1971); Release, supra note 36, at 267.
\item \textsuperscript{113} Release, supra note 36, at 267.
\end{itemize}
day.\textsuperscript{115} The offender has a sentence to serve and, therefore, must spend his non-working time in prison.\textsuperscript{116} The deterrence function is served adequately.\textsuperscript{117}

The retributive function is met during nonworking hours, including weekends, which the individual must spend in prison.\textsuperscript{118} Such prisoners bear the stigma of being labelled a criminal.\textsuperscript{119} In addition, participation in a work-release program is more difficult than serving the traditional sentence in that the prisoner must continually adjust both to confinement and to freedom.\textsuperscript{120}

The rehabilitative function is served in that the offender maintains his self-respect through his employment activities.\textsuperscript{121} He contributes to society\textsuperscript{122} and maintains a sense of responsibility.\textsuperscript{123} The total reformation process is facilitated.\textsuperscript{124}

In brief, work-release programs are an ideal method of implementing the integrative theory of punishment.\textsuperscript{125} As stated previously,\textsuperscript{126} this theory is the guide for determining the appropriate punishment for corruption and conflicts of interest.

Individuals convicted of corruption or conflicts of interest should be sentenced to participation in a modified work-release program. They should be sentenced to a specified period of imprisonment with release time for the performance of free public service in a governmental agency. Their duties should approximate as closely as possible those performed during the commission of the acts for which they were convicted. They must return to prison at the end of each day of duty, and weekends should be spent in prison.

By contributing to society without payment for such services, any necessary rehabilitation will be encouraged. Society's desire for retribution will be satisfied by labelling these offenders as criminals, by requiring them to spend the majority of their hours in confinement, and by requiring that they reimburse society for the damage caused by their misconduct in office through the performance of free public service. Such free service, confinement in prison, and the stigma of the criminal label will also serve to deter others tempted to engage in such misconduct. All the functions of the integrative theory are served. The model act implements this proposal.\textsuperscript{127}

The following section discusses the advantages and disadvantages of restitution in serving the objectives of punishment.
d. Restitution

One researcher has concluded that imprisonment discourages voluntary restitution since incarceration constitutes a ritual form of restitution. However, mandatory restitution may serve both retributive and rehabilitative objectives. Court-ordered restitution adds an element of punitiveness that helps confirm the criminal character of the proscribed behavior. The offender, however, may view mandatory restitution as a means of evading criminal responsibility. To avoid this, the individual convicted of corruption and conflicts of interest should be required both to participate in the work-release program described above, including the provision of free public service which is also a form of restitution to the public, and to disgorge all proven profits earned from his illegal conduct. The use of the constructive trust as a means of accomplishing mandatory restitution will be discussed later.

The next section begins the discussion of factors other than those dictated by criminal sociology (criminology) which must be considered in drafting a model act controlling corruption and conflicts of interest.

B. Noncriminological Considerations in the Formulation of a Statute Controlling Corruption and Conflicts of Interest

Corruption and conflicts of interest involve problems of individual ethics and the administration of government. Unfortunately, problems of public interest and ethics are not easily defined with the clarity required for effective control.

The goal of any regulation of public officials' or employees' conduct is the promotion of both actual, and the appearance of actual, objectivity and impartiality in the conduct of governmental affairs without disqualifying capable public servants with needlessly stringent restrictions. The public servant should not be allowed to profit at the public's expense. However, he should not be

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129 Coddington, supra note 13, at 170-71.
131 Robin, supra note 130, at 185-86; Thieves, supra note 130, at 701.
132 See the discussion in the text accompanying notes 126-127 supra.
133 See the discussion in the text accompanying notes 489-502 infra.
135 Yankovich, supra note 93, at 138.
136 Comment, State Legislative Conflicts of Interest: An Analysis of the Alabama Ethics Commission Recommendations, 23 ALA. L. Rev. 369, 380 (1971) [hereinafter cited as Comment]; Note, Conflicts of Interest of State Legislators, 76 HARV. L. Rev. 1209, 1209 (1963); [hereinafter cited as Note]; Comment, Legislative Conflicts of Interest—An Analysis of the Pennsylvania Legislative Code of Ethics, 19 VILL. L. Rev. 82, 89 (1973) [hereinafter cited as Pennsylvania].
137 Note, supra note 136, at 1209; Pennsylvania, supra note 136, at 83.
required to suffer severe hardship because of excessively complex regulation of his conduct.\textsuperscript{139} Thus, the optimum level of regulation will protect the public welfare while allowing reasonable activities of public servants.\textsuperscript{140}

Public officials and employees need an ascertainable standard for the evaluation of their conduct;\textsuperscript{141} they need standards allowing them to evaluate the effect of nonofficial conduct upon the performance of official duties.\textsuperscript{142} The primary purpose of statutes regulating the conduct of public servants is the establishment of such conduct guides.\textsuperscript{143} Establishing these standards should discourage the dishonest from government service\textsuperscript{144} while also deterring misconduct by those already serving the public.\textsuperscript{145}

Furthermore, for a democracy to survive, the public must have faith in its elected and appointed public servants' integrity.\textsuperscript{146} Any discovery of corruption is likely to cause disrespect for all government.\textsuperscript{147} Legislation controlling officials' and employees' misconduct has as its purpose the maintenance of public confidence in the governmental process.\textsuperscript{148} The public must be assured of equal treatment for all.\textsuperscript{149}

The basic concept underlying the regulation, by statute, of public servants' conduct is that since these individuals occupy positions of public trust,\textsuperscript{150} fiduciary principles should govern their behavior.\textsuperscript{160}

1. Potential Means for Controlling Corruption and Conflicts of Interest

Voter policing and control of public servants' misconduct provides an inconsistent and unpredictable sanction.\textsuperscript{151} No uniform standards are provided which will permit such persons to determine in advance what is acceptable and unacceptable conduct.\textsuperscript{152} Consequently, some form of regulation supplementing voter election decisions must be formulated. Voter policing is of importance when combined with officially enacted standards of behavior.

Legislative codes of conduct and self-policing are also ineffective in combat-
ing misconduct. Legislatures simply are unable and unwilling to police their own membership. This is the result of conformance to group standards encouraging civility, assistance, and cohesion. Joint legislative committees have also been ineffective in policing membership conduct. Enforcement of legislative ethics must occur in a body external to the legislature in order to avoid the paralysis of the legislature's normative pressures.

Finally, enforcement of codes of ethics cannot be placed with department or agency chiefs. To do so creates inequities and lack of uniformity of application. Enforcement of governmental ethics must be placed in an independent agency of the state.

Ambiguous laws often are the cause of high rates of violation. To combat such ambiguity, those charged with administering the law should have the authority to issue legally binding interpretations, subject to court review.

Clear standards of official behavior are absolutely necessary. It is important that the public servant have unambiguous guidance so that borderline cases of potential misconduct can be quickly settled. Advance knowledge of acceptable conduct aids in avoiding improper behavior.

There must exist some independent body from which the public servant can request an opinion as to whether certain conduct is proper. If approval is given, his actions should not be voidable at the option of the government. That is, if the advisory opinion is requested in good faith and all material facts are stated in the request, the opinion should be binding on the government. Although an opinion may be amended or revoked, it should be binding on the government as to the requesting party.

Several writers have advocated the use of an administrative agency as the mechanism for enforcing a statute controlling misconduct of public servants. One reason offered in support of such a recommendation is that administrative enforcement provides flexibility in the behavior standard and in its application.

154 Conflicts, supra note 152, at 453.
155 Id. at 381-82.
156 Id. at 391-92; Pennsylvania, supra note 136, at 123 n. 254.
157 Id. at 396.
158 Id. at 397.
160 Id.
163 Id.
164 Yankovich, supra note 93, at 34.
165 Note, supra note 134, at 994.
166 Note, A Conflict-of-Interests Act, 1 HARV. J. LEGIS. 68, 70 (1964).
168 Id. at 1508.
169 Freilich & Larson, supra note 162, at 402.
170 See id.
171 E.g., Freilich & Larson, supra note 162, at 401; Philos, The Conflict in Conflicts of Interest: The Rule of Law—The Role of Ethics, 27 FED. B.J. 7, 23 (1967); Rhodes, supra note 145 at 397; Comment, supra note 136, at 374-75; Note, 167, at 69; Comment, Texas Public Ethics Legislation: A Proposed Statute, 50 TEX. L. REV. 931, 958 (1972) thereinafter cited as TEX. L. REV. 1.
As noted above, however, one purpose of such a statute is the provision of advance guidance and warning to the public servant. The attainment of these goals is seriously impeded by the employment of flexible standards. This totem pole flexibility largely eliminates any advance warning or deterrent effect.

Another rationale for the use of noncriminal sanctions is that most misconduct of public servants defies objective definition. But by utilizing vague definitions, advance warning, guidance, and deterrence are nearly eliminated.

Still another objection to the use of criminal sanctions is that enforcement is after the fact while the administrative approach permits the rendering of advance advisory opinions when so requested by the public servant. However, advance advisory opinions may be rendered by the state attorney general under a criminal sanctions system.

It is also alleged as a fault of criminal sanctions that it is impossible to define specifically in advance every misconduct situation that may occur. But this is undoubtedly true regardless of the type of sanction used. To the extent that it is used to justify the formulation of flexible and vague standards, guidance, advance warning, and deterrence will suffer. Finally, the use of advisory attorney general opinions will alleviate this problem somewhat.

Another indictment of criminal sanctions is that juries will acquit defendants if too severe punishment results from a verdict of guilty. While this is an argument for aligning the punishment with the offense, an argument no one wishes to rebut, it cannot be considered an argument against the use of criminal sanctions per se.

Criminal sanctions are also criticized as being too harsh for enforcement against public officials and employees. This overlooks the public's desire for retribution. The public not only favors criminal prosecution of those public servants engaging in misconduct but also approves of a fairly long period of imprisonment as punishment for such actions. In addition, this public desire for retribution at least indirectly rebuts the argument that a jury would be loath to convict guilty defendants.

Where the misconduct to be deterred can be explicitly and objectively defined, the use of criminal statutes is appropriate. Clearly undesirable and definable conduct should be included in a criminal statute, but before the desired requisite guidance, warning and deterrence can result, all statutes regulating the conduct of public servants must be explicit. Thus, such misconduct is appropriately proscribed by criminal statutes. Such a statute must be rigid

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174 See the discussion in the text accompanying notes 141-145, 165-167 supra.
175 Rhodes, supra note 145, at 384.
176 Id. at 399.
179 Note, supra note 167, at 69; Note, supra note 134, at 1020.
180 Attitudes, supra note 67, at 128.
181 Gardiner, supra note 67, at 50-51; Wincanton, supra note 67, at 76.
182 Note, supra note 50, at 600; Note, supra note 136, at 1225; Conflicts, supra note 152, at 456; Pennsylvania, supra note 136, at 89-90.
183 Eisenberg, supra note 143, at 700.
enough to incorporate societal values (retribution) but flexible enough for deterrence and rehabilitation.\textsuperscript{184}

Substituting administrative and civil sanctions for criminal sanctions requires caution;\textsuperscript{185} it should be restricted to situations in which the advantages of administrative over criminal proceedings are clearly understood by the public.\textsuperscript{186} This condition does not exist in the area of corruption and conflicts of interest, for, as noted above,\textsuperscript{187} the public desires lengthy incarceration sentences as punishment for such conduct.

Another problem with the use of the administrative sanction is the tendency for the work product of administrative agencies to deteriorate gradually.\textsuperscript{188} The agency over time becomes "lethargic and indifferent to the public interest."\textsuperscript{189} When enforcement of criminal statutes is placed under the responsibility of the elected state attorney general, his responsibility to the voters prevents the onset of the lethargy characteristic of appointed agency members.

The feasibility of placing enforcement responsibility in the state attorney general is evidenced by the Iowa Attorney General's creation of a Special Prosecutions Division to handle cases of governmental misconduct.\textsuperscript{190} Of course, the state attorney general must receive sufficient funds to staff his office in accordance with these additional responsibilities. For example, in the first two years of existence of the Massachusetts conflicts of interest statute, over three hundred advisory opinions were issued\textsuperscript{191} with one hundred opinions being issued within one month after the effective date of the act.\textsuperscript{192}

The model act basically employs criminal sanctions enforced by the state attorney general. This will most effectively aid achievement of the goal of controlling corruption and conflicts of interest. The civil sanctions of the model act also will be enforced by the state attorney general.

2. Specific Procedural Aspects of the Model Act

The model act, section 4(b), establishes authority and responsibility for its enforcement in the attorney general's office. In addition to investigatory and prosecutorial functions, this office also has responsibility for the issuance of advisory opinions when requested. To provide the requisite guidance and warning, these opinions must be issued within thirty days of receipt; otherwise, the conduct is deemed approved. All opinions must be published, with deletions necessary to maintain the anonymity of the requesting party. In proper situations, the opinions are a defense to any action by the state. When appropriate, these functions are performed by a special prosecutor appointed by the governor.

\textsuperscript{184} Mueller, supra note 71, at 82.
\textsuperscript{185} H. MANNHEIM, supra note 47, at 482.
\textsuperscript{186} Id.
\textsuperscript{187} See the discussion in the text accompanying notes 180-81 supra.
\textsuperscript{188} P. DOUGLAS, ETHICS IN GOVERNMENT 29 (1952).
\textsuperscript{189} Id. at 30.
\textsuperscript{190} Note, supra note 50, at 601.
\textsuperscript{192} Id. at 386.
The attorney general or a special prosecutor must initiate a civil action or suit or criminal prosecution within ninety days after the receipt of a citizen complaint or publish reasons for not doing so.

Those government officials and employees subject to a statute regulating their behavior must be assured that any judgment regarding their conduct will be the product of an impartial and competent body. Consequently, for the trial of the governor, lieutenant governor, attorney general, treasurer, secretary of state, any justice of the state's highest appellate court, a state senator, and a state representative, a special Public Ethics Court is created by Section 4(c)(1) of the Model Act. The trial judge is the chief justice or an associate justice of the state's highest appellate court appointed by the chief justice of that court or by the most senior associate justice not disqualified from making such an appointment if the chief justice is so disqualified. This will provide a dignity and prestige to the trials of such high-ranking government officials.

The trials of all other elected and appointed officials and employees will occur in the highest trial court of record having jurisdiction of the geographic area in which the alleged misconduct was committed. The chief judge of the court or one of the judges of the court designated either by the chief judge or by the most senior judge of the court not disqualified from making such a designation, if the chief judge is so disqualified, conducts these trials.

Appeals of all verdicts and rulings proceed directly to the state's highest appellate court. Any judge or justice who conducted the trial is ineligible for participation in the appellate decision. He must be replaced by the most senior chief judge of all the state's highest trial courts of record who was not involved in the conduct of the trial.

To avoid the institution of "political trials," § 5 of the model act waives sovereign immunity for malicious and unfounded actions initiated by the attorney general or a special prosecutor. Recovery of actual damages is the remedy.

Model Constitutional Amendment I eliminates any incumbent's potential immunity from a civil action or suit or criminal prosecution for official misconduct or immunity from a civil action for the refusal to file a required financial disclosure statement. Final criminal conviction, final imposition of a constructive trust on illegal profits, or a final decree voiding a government contract or transaction because of official misconduct results in automatic removal from any public office or position held.

An amendment also is drafted, Model Constitutional Amendment III, which eliminates the separation of powers doctrine that only the legislature can remove one of its members from office. No longer is impeachment the sole means of removing certain officers.

Finally, constitutional amendment II provides that the state senate refuse confirmation of any appointee who refuses to file a required financial disclosure statement. Appointments not requiring senate confirmation are automatically

194 This doctrine is discussed in Eisenberg, supra note 143, at 696. Also, see U.S. Const. art. I, § 5, cl. 1 and cl. 2 for an example of such a restriction.
withdrawn upon such refusal. The attorney general, or the governor, is required
to disqualify a candidate for elective office who refuses to file a required financial
disclosure statement.

III. Financial Disclosure as a Means of Combating Corruption
and Conflicts of Interest

Disclosure of financial interests offers an important practical method of
deterring misconduct of public servants.195 It provides a feasible alternative to
overdetailed regulation of official misconduct.196 Some writers view disclosure
as a prerequisite to the effective enforcement of statutes regulating such con-
duct,197 while others have deemed it the antibiotic remedy for official mis-
conduct.198 In short, publicity is considered "the most effective safeguard against
the misconduct of public officials."199 Honest disclosure is also a weapon against
irresponsible charges by political opponents,200 a feature operating to the
political advantage of the honest public servant and against the unscrupulous.

The primary antidote for official misconduct is an informed public interest
in government.201 Financial disclosure seeks the collection of relevant informa-
tion which will allow the public to decide what is proper conduct;202 the public
is thus enabled to make informed judgments about the public servant's fitness to
hold office.203 A by-product is the promotion of public confidence in those hold-
ing public office.204 Moreover, financial disclosure permits the public servant's
(colleagues to evaluate any of the discloser's decisions or recommendations on the
basis of potential or actual pecuniary motivation.205

Financial disclosure forces the official or employee to determine the effects
of his interests and to accept responsibility for his actions.206 Disclosure results in
the exercise of caution to avoid apparent improprieties in transactions in which
he has an interest.207 Since most public servants value their reputations highly,208
they readily appreciate the potential stigma resulting from any conduct pecuni-
arily favorable to them which cannot be supported by clear reasoning.209 Thus,
financial disclosure deters deceit and forces the public servant to consider in
advance the implications of his conduct;210 and, additionally, financial disclosure

195 Getz, supra note 149, at 14-15.
196 Texas, supra note 172, at 933-34.
197 Freilich & Larson, supra note 162, at 389, 406; Note, supra note 177, at 461; Legis-
   lative Comment, supra note 140, at 403.
198 G. GRAHAM, MORALITY IN AMERICAN POLITICS 245 (1952).
199 Comment, Conflict of Interest in Public Contracts in California, 44 CALIF. L. REV.
   355, 373 (1956).
200 Getz, supra note 149, at 272, 273.
202 Eisenberg, supra note 143, at 688.
203 Texas, supra note 172, at 934, 938 n.36.
204 Note, The Illinois Governmental Ethics Act — A Step Ahead Toward Better Govern-
205 Rhodes, supra note 145, at 386; Note, supra note 134, at 1022.
206 Eisenberg, supra note 143, at 688.
   357 n.68 (1974).
208 P. DOUGLAS, supra note 188, at 98.
209 Note, supra note 134, at 1022.
210 Rhodes, supra note 145, at 388.
makes financial misconduct easier to detect.\

In summary, disclosure creates informative, group pressure, and enforcement effects. The informative effect permits the recipient of disclosure (the public and colleagues) to act in accordance with all the facts. The group pressure effect allows the recipient to formulate conduct norms for the discriber, who will avoid engaging in potentially embarrassing conduct. Finally, complete and accurate disclosure facilitates enforcement of statutes regulating conduct by aiding in the detection of violations.

One commentator views financial disclosure as a means of promoting governmental efficiency and economy. Certainly this is a by-product of the elimination of self-serving behavior by the public servant.

The benefits of financial disclosure, though, are seriously weakened when the public servant or his supervisor controls disclosure or are the only parties receiving the disclosed information. Disclosure must be made to a body independent of the one in which the public servant is an incumbent.

Finally, a disclosure statute should prohibit the filing of false statements; indeed, maximum deterrence would require that such an act be considered a felony. In addition, disclosure statements should be filed annually and be open to public inspection.

A. State Court Cases Delimiting Constitutional Financial Disclosure Requirements

1. The Right of Privacy: City of Carmel-by-the-Sea v. Young

In City of Carmel-by-the-Sea v. Young, the California supreme court held California’s financial disclosure law unconstitutional as an overbroad intrusion into the right of privacy and an invalid restriction on the right to seek or hold public office.

The court recognized that the public’s right to know of matters which might cause a conflict of interest between the public duties and private financial interests of public servants is a proper governmental concern. Even though the governmental purpose is valid, however, means stifling fundamental liberties cannot be used to achieve the purpose if it can be achieved by the use of a more narrowly restricted approach. The court reaffirmed the citizen’s right to hold public office and determined that the protection against mandatory public dis-

211 Comment, supra note 150, at 113.
212 Note, supra note 173, at 1292.
213 Id.
214 Id. at 1293.
215 Id.
217 Comment, supra note 150, at 125.
218 Freilich & Larson, supra note 162, at 408.
219 Pennsylvania, supra note 136, at 128.
220 Id.
223 2 Cal. 3d 262, 466 P.2d at 226-27, 85 Cal. Rptr. at 3.
closure of one's personal financial affairs, including those of one's spouse and children, is within the zone of privacy protected by the fourth amendment.\(^{224}\) Furthermore, this protection was held to be within the penumbra of fundamental rights into which the government may not intrude without a showing of compelling need coupled with the use of means not overly broad.\(^{225}\)

Consequently, the government's need to minimize possible conflicts of interest was balanced with the individual's right to privacy in his personal financial affairs while seeking or occupying a public office. The court noted that the California statute's coverage applied to those holding office in a state agency regardless of the nature and scope of the agency's duties, as well as to local office holders.\(^{226}\) As a consequence, the court concluded that the compulsory disclosure was not related to financial affairs or assets which reasonably could be expected to create a conflict of interest. That is, the disclosure was not related to those assets or financial affairs having a rational connection with the functions or jurisdiction of a specific agency or with the functions or jurisdiction of a public officer or employee. Asset values exceeding $10,000 had to be disclosed regardless of the asset's location or nature or whether it had any relation to the discloser's duties or whether the discloser controlled it.\(^{227}\) Thus, the statute was found to be unconstitutionally overbroad,\(^{228}\) while the invasion of privacy and the chilling effect on the seeking or holding of any public office were deemed "too clear for dispute."\(^{229}\)

The court noted that requiring relevant disclosures of investments and assets would be rationally related to the valid purpose of preventing conflicts of interest by public servants. Such purpose, however, could be accomplished by a statute drafted more narrowly than the one at issue.\(^{230}\) The court noted further that the statute's mandatory requirement that all investments exceeding $10,000 be disclosed may be relevant for members of the legislature and some public officials and employees.\(^{231}\) The essential point is that the legislature is not precluded from enacting a statute requiring "broad disclosure of assets, income or receipts relevant to the duties and functions of a public officer or employee."\(^{232}\) The instant statute was unconstitutional, however, because no overriding necessity was established which justified the intrusion into relevant and irrelevant financial affairs of public officials and employees subject to the statute. By not limiting disclosure only to investments or assets which might be affected by the duties or functions of a public office, the statute exceeded legitimate state interest, and caused an unnecessary chilling effect on the individual's willingness to seek or hold public office.\(^{233}\)

Justice Mosk, in dissent, stated that the fourth amendment's protection

\(^{224}\) Id. at 268, 466 P.2d at 231-32, 85 Cal. Rptr. at 7-8.
\(^{225}\) Id., 466 P.2d at 232, 85 Cal. Rptr. at 8.
\(^{226}\) Id. at 269, 466 P.2d at 232, 85 Cal. Rptr. at 8.
\(^{227}\) Id., 466 P.2d at 232, 85 Cal. Rptr. at 8.
\(^{228}\) Id. at 270, 466 P.2d at 233, 85 Cal. Rptr. at 9.
\(^{229}\) Id., 466 P.2d at 233, 85 Cal. Rptr. at 9.
\(^{230}\) Id., 466 P.2d at 233, 85 Cal. Rptr. at 9.
\(^{231}\) Id. at 272, 466 P.2d at 234, 85 Cal. Rptr. at 10.
\(^{232}\) Id., 466 P.2d at 234, 85 Cal. Rptr. at 10.
\(^{233}\) Id., 466 P.2d at 234-35, 85 Cal. Rptr. at 10-11.
against unreasonable searches and seizures is irrelevant to the disclosure of financial interests.\footnote{234} He found no violation of any first amendment rights by the statute at issue, and stated his belief that the provision of public knowledge of significant economic factors which may influence an official’s decisions outweighs the officer’s economic privacy. Finally, the Mosk dissent implicitly accepted the relevant (related)-to-duties test of the majority opinion but held that it is doubtful that any investments over the statute’s $10,000 disclosure threshold are irrelevant to the motivations of a public servant.\footnote{235}

_Carmel_ has been the subject of several criticisms. One writer argued that the _Carmel_ court relied on a fourth amendment generic right of privacy which is nonexistent.\footnote{236} Fourth amendment personal privacy issues arise only in the context of an unreasonable search and seizure, which is not the context of _Carmel_. The same writer criticizes the _Carmel_ court’s use of the penumbral rights theory to elevate private economic interests to a fundamental rights status abandoned by the Supreme Court.\footnote{237} This critic correctly explains that the Supreme Court requires only that legislation affecting economic interests rationally relate to a valid state purpose. He maintains that the penumbral rights approach to the regulation of economic interests should face the same test.\footnote{238} The _Carmel_ majority, however, was concerned with protecting the privacy of financial affairs and not with economic freedom or interests per se.

_Carmel_’s balancing process was also criticized. _Carmel_ might have reached a different conclusion if the proper competing interests had been examined.\footnote{239} The competing interests that should be balanced are the public servant’s right to personal privacy in his financial affairs and the public’s right to informed self-government. It would appear, however, that the _Carmel_ court’s recognition of the public’s right to know of matters which might cause a conflict of interest\footnote{240} and of the prevention of conflicts of interest as a valid state purpose\footnote{241} includes the public’s right to informed self-government. Another critic states that _Carmel_ failed to recognize the public’s right to know.\footnote{242} It is submitted that both criticisms are based on misinterpretations of _Carmel_. The most telling criticism is that the _Carmel_ court failed to consider in its balancing process the statute’s assertion that full disclosure of a public servant’s financial affairs is necessary to maintain public confidence in government.\footnote{243} It is submitted that, had both this interest and that of the public regarding informed self-government, discussed in the preceding paragraph, been balanced against the right to personal financial privacy, the statute would have been upheld.

\footnote{234}{Id. at 278, 466 P.2d at 239, 85 Cal. Rptr. at 15.}
\footnote{235}{Id. at 284, 466 P.2d at 243, 85 Cal. Rptr. at 19.}
\footnote{236}{Comment, _supra_ note 216, at 539.}
\footnote{237}{Id. at 539.}
\footnote{238}{Id. at 546.}
\footnote{239}{Id. at 549.}
\footnote{240}{2 Cal. 3d at 262, 466 P.2d at 226-27, 85 Cal. Rptr. at 3.}
\footnote{241}{Id. at 270, 466 P.2d at 233, 85 Cal. Rptr. at 9. Both elements also are recognized in the court’s statement that it must balance the state’s need to expose or minimize possible conflicts of interest with the public servant’s privacy rights. _Id._ at 269, 466 P.2d at 232, 85 Cal. Rptr. at 8.}
\footnote{242}{Note, _supra_ note 207, at 354.}
\footnote{243}{49 _TEXAS L. REV._ 346, 353 (1971) [hereinafter cited as _TEXAS_].}
2. Cases Upholding Financial Disclosure

In 1973, the California legislature enacted a more limited conflicts of interest statute,\(^{244}\) the constitutionality of which was tested in *County of Nevada v. MacMillen*\(^{245}\) and upheld. The court affirmed the continuing validity of *Carmel* but concluded that the new statute satisfied the *Carmel* standards.\(^{246}\)

The *MacMillen* court decided that neither the right of privacy nor the right to seek and hold public office must always override the public’s right “to an honest and impartial government.”\(^ {247}\) The public’s interest in maintaining honest and impartial government is paramount to the interests of an official’s spouse and dependent children in the maintenance of complete financial privacy.\(^ {248}\) In addition, *MacMillen* held that requiring financial disclosure only by certain high-ranking public officials and employees does not violate the equal protection clause.\(^ {249}\)

In another relevant financial disclosure case, *Stein v. Howlett*,\(^ {250}\) Illinois’ financial disclosure provisions\(^ {251}\) were held to be constitutional. The Illinois supreme court found that the disclosure provisions were intended to prevent conflicts of interest, to reveal any abuse of office, and to instill public trust in government.\(^ {252}\) The court acknowledged that disclosure of matters truly unrelated to any state activity does not facilitate achievement of the statute’s purpose but held that it is proper to require disclosure of “sources of substantial amounts of income and of significant business interests.”\(^ {253}\) The purpose of this statute necessitates broad coverage and, thus, reflects the compelling state interest which outweighs the rights of the individual public servant; the statute is not overbroad, therefore, nor an unconstitutional invasion of privacy.\(^ {254}\)

It should be noted that the Illinois constitution expressly establishes a right of privacy\(^ {255}\) which is not found in the fourth amendment of the United States Constitution, relied on in part by the *Carmel* court. The *Stein* court did not expressly hold that the right of privacy guaranteed by the Illinois constitution included privacy in financial matters but held that the statute’s purpose of instilling public trust in government and the purposes of preventing conflicts of interest and revealing abuses of office constituted a sufficient state interest that is paramount to the individual’s right of financial privacy.\(^ {256}\)

The *Stein* court distinguished *Carmel* by noting that the California court objected to the statutory requirement of identical financial disclosure for all officials, whether state or local, while the Illinois statute applies stricter dis-
closure requirements to state officials than to local officials.\textsuperscript{257} Thus, the Illinois statute has a greater potential for passing the \textit{Carmel} relevant (related)-to-duties test than did the original California statute.

Another distinction, not noted by the \textit{Stein} court, is that the Illinois statute requires disclosure only of the identity of assets and sources of income\textsuperscript{258} while the California statute required disclosure of the nature and extent of any investments exceeding $10,000 in value.\textsuperscript{259} Of course, the comparative extent of any privacy intrusion in a particular case would depend upon such factors as the value of each investment and the total number of investments held.

Despite such statutory differences, the crucial distinction between \textit{Carmel} and \textit{Stein} is that the latter recognizes the public's right to know, the fostering of public confidence in government, and the prevention of conflicts of interest as a compelling state interest overriding the public servant's right of privacy in financial affairs. As noted previously,\textsuperscript{260} \textit{Carmel}, on the other hand, did not consider the necessity of cultivating public confidence in government, the public's right to know, or the prevention of conflicts of interest as a compelling state interest overriding the public servant's right of privacy in his financial affairs.\textsuperscript{261}

The Illinois supreme court in \textit{Illinois State Employees Ass'n v. Walker}\textsuperscript{262} further developed the principles announced in \textit{Stein}. \textit{Walker} upheld the constitutionality of a governor's executive order requiring the filing of detailed financial disclosure statements (including the monetary amounts of all assets, liabilities, and income sources) by certain state employees. The right of privacy guaranteed by the Illinois constitution\textsuperscript{263} did not restrict the disclosure by state officers and employees of economic interests since the state constitution\textsuperscript{264} also authorizes economic disclosures.\textsuperscript{265} The court concluded that the state's compelling need for efficient, ethical government is paramount to the employee's fundamental right of privacy.\textsuperscript{266} Complete financial disclosure is substantially related to the valid state concern and, therefore, is not an overly broad requirement. Finally, the court held that because of the danger of indirect conflicts of interest and the possibility of influencing an employee through gifts to a spouse, the provision of the executive order relating to the disclosure of interests of spouses and immediate family members is not limited to those interests constructively controlled by the employee nor to those interests deemed by the employee to be related to his or her public employment.\textsuperscript{267}

The primary significance of \textit{Walker} is its holding that requiring detailed financial disclosures (including monetary amounts) is not unconstitutionally overbroad because such disclosures are substantially related to the state's com-

\textsuperscript{257} \textit{Id.} at 579, 289 N.E.2d at 414.
\textsuperscript{258} ILL. ANN. STATS. ch. 127, § 604A-102 (Supp. 1974).
\textsuperscript{260} See the discussion in the text accompanying note 243 supra.
\textsuperscript{261} Compare 2 Cal. 3d at 262, 466 P.2d at 226-27, 85 Cal. Rptr. at 3 \textit{with id.} at 272, 466 P.2d at 234, 85 Cal. Rptr. at 10.
\textsuperscript{262} 57 Ill. 2d 512, 315 N.E.2d 9 (1974).
\textsuperscript{263} ILL. CONST. art. 1, § 6.
\textsuperscript{264} ILL. CONST. art. 13, § 2.
\textsuperscript{265} 57 Ill. 2d at 524, 315 N.E.2d at 15.
\textsuperscript{266} \textit{Id.} at 526, 315 N.E.2d at 17.
\textsuperscript{267} \textit{Id.} at 527-28, 315 N.E.2d at 17.
pelling interest in efficient and ethical government.

Some of the Stein-Walker holdings are contradicted in Lehrhaupt v. Flynn. New Jersey township officials challenged the constitutionality of a financial disclosure ordinance. The court held, *inter alia*, that instilling trust of government officials in the public is not a valid governmental interest. Lehrhaupt also held that requiring disclosure of financial interests of spouses and minor children, unless constructively controlled by the reporting official, is unconstitutional.

Another recent state case relevant to the constitutionality of financial disclosure laws is Fritz v. Gorton. In this case the Washington state supreme court upheld the constitutionality of the Washington disclosure statute. This statute requires the filing of a financial disclosure statement by all elected officials and candidates with the exception of incumbents in the offices of president, vice president, and precinct committeeman and candidates for these offices. Disclosure statements are required of other public officials and public employees by a statute not at issue in this case.

As background for its opinion, the Fritz court noted that an informed and active electorate is vital to the existence of a democracy and recognized the current increase in distrust of public officials and government. Proceeding to the disclosure portion of its opinion, the Washington court stated that, ideally, financial disclosure legislation should not totally ignore the right of privacy of those subject to the disclosure statute. There should be an optimum balance between the rights of those subject to the disclosure statute and the right of the public to know or be informed about those who represent them in government. The court recognized, however, that the right of privacy is not absolute. There are inherent limitations on this right when the protected individual is a candidate or incumbent public official; information which directly relates to the qualifications and fitness of those seeking or holding public office is in the public domain.

The majority noted that freedom of the press has been construed so as to encourage and protect public discussion of the conduct of public officials, and the right to receive information is fundamental to the right of free speech. This right of the public to know is not less fundamental than the right of privacy. The privacy rights of the candidate or officeholder are not paramount to the public's right to be informed of matters related to one's fitness to hold public office. The court decided that the terms of the statute were not irrationally unrelated to the legitimate purposes to be served by the legislation, and, therefore,

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269 Id. at 333, 323 A.2d at 540.
270 Id. at 334-35, 323 A.2d at 541.
274 83 Wash. 2d at 283-84, 517 P.2d at 917.
275 Id. at 293-94, 517 P.2d at 922.
276 Id., at 294, 517 P.2d at 923.
277 Id. at 294-95, 517 P.2d at 923.
278 Id. at 296, 517 P.2d at 924.
279 Id. at 298, 517 P.2d at 925.
are not overbroad.\textsuperscript{280}

In analyzing the overbreadth issue, the court interpreted the statute as not requiring detailed itemization in specific dollar amounts but only the identification of assets and relationships fitting within broad monetary categories;\textsuperscript{281} other aspects of the statute will be discussed later.\textsuperscript{282} The court recognized, however, that the disclosure statute may require disclosures not clearly related to a particular public office and concluded that it would be impossible to tailor required disclosures to each existing public office. The statute, therefore, was not unconstitutionally overbroad.\textsuperscript{283}

3. General Principles of the State Court Decisions

Some general principles can be discerned from a comparative analysis of these decisions. \textit{Carmel} and \textit{Fritz} both balanced the public's right to know against the public servant's right to financial privacy, with the \textit{Carmel} court adding the government interest in preventing official misconduct. The \textit{Carmel} scales found the privacy interests to be overriding while \textit{Fritz} found the public's right to know to be overriding. The \textit{Carmel} test of overbreadth depends on whether disclosures are unrelated or irrelevant to duties. The \textit{Fritz} court recognizes the impossibility of tailoring disclosure requirements to each public post and instead asks whether the required disclosures are irrationally unrelated to the statute's legitimate purposes. In short, \textit{Carmel} and \textit{Fritz} assign different weights in their respective balancing of the same interests (with \textit{Carmel} adding the government interest in preventing official misconduct) and employ different tests of overbreadth.

It is submitted that the statutory differences of \textit{Carmel} and \textit{Fritz} do not affect the above conclusions. The California statute required that every public official and employee disclose the nature and extent of each investment or financial interest owned or constructively owned which exceeded $10,000 in value.\textsuperscript{284} Certainly this requirement would intrude on the financial privacy of only the wealthier officials and employees, and even they could avoid this intrusion by owning many investments and interests, each having a value of less than $10,000. The potential for invasions of privacy is much greater under the Washington statute since it requires disclosure of the identity and values of investments, financial interests, debts, the identity of persons for whom legislative or rate matters were advocated for compensation, and the identity of employers.\textsuperscript{285} Disclosure thresholds range from total disclosure to a threshold of $5,000.\textsuperscript{286} Thus, although the Washington statute constitutes a greater invasion of privacy than did the California statute, the \textit{Fritz} court did not give overriding weight to the privacy interest while the \textit{Carmel} court did.

\textsuperscript{280} Id. at 300, 517 P.2d at 926.
\textsuperscript{281} Id. at 299, 517 P.2d at 925.
\textsuperscript{282} See the discussion in the text accompanying notes 283-86 infra.
\textsuperscript{283} Wash. 2d at 300, 517 P.2d at 926.
\textsuperscript{286} Id.
Additional support for the different weights view is the fact that each statute applies indiscriminately to all members of the regulated class. The California statute applied to all public servants, whether of high or low power and jurisdiction, and the Washington statute applies to all elected officials and candidates, whether of high or low authority. But the California act was deemed to unconstitutionally invade the right of privacy while the Washington statute does not. The different results are best explained by the different weights assigned by the respective courts to the interests involved.

It may be argued that the Fritz assignment of a lower weight to the privacy interest than to the public’s right to know is limited to a statute, such as Washington’s, in which only the conduct of elected officials is regulated. That is, the privacy rights of elected officials and candidates are subordinate to the public’s right to know of matters relevant to the conduct of such individuals, but privacy rights of appointed public servants outweigh the public’s right to know.

Carmel, however, did not intimate that the California statute was overbroad only as to all appointed public servants and constitutional as to all elected officials. Rather, the public’s right to know and the state interest in preventing official misconduct increased while the right to privacy decreased as the authority and responsibility of the individual increased, regardless of whether he was appointed or elected. Fritz applied the same right of privacy and right to know standard to all elected officials and candidates, regardless of increasing or decreasing authority and responsibility, once again indicating that different weights were assigned by the respective courts to the interests involved.

The significance of MacMillen is its recognition that the public servant’s right of privacy and the right to seek and hold public office do not always override the public’s interest in honest and impartial government. Important also is the holding that limiting financial disclosure to certain high-ranking public servants does not violate the equal protection clause.

Stein includes in the balancing process the state interest in fostering public confidence in government. This interest plus the public’s right to know and the government interest in the prevention of conflicts of interest outweigh the public servant’s right of financial privacy. The significance of Stein is that it recognizes the importance of this state interest in cultivating public confidence in the integrity of government. It is submitted that Lehrhaupt’s holding that such an objective does not constitute a valid governmental concern is not the better view.

It is arguable, of course, that since the Illinois statute requires fuller disclosure for high-ranking public officials than for those of lower rank, Stein is really in accord with Carmel as to the applicable law. Both apply a relevant (related)-to-duties test of overbreadth. However, the Stein court only mentioned the statutory differences in passing. The heart of its decision is the inclusion in the balancing process of the state’s interests in fostering public confidence in government, preventing conflicts of interest, and facilitating the public’s right to know. These interests, when balanced against privacy rights, override the latter. Carmel found the privacy right to be overriding but neglected to include in the balancing process the state interest in fostering public confidence in government.

Walker’s importance is its holding that the state’s compelling need for
efficient, ethical government is paramount to the employee's fundamental right of privacy. Even detailed financial disclosure in monetary amounts is substantially related to the valid state concern and, therefore, is not overbroad.

An important distinction involves the *Walker-Lehrhaupt* disagreement regarding the constructive control of assets of spouses and minor children. The *Lehrhaupt* requirement of constructive control is founded on the existence of certain legal impediments to the reporting official's ability to obtain information from spouses and minor children.\(^{287}\) It is submitted that a statute requiring a public official to report the assets of spouses and minor children creates a duty on spouses and minor children to provide the required information to the reporting official regardless of the existence of obstacles to such disclosures when the recipient is not a reporting public official. In short, to more effectively control corruption and conflicts of interest, the *Walker* requirement that all interests of spouses and minor children be disclosed by the reporting official should be followed as closely as possible.

The better views are those expressed in *Stein, Walker, Fritz* and *MacMillen*; they are incorporated in the model act. The public's right to know and the government interest in both the prevention of official misconduct and the cultivation of public confidence in the integrity of government outweigh the public servant's interest in financial privacy so long as the disclosure statute is not overbroad in its reach. Since it is impossible to match disclosure requirements to each existing public post, the proper test of overbreadth is whether the disclosure requirements are irrationally unrelated to the valid purpose of the disclosure statute. The model act applies the principle that the disclosure of the mere existence of a possible conflict of interest should be sufficient to alert the public to seek an explanation.\(^{288}\)

### B. The Constitutional Privilege Against Self-incrimination as a Check on Financial Disclosure

#### 1. Cases Involving Statutes Compelling Incriminating Evidence

The decision providing much of the background for the discussion in this section and the preceding one is *Shelton v. Tucker*.\(^{289}\) *Shelton* considered the constitutionality of an Arkansas statute which required, as a condition of employment for a teacher in a public school or college, the annual filing of an affidavit listing every organization to which the affiant had belonged or regularly contributed during the preceding five years.\(^{290}\) The Court noted that a state has the right to investigate the competence and fitness of its teachers;\(^{291}\) yet, even though the government's purpose is valid and substantial, means cannot be used to achieve its which broadly stifle fundamental liberties if the end can be achieved

\(^{287}\) 129 N.J. Super. at 334, 323 A.2d at 540-41.

\(^{288}\) *Texas*, supra note 243, at 355.

\(^{289}\) 364 U.S. 479 (1960).

\(^{290}\) Id. at 480.

\(^{291}\) Id. at 485.
The Court ultimately held that the statute's interference with the right of association exceeded the state's interest in investigating the fitness and competence of its teachers. The relevant portion of the opinion, for purposes of this discussion, is the limitation on the infringement of fundamental rights by an overbroad statute enacted pursuant to a valid state concern.

The same theory was applied in *Marchetti v. United States* in which the Court began the development of a line of self-incrimination cases relevant to financial disclosure requirements. Petitioner, engaged in the business of gambling, was convicted of failing to register his business and pay a federal occupational tax. The Court noted that, as a group, those engaged in wagering are inherently suspected of criminal conduct. Further, the information required by the federal wagering tax laws was made available to assist authorities in the enforcement of statutes proscribing gambling. The Court held that the privilege against self-incrimination is not waived merely because an inherently suspect group has been ordered either to cease engaging in activities requiring registration or to provide incriminating evidence by registering and have elected to do neither. Nor is the privilege against self-incrimination diminished because disclosure of an illegal purpose precedes the illegal act, such as requiring a party to register and post a wagering tax stamp before being allowed to conduct an illegal gambling business. The privilege is not concerned with a chronological formula but with "the substantiality of the risks of incrimination." Here, a party could reasonably fear that registration and acquisition of a wagering tax stamp would constitute decisive evidence of a violation of state gambling statutes.

The Court held that the *Shapiro v. United States* required records exception was inapplicable to the privilege against self-incrimination. *Shapiro* was distinguished in three ways: (1) the statute at issue did not require the maintenance of records ordinarily kept but required the provision of information unrelated to business records; (2) the information demanded had no public aspects, for this status is not created merely because the Government desires information; and (3) the requirements of the instant statute did not involve a noncriminal, regulatory area but were directed at a group inherently suspected of engaging in criminal conduct.

Although the Court reaffirmed the power of Congress to tax illegal activities and did not find the wagering tax unconstitutional, it held that those who properly assert the privilege against self-incrimination cannot be punished criminally for failure to comply with the statute. Congress may tax illegal

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292 Id. at 488.
293 Id. at 490.
295 Id. at 47.
296 Id. at 52.
297 Id. at 54.
298 Id.
299 335 U.S. 1 (1948).
300 390 U.S. at 57.
301 Id. at 58.
302 Id. at 61.
303 Id.
activities but in so doing cannot require the provision of self-incriminating information or establish a procedure whereby payment of the tax constitutes conclusive evidence of engaging in illegal conduct. A statute may not require the performance of an act when such performance constitutes evidence of criminal conduct.

In *Grosso v. United States*, the Supreme Court extended the protection for the right against self-incrimination established in *Marchetti*. Petitioner was convicted of willful failure to pay a federal wagering excise tax, of willful failure to pay a federal occupational tax, and of conspiracy to defraud the United States by evading payment of both taxes. The Court noted that the wagering tax return is designed for use only by those engaged in the gambling business. Its submission and the responses to the questions asked directly for evidence of the taxpayer's gambling activities; and if the return does not accompany the tax due, the payment is not accepted.

The Court concluded that those liable for payment of the excise tax could reasonably believe that information obtainable from its payment or the submission of the required form would be provided to federal and state prosecutors. Therefore, the hazards of incrimination resulting from the obligation to pay the excise tax and to file the accompanying return are not imaginary and insubstantial. Since petitioner's submission of an excise tax payment with his responses to the questions on the accompanying form would directly incriminate him, his claim of the privilege against self-incrimination as to the entire tax payment procedure is valid.

The Court also found that the *Shapiro* required records doctrine could not be applied to this case. The opinion defined the doctrine as being composed of three elements: (1) the essential purposes of the inquiry must be regulatory, (2) the information required must be obtainable through the preservation of records which the regulated party customarily keeps, and (3) the records must have public aspects rendering them analogous to public documents. Here, the first and third elements are missing since the statute's requirements affect almost exclusively "individuals inherently suspect of criminal activities." Also, the information sought lacked the characteristics of a public document.

Consequently, the Court held that a claim of the privilege against self-incrimination precluded conviction for a failure to pay the tax. The tax itself, however, was constitutional, and claiming the privilege does not eliminate the tax liability. But since payment would not be accepted without the accompanying return, and since both payment and filing the return constituted incriminating

305 Id. at 63.
306 Id. at 65.
307 Id. at 66.
308 Id. at 67.
309 Shapiro v. United States, 335 U.S. 1 (1948).
310 390 U.S. at 67.
311 Id. at 68.
312 Id.
313 Id. at 70 n.7.
314 Id.
evidence, to allow conviction for failure to pay the tax would allow the Government to coerce incriminating statements and abolish the protection of the privilege.

Haynes v. United States\textsuperscript{315} involved a conviction for the willful possession of an unregistered firearm.\textsuperscript{316} The Court found that, by registering, the registrant subjected himself to possible prosecution for the possession of a firearm which at any time was made or transferred without having been registered.\textsuperscript{317} The Court concluded, therefore, that the risks of incrimination created by the registration requirement are genuine and substantial.\textsuperscript{318} The majority held that the required records exception to invocation of the privilege against self-incrimination did not apply because: (1) the registration inquiries did not concern a noncriminal, regulatory area but an area characterized by criminal statutes, and (2) there were no records or documents to which the public aspects may have attached.\textsuperscript{319} Consequently, claiming the privilege against self-incrimination was a complete defense to prosecution for failure to register a firearm or for the possession of an unregistered firearm.\textsuperscript{320}

In short, a statute providing for the prosecution of those who fail to disclose evidence which may also be incriminating is subject to a proper claim of the privilege against self-incrimination. Otherwise, the statute would coerce incriminating statements from the discloser and thereby render the privilege against self-incrimination a mockery.

2. Self-incrimination as Applied to Public Officials

A number of cases have involved public officials who invoked the privilege against self-incrimination with regard to their official duties. In Garrity v. New Jersey,\textsuperscript{321} certain New Jersey police officers were questioned during an investigation of alleged irregularities in the processing of municipal court cases. Before questioning, each officer was advised that anything he said could be used against him in a state criminal proceeding, that he could refuse to answer if the response might tend to incriminate him, but that a refusal would subject him to removal from office.\textsuperscript{322} These alternatives were based on a New Jersey statute which provided that the refusal to answer on the basis that the answer might tend to incriminate the responder would result in removal from, or forfeiture of, office.\textsuperscript{323} The answers were then used in subsequent prosecutions.

The Court held that the alternative presented appellants, job forfeiture or self-incrimination, "is the antithesis of free choice to speak out or to remain silent."\textsuperscript{324} The statements were the result of coercion and could not be sustained.

\textsuperscript{315} 390 U.S. 85 (1968).
\textsuperscript{316} Id. at 86-87.
\textsuperscript{317} Id. at 97.
\textsuperscript{318} Id.
\textsuperscript{319} Id. at 98-99.
\textsuperscript{320} Id. at 100.
\textsuperscript{321} 385 U.S. 493 (1967).
\textsuperscript{322} Id. at 494.
\textsuperscript{323} Id. at 494-95 n.1.
\textsuperscript{324} Id. at 497.
as voluntary.\textsuperscript{325} The Court concluded that the fourteenth amendment's protection against coerced statements prohibits the use in subsequent criminal proceedings of statements made under threat of removal from office.\textsuperscript{326} In dictum, the Court stated that this protection extended to all, not just to policemen. A statute, therefore, may not make the exercise of the privilege against self-incrimination grounds for the forfeiture of, or removal from, public office.

In \textit{Gardner v. Broderick},\textsuperscript{327} the Court began to hone the privilege against self-incrimination as applied to public servants. Here, appellant police officer appeared before a grand jury investigating police bribery and corruption; the grand jury planned to question him regarding the performance of his official duties. He refused to sign a form waiving immunity from prosecution and was discharged solely because of his refusal.\textsuperscript{328} The Court noted that New York City was empowered by statute to discharge any public officer who either refused to answer any question regarding city affairs on the ground that his answer would tend to incriminate him, or refused to waive immunity from prosecution on any matter about which he was requested to testify.\textsuperscript{329}

The Court stated that the privilege against self-incrimination may be knowingly and voluntarily waived. And the privilege cannot be claimed if there is a grant of immunity from federal and state use of the coerced testimony in a criminal prosecution against the testifier.\textsuperscript{330} The privilege against self-incrimination was seen by the court as prohibiting any attempt at coercing a waiver of the immunity it confers on penalty of discharge from public employment.\textsuperscript{331} However, if appellant policeman had refused to answer questions narrowly related to the performance of his official duties, without being required to waive immunity from prosecution, the privilege would not have barred his dismissal.\textsuperscript{332} Here, the appellant was discharged not for failure to answer relevant questions regarding the performance of his official duties, but for his refusal to waive the constitutional protection afforded by the privilege against self-incrimination. Exercising common sense, the Court notes that petitioner's testimony was demanded, not to obtain an accounting of his performance, but for use in a criminal prosecution, for there would be no reason to coerce a waiver of immunity from prosecution if no prosecution, but only an accounting of performance, had been the goal in questioning petitioner.\textsuperscript{333}

Thus, a public official can be discharged for refusing to answer questions related to the performance of his official duties, but he cannot be discharged for invoking the privilege against self-incrimination (including a refusal to waive immunity from prosecution) as the basis for his refusal to answer. If the purpose of the disclosure is solely to evaluate official conduct, the public servant may be discharged for refusing to answer questions since the privilege does not apply

\textsuperscript{325} \textit{Id.} at 497-98.  
\textsuperscript{326} \textit{Id.} at 500.  
\textsuperscript{327} 392 U.S. 273 (1968).  
\textsuperscript{328} \textit{Id.} at 274-75.  
\textsuperscript{329} \textit{Id.} at 275 n.3.  
\textsuperscript{330} \textit{Id.} at 276.  
\textsuperscript{331} \textit{Id.} at 279.  
\textsuperscript{332} \textit{Id.} at 278.  
\textsuperscript{333} \textit{Id.} at 279.
when statements are not to be used in a subsequent prosecution. If he is asked to waive the privilege against self-incrimination, however, subsequent prosecution apparently is intended, and the public servant can claim the privilege and refuse to testify; he cannot be discharged for invoking the privilege and refusing to testify.

Another self-incrimination decision involving public servants is *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation.* An investigation of corruption in the New York City Department of Sanitation was begun. In accordance with the authority granted the city, noted in the preceding case discussion, some petitioners were dismissed because of their refusal to testify by invoking the privilege against self-incrimination, and others were dismissed for their refusal to sign waivers of immunity from prosecution. The Court concluded that petitioners "were not discharged merely for refusal to account for their conduct as employees of the City." Instead, they were discharged for invoking or refusing to waive the privilege against self-incrimination. The Majority reaffirmed its view that if New York had required petitioners to answer questions directly related to the performance of their official duties on penalty of discharge from public employment without requiring waiver of the privilege, the petitioners could have been discharged for refusing to answer.

In sum, a public servant may be dismissed for refusing to answer questions intended and designed to secure evidence solely to aid in evaluating the public servant's performance. He has no constitutional protection against answering such questions. And, of course, he may be dismissed after a hearing that meets due process requirements if his conduct is deemed to be substandard. But if the purpose of the questions is to elicit evidence to be used in a criminal prosecution, the public servant may invoke the privilege and refuse to answer. To dismiss him for refusing to answer in this situation constitutes an unconstitutional attempt to coerce a waiver of the privilege, which may be waived only voluntarily.

Attempting to coerce a waiver of the privilege reveals that the purpose of the questioning is to provide evidence for a criminal trial. Of course, the public servant's refusal to answer may stimulate the authorities to investigate his conduct independently. Evidence of improper conduct obtained from independent sources would be admissible in a dismissal hearing or criminal prosecution.

3. Other Self-incrimination Cases

During the 1973 term, the Supreme Court, in *Lefkowitz v. Turley,* again discussed the privilege against self-incrimination. If any party contracting with New York refused to waive immunity from prosecution or to answer ques-

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334 Id.
335 392 U.S. 280 (1968).
336 See the discussion in the text accompanying note 329 supra.
337 392 U.S. at 282-83.
338 Id. at 283.
339 Id. at 284.
tions when summoned to testify regarding his contracts with the State or any of its subdivisions, the State of New York was empowered by statute to cancel his existing contracts and to disqualify the party from additional contracts with New York for a five-year period. Appellee architects were summoned to testify before a New York grand jury investigating bribery and corruption but refused to sign waivers of the privilege. The investigating district attorney then notified various contracting authorities of appellees' conduct.

The Court recognized that a state has a strong interest in maintaining the integrity both of its civil service and of its transactions with independent contractors. Of equal importance is the interest of a state in the enforcement of its criminal laws. However, immunity sufficient to satisfy the privilege against self-incrimination must be granted in order to compel self-incriminating answers. The Majority concluded that New York's intention was to compel testimony that was not immunized. A waiver obtained by threat of substantial economic sanction such as the loss of public contracts, the Court observed, is not voluntary. There is no constitutional difference between threatening a state employee with loss of his job and threatening a contractor with loss of public contracts for refusing to waive the privilege.

Although a state is precluded by the fifth and fourteenth amendments from compelling self-incriminating testimony from its employees and contractors that may be used in a subsequent criminal proceeding, such testimony may be compelled if it or its derivatives cannot be used in such proceedings. Just as state employees, if they are granted adequate immunity, may be required to answer questions about their job performance or lose their public employment, so a state may require that those with whom it contracts answer relevant inquiries about their performance of public contracts or suffer cancellation of existing contracts and disqualification from contracting with public agencies for a stated future period. The state may not, however, compel those with whom it contracts to waive the privilege against self-incrimination and consent to the use of their testimony in subsequent criminal proceedings. Any such testimony obtained in response to a threat of employment loss is compelled and inadmissible. Answers may be obtained in response to threatened employment loss if the witness is granted immunity sufficient to supplant the privilege, but the state may not require a waiver of such immunity.

A self-incrimination decision relevant to political appointments is *Orloff v. Willoughby*, which involved a medical doctor who was denied a commission following induction into the Army because of his refusal to complete a loyalty certificate required of commissioned officers. The Court held, *inter alia*, that

341 *Id.* at 71.
342 *Id.* at 76.
343 *Id.* at 79.
344 *Id.*
345 *Id.* at 82.
346 *Id.* at 83.
347 *Id.* at 84.
348 *Id.*
349 *Id.* at 85.
350 *Id.*
351 345 U.S. 83 (1953).
invocation of the privilege against self-incrimination provided a valid basis for the Government's refusal to "appoint him to a post of honor and trust."

The appointing authority has the right to inquire and learn facts affecting the appointee's fitness for the appointive post. Thus, any refusal to answer questions may be made the basis for a refusal to appoint or confirm a person aspiring to a position of public trust or for the disqualification of elective candidates.

Under *Orloff*, therefore, appointees to public positions may be refused confirmation or may have their appointments withdrawn before the effective dates because of a refusal to answer questions relevant to their fitness for public office by invocation of the privilege against self-incrimination. This rationale also applies to elective candidates; such potential public servants may not be coerced into waiving the privilege, but they may be disqualified from seeking elective office because of a refusal to answer pertinent questions.

Another relevant decision is *Bryson v. United States.* Petitioner was convicted of falsely and fraudulently denying affiliation with the Communist Party in an affidavit filed with the National Labor Relations Board. The Court reaffirmed the principle that fraud and deceit are not excused by a claim that a statute is unconstitutional. Another statute's unconstitutionality is no defense to a prosecution for fraud. Applying this concept to the instant case, the Court held that an individual may refuse to answer Government questions infringing his constitutional rights, or he may answer them honestly, but he cannot with impunity knowingly answer falsely. In short, if the privilege against self-incrimination applies, it should be invoked and the question not answered; if the question is answered, however, it must be answered truthfully.

In *California v. Byers,* the Court again discussed the privilege against self-incrimination. Although the precedential value is weakened somewhat by announcement in a plurality opinion, the decision formulates principles relevant to this discussion. Respondent Byers was charged with failing to stop and identify himself after a vehicle accident. The Court held that in order to invoke the privilege against self-incrimination, it must be shown that the compelled disclosures will create a substantial risk of self-incrimination. Thus, the "stop and identify" requirement does not violate the privilege against self-incrimination because: (1) it is directed at all persons and not at a group suspected of criminal conduct, (2) the required disclosures do not involve a substantial risk of self-incrimination, (3) the statutory purpose is noncriminal, and (4) self-reporting is essential to fulfillment of the noncriminal purpose. The Court found further that the act of stopping one's vehicle at the scene of an accident does not provide testimonial evidence within the constitutional meaning. Leaving one's name at the scene of an accident "identifies but does not by itself implicate anyone in

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352 Id. at 91.
354 Id. at 68.
355 Id.
356 Id. at 72.
358 Id. at 429 (plurality opinion).
359 Id. at 430-31 (plurality opinion).
criminal conduct." Thus there is no constitutional right of refusal to file a required report or statement in order to avoid the mere possibility of self-incrimination.

4. The Effect of Immunity Grants

The Supreme Court has discussed grants of immunity against prosecution as a means of overcoming a refusal to answer questions by invocation of the privilege against self-incrimination. The first decision, *Kastigar v. United States*, involved the federal government but is applicable to the states through the second decision, *Zicarelli v. New Jersey State Commission of Investigation*.

*Kastigar* presented the issue whether the United States must grant use and derivative use immunity or transactional immunity in order to compel testimony from a witness who invokes the privilege against self-incrimination. The majority held that a grant of immunity from prosecution must grant protection equal to that of the privilege against self-incrimination, but the immunity need not be greater. The test of such equality is whether the immunity grant leaves the witness and the prosecution in substantially the position both would have occupied had the witness claimed the privilege against self-incrimination. In such a case, the immunity, being equal to the privilege, replaces the privilege.

The Majority opinion concluded that immunity from use and derivative use is equal to the scope of the privilege and is sufficient to compel testimony over invocation of the privilege. Transactional immunity, since it grants complete immunity from prosecution for any offense to which the forced testimony relates, grants more extensive protection than does the privilege against self-incrimination.

*Zicarelli* involved an appellant subpoenaed to testify concerning organized crime and corruption in Long Branch, New Jersey. Appellant invoked the privilege against self-incrimination and refused to answer a series of one hundred questions. The Court held, *inter alia*, that immunity from use and derivative use of compelled self-incriminating testimony by state authorities is equal to the protection guaranteed by the privilege against self-incrimination and is sufficient to compel testimony.

Thus, one method of compelling testimony regarding the performance of official duties or one's fitness for public office is to grant immunity from use and derivative use of the compelled testimony in subsequent criminal proceedings. If the compelled testimony reflects unfavorably on performance or fitness, the public servant can be removed from office and the appointee's appointment withdrawn or not confirmed. Such actions are civil in nature and do not in-

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360 *Id.* at 434 (plurality opinion).
363 406 U.S. at 443.
364 *Id.* at 453.
365 *Id.*
366 *Id.*
368 *Id* at 474.
369 *Id.* at 475-76.
volve criminal proceedings in which immunized testimony is being used in violation of the privilege against self-incrimination.

5. Conclusion

It is now appropriate to apply the preceding case discussions to the drafting of the model act and necessary model constitutional amendments. First, even if the privilege applies to a particular disclosure situation, the discloser cannot file a willfully false statement. He must answer honestly or assert the privilege and refuse to disclose the required information. Thus, it is constitutionally permissible to establish criminal penalties for the willful filing of false financial disclosure statements.

The public servant may not be removed from office for asserting the privilege against self-incrimination. Such action reveals that the evidence sought is intended for use in a subsequent criminal prosecution, which renders the privilege operative. Any attempt at coercing a waiver of the privilege, such as by requiring dismissal from office for the refusal to waive the privilege and answer questions, is unconstitutional.

But the public official or employee may be dismissed for refusing to answer questions regarding his official performance in a noncriminal hearing. The privilege against self-incrimination does not apply directly to a noncriminal proceeding. There must still be no attempt, however, at coercing a waiver of the privilege since this converts the proceeding into a quest for criminal evidence and renders the privilege operative. Presence of such coercion will preclude dismissal for failure to disclose requested, but self-incriminating, information.

The model act creates criminal penalties for the filing of a false disclosure statement370 but allows dismissal from office for the refusal or failure to file the required statement.371 Separate sections proscribe specified misconduct,372 but no evidence of same is required to be disclosed in the financial statement.373 Any disclosure of criminal conduct constitutes a voluntary waiver of the privilege against self-incrimination.374 Of course, the submission of any information not required by the disclosure statute but which constitutes evidence of the violation of the criminal portion of the model act can be used in a criminal prosecution since the privilege has been voluntarily waived in such a situation; there has been no coerced waiver.

Furthermore, under the Byers375 doctrine, the privilege is not violated by the disclosure provisions of the model act because they are not directed at a group inherently suspected of criminal activity. The required disclosures do not involve a substantial risk of self-incrimination, since their purpose is noncriminal and essential to fulfilling a noncriminal, regulatory purpose. However, in the interest of complete fairness and due process, the model act allows invocation of the

370 See Appendix B, Model Act § 7(a).
371 See id. at §§ 8(c).
372 See id. at §§ 9-16.
373 See id. at §§ 8(c) (1).
374 See id. at §§ 8(c) (3), 8(c) (4).
privilege and provides for the granting of immunity from prosecution. Finally, under the model constitutional amendments, appointees to public positions will be denied appointment or confirmation because of a refusal or failure to file a required financial disclosure statement. Similarly, candidates for elective office will be disqualified because of a refusal or failure to file a required financial disclosure statement.

C. Financial Disclosure Provisions of the Model Act

The model act’s provisions concerning financial disclosure attempt to ignore insubstantial and remote interests or relationships that do not present a danger of causing official misconduct. The model act also attempts to limit the invasion of the public servant’s financial privacy to that which is necessary to protect the public interest.

The de minimis concept recognizes that, in a practical sense, some interests are too insignificant to cause official misconduct. Relationships may be so remote as to create little danger of causing an abuse of public office. Exclusion of such interests or relationships from regulation is justified by balancing the goal of promoting actual and apparent governmental integrity against the necessity of recruiting competent public servants. The goal of the act, therefore, is to require disclosure only by those public servants occupying positions of public trust providing both opportunity and temptation for official misconduct.

The financial disclosure provisions, §§ 6, 7, and 8, of the model act are as follows:

Public access to financial disclosure statements and adequate availability of copying services are required. Reasonable copying fees must be paid, however.

It is a felony to file a materially false statement of economic interests. If the convicted public servant, appointee, or elective candidate presents no danger to himself or to society, he is sentenced to perform free public service in a position that will utilize his abilities and experience. Off-duty hours are spent in confinement. Such punishment should satisfy society’s desire for retribution, provide the required deterrent effect concerning potential offenders, and aid in any needed rehabilitation of the convict.

The defendant may be tried by a jury and has rights of appeal. The state representative is also authorized to appeal any verdict directly to the state’s highest appellate court. Also, both parties may appeal any final ruling of the trial judge directly to the state’s highest appellate court.

The refusal to file a financial disclosure statement is a basis for removal from office, but no criminal prosecution for such refusal may be pursued. Independent evidence may be used in a criminal prosecution for official mis-

376 See Appendix B, Model Act § 8(c)(1).
377 See id. at § 8(d)(1).
378 See Appendix A, Model Constitutional Amendment II, § 2.
379 See id. at § 1.
380 See id. at § 3.
381 Note, supra note 160, at 680.
382 Freilich & Larson, supra note 162, at 404.
383 Pennsylvania, supra note 136, at 94 n. 91.
conduct, however. A civil forfeiture of $100 per day is established for the tardy filing of any required financial disclosure statement.

Anyone required to file a financial disclosure statement may, when appropriate, refuse by invoking the privilege against self-incrimination. The refusal to file under other circumstances may not be used as the basis for a criminal prosecution although it is grounds for removal from office. These removal proceedings are grounded on the refusal to provide relevant information, not on invocation of the privilege against self-incrimination.

Any evidence of criminal conduct provided in the financial disclosure statement is deemed to be a voluntary waiver of the privilege against self-incrimination since the model act permits invocation of the privilege and does not coerce any waiver. Thus, any statements contained in the disclosure statement may be used in any subsequent criminal or civil action or suit instituted by the state against the discloser.

If immunity from use or derivative use in a subsequent criminal prosecution of any compelled self-incriminating testimony is granted, a financial disclosure statement must be filed. Evidence produced may be used in any civil proceeding to remove incumbents from office, to deny appointment or confirmation to potential appointees, and, possibly, to disqualify candidates for elective office. This evidence also may be used in a private civil action against the discloser.

IV. Conduct Proscribed by the Act

The following sections discuss proscribed conduct committed by public servants. Violations are felonies and result in sentences of free public service combined with imprisonment. Final conviction for any of these offenses results in automatic removal from any public office or position currently occupied by the involved public servant. Also discussed are various civil remedies available to the state and private parties applicable to official misconduct.

A. Section 9: Interests in Contracts Awarded by a Governmental Body

In the regulation of official misconduct, "contract prohibitions" concern the awarding of government contracts in which a public servant has an interest. 384 "Self-dealing" concerns a public servant's private interests in any matter involving a governmental body. 385 The former will be discussed first.

It has been noted that a public servant's securing of a profitable contract for his private benefit probably incites more public wrath and indignation than any other form of official misconduct. 386 If the public servant has some connection with a government contract, he may be forced to choose between his own best interests and those of the government. 387 It is also possible that a public

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384 Id. at 97 n. 110.
385 Id.
386 Legislative Comment, supra note 140, at 402.
387 Note, supra note 134, at 987.
servant having an interest in a contract may exert whatever influence he possesses to pressure the public official or employee who has responsibility concerning the contract to favor the pressuring party. The second party is then forced to choose between the proper discharge of his duties and appeasement of thepressuring public servant. Thus, the public servant's discretion and its exercise afford him the ability to benefit private interests.

Whenever public servants hold positions of public trust without divestiture of their private economic interests, the foundation is laid for a valid concern that governmental efficiency and economy will suffer. To prevent actual misconduct, one view holds that the public officer or employee should be precluded from having an interest at any time during his term of office in any contract requiring official consideration. A more practical view realizes that requiring complete divestment of private economic interests will deter many competent individuals from pursuing government service. The problem is to protect the public from self-interested public servants without unnecessarily fettering governmental recruitment.

Perhaps the most workable solution is that which requires the public servant to disclose any interest he has in the award of a government contract, to refrain from influencing any decision on the award, to refrain from voting or issuing any decision pertinent to the award, and to execute a certificate that he has complied with these requirements. If such self-disqualifications become too frequent, the electorate should remedy the situation at a subsequent election if the public servant is elected. If he is appointed, public pressure may force his resignation or discharge. This disclosure and self-disqualification approach is adopted in section 9 of the model act.

Special considerations apply when a certain firm is the sole supplier of a good or service. It is foolish to ban contracts with sole-supplier firms in which officials or employees have interests. The model act does not require disclosure and self-disqualification in such instances. However, any claim of sole supplier status must be closely scrutinized.

The disclosure and self-disqualification requirement is not obviated by competitive bidding for the contract award. The possibility of eroding the public protection afforded by competitive bidding stems from the public servant's discretion in the selection of which suppliers to notify regarding requests for bids, his discretion in determining the extent of advertising for bids, his
discretion in determining who is a responsible bidder" and the lowest responsible bidder; his discretion when inspecting performance; his discretion in imposing sanctions for faulty performance; and his discretion in the negotiation and determination of contract modifications.

Excluded from the concept of "interest" in a government contract are purchases under conditional sales contracts from firms bidding on government contracts and commercial loans obtained from these firms in accordance with prevailing commercial standards in the city in which each loan or retail purchase occurred. The model act excludes these "interests" from the disclosure and self-disqualification requirement.

Since privately owned public utility companies usually are the sole source of the services they provide, their rates are subject to state regulation. Contracts with such entities are nonconsensual in origin as the utility must supply all who demand service. A public servant's interest in such an entity does not present the possibility of an abuse of office, and such interests are not included in regulations of the type under consideration. The model act excludes such interests from the disclosure and self-disqualification requirement.

One view holds that a public servant is not deemed to have a prohibited "interest" in a governmental contract merely because he voted on a general appropriation bill which appropriated funds to an agency which subsequently authorized and awarded the contract to him or to a business in which he holds an interest. In effect, such an individual is viewed as having had no contact with the contract in his official capacity. The model act, however, does not exempt such an official from the disclosure and self-disqualification requirement. Otherwise, the legislator would not be precluded from exerting his influence in order to receive a contract award after funds were appropriated to the responsible agency.

One commentator has advocated the use of strong criminal sanctions to deter public servants from acquiring interests in public contracts. The model act adapts this approach to its disclosure, self-disqualification, and certification procedure by establishing criminal penalties for perjury or for the failure to follow the procedure.

The strict rule is that contracts involving interested public servants are

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401 Note, supra note 134, at 999.
402 Comment, supra note 400, at 325; Note, supra note 143, at 1055.
403 Kaufmann & Widiss, supra note 141, at 198; Note, supra note 134, at 1000; Note, supra note 143, at 1055.
404 Note, supra note 134, at 1000.
405 Kaufmann & Widiss, supra note 141, at 198.
406 Freilich & Larson, supra note 162, at 404.
407 Kaufmann & Widiss, supra note 141, at 196.
408 Id.
409 Note, Temptation and Tradition in the California School Board, 5 STAN. L. REV. 61, 63 (1952).
410 Kaufmann & Widiss, supra note 141, at 196; Note, supra note 409, at 63.
411 Comment, Legislative Bodies — Conflict of Interest — Legislators Prohibited From Contracting With State, 7 NAT. RES. J. 296, 300 (1967).
412 Id.
void as violative of public policy.\textsuperscript{414} One study concludes that, by uneven enforcement, governmental bodies may use this rule to avoid burdensome contracts rather than to deter official misconduct.\textsuperscript{415} For maximum deterrence, the model act provides for the voiding of such contracts and for the recovery of all illegal profits.\textsuperscript{416} The risks of voidability and loss of profits, plus criminal sanctions, should provide sufficient deterrent against official misconduct of the type under discussion. And, since enforcement, by the state attorney general or a special prosecutor, is independent of contract authority, there should be little danger that the act will be invoked only to avoid burdensome contracts.

B. Section 10: Interests in Governmental Transactions

When a public official or employee acts in his official capacity and exercises discretion in a certain matter, "his deeds are permeated with a public interest."\textsuperscript{417} No public official or employee should be allowed to act officially on any matter in which his official action may produce personal benefit to himself unless the benefit is not peculiar to the official or employee but is shared by all individuals in the same class.\textsuperscript{418} Therefore, a statute regulating official misconduct must include both contracts and all official transactions in which discretion is exercised.\textsuperscript{419} Otherwise, there exists a risk that personal interests will prevail over the public interest or that such an appearance will be presented to the public, or both.\textsuperscript{420}

A public official or employee should be prohibited from acting officially on any private party's request (when the benefit is enjoyed only by that private party and not by a large class) if the acting official or employee has an attachment to or interest in the requesting party.\textsuperscript{421} "Sentiment and friendship can exert just as profound an influence as proprietary and financial interests."\textsuperscript{422} Similarly, public officials and employees should not be permitted to exploit their influence or acquaintance with those public officials and employees responsible for governmental transactions or regulation in which the former have a personal interest.\textsuperscript{423}

Retail purchases under conditional sales contracts and loans from commercial institutions do not create prohibited interests in a transaction involving such entities\textsuperscript{424} when obtained in accordance with prevailing commercial standards in the city in which each such retail purchase or loan occurred. The other exclusions pertaining to interests in government contracts\textsuperscript{425} are inapplicable as such exclusions would permit circumvention of the noncontractual, and often

\begin{itemize}
\item \textsuperscript{414} Note, \textit{supra} note 160, at 688.
\item \textsuperscript{415} Comment, \textit{supra} note 90, at 367-68.
\item \textsuperscript{416} See Appendix B, Model Act §§ 19 and 18, respectively.
\item \textsuperscript{417} Freilich & Larson, \textit{supra} note 162, at 400.
\item \textsuperscript{418} \textit{Id.} at 403.
\item \textsuperscript{419} \textit{Id.} at 400.
\item \textsuperscript{420} Pennsylvania, \textit{supra} note 136, at 91.
\item \textsuperscript{421} Freilich & Larson, \textit{supra} note 162, at 405.
\item \textsuperscript{422} Kaufmann & Widiss, \textit{supra} note 141, at 195.
\item \textsuperscript{423} Eisenberg, \textit{supra} note 143, at 686.
\item \textsuperscript{424} Freilich & Larson, \textit{supra} note 162, at 404.
\item \textsuperscript{425} See the discussion in the text near notes 396-97, 407-10 \textit{supra}.
\end{itemize}
regulatory, area now under discussion.

The strict view prohibits an elected public official from taking any legislative action, including introducing or voting upon a bill, in regard to any measure or bill in which he has a personal interest.426 However, the public official may have been elected because his interests coincide with those of his constituents;427 he may have a community of interests with his electors.428 To preclude his participating in legislative action may conflict with his duty to represent his constituents.429 Additionally, disqualification at the legislative committee level conflicts with the need for specialization and assignment of individuals to committees in which their specialized expertise may be best utilized.430

Publicity concerning a public official's private interests will help the voters determine who can best represent them.431 Consequently, § 10 of the model act, which applies to interests in governmental transactions, does not bar participation in legislative matters by such officials, but they are subject to the financial disclosure requirements of §§ 6, 7, and 8.

C. Section 11: Confidential Information

Because of his position, the public official or employee is often aware of confidential government information that is of value to private interests.432 Private profit may result from the unauthorized or premature divulging of such government information.433 The public official or employee may use the confidential information himself or disclose it to others;434 in either case, he exploits his public position for private advantage.435 When this occurs and the public learns that public offices have been used to further private advantage rather than the public interest, confidence in government is weakened.436

The public official or employee should be prohibited from revealing information which is not legally or customarily available to the public.437 He should be prohibited from disclosing such information even in the course of employment obtained after his termination of public service.438 In addition, the prohibition on disclosure or use should endure until the information is made available to the general public.439 These principles are enacted in § 11 of the model act.

426 Comment, supra note 136, at 401-02.
427 Note, supra note 177, at 454.
428 Getz, supra note 149, at 192-93; Pennsylvania, supra note 136, at 92.
429 Getz, supra note 149, at 12.
430 Id. at 193, 268.
431 Note, supra note 167, at 81.
432 Tex. L. Rev., supra note 172, at 951.
433 Note, supra note 145, at 1068.
434 Note, supra note 160, at 686.
436 Note, supra note 145, at 1068.
437 Freilich & Larson, supra note 162, at 406.
439 Id.
D. Section 12: Assisting in Transactions Involving a Governmental Body

One should not use the acquaintances, contacts, and influence obtained as a public official or employee to further his private interests or those of others in transactions involving the governmental unit in which he holds a position of public trust. If a public servant represents private interests before a government agency, there is a danger that he will be able to exert undue influence on the agency to gain a favorable ruling or decision. And if the official or employee has supervisory responsibilities in the agency, there is the danger that he will be incapable of exercising objective judgment in his supervisory role.

However, the citizen's best recourse for dealing with government is his elected representative, who is expected to act in constituents' behalf in their contacts with the executive branch. If the elective official refuses to so represent his constituents, "he may expect very soon to be retired to private life." Furthermore, it contradicts the underlying concept of representative government to isolate public officials from the pressure of their constituents. The chief objection to legislation regulating the representation of private parties by public officials and employees before governmental agencies is that such laws deter the recruitment of professionals, especially attorneys, into government service. Statutes regulating official misconduct should not include the public official's performance of his constituency-service role in which representation is performed free of charge and in fulfillment of the obligations of his public office. Official misconduct may arise only when representation is undertaken for profit. Thus, contingent fees payable to an individual or his partner for such representation should be prohibited. This approach seeks to protect the public interest without unnecessarily restricting the outside activities of public officials. In addition, the public servant should be prohibited from the representation of corporations in which he holds financial interests since he will benefit, at least indirectly, from favorable agency decisions.

To allow the public servant to represent a client before a government agency when he believes the client should win, as suggested by some commentators, would permit the dishonest public servant to circumvent the statute merely by falsely stating that he believed his client should prevail before the agency. But the prohibition on representation need not apply to instances before courts since they are more independent of the public servant's influence, especially

440 Note, supra note 167, at 78.
441 Note, supra note 160, at 684.
442 Id.
443 Pennsylvania, supra note 136, at 84.
444 Getz, supra note 149, at 169.
445 P. Douglas, supra note 188, at 88.
446 Pennsylvania, supra note 136, at 83.
447 Note, supra note 134, at 1005.
448 Comment, supra note 136, at 387.
449 Id.
450 Tex. L. Rev., supra note 172, at 950; Note, supra note 143, at 1067.
451 Eisenberg, supra note 143, at 680; Note, supra note 160, at 685.
452 See Getz, supra note 149, at 30.
453 Note, supra note 177, at 460.
when legislators are involved, than are state agencies. Section 12 of the model act reflects this view.

E. Section 13: Income from Outside Sources

Several writers have considered the problem of regulating income earned from outside sources since this income is viewed as a cause of official misconduct. However, since this problem is better controlled by other sections of the model act, no separate provision is made for income from outside sources other than the prohibition of bribery.

F. Section 14: Ex Parte Communications

Whenever any determination or award is to be made after a public hearing, all considerations relevant to the final action should be made public. Any public servant who encourages, makes, or accepts any relevant unilateral communication prior to a determination or award and fails to make such communication a part of the record acts illegally. The model act prohibits such conduct.

G. Section 15: Gifts

The acceptance by public officials and employees of gifts and favors from outsiders may impair both the recipient's objectivity by influencing him to perform his official duties so as to benefit the donor, and the public image of integrity pertaining to the governmental unit with which he is associated. Gardiner's study of political corruption reveals that gifts are one of the methods used in buying protection from the law enforcement process. Consequently, no gifts should be solicited or accepted from private parties except, perhaps, in situations in which reciprocation is not ordinarily expected.

One proposal bans the acceptance of gifts exceeding a certain total from any one donor which might reasonably tend to influence the donee's performance of his official duties. It is submitted that the better view is that which prohibits the receipt of any gift, regardless of its size, under circumstances where the recipient knows or should know that it is intended to, or will, influence the recipient's official conduct. The model act employs the latter view.

454 See Pennsylvania, supra note 136, at 108.
455 E.g., Comment, supra note 136, at 381; Note, supra note 177, at 454, 460; Note, supra note 204, at 1209-10; Note, supra note 160, at 684; Pennsylvania, supra note 136, at 83, 119-20.
456 Freilich & Larson, supra note 162, at 405.
457 Id. at 405-06.
458 Comment, supra note 136, at 391.
459 Pennsylvania, supra note 136, at 111-12.
460 See Comment, supra note 136, at 391.
461 Wincanton, supra note 67.
462 Id. at 66.
463 Freilich & Larson, supra note 162, at 405.
464 Comment, supra note 136, at 393-94; Tex. L. Rev., supra note 172, at 949.
465 Pennsylvania, supra note 136, at 112.
H. Section 16: Postemployment

A situation providing the potential for abuse is that involving former public officials and employees whose subsequent activities in the private sector involve the representation of persons before governmental agencies. Potential abuses include the use of specialized knowledge for private gain, the exploitation of acquaintances, and the exploitation of knowledge of specific cases in which the former public servant was involved. The objective is to regulate those public servants who are lured from public service by private interests wishing to utilize the technical specialization and personal contacts of such public officials and employees. This regulatory objective must be balanced against the individual’s right to select his occupation.

One view holds that, due to the insecurity of legislative service and the small salaries received for the service, postlegislative-service employment restrictions are unreasonable. Another proposal advocates prohibiting a former legislative member, for a one- or two-year period, from receiving compensation for assisting anyone with matters that were before the legislative body during the former member’s term. And compensated lobbying by a former member should be prohibited for a period of one or two years. Section 16 of the model act attempts to regulate relevant conduct of former legislative members by employing the latter view.

The model act regulates more extensively the subsequent employment activities of former nonlegislative public officials and employees. The advantages of public servants, when representing persons before any agency of state, county, or local government, and especially the unit in which the former public servant was involved, are obvious but decrease over time. Thus, the former public servant and his partners should be prohibited from engaging in transactions with, or representation before, only the governmental unit with which the former public servant was associated. The ban should endure for two years after the severing of public service.

I. Section 17: Special Employees

Because of the increasingly complex tasks which modern government is obligated to undertake, it often becomes necessary to rely on the special knowledge and abilities of consultants and other temporary employees. Such personnel spend only a limited portion of their professional time in government

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466 Eisenberg, supra note 143, at 685.
467 Id.
468 Id.; Note, supra note 160, at 683.
469 Kaufmann & Widiss, supra note 141, at 204; Note, supra note 160, at 683.
470 Comment, supra note 136, at 387.
471 Pennsylvania, supra note 136, at 122.
472 Id.
473 See Note, supra note 167, at 79.
474 Note, supra note 160, at 683, 690.
475 Id. at 690.
476 Id. at 686; Note, supra note 143, at 1052.
service. To strictly regulate the conduct of these employees would seriously deter their recruitment since it is unreasonable to require them to divest themselves of business interests or to penalize either the companies who employ them, or those in which these employees hold financial interests.

Government should not be forced, by overly strict regulation of employee conduct, to sacrifice the best advice and expertise available. While limiting the regulation of special employees' conduct is appropriate since they have such a tenuous connection with government although their services are often of particular importance, there is the possibility that these employees will also abuse their public employment for personal gain.

A special employee is one who may or may not be compensated for his services, and who serves a limited number of hours or days in any annual period. Elected officials are excluded from the special employee classification, and it has been proposed that holders of major political appointments also should be excluded.

Once qualified as a special employee, the individual should be subject to statutes regulating official misconduct only as to those transactions in which his personal participation is or was substantial. One proposal is that the governor be given authority to make exceptions for such employees when the public interest so requires. The model act adopts what is believed to be the better view, that which establishes both definite standards for designation as a special employee and the results of such classification.

J. Sections 18 and 19: Constructive Trust, Voidability of Contracts and Transactions, and Private Party Actions

Government officials and employees are servants of the people and, therefore, act as fiduciaries in their relationships with the public. As fiduciaries, they owe the public the primary duty of loyalty. Employment of the fiduciary principle allows the equitable remedy of an accounting which enables the community to recover illegal profits upon judicial recognition of the public official or employee's abuse of trust. If the public can recover all the illegal profits gained by a disloyal public official or employee, the incentive for official misconduct will disappear or at least be reduced. This objective is fulfilled by

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477 Note, supra note 160, at 686.
478 See Note, supra note 134, at 1016.
479 Note, supra note 143, at 1052.
480 Buss, supra note 191, at 381.
481 Id.
482 Note, supra note 160, at 687.
483 Id.
484 Id.
485 Id.
486 Id. at 687, 691.
487 Note, supra note 167, at 70, 77.
488 See Note, supra note 160, at 691.
490 Note, supra note 168, at 1501.
491 Tex. L. REV., supra note 172, at 946.
the imposition of a constructive trust.\textsuperscript{494} The disloyal public servant, as the constructive trustee for the benefit of the public, can never truly acquire title to his illegal profits.\textsuperscript{495}

A statute seeking to employ the above principles should utilize the constructive trust principle that no one should be permitted to profit from his wrongful conduct.\textsuperscript{496} The statute should include the principle that a change in the form of the proceeds of such conduct does not preclude recovery if the proceeds can be traced and are not in the possession of a bona fide purchaser for value.\textsuperscript{497}

Another advantage of the constructive trust as a tool for the control of official misconduct is that this remedy employs the simpler procedures of equity rather than the more complex procedures of a criminal proceeding.\textsuperscript{498} Also, since it involves a civil proceeding, the rights afforded criminal defendants by the fifth and sixth amendments are inapplicable.\textsuperscript{499} Imposition of a constructive trust does not constitute a deprivation of property without due process of law.\textsuperscript{500} And furthermore, by authorizing the governmental unit to recover all illegal profits gained from the official misconduct, the problems inherent in determining the actual damages caused by such conduct are avoided.\textsuperscript{501} The governmental unit then holds the recovery subject to the rights of third parties damaged by the public servant's misconduct.\textsuperscript{502}

The model act employs the above views. It also allows the constructive trust as a remedy supplementing others that are available under the act.

The governmental unit should be permitted to avoid any obligation created by a contract or transaction that was effected by official misconduct.\textsuperscript{503} The model act establishes this equitable remedy, which is supplementary to others available to the government. Thus, the government may criminally prosecute the disloyal public servant, subject him to the imposition of a constructive trust on illegal profits, seek a decree voiding a contract or transaction effected by official misconduct, or utilize any combination of all three remedies.

Since Model Constitutional Amendment III, § 3 provides for automatic removal from office upon final conviction for official misconduct, or upon final imposition of a constructive trust upon property, funds, and profits gained from official misconduct, or upon a final decree that a government contract or transaction is void because of official misconduct, the model act confers no standing upon a private party to initiate any of the aforementioned civil actions or suits.
The model act does permit a private party to initiate a civil damage action against the public servant to recover the damages suffered by the private party if the attorney general or special prosecutor refuses to initiate any criminal action or civil action or suit against the same public servant. If the government has recovered illegal profits through the imposition of a constructive trust, a private party may initiate a civil damage action against the public servant to recover the damages suffered by such party in excess of his pro rata share of the government's total recovery.

V. General Conclusions

Enacting a statute is not always the most effective method of preventing undesirable conduct.504 Before such a statute is passed, a determination should be made that the undesirable conduct can be controlled effectively by the criminal justice system.505 In the control of official misconduct, the relevant question is what, if any, aid the law may offer.506

High ethical standards are based primarily on individual conscience, but legislation can establish the guidelines of proper behavior for public officials and employees.507 Such legislation may also deter official misconduct.508 Statutory enactments will not create honest public servants, but legislation can offer substantial encouragement to their development.509

The model act reflects the conclusions of this article that the most effective means of controlling official misconduct of public servants include criminal prosecutions, removal from office or position, and the forfeiture of all property and funds gained from official misconduct. As an added deterrent, private citizens are also given standing to recover actual damages caused by the misconduct of public servants.

504 A. Morris, supra note 48, at 157.
505 Grupp, supra note 6, at 4.
506 Buss, supra note 191, at 301.
507 Note, supra note 177, at 464.
508 Id.
APPENDIX A

Model Constitutional Amendments Necessary to Implement the Model Act

Amendment I

Elimination of Public Officials' and Employees' Immunity

Section 1. State civil or criminal action. No elected or appointed official or employee of any branch of state, county, or municipal government of this state shall be immune from any civil action or suit or criminal action authorized by appropriate legislation and instituted by the state Attorney General or a Special Prosecutor appointed by the Governor for any official misconduct, as defined by appropriate legislation, by reason of incumbency in any state, county, or municipal office or position either at the time of committing the alleged misconduct or at the time of trial. The penalties shall be those established by this constitution and by appropriate legislation for such misconduct.

Section 2. Private damage action. No elected or appointed official or employee of any branch of state, county, or municipal government of this state shall be immune from any civil action authorized by appropriate legislation and instituted by a private party for damages suffered as a consequence of the official misconduct, as defined by appropriate legislation, of such public official or employee, by reason of incumbency in any state, county, or municipal office or position either at the time of committing the alleged misconduct or at the time of trial.

Section 3. Removal from office. No elected or appointed official or employee of any branch of state, county, or municipal government of this state shall be immune from any civil action or suit instituted by the state Attorney General or a Special Prosecutor appointed by the Governor to remove such official or employee from office or position for a refusal or failure to file a complete statement of economic interests required by appropriate legislation, by reason of incumbency in any state, county, or municipal office or position either at the time of the alleged refusal or failure to file or at the time of the civil action or suit.

Amendment II

Denial of Appointee Confirmation, Automatic Withdrawal of Appointments and Disqualification of Elective Candidates

Section 1. Denial of appointee confirmation. The state Senate shall refuse to confirm any person appointed to a public office or position by the Governor if such appointee refuses or fails to file a complete statement of economic inter-
Section 2: Automatic withdrawal of appointments. The appointment of any person to any office or position in any branch of state, county, or municipal government of this state, except appointees to offices or positions requiring confirmation by the state Senate within section 1 of this Amendment, shall be withdrawn automatically prior to the effective date of such appointment if the appointee refuses or fails to file a complete statement of economic interests, required by appropriate legislation, by the date specified in such legislation.

Section 3. Disqualification of elective candidates. Any candidate for any elective office in this state, other than the office of state Attorney General, who refuses or fails to file a complete statement of economic interests, required by appropriate legislation, by the date specified in such legislation, shall be disqualified from seeking such office by the state Attorney General. Any candidate for the office of state Attorney General who refuses or fails to file a complete statement of economic interests, required by appropriate legislation, by the date specified in such legislation, shall be disqualified from seeking such office by the Governor.

Amendment III

Trial of Public Officials and Employees, Removal from Office, and Jurisdiction of Legislature and Attorney General or Special Prosecutor

Section 1. Official misconduct trial. Any elected or appointed official or employee of any branch of state, county, or municipal government of this state shall be subject to any criminal action or civil action or suit authorized by appropriate legislation and instituted by the state Attorney General or by a Special Prosecutor appointed by the Governor, under conditions specified by appropriate legislation, for the alleged commission of official misconduct, defined by appropriate legislation, in a trial court of record designated by appropriate legislation for such purpose.

Section 2. Removal trial. Any elected or appointed official or employee of any branch of state, county, or municipal government of this state shall be subject to a civil action or suit, in a trial court of record designated by appropriate legislation for such purpose, instituted by the state Attorney General or a Special Prosecutor appointed by the Governor, under conditions specified by appropriate legislation, to remove such official or employee from office or position for the refusal or failure to file a complete statement of economic interests required by appropriate legislation, by the date specified in such legislation. Such civil action or suit shall be conducted in accordance with the rules of equity procedure except that there shall be a jury trial in such action or suit unless waived by the official or employee involved.

Section 3. Automatic removal from office. A final criminal conviction for official misconduct, as defined by appropriate legislation, or a final court im-
position of a constructive trust upon property, funds, or profits gained by a public official or employee from official misconduct, as defined by appropriate legislation, or a final court decree voiding a government contract or transaction for official misconduct, as defined by appropriate legislation, shall result in automatic removal of the involved public official or employee from any public office or position held at the time of final conviction, final imposition of a constructive trust, or final decree, in addition to any additional penalties prescribed by appropriate legislation. A civil action or suit to impose a constructive trust or to declare a government contract or transaction void shall be conducted in accordance with the rules of equity procedure except that there shall be a jury trial in such action or suit unless waived by the public official or employee involved.

Section 4. Jurisdiction of legislature. This Amendment shall have no effect on the existing jurisdiction of the state Legislature to impeach and convict any public official or employee.

Section 5. Jurisdiction of Attorney General or a Special Prosecutor. The jurisdiction of the state Attorney General or a Special Prosecutor, established by Constitutional Amendments I, II, and III and appropriate legislation pertaining thereto, shall not be affected by any impeachment or conviction action or decision of the state legislature.

APPENDIX B

Model Act for the Control of Corruption and Conflicts of Interest

Short Title

Section 1. This Act shall be known, and may be cited, as the Standards of Official Conduct Act.

Statement of Purposes, General Rules of Construction, Severability, and Supremacy of Act

Section 2. (a) Purposes. The purposes of this Act are to foster needed and important public confidence in the integrity and efficiency of government, to require the loyal performance of official duties by all public servants, and to protect the public by establishing high standards of conduct and efficient mechanisms for the control and punishment of any public official or employee violating any provision of this Act.

(b) Construction. (1) This Act shall be liberally construed to promote its purposes and policies.

(2) No part of this Act shall be deemed to have been repealed by subsequent legislation unless such legislation does so expressly.

(c) Severability. The provisions of this Act are severable, and if any provision or its application is held unconstitutional or invalid by a court of competent jurisdiction, the unconstitutionality or invalidity shall not affect
other provisions or applications of this Act which can be given effect without
the unconstitutional or invalid provision or application.

(d) Supremacy of Act. Since the purposes of this Act are matters of state-
wide concern, the provisions of this Act shall be controlling regardless of any
other law, including general, special, or local laws, to the contrary.

Definitions

Section 3. (a) Definitions. As used in this Act:

(1) "Action" or "proposed action" means any legislative, administrative,
appointive, or discretionary act of any public official or employee of the state
or any county or municipal government.

(2) "Business" means a corporation, partnership, sole proprietorship, or
any other organization or association conducting activities for profit or economic
gain.

(3) "Compensation" means any benefit of an economic nature given for
services rendered.

(4) "Confidential information" means information which by law or
practice is not available to the public.

(5) "Contract" means any express or implied agreement with the state
or any county or municipal government.

(6) "Employment" means any rendering of services for compensation.

(7) "Financial interest" means an interest held by an individual, by such
individual's spouse, or by any minor children for whom such individual or such
individual's spouse is a parent or legal guardian which is:

(A) The interest of a trustee in a trust; or

(B) The interest of a beneficiary or cestui que trust in a trust; or

(C) The interest of a trustor or settlor in a revocable trust; or

(D) An ownership interest in a business; or

(E) A creditor interest in an insolvent business; or

(F) An employment or prospective employment for which formal or in-
formal negotiations have begun.

(8) "Gift" means any favor or economic benefit, other than compensation,
that a reasonable person would expect to cultivate goodwill in the donee toward
the donor.

(9) "Interest, any" (i.e., "any interest") means any direct or indirect
personal, pecuniary, material, or sentimental benefit, unless expressly excluded
by any provision of this Act, accruing to a public official or employee as a result
of a contract or transaction which is or may be the subject of an official action
or proposed action by or with the state or any county or municipal government.

(10) "Municipal government" means any city, town, village, or other
political subdivision of the state (except a county); any school district; any
public school, college, or university; any special district; any public authority or
commission; or any public corporation or agency exercising governmental
powers under state law.

(11) "Public official or employee" means any elected, appointed, nomi-
nated, or employed person, except a special employee, serving the state or any
county or municipal government, whether paid or unpaid for such services.

(12) "Transaction" means the conducting of any activity which results in
or may result in action or proposed action by the state, county, or municipal
government.

Violation a Felony, Type of Sentence, Attorney General
and Special Prosecutor Jurisdiction and Duties,
Court Jurisdiction and Appeals, Advisory Opinions,
and Citizen Complaints

Section 4. (a) Violation a felony; type of sentence. (1) Violation of any
criminal provision of this Act shall constitute a felony.

(2) Sentencing for the violation of any criminal provision of this Act shall
be as follows:

(A) Unless the person convicted of violating any of the criminal provisions
of this Act presents a danger to himself or to others, such person shall be re-
quired, throughout the entire sentence term, to perform without compensation, in
any branch of state, county, or municipal government, whatever services the
sentencing judge believes will most effectively utilize such person's abilities and
experience and which reasonably approximate such person's official duties at the
time of the violation if such person was a public official or employee at the time
of the violation. All off-duty hours must be spent in confinement at the state
penitentiary or a jail or prison located near the area in which the convicted
person performs the free services.

(B) If the person convicted of violating any of the criminal provisions of
this Act does not qualify for the treatment imposed by subsection (a)(2)(A) of
this section, such person shall be sentenced in accordance with ordinary pro-
cedures applicable to such persons.

(b) Attorney General and Special Prosecutor's jurisdiction and duties.
(1) The state Attorney General shall have sole jurisdiction, except as noted in
subsection (b)(2) of this section, of state civil actions and suits and criminal
actions instituted for any violation of the provisions of this Act.

(2) The Governor shall appoint a Special Prosecutor who shall remain
independent of the state Attorney General and who shall have sole jurisdiction
of state civil actions and suits and criminal actions instituted for any violation
of the provisions of this Act committed by the state Attorney General or any
public official or employee who performs any duties within the authority and
responsibility of the state Attorney General. The Governor shall make such
appointment when he concludes that there exists probable cause to believe that
the state Attorney General or any public official or employee who performs any
duties within the authority and responsibility of the state Attorney General has
violated any provision of this Act.

(c) Court jurisdiction and appeals. The court jurisdiction of any state-
instituted civil action or suit or criminal action commenced for a violation of
any provision of this Act shall be as follows:

(1) For proceedings involving the Governor, Lieutenant Governor, Attorney
General, Treasurer, Secretary of State, any Justice of the state Supreme Court, any state Senator, and any state Representative, there is hereby created a Public Ethics Court, composed of the Chief Justice or one Associate Justice of the state Supreme Court specially designated before each such trial by the Chief Justice of the state Supreme Court for the conduct of such trial. Any Justice shall be ineligible for such appointment if he is a defendant or similarly involved in subject trial. The most senior Associate Justice not a defendant or similarly involved in such trial shall make the appointment if the Chief Justice is a defendant or similarly involved in subject trial. This court shall have all the powers of a circuit court. The Public Ethics Court shall be convened upon petition of the state Attorney General or a special Prosecutor.

(2) For proceedings involving public officials and employees other than those enumerated in subsection (c)(1) of this section, the circuit court having jurisdiction of the geographic area in which the alleged violation occurred shall have jurisdiction. The Chief Judge of said circuit court, or a judge of such circuit court specially designated before each such trial by the Chief Judge, shall conduct the trial. Any judge who is a defendant or similarly involved in subject trial shall be ineligible to conduct subject trial. The most senior trial judge of the circuit court having jurisdiction who is not a defendant or similarly involved in subject trial shall make the appointment if the Chief Judge is a defendant or similarly involved in subject trial. This court shall have all the powers of a circuit court. This court shall be convened upon the petition of the state Attorney General or a Special Prosecutor.

(3) A person described in subsections (c)(1) and (c)(2) of this section shall be tried by a panel of twelve jurors unless such person waives a jury trial. A jury verdict shall be rendered when any ten jurors are in agreement.

(4) All verdicts, impositions, decrees, or judgments involving persons enumerated in subsections (c)(1) and (c)(2) of this section may be appealed directly to the state Supreme Court by such involved persons or by the Attorney General or a Special Prosecutor having jurisdiction of the case, as may final rulings of the trial judge. Any judge or justice who was involved in the actual conduct of the trial or who was a defendant or who was similarly involved in the trial is ineligible for participation in the appellate decision and shall be replaced, if he or she is an associate justice or Chief Justice of the state Supreme Court, by the most senior Chief Judge of circuit court jurisdiction who was not involved in the conduct of the trial and who was not a defendant or similarly involved in the trial.

(d) Advisory opinions of Attorney General. (1) On the request of any person subject to the provisions of this Act, except those persons included in subsection (e) of this section, for interpretations of this Act, the state Attorney General shall issue advisory opinions stating the reasons for the conclusions reached. These advisory opinions shall be made public, but the identity of the requesting party and other matters necessary to maintain confidentiality shall be deleted from the public record.

(2) Within thirty days of the receipt of a request for an advisory opinion, the Attorney General shall issue an opinion. The failure to issue an opinion
within thirty days shall imply that the submitted facts are not violative of this Act. A statement of the submitted facts in such cases shall be published in accordance with the publication requirements of subsection (d)(1) of this section.

(3) An opinion that no violation is perceived shall not preclude subsequent criminal prosecution or a civil action or suit by the state Attorney General under this Act if the actual transaction differs materially from the facts submitted in the request for an advisory opinion.

(4) The receipt of an advisory opinion that proposed conduct will not violate this Act shall constitute a complete defense to any subsequent criminal action or civil action or suit instituted by the state Attorney General under this Act if:

(A) the statement of facts submitted with the request for an advisory opinion contained no material omission or misstatement; and

(B) the actual conduct did not vary materially from the facts submitted in the request for an advisory opinion; and

(C) the advisory opinion was issued in response to prospective conduct; and

(D) the party requesting the opinion acted in good faith in relying upon the advisory opinion.

(5) A defense to a criminal or civil action or suit instituted by the state Attorney General under this Act which is based on subsection (d)(4) of this section shall remain complete although a court later holds erroneous any determination of law upon which the advisory opinion was based.

(6) The state Attorney General may subsequently amend or revoke an advisory opinion he has issued, but such amendment or revocation shall have prospective application only.

(e) Advisory opinions of a Special Prosecutor. (1) On the request of the state Attorney General or any public official or employee who performs any duties within the authority and responsibility of the state Attorney General for interpretations of this Act, the Governor shall appoint within ten days of such request a Special Prosecutor independent of the Attorney General who shall issue an advisory opinion stating the reasons for the conclusions reached. These advisory opinions shall be made public, but the identity of the requesting party and other matters necessary to maintain confidentiality shall be deleted from the public record.

(2) Within thirty days of the receipt by the Governor of a request for an advisory opinion, the Special Prosecutor shall issue an opinion. The failure to issue an opinion within thirty days shall imply that the submitted facts are not violative of this Act. A statement of the submitted facts in such cases shall be published in accordance with the publication requirements of subsection (e)(1) of this section.

(3) An opinion that no violation is perceived shall not preclude subsequent criminal prosecution or civil action or suit by a Special Prosecutor under this Act if the actual transaction differs materially from the facts submitted in the request for an advisory opinion.

(4) The receipt of an advisory opinion that proposed conduct will not violate this Act shall constitute a complete defense to any subsequent criminal
prosecution or civil action or suit instituted by a Special Prosecutor under this Act if:

(A) the statement of facts submitted with the request for an advisory opinion contained no material omission or misstatement; and

(B) the actual conduct did not vary materially from the facts submitted in the request for an advisory opinion; and

(C) the advisory opinion was issued in response to prospective conduct; and

(D) the party requesting the opinion acted in good faith in relying upon the advisory opinion.

(5) A defense to a criminal or civil action or suit instituted by a Special Prosecutor under this Act which is based on subsection (e)(4) of this section shall remain complete although a court later holds erroneous any determination of law upon which the advisory opinion was based.

(6) The Attorney General may subsequently amend or revoke an advisory opinion issued by a Special Prosecutor, but such amendment or revocation shall have prospective application only.

(f) Private party complaints. Any person may file a complaint, on a form provided by the state Attorney General, alleging a specific violation or violations of this Act and any resultant damages which such complainant may have suffered. If the state Attorney General or a Special Prosecutor, as appropriate, does not thereafter institute a criminal prosecution or civil action or suit under this Act, based on the specific violation or violations alleged in the complaint, within ninety days of the receipt of a properly filed complaint, the Attorney General or a Special Prosecutor, as appropriate, shall make public his reasons therefor. The identity of the public official or employee and other items necessary to maintain his or her anonymity shall be deleted from the public record.

Waiver of Sovereign Immunity

Section 5. (a) Procedure. (1) Any person injured by any wrongful action or suit instituted by the state Attorney General or a Special Prosecutor may recover actual damages from this state.

(2) Such damages shall be first alleged in a claim filed with the state Attorney General on a form provided by the Attorney General in accordance with the state Tort Claims Act.

(3) If a claim is disallowed, in total or in part, or if the state Attorney General fails to issue a decision within 180 days of the receipt of a properly filed claim, the damages not allowed may be filed as a civil damages action in any circuit court of this state.

(4) The claim involved in subsection (a)(2) of this section and the civil action involved in subsection (a)(3) of this section shall require proof, by a preponderance of the evidence, of the institution of an action or suit by the state Attorney General or a Special Prosecutor motivated by malice and without probable cause.

(b) Waiver of sovereign immunity. This section expressly waives sovereign
immunity and supplements the state Tort Claims Act.

Persons Required to File Statements of Economic Interests, Offices of Filing, Filing Dates, and Public Access to Filed Statements

Section 6. (a) Persons required to file statements with state Attorney General. The following persons, except those also included in subsection (b) of this section, who shall then be governed solely by subsection (b) of this section, shall file verified statements of economic interests, providing the information required by section 8 of this Act, with the state Attorney General:

1. every elected official, including United States Senators and Representatives from this state and candidates for elective offices, but excluding the President and Vice President and candidates for such offices;

2. persons holding office as a Regent on the Board of Regents of the state college or university system;

3. persons holding effective appointments to any office or position, except that of employee, in any branch of state, county, or municipal government of this state;

4. persons in the process of being appointed to any office or position specified in subsection (a)(3) of this section and whose appointments have not yet become effective;

5. persons, including those whose primary duties involve teaching, who are compensated for services to the state government and any county or municipal government as employees and not as independent contractors at an annual rate exceeding $15,000 and other persons so employed who are compensated at an annual rate of less than $15,000 if they receive fees for professional services rendered the state, and any and all county governments and any and all municipal governments of this state such that their total income from public employment in this state, including all such professional fees, exceeds $15,000 annually.

(b) Persons required to file statements with Governor; Governor's duties.

1. The state Attorney General and all public officials and employees who perform any duties within the authority and responsibility of the state Attorney General and whose total annual compensation for services rendered the state government and any and all county and municipal governments exceeds $15,000 shall file with the Governor a verified statement of economic interests providing the information required by section 8 of this Act.

2. The Governor shall appoint a Special Prosecutor who shall remain independent of the state Attorney General and who shall have sole jurisdiction of any state civil action or suit or criminal action against any person included in subsection (b)(1) of this section when the Governor concludes that there exists probable cause to believe that such person has violated any of the provisions of sections 6, 7, or 8 of this Act.

(c) Due dates. All persons listed in subsections (a) and (b) of this section who are required to file statements of economic interests providing the informa-
tion required by section 8 of this Act must file such statements at least annually in the appropriate office on or before January 31st of the year following the calendar year covered by the statement of economic interests.

(d) Special statements of economic interests required of candidates and appointees; due dates. (1) Every candidate for elective office, except those excluded in subsection (a)(1) of this section, and all persons in the process of being appointed to any office or position, except that of employee, in any branch of state, country or municipal government of this state shall file a special and complete statement of economic interests reflecting the interests required to be disclosed by section 8 of this Act and the status of the interests specified in subsections (b)(1), (b)(2), (b)(3), (b)(6), (b)(11), (b)(12), and (b)(13) of section 8 of this Act on a date not more than fifteen days prior to the date of filing, which must occur within the period stated in subsection (d)(2) of this section.

(2) The filing period for persons listed in subsection (d)(1) of this section shall be the period forty-five to thirty days prior to:
   (A) the election date if a candidate for elective office;
   (B) the confirmation hearing date if an appointee whose appointment is subject to confirmation by the state Senate;
   (C) the effective date of the appointment if an appointee whose appointment is not subject to confirmation by the state Senate.

(3) All special statements of economic interests required by subsections (d)(1) and (d)(2) of this section shall be filed in the appropriate office listed in subsections (a) and (b) of this section. Each elective candidate or appointee to an office included in subsection (a) of this section shall file a special statement of economic interests with the state Attorney General. Each elective candidate or appointee to an office included in subsection (b) of this section shall file a special statement of economic interests with the Governor.

(e) Public access to filed statements of economic interests. (1) All statements of economic interests shall be made available for public inspection at all reasonable times in the office where filed.

(2) Facilities for copying all statements of economic interests shall be made available at a reasonable cost in the offices where the statements are filed.

Filing a False Statement of Economic Interests and Late Filing of a Statement of Economic Interests

Section 7. (a) Filing a false statement of economic interests. Any person who files any materially false statement of economic interests is guilty of a felony and shall be sentenced, in accordance with the provisions of section 4(a)(2) of this Act, to a term of not more than five years.

(b) Late filing of a statement of economic interests. Any person who files in the appropriate office a complete statement of economic interests providing the information required by section 8 of this Act, or the information required by section 6(d)(1) of this Act if such person is listed in section 6(d)(1) of this Act, within twenty days after the required due date shall be subject to a civil forfeiture of $100 for each day the required statement of economic interests is
not filed. After the expiration of said twenty-day period, the lack of filing shall be deemed a refusal or failure to file and shall be governed by section 8(c) of this Act and by Constitutional Amendment II, but the accumulated civil forfeiture shall remain in effect unless the privilege against self-incrimination is invoked properly.

Control and Constructive Control, Interests Required to Be Listed in the Statement of Economic Interests, Privilege Against Self-Incrimination, and Immunity and Civil Actions or Suits

Section 8. (a) Control and constructive control. The statement of economic interests required by section 6 of this Act shall include the interests of the persons required to file the statement, the interests of his or her spouse, and the interests of any minor children for whom the person required to file the statement or such person's spouse is a parent or legal guardian.

(b) Interests to be listed. The following interests shall be listed by all persons required to file a statement of economic interests:

(1) occupation, employer, and business address; and
(2) each financial interest exceeding $3,000 in any one bank or savings and loan association, including a savings account, and the cash surrender value of insurance policies; and
(3) the identity and nature, but not the current market value, of any financial interest, the current market value of which exceeds $3,000, in any business conducting activities for profit or economic gain in this state; and
(4) the complete identity of any capital asset, including the legal description of real property, from which a capital gain in excess of $2,000 was realized in the preceding calendar year; and
(5) the name and address of any source from which compensation in any form was received during the preceding calendar year, except that only the total compensation in any form received from all sources protected by any privilege, including but not limited to that of the doctor and patient or attorney and client, need be reported; and
(6) the name or other identification of any business or trust in which is held any office, trusteeship, directorship, partnership interest, or financial interest of ten percent or more; and
(7) the name of any other business or trust from which a business or trust listed in subsection (b)(6) of this section has received compensation, in any form, in excess of $500 during the preceding calendar year and the consideration rendered for such compensation; and
(8) a legal description of all real property having an assessed valuation in excess of $1,000 in which any financial interest or increased financial interest was acquired during the preceding calendar year, the amount and nature of each such financial interest, and the total consideration given in acquiring each such financial interest; and
(9) a legal description of all real property having an assessed valuation in
excess of $2,000 in which a financial interest was held during the preceding calendar year and not included in subsection (b)(8) of this section; and

(10) a legal description of all real property having an assessed valuation in excess of $3,000 in which any business or trust held a financial interest during the preceding calendar year if any financial interest in such business or trust was held during the preceding calendar year; and

(11) a legal description of all real property having an assessed valuation in excess of $3,000 in which any business or trust holds a financial interest if any financial interest in such business or trust is held; and

(12) the identity of any compensated lobbyist with whom any business is maintained; and

(13) the name and address of each creditor to whom $500 or more is owed, the repayment terms of each such debt, and the security given, if any, for each such debt, except that the security given for purchases under conditional sales contracts need not be disclosed.

(c) Privilege against self-incrimination. (1) Any person required to file a statement of economic interests may, when appropriate, invoke the privilege against self-incrimination and refuse to file a statement of economic interests or refuse to disclose any interests required to be disclosed.

(2) Any other refusal to file a statement of economic interests or to disclose any interests required to be disclosed shall subject an incumbent public official or employee to removal from office or position or other civil actions or suits, but no criminal actions may be instituted for such refusals. Candidates for elective office and appointees shall be governed by Constitutional Amendment II upon refusal to file a statement of economic interests or to disclose any interests required to be disclosed, the privilege against self-incrimination notwithstanding.

(3) Evidence of criminal conduct provided in any filed statement of economic interests shall constitute a waiver of the privilege against self-incrimination and may subject the discloser to criminal prosecution or to civil actions or suits.

(4) Any information provided in a filed statement of economic interests may be used in any subsequent civil action or suit or criminal action instituted by the state Attorney General or a Special Prosecutor, as appropriate, against the discloser. Such information may also be used by a private party in a private action for damages, authorized by this Act, against the discloser.

(d) Immunity and civil actions and suits. (1) Any person required to file a statement of economic interests may be granted immunity from use and derivative use in any subsequent criminal proceeding of any compelled, self-incriminating testimony, including disclosures provided in filed statements of economic interests. Such immunity shall supplant the privilege against self-incrimination.

(2) Any person receiving a grant of immunity specified in subsection (d)(1) of this section shall file a complete statement of economic interests disclosing all the information required. Such person shall be subject to any civil action or suit authorized by this Act.
Interest in Governmental Contracts

Section 9. (a) Procedure. If any public official or employee has any interest, including but not limited to those of a personal, pecuniary, or sentimental nature, in any contract, except as provided in subsection (b) of this section, which is being considered by any branch, agency, or department of state, county, or municipal government, such public official or employee:

(1) shall, as soon as practicable after learning, or upon the expiration of a reasonable time after he should have known by the exercise of ordinary care, that a contract in which he has an interest is the subject of consideration by any branch, agency, or department of state, county, or municipal government, disclose the fact of such interest to the entity considering the contract; and

(2) shall not influence or attempt to influence any vote, or himself vote on or participate in the award of the contract; and

(3) shall execute, after the contract has been awarded, a certificate that he has complied with all the requirements of subsections (a)(1) and (a)(2) of this section.

(b) Exclusions. (1) Retail purchases under conditional sales contracts and loans obtained from commercial lending institutions are excluded from the provisions of this section if obtained in accordance with prevailing commercial standards for like transactions in the city in which each such loan or retail purchase occurred.

(2) Financial interests in privately owned public utility companies are excluded from the provisions of this section.

(3) Financial interests in businesses which are the sole supplier of a good or service are excluded from the provisions of this section. In making the sole supplier determination, state government shall be confined to the geographical boundaries of the state, each county shall be confined to its geographical boundaries, and each municipal government shall be confined to its geographical or jurisdictional boundaries.

(c) Violation a felony; sentence. Any person subject to the provisions of this section who violates any of the provisions of subsection (a) of this section, including the filing of a false certificate required by subsection (a)(3) of this section, is guilty of a felony and shall be sentenced, in accordance with the provisions of section 4(a)(2) of this Act, to a term of not more than seven years.

Interest in Governmental Transactions

Section 10. (a) Procedure. If any public official or employee has any interest, including but not limited to those of a personal, pecuniary, or sentimental nature, in any action or proposed action of any branch, agency, or department of state, county, or municipal government not included in subsection (a) of section 9 of this Act and not excluded by subsections (b)(1) or (b)(2) of this section, such public official or employee:

(1) shall, as soon as practicable after learning, or upon the expiration of a reasonable time after he should have known by the exercise of ordinary care, that any governmental action in which he has an interest is the subject of con-
consideration by any branch, agency, or department of state, county, or municipal government, disclose the fact of such interest to the entity considering the action or proposed action; and

(2) shall not influence or attempt to influence any vote, or himself vote on or participate in any decision involving the action or proposed action; and

(3) shall execute, after the decision on the action or proposed action has been made, a certificate that he has complied with all the requirements of subsections (a)(1) and (a)(2) of this section.

(b) Exclusions. (1) Any elected public official of the legislative branch of state, county, or municipal government, when introducing or voting upon any bill, measure, ordinance, or resolution, is excluded from the provisions of this section.

(2) Retail purchases under conditional sales contracts and loans obtained from commercial lending institutions are excluded from the provisions of this section, if obtained in accordance with prevailing commercial standards for like transactions in the city in which each such loan or retail purchase occurred.

(c) Violation a felony; sentence. Any person subject to the provisions of this section who violates any of the provisions of subsection (a) of this section, including the filing of a false certificate required by subsection (a)(3) of this section, is guilty of a felony and shall be sentenced, in accordance with the provisions of section 4(a)(2) of this Act, to a term of not more than seven years.

Confidential Information

Section 11. (a) Use for private gain. (1) No public official or employee shall use confidential information acquired as a result of holding any position in any branch of state, county, or municipal government for the private benefit of such official or employee or any other person, business, or other entity.

(2) The prohibition on the use of confidential government information specified in subsection (a)(1) of this section shall continue until such information is made available to the general public by a properly authorized public official or employee.

(b) Violation a felony; sentence. Any person subject to the provisions of this section who violates any of the provisions of subsection (a) of this section is guilty of a felony and shall be sentenced, in accordance with the provisions of section 4(a)(2) of this Act, to a term of not more than seven years.

Assisting in Transactions
Involving a Governmental Body

Section 12. (a) Representation or assistance prohibited. (1) No public official or employee shall receive or agree to receive compensation in any form for representing or assisting any person, business, or other entity in any transaction involving any branch of state, county, or municipal government.

(2) The provisions of subsection (a)(1) of this section apply to the partners of any public official or employee.
(3) No public official or employee shall represent or assist any business or other entity in any transaction involving any branch of state, county, or municipal government if he holds any financial interest in such business or entity.

(4) No partner of any public official or employee shall represent or assist any business or other entity in any transaction involving any branch of state, county, or municipal government if either such partner or the public official or employee holds any financial interest in such entity or business.

(5) No public official or employee, nor any partner of a public official or employee, shall represent any interest of such public official or employee or any interest of a partner of such public official or employee in a transaction involving any branch of state, county, or municipal government in any appearance before, or filing of any legal documents with, any branch of state, county, or municipal government.

(b) Exclusion. The provisions of subsection (a) of this section do not apply to representation before any court.

(c) Violation a felony; sentence. Any person subject to the provisions of this section who violates any of the provisions of subsection (a) of this section is guilty of a felony and shall be sentenced, in accordance with the provisions of section 4(a)(2) of this Act, to a term of not more than seven years.

Bribery

Section 13. (a) Compensation for official action. No public official or employee shall accept or agree to accept compensation in any form, other than that provided by law, for the performance or nonperformance of official actions.

(b) Violation a felony; sentence. Any person subject to the provisions of this section who violates any provision of subsection (a) of this section is guilty of a felony and shall be sentenced, in accordance with the provisions of section 4(a)(2) of this Act, to a term of not more than ten years.

Ex Parte Communications

Section 14. (a) Public record required. No public official or employee shall encourage, make, or accept any ex parte or unilateral communication in any form which is relevant to any determination to be made after a public hearing without making the contents of such communication a part of the record of such public hearing.

(b) Violation a felony; sentence. Any person subject to the provisions of this section who violates any of the provisions of subsection (a) of this section is guilty of a felony and shall be sentenced, in accordance with the provisions of section 4(a)(2) of this Act, to a term of not more than three years.

Gifts

Section 15. (a) Receipt of gifts prohibited. No public official or employee shall solicit or accept a present or future gift, favor, service, or anything of value
from any person, business, or other entity under circumstances where the public official or employee knows or should know by the exercise of ordinary care that such gift, favor, service, or thing of value will, or might tend to, affect the present or future performance of official duties by such donee public official or employee.

(b) Exclusion. Any award presented in recognition of public service, which is awarded publicly, is excluded from the provisions of this section.

(c) Violation a felony; sentence. Any person subject to the provisions of this section who violates any of the provisions of subsection (a) of this section is guilty of a felony and shall be sentenced, in accordance with the provisions of section 4(a)(2) of this Act, to a term of not more than ten years.

Postemployment

Section 16. (a) Prohibited conduct. No person who has served as a public official or employee of any branch, except the legislative branch, of state, county, or municipal government shall, for a period of two years after the termination of such public service or employment, appear before the branch of government of state, county, or municipal government in which such public official or employee previously served or receive compensation in any form for any services rendered on behalf of any person, business, or other entity regarding any case, proceeding, application, or transaction in which such former public official or employee personally participated during his period of public service or employment.

(b) Special provisions for legislative members. (1) No person who has served as a member of the legislative branch of any unit of state, county, or municipal government shall assist, except in court representation or the rendering of legal advice, any person, business, or other entity with any matter that was before the legislative body in which such former member served during such member's service. This prohibition shall expire two years after the termination of legislative service.

(2) No person who has served as a member of the legislative branch of any unit of state, county, or municipal government shall, for compensation in any form, engage in lobbying activities before the legislative branch in which such former member served. This prohibition shall expire two years after the termination of the former member's legislative service.

(c) Violation a felony; sentence. Any person subject to the provisions of subsections (a) or (b) of this section who violates such a subsection is guilty of a felony and shall be sentenced, in accordance with the provisions of section 4(a)(2) of this Act, to a term of not more than five years.

Special Employees

Section 17. (a) Definition of special employee; effect. (1) A person performing services for any branch of state, county, or municipal government is a special employee if:
(A) such person is not an elected official; and
(B) such person has not been appointed to any public office or position by the highest ranking executive officer of the state or any county or municipal government; and
(C) such person occupies a position which, because of its classification by the civil service commission having jurisdiction or by the terms of the employment contract with such person, also allows private employment during normal duty hours; or
(D) such person did not earn compensation in any form as a state, county, or municipal government employee for a total of more than 100 days in the preceding 365 days.

(2) A person who qualifies as a special employee shall be subject to the provisions of this Act only regarding matters for which such person has or had direct responsibility as defined by the terms of such person's employment contract or classification by the civil service commission having jurisdiction.

Constructive Trust, Private Party's Right to Pro Rata Share, and Private Party Actions

Section 18. (a) Constructive trust imposition. (1) The state Attorney General or a Special Prosecutor appointed by the Governor, as specified in section 4(b)(2) of this Act, is authorized to institute a civil action or suit to impose a constructive trust upon all property, funds, and profits acquired by violation of any of the provisions of this Act, and upon the products thereof in the possession of whomever found, except when in the possession of a bona fide purchaser for value without notice.

(2) The constructive trust action or suit authorized in subsection (a)(1) of this section shall be instituted against the public official or employee acquiring property, funds, or profits by violation of any of the provisions of this Act, against the property, funds, or profits, whether in original or altered form, and against possessors of such property, funds, or profits, whether in original or altered form, except bona fide purchasers for value without notice, in a court having jurisdiction of such action or suit as specified in section 4(c) of this Act.

(3) The tracing and recovery of such property, funds, or profits shall be in accordance with established principles of equity governing the imposition of a constructive trust.

(4) The final imposition of a constructive trust shall result in the automatic removal from office or position of any public official or employee whose violation of any of the provisions of this Act was the basis for the imposition of said constructive trust.

(b) Private party's right to pro-rata share; private party actions. (1) After final imposition of a constructive trust, as specified in the provisions of subsection (a) of this section, the state Attorney General or a Special Prosecutor, as appropriate, who had jurisdiction of the action or suit to impose the constructive trust shall hold the recovered property, funds, or profits subject to the claims of innocent third parties damaged by the conduct which provided the basis for
imposition of the constructive trust.

(2) Within ten days after final imposition of the constructive trust, and for a period of 60 days thereafter, the state Attorney General or a Special Prosecutor, as appropriate, who had jurisdiction of the action or suit to impose the constructive trust, shall cause to be published in the official state newspaper a notice inviting submission of damage claims, on forms specially provided for such purpose by the state Attorney General, by innocent third parties suffering damage from the conduct which provided the basis for imposition of the constructive trust.

(3) Within 60 days after the expiration of the 60-day period specified in subsection (b)(2) of this section, the state Attorney General or a Special Prosecutor, as appropriate, who had jurisdiction of the imposition of the constructive trust shall determine the validity of each private party claim, including the amount of each such claim, and shall either disallow a claim in its entirety if found invalid or allow either what is deemed to represent actual damages if the claim is found to be valid but excessive or allow the total amount of the claim if found valid and not excessive.

(4) If the claim is allowed, either in total or in part, the award to each claimant shall be the total amount allowed if the aggregate of allowed claims does not exceed the total recovery of the state Attorney General or a Special Prosecutor, as appropriate, who had jurisdiction of the imposition of the constructive trust. Any excess recovery shall be transferred to the General Fund of the state, county, or municipal government served by the public official or employee whose violation of any of the provisions of this Act provided the basis for the imposition of the constructive trust.

(5) If the aggregate of allowed claims exceeds the total recovery by the state Attorney General or a Special Prosecutor, as appropriate, who had jurisdiction of the imposition of the constructive trust, each award shall be based on the percentage which the respective allowed amount represents of the total allowed claims multiplied by the total recovery of the state Attorney General or a Special Prosecutor.

(6) There shall be no right of appeal regarding the disallowance of any claim or any award made by the state Attorney General or a Special Prosecutor, as appropriate, who had jurisdiction of the imposition of the constructive trust.

(7) No party other than one of those specified in subsection (a)(1) of this section shall have standing to institute a civil action or suit to impose a constructive trust upon property, funds, or profits acquired by violation of any of the provisions of this Act.

(8) If a constructive trust has been imposed in accordance with subsection (a) of this section for the same conduct causing damage to a private party, each such private party damaged by such conduct whose claim for damages has been disallowed by the state Attorney General or a Special Prosecutor, as appropriate, who had jurisdiction of the imposition of the constructive trust or whose award is less than the amount sought in a claim properly filed with the state Attorney General or a Special Prosecutor, as appropriate, who had jurisdiction of the imposition of the constructive trust, may file, in a court having juris-
diction of similar damage actions, a private action for damages in an amount representing the excess of the amount claimed over the award received against the public official or employee who has committed conduct violative of any provision of this Act, such conduct having provided the basis for imposition of the constructive trust. The only issue for determination in such private damage action is the amount of actual damages suffered by the private party plaintiff as a result of the conduct of the public official or employee which provided the basis for imposition of the constructive trust.

(9) In addition to the provisions of subsection (b)(8) of this section, the following provisions shall govern the institution of private party damage actions against public officials and employees violating any of the provisions of this Act:

(A) If no constructive trust has been imposed in accordance with the provisions of subsection (a) of this section for the same conduct causing damage to a private party, no private party damaged by such conduct may institute a civil action to recover damages from a public official or employee suffered as the result of such conduct without first filing a complaint alleging damages suffered in accordance with the provisions of section 4(f) of this Act. If the state Attorney General or a Special Prosecutor, as appropriate, then refuses to institute any criminal action or civil action or suit, in accordance with the provisions of section 4(f) of this Act, such private party may institute a civil action for damages against the public official or employee; but if the state Attorney General or a Special Prosecutor, as appropriate, within the period specified in section 4(f) of this Act, institutes or has instituted any criminal action or civil action or suit, other than a civil action or suit to impose a constructive trust, no private party may institute a private action to recover damages, based on the same conduct included in the criminal action or civil action or suit instituted by the state Attorney General or a Special Prosecutor, as appropriate, against the public official or employee without first requesting and receiving permission to institute such an action, in writing, from the state Attorney General or a Special Prosecutor, as appropriate, who has jurisdiction of the case.

(B) If the state Attorney General or a Special Prosecutor, as appropriate, in response to a citizen complaint institutes within the period specified in section 4(f) of this Act or has instituted a civil action or suit to impose a constructive trust upon the property, funds, or profits acquired as the result of violation of any of the provisions of this Act by a public official or employee, each private party damaged by the same conduct is limited to the remedies in subsections (b)(1) through (b)(8) of this section.

(C) If the state Attorney General or a Special Prosecutor, as appropriate, is unsuccessful in any criminal action or civil action or suit, no private action for damages may be instituted against the same public official or employee for the same conduct which formed the basis for the criminal action or civil action or suit instituted by the state Attorney General or a Special Prosecutor, as appropriate.
Voidability of Government Contracts and Transactions and Private Party Standing

Section 19. (a) Voidability of contracts and transactions. (1) The state Attorney General or a Special Prosecutor appointed by the Governor, as specified in section 4(b)(2) of this Act, is authorized to institute a civil action or suit seeking a declaration or decree, on behalf of the state or any county or municipal government, that a contract or transaction entered into, performed, or agreed to by the state or such county or municipal government is void because such contract or transaction was influenced or effected by conduct of a public official or employee of the state or of a county or municipal government which is or was in violation of any of the provisions of this Act.

(2) The civil action or suit specified in subsection (a)(1) of this section shall be instituted in the court having jurisdiction as specified in section 4(c) of this Act.

(b) Standing to institute suit. No person other than one of those specified in subsection (a)(1) of this section shall have standing to institute an action or suit seeking a declaration or decree that any state, county, or municipal government contract or transaction is void.

Multiple Actions and Suits by State Attorney General or a Special Prosecutor

Section 20. The institution by the state Attorney General or a Special Prosecutor, as appropriate, of any suit or action authorized by this Act shall not preclude the institution by the state Attorney General or a Special Prosecutor, as appropriate, of any other suit or action authorized by this Act which is based on the same or another violation of any provision of this Act, except that subsequent actions or suits shall be subject to the principles of res judicata and collateral estoppel.

Immunity from Prosecution and Its Effect on Civil Actions and Suits

Section 21. (a) Immunity from criminal prosecution. Any person subject to the provisions of this Act may be granted immunity from the use and derivative use of any compelled, self-incriminating testimony, including a filed statement of economic interests, in a subsequent criminal prosecution for violation of any provision of this Act.

(b) Civil actions or suits. Any person receiving a grant of immunity specified in subsection (a) of this section shall remain subject to any civil action or suit authorized by this Act.

Repealer

Section 22. Other state laws and parts of laws in conflict with the pro-
visions of this Act are hereby repealed.

*Effective Date*

*Section 23.* This Act shall be effective 90 days after its passage by the state legislature.