

Catholic University Law Review

Volume 30
Issue 4 Summer 1981

Article 3

1981

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Recommended Citation

Louis B. Jack, *Constitutional Aspects of Financial Disclosure under the Ethics in Government Act*, 30 Cath. U. L. Rev. 583 (1981).

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CONSTITUTIONAL ASPECTS OF FINANCIAL DISCLOSURE UNDER THE ETHICS IN GOVERNMENT ACT

*Louis Bernard Jack**

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.**

On October 26, 1978, President Carter signed into law the Ethics in Government Act of 1978 (E.G.A.).¹ Designed to "preserve and promote the integrity of public officials and institutions,"² the Act requires, *inter alia*, that high-level federal officials make periodic public disclosure of their personal finances and the finances of their spouses and dependent children.³

In general terms, affected officials and their immediate families must disclose the nature and sources of their outside income, property interests, transactions and holdings, gifts, and liabilities.⁴ In most cases, dollar amounts are to be reported in "value ranges"⁵ rather than by exact amounts. In addition, the identity of positions held in businesses or organizations (other than social, religious, fraternal or political organizations and positions of a purely honorary nature) must be disclosed.⁶ The major exceptions from disclosure are for income from and holdings in qualifying

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** L. BRANDEIS, *OTHER PEOPLES' MONEY AND HOW THE BANKERS USE IT* 62 (Nat'l Home Library Foundation ed. 1933).

1. Pub. L. No. 95-521, 92 Stat. 1824 (1978).

2. *Id.*, Preamble.

3. The Act also establishes an Office of Government Ethics (within the Office of Personnel Management); amends 18 U.S.C. § 207 to increase post-employment restrictions; creates a statutory mechanism for appointing a special prosecutor (28 U.S.C. §§ 591-598); and establishes an Office of Senate Legal Counsel (2 U.S.C. § 288).

4. 5 U.S.C. app. § 202(a)-(e) (Supp. III 1979).

5. *Id.* § 202(a)(1)(B),-(d)(1).

6. *Id.* § 202(a)(6)(A).

"blind trusts,"⁷ as well as for gifts and income in certain nominal amounts.⁸ Once submitted, the financial statements are to be checked for conflicts of interest, and made available upon request to the public.⁹

The financial disclosure requirements for the legislative, executive and judicial branches are found in Titles I, II, and III of the Act, respectively. While the procedural and administrative provisions of the Act differ among the three branches of government, most of the substantive disclosure requirements are identical. Thus, notwithstanding three provisions that apply only to the executive branch,¹⁰ the financial disclosure requirements of Titles I, II and III are sufficiently uniform to be considered together for the purpose of the following constitutional analysis.¹¹

I. PRIVACY

The existence of a constitutional right of privacy flowing from the various provisions of the Bill of Rights is now well-established.¹² While the existence of the right is clear, the application of the right to personal financial privacy is unsettled. In extremely personal matters involving family decisions—where the right of privacy is strongest—the courts have

7. *Id.* § 202(f).

8. *Id.* § 202(a)(1)-(6).

9. *Id.* §§ 205, 206.

10. Section 202(a)(6)(B) requires nonelected reporting executive officials to disclose in their initial reports any outside earnings of more than \$5,000 received from any one source during either of the two preceding calendar years. Specifically, the identity of the source and the nature of the services performed by the reporting individual are to be disclosed. However, information considered confidential as a result of a legally recognized privilege (*e.g.*, doctor-patient, attorney-client) need not be disclosed.

Section 202(f)(4)(B) provides that assets held in qualifying blind trusts for presidential appointees and their families will not be subject to conflict of interest statutes such as 18 U.S.C. § 208. Therefore, such assets need not be divested. According to the conference report, this provision was intended to facilitate the appointment of individuals with "well-diversified assets" whose "position will involve decisions touching on a broad range of issues affecting a large number of subject areas." S. REP. NO. 127, 95th Cong., 2d Sess. 71 (1978).

Section 210 limits the outside earned income of certain presidential appointees to no more than 15% of their government salary per year.

11. For the sake of convenience, statutory citations which follow are to the disclosure provisions of Title II of the Act. Title II has been codified in the appendix to 5 U.S.C. app. §§ 201-211 (Supp. III 1979). Implementing regulations have been published by the Office of Personnel Management at 5 C.F.R. § 734 (1981).

12. *See* *Roe v. Wade*, 410 U.S. 113 (1973) (the due process clause of the fourteenth amendment); *United States v. United States Dist. Court*, 407 U.S. 297 (1972) (freedom from unreasonable search and seizure under the fourth amendment); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the retained rights of the people under the ninth amendment); *NAACP v. Alabama*, 357 U.S. 449 (1958) (freedom of association under the first amendment); *Boyd v. United States*, 116 U.S. 616 (1886) (privilege against self-incrimination under the fifth amendment).

tolerated very little government interference.¹³ However, the courts have traditionally interpreted the Constitution to permit considerable government regulation and scrutiny of financial matters.¹⁴ The right of financial privacy, then, is inherently limited. Moreover, the public servant's legitimate expectation of financial privacy is even narrower than that of a counterpart in the private sector.¹⁵ The Supreme Court, however, has made no definitive rulings on the nature of a constitutional right to financial privacy.

In *California Bankers Association v. Shultz*,¹⁶ a decision upholding the recordkeeping and disclosure requirements imposed by the Bank Secrecy Act of 1970, Justice Powell wrote in a concurring opinion:

A significant extension of the regulations' reporting requirements, however, would pose substantial and difficult constitutional questions for me. In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy.¹⁷

In *Buckley v. Valeo*,¹⁸ the Supreme Court upheld the financial disclosure provisions of the Federal Election Campaign Act, finding that the substantial public interests served by disclosure outweighed the burden on political contributors' first amendment rights.¹⁹

Although the Supreme Court has not ruled definitively on public employees' right to financial privacy, many state courts have considered privacy attacks on state financial disclosure statutes. The majority of these decisions have upheld the constitutionality of disclosure statutes.²⁰ In *Plante v. Gonzales*,²¹ the Court of Appeals for the Fifth Circuit became the only federal court to rule authoritatively on the constitutionality of a state financial disclosure statute. In a subsequent case, *Duplantier v. United*

13. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

14. *California Banker's Ass'n v. Schultz*, 416 U.S. 21 (1974).

15. *Plante v. Gonzales*, 575 F.2d 1119, 1135-36 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979); *O'Brien v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

16. 416 U.S. 21 (1974).

17. *Id.* at 78-79.

18. 424 U.S. 1 (1976).

19. *Id.* at 60-84.

20. *See Plante v. Gonzales*, 575 F.2d at 1124 n.8 (citing cases in which the courts of 11 of 14 states upheld various disclosure statutes).

21. 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979). *See* notes 31-35 and accompanying text *infra*.

States,²² the Fifth Circuit rejected challenges based on separation of powers, right of privacy, equal protection and due process, and upheld the constitutionality of mandatory financial disclosure by federal judges under the Ethics in Government Act.²³

The courts have struggled to decide which standard of judicial review to apply when deciding the constitutionality of financial disclosure statutes. A minority of courts have found financial privacy to be a "fundamental" constitutional right entitled to the benefit of strict scrutiny.²⁴ Such courts permit governmental intrusion into financial privacy only if *every* aspect of the intrusion is *necessary* to achieve a compelling governmental interest and *no* alternatives less subversive to constitutional rights are available.²⁵

Other courts have noted that the Supreme Court has never expressly recognized financial privacy to be a fundamental right entitled to special constitutional protection.²⁶ These decisions have therefore applied a more lenient standard of review. For example, in *Hunter v. City of New York*,²⁷ the court found that: "[T]he test is whether the means employed [by the statute] are 'reasonable and appropriate' to accomplish its legitimate purposes. . . . Under this method of review, challenged legislation will not be set aside if any state of facts reasonably may be conceived to justify it."²⁸ Under this mere rationality standard, a court will typically refuse to examine the "who, what and how of disclosure" required by the statute.²⁹

22. 606 F.2d 654 (5th Cir.), *rehearing denied*, 608 F.2d 1373 (1979), *cert. denied*, 101 S. Ct. 854 (1981).

23. 606 F.2d at 666-73.

24. *See* note 25 *infra*.

25. *See* *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3rd 259, 268, 466 P.2d 225, 232, 85 Cal. Rptr. 1, 8 (1970); *Advisory Opinion on Constitutionality of 1975 PA 227* (Questions 2-10), 242 N.W.2d 3, 20 (1976); *Slevin v. City of New York*, 477 F. Supp. 1051, 1055 (S.D.N.Y. 1979). Each of these cases invalidated a financial disclosure statute which demanded as much information from minor officials as from high officials.

26. *See* *Illinois State Employees Ass'n v. Walker*, 57 Ill. 2d 512, 315 N.E.2d 9 (1974), *cert. denied*, 419 U.S. 1058 (1974); *Stein v. Howlet*, 52 Ill. 2d 570, 289 N.E.2d 409 (1972), *appeal dismissed*, 412 U.S. 925 (1973); *Montgomery County v. Walsh*, 274 Md. 502, 336 A.2d 97 (1975), *appeal dismissed*, 424 U.S. 901 (1976); *Hunter v. City of New York*, 88 Misc. 2d 562, 391 N.Y.S.2d 289 (Sup. Ct. 1976), *modified*, 58 A.D.2d 136, 396 N.Y.S.2d 186 (App. Div. 1977), *aff'd* 44 N.Y.2d 708, 376 N.E.2d 928, 405 N.Y.S.2d 455 (1978); *Fritz v. Gorton*, 83 Wash. 2d 275, 517 P.2d 911 (1974), *appeal dismissed*, 417 U.S. 902 (1974); *In re Kading*, 70 Wis. 2d 508, 235 N.W.2d 409 (1975).

27. 88 Misc. 2d 562, 391 N.Y.S.2d 289 (Sup. Ct. 1976), *modified*, 58 A.D.2d 136, 396 N.Y.S.2d 186 (App. Div. 1977), *aff'd*, 44 N.Y.2d 708, 376 N.E.2d 928, 405 N.Y.S.2d 455 (1978).

28. *Id.* at 572, 391 N.Y.S.2d at 297 (citations omitted).

29. *Id.* at 572, 391 N.Y.S.2d at 298. *See also* *Illinois State Employees Ass'n v. Walker*, 57 Ill. 2d 512, 315 N.E.2d 9 (1974), *cert. denied*, 419 U.S. 1058 (1974) (executive order requiring financial disclosure statements of employees of only certain state agencies not violative

Unlike the majority of state court decisions,³⁰ the Fifth Circuit's decision in *Plante v. Gonzalez* concluded that financial privacy is specially protected by the Constitution.³¹ The *Plante* court identified two separate components of the constitutional right to privacy: the right to *autonomy* in personal or family decision-making and the right to *confidentiality*.³² The "autonomy" branch of privacy involves "matters relating to marriage, procreation, contraception, family relationships and child rearing and education."³³ In cases involving the autonomy branch of privacy, state actions are strictly scrutinized to determine whether they are the least restrictive means to reach a compelling state interest.³⁴ The *Plante* court noted that:

Disclosure laws, unlike laws banning contraception, miscegenation, or abortion, do not remove any alternatives from the decision-making process. Their effect on financial decisions is more indirect. They might deter some decisions. More basically, however, disclosure laws do not involve decisions as important as those in the earlier decided cases. . . . While disclosure may have some influence on intimate decision-making, we conclude that any influence does not rise to the level of a constitutional problem.³⁵

While citing the *Plante* decision, a federal district court in New York nevertheless reached the opposite conclusion. In *Slevin v. City of New York*,³⁶ the court noted the existence of a number of constitutional inter-

of equal protection, but is a rational classification within the purpose of the order); *Montgomery County v. Walsh*, 274 Md. 502, 336 A.2d 97 (1975), *appeal dismissed*, 424 U.S. 901 (1976) (requiring financial disclosure of elected but not paid members of boards, commissions and committees did not violate equal protection since there could have been a rational basis for the distinction).

30. See note 20 *supra*.

31. 575 F.2d 1119, 1136 (5th Cir. 1978).

32. *Id.* at 1128. The court noted that the Supreme Court first drew this distinction in *Whalen v. Roe*, 429 U.S. 589 (1977). The *Plante* court quoted the following language from *Whalen*: "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." 429 U.S. at 598-600.

33. *Plante v. Gonzales*, 575 F.2d at 1129, *quoting* *Paul v. Davis*, 424 U.S. 693, 713 (1976). As the *Plante* court noted, the Supreme Court has limited the power of the states to regulate conduct in these areas. 575 F.2d at 1129. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65-66 (1973); *Roe v. Wade*, 410 U.S. 113, 152-54 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

34. Using such scrutiny, the Supreme Court has voided regulations dealing with contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); abortion, *Roe v. Wade*, 410 U.S. 113 (1973); and miscegenation, *Loving v. Virginia*, 388 U.S. 1 (1967).

35. 575 F.2d at 1130-31.

36. 477 F. Supp. 1051 (S.D.N.Y. 1979) (preliminarily enjoining city from enforcing financial disclosure law against certain firemen and their spouses).

ests that could be infringed upon by financial disclosure laws including:

[T]he right to privacy, in its many facets,—financial, marital, familial . . . and freedom of association, of belief, and of speech. . . . These interests trigger important procedural protections including the doctrine that laws affecting fundamental interests should be justified by at least substantial—and perhaps compelling—state interests; that they be drawn narrowly to deal only with the legitimate state interests at stake; and that they be sufficiently clear to provide adequate guidance to individuals interested in complying.³⁷

The court proceeded to find the New York law unnecessarily intrusive.³⁸ The court's use of strict scrutiny analysis was appropriate, however, only if the court was correct in assuming that financial disclosure interferes with a fundamental constitutional right. This assumption is in direct conflict with the view of the Fifth Circuit in *Plante*³⁹ and *Duplantier*⁴⁰ that financial disclosure laws are of a different, significantly less intrusive nature than laws regulating such issues as marriage, procreation, and contraception.⁴¹

The confidentiality component of the constitutional right of privacy has only recently begun to emerge. It has been defined in *Whalen v. Roe*⁴² as "the individual interest in avoiding disclosure of personal matters."⁴³ In *Whalen*, however, the Supreme Court did not address the standard to be applied to *public* disclosure of confidential materials as required under a statute. Later, in *Nixon v. Administrator of General Services*,⁴⁴ the Court recognized that former President Nixon had a legitimate expectation of privacy in his presidential records⁴⁵ and allowed archivists to examine the records to screen out personal materials.⁴⁶ Again, public disclosure under a statute was not involved.

In *Plante v. Gonzales*, the Fifth Circuit applied the constitutional right to

37. *Id.* at 1055-56 (citations omitted).

38. *Id.* at 1057-58.

39. 575 F.2d at 1132.

40. 606 F.2d at 670.

41. However, in *Buckley v. Valeo*, 424 U.S. 1 (1975), the Supreme Court recognized that a statute requiring disclosure of political contributions was a burden on the first amendment right of freedom of association. Therefore, the statute had to be strictly scrutinized to insure that it was the "least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." 424 U.S. at 68.

42. 429 U.S. 589 (1977).

43. *Id.* at 599.

44. 433 U.S. 425 (1977).

45. *Id.* at 457.

46. *Id.* at 465.

confidentiality to a Florida public financial disclosure statute which was very similar to the Ethics in Government Act of 1978.⁴⁷ With regard to the appropriate standard of review, the court observed that the Supreme Court "has clearly recognized that the privacy of one's personal affairs is protected by the Constitution."⁴⁸ The court used a balancing test whereby a public financial disclosure statute is valid if it "significantly promotes" important state goals.⁴⁹ In *Duplantier v. United States*, the Fifth Circuit concluded that the E.G.A. substantially furthered legitimate governmental interests which outweighed the incidental intrusion into the financial privacy of federal judges.⁵⁰

The interests promoted by the E.G.A. were summarized in the legislative history:

- (1) to restore public confidence in the integrity of top government officials and the government as a whole;
- (2) to demonstrate the high level of integrity of most government officials;
- (3) to deter conflicts of interests;
- (4) to deter undesirables from entering government service;
- and
- (5) to enable the public to evaluate the performance of officials in light of their outside financial interests.⁵¹

Similar statutory goals have been recognized by the courts as compelling governmental interests.⁵² Moreover, the majority of decisions in this area have concluded that, while financial privacy is a serious matter deserving strong protection, the public interests supporting public disclosure are even stronger.⁵³ Thus, it appears clear that mandatory financial disclosure is, at least in principle, constitutional, although the features of each statute's financial disclosure plan vary, and, according to *Plante*, "[e]ach of these features must be individually examined, [and] its incremental benefits balanced against the added violation of the officials' privacy."⁵⁴

Unlike the statute in *Plante* which applied only to *elected* officials, the

47. 575 F.2d at 1123.

48. *Id.* at 1134.

49. *Id.*

50. 606 F.2d at 670-71.

51. S. REP. NO. 170, 95th Cong., 2d Sess. 21 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 4237, 4238.

52. See, e.g., *Plante v. Gonzalez*, 575 F.2d at 1134; *Goldtrap v. Askew*, 334 So. 2d 20, 22 (Fla. 1976); *Stein v. Howlett*, 52 Ill. at 577-78, 289 N.E.2d at 413; *Montgomery County v. Walsh*, 274 Md. at 514, 336 A.2d at 105.

53. *Plante v. Gonzales*, 575 F.2d at 1136.

54. *Id.*

E.G.A. also applies to political appointees and regular public employees.⁵⁵ This is permissible because the E.G.A. is intended to preserve and promote not only the integrity of elected officials, but also that of the government as a whole. Regardless of whether public officials are elected or appointed, they have taken upon themselves the responsibilities of public service and concomitant limitations on personal privacy.⁵⁶ While drawing the bottom line at the GS-16 level is somewhat arbitrary,⁵⁷ it is nonetheless rational since courts have upheld similar provisions applying to even lower job classifications.⁵⁸

The requirement that personal financial information be disclosed to the public is essential to accomplish the ambitious first, second and fifth goals of the E.G.A. listed above. Moreover, the decisions acknowledge that the various compelling purposes of public financial disclosure—such as restoring public confidence in government officials—outweigh public officials' ever-diminishing legitimate expectation of privacy.⁵⁹

Another possible concern is that the federal officials covered by the E.G.A. are required to disclose financial information pertaining to their spouses and dependent children.⁶⁰ The necessity for "family disclosure" was explained in *County of Nevada v. MacMillen*:⁶¹

Common sense tells us that although an official may have no economic interest in [the property of a spouse or child], nevertheless he may react favorably, or without total objectivity, to a proposal which could materially enhance the value of that property. Dis-

55. 5 U.S.C. app. § 201(a)-(f) (Supp. III 1979).

56. *Duplantier v. United States*, 606 F.2d at 670.

57. *Cf. Comer v. City of Mobile*, 337 So. 2d 742, 752-53 (Ala. 1976) (a provision in a state ethics statute requiring certain public officials in cities whose populations were greater than 15,000 to file disclosure statements was held to be arbitrary and capricious).

58. *See, e.g., Gideon v. Alabama State Ethics Comm'n*, 379 So. 2d 570 (Ala. 1980) (upholding statute with \$15,000 threshold); *Montgomery County v. Walsh*, 274 Md. 502, 336 A.2d 97 (1974) (upholding a statute that covered "a broad range of governmental officials and employees who exercise significant governmental authority, whether they be elected or appointed"); *Hunter v. City of New York*, 88 Misc. 2d 562, 391 N.Y.S.2d 289 (Sup. Ct. 1976) (upholding a disclosure statute that applied to city officials earning \$25,000 a year or more).

59. *See Duplantier v. United States*, 606 F.2d at 670; *Plante v. Gonzales*, 575 F.2d at 1135-36; *County of Nevada v. MacMillen*, 11 Cal. 3d 662, 671 n.7, 522 P.2d 1345, 1350 n.7, 114 Cal. Rptr. 345, 350 n.7 (1974); *Illinois State Employees Ass'n v. Walker*, 57 Ill. 2d at 526, 315 N.E.2d at 16; *Lehrhaupt v. Flynn*, 129 N.J. Super. 327, 323 A.2d 537, 540 (Super. Ct. Ch. Div. 1974), *aff'd*, 140 N.J. Super. 250, 261, 356 A.2d 35, 41-42 (Super. Ct. App. Div. 1976); *Hunter v. City of New York*, 88 Misc. 2d at 577-78, 391 N.Y.S.2d at 301. *See also Fritz v. Gorton*, 83 Wash. 2d at 294-99, 517 P.2d at 923-25 (discussing the public's emerging right to know in the first amendment context: "[T]he right to receive information is the fundamental counterpart of the right of free speech.").

60. 5 U.S.C. app. § 202(e)(1) (Supp. III 1979).

61. 11 Cal. 3d 662, 522 P.2d 1345, 114 Cal. Rptr. 345 (1974).

closure might substantially inhibit any such sympathetic reaction, thereby promoting the act's goal of honesty and impartiality in government.⁶²

The court ruled that while the statute infringed upon the privacy of the official's family, the public's interest in honest, impartial government officials outweighed the interest of privacy in financial affairs.⁶³ Thus, family disclosure has been held a reasonable and necessary adjunct to disclosure by public officials.⁶⁴

In addition to requiring financial information about a public official's immediate family, the E.G.A. also requires information about sources of an official's outside earnings and the nature of service performed for such earnings. Similar statutory provisions have been attacked for indirectly requiring the disclosure of legally privileged information.⁶⁵ For example, such a statute could require a public official who also practices psychiatry to disclose the names of his clients, thereby breaching the doctor-patient privilege and violating patient privacy. The "secondary source" problem is avoided in the E.G.A. by a provision excepting from disclosure "any information which is considered confidential as a result of a privileged relationship, established by law."⁶⁶

As mentioned at the outset of this article, most of the financial information required by the E.G.A. may be disclosed in the form of "value categories."⁶⁷ However, in the case of certain gifts⁶⁸ and specified forms of

62. *Id.* at 676, 522 P.2d at 1353, 114 Cal. Rptr. at 353. The commonality of financial interests between government employees and their families is also reflected in 18 U.S.C. § 208, a criminal conflict of interest statute that prohibits federal employees from participating in matters in which they know their spouses or dependent children have a pecuniary interest.

63. *Id.* at 671, 522 P.2d at 1350, 114 Cal. Rptr. at 350.

64. *See also* *Gideon v. Alabama State Ethics Comm'n*, 379 So. 2d at 575; *County of Nevada v. MacMillen*, 11 Cal. 3d at 676, 522 P.2d at 1353, 114 Cal. Rptr. at 353; *Illinois State Employees Ass'n v. Walker*, 57 Ill. 2d at 527-28, 315 N.E.2d at 17; *Stein v. Howlett*, 52 Ill.2d at 570, 289 N.E.2d at 409; *Montgomery County v. Walsh*, 274 N.W.2d at 518, 336 A.2d at 107-08; *Advisory Opinion on Constitutionality of 1975 P.A. 227 (Questions 2-10)*, 396 Mich. at 506-07, 242 N.W.2d at 20; *Hunter v. City of New York*, 88 Misc. 2d at 574, 391 N.Y.S.2d at 299; *Fritz v. Gorton*, 83 Wash. 2d at 294, 517 P.2d at 923; *In re Kading*, 70 Wisc. at 527-28, 235 N.W.2d at 418.

65. *Plante v. Gonzales*, 575 F.2d at 1137; *Labor's Educ. and Political Club v. Danforth*, 561 S.W.2d 339, 349-50 (Mo. 1977); *Hunter v. City of New York*, 88 Misc. at 570-71, 391 N.Y.S.2d at 296-97.

66. 5 U.S.C. app. § 202(a)(6)(B) (Supp. III 1979).

67. *See* note 5 and accompanying text *supra*. By utilizing these categories, an official need not report the exact value of income received but may approximate the value by placing the item within a dollar amount range. For instance, under § 202(a)(1)(B), income from dividends, rent, interest, and capital gains are to be reported in the following categories:

(i) not more than \$1,000,

income,⁶⁹ exact dollar amounts or good faith estimates are required.

Several state courts have virtually conditioned the constitutionality of financial disclosure statutes on their use of value ranges rather than exact dollar amounts.⁷⁰ In *Plante*, the Fifth Circuit rejected an argument by Florida state senators that all of the benefits of the disclosure statute could be accomplished without resort to specific figures.⁷¹ The court ruled that, "[w]hile sufficiently narrow ranges would convey much useful information, increasing the specificity will increase the value of the information."⁷² Furthermore, "[w]hile the incremental benefit may be slight, the incremental harm is even slighter."⁷³

Alternatively, it could be argued that the naked certainty of exact amounts leaves nothing to the imagination and is, at least philosophically, far more intrusive than even the scantiest value ranges. In any event, most of the E.G.A.'s disclosure requirements are directed toward value categories and a completed financial report falls far short of a net worth statement. Thus, while systematic requirements for exact figures would produce valuable information, there is little or nothing to be gained from requiring, as the E.G.A. does, the disclosure of exact amounts in only a few instances. Nevertheless, the few instances of exact amount disclosure probably do not amount to an unconstitutional intrusion.

II. SEARCH AND SEIZURE

In a sense, we have already touched upon the fourth amendment's right

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- (ii) greater than \$1,000 but not more than \$2,500,
 - (iii) greater than \$2,500 but not more than \$5,000,
 - (iv) greater than \$5,000 but not more than \$15,000,
 - (v) greater than \$15,000 but not more than \$50,000,
 - (vi) greater than \$50,000 but not more than \$100,000,
 - (vii) greater than \$100,000.

68. 5 U.S.C. app. § 202(a)(2)(B) (Supp. III 1979). Included within this category are all gifts with a fair market value of \$36 or more other than transportation, lodging, food or entertainment, received from any source other than a relative, and aggregating \$100 or more in value.

69. *Id.* § 202(a)(1)(A). Included within this category is all income received from any source other than a current United States government salary, dividends, rents, interest and capital gains.

70. See *County of Nevada v. MacMillen*, 11 Cal. 3d at 671, 522 P.2d at 1350, 114 Cal. Rptr. at 350; *Illinois State Employees Ass'n v. Walker*, 57 Ill. 2d at 527, 315 N.E.2d at 17; *Montgomery County v. Walsh*, 274 Md. at 502, 336 A.2d at 97; *Klaus v. Minnesota State Ethics Comm'n*, 209 Minn. 430, 437, 244 N.W.2d 672, 676 (1976); *In re Kading*, 70 Wis. at 528, 235 N.W.2d at 418.

71. 575 F.2d at 1136.

72. *Id.*

73. *Id.*

to be secure from unreasonable searches and seizures, because this right is also a component of constitutional privacy.⁷⁴ Having found the E.G.A.'s disclosure requirements to be a reasonable intrusion into the financial privacy of public servants, it would appear that this scheme of mandatory disclosure could only be characterized as a reasonable search. The fourth amendment, of course, does not prohibit reasonable searches.⁷⁵

Few cases have dealt with financial disclosure as a search and seizure. In *O'Brien v. DiGrazia*,⁷⁶ several Boston policemen were ordered to complete an extensive financial questionnaire after their names had been found on a list in the possession of a man known to be involved in organized crime. The Police Commissioner demanded financial information only after he had cause to suspect the patrolmen's integrity. Upholding the constitutionality of the forced disclosure, the Court of Appeals for the First Circuit ruled that: "even if the Fourth Amendment applies to this sort of intrusion, the Commissioner's order is not so lacking in justification as to be an 'unreasonable' invasion of the patrolmen's 'legitimate expectation of privacy.'" ⁷⁷ In a footnote, the court further stated: "Even in the absence of any basis for suspicion on the part of the Commissioner, a requirement that police officers reveal their finances to the Commissioner serves the public interest in an honest force."⁷⁸

In line with the preceding comments on the right to privacy, it follows that the system of compulsory financial disclosure set forth in the E.G.A. does not violate the fourth amendment. The legitimate expectation of privacy of public servants—like that of the police officers in *DeGrazia*—is limited by the positions of responsibility they hold.⁷⁹

III. OVERBREADTH

The overbreadth doctrine is based on the principle that "a governmental purpose to control or prevent activities constitutionally subject to state reg-

74. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

75. *Elkins v. United States*, 364 U.S. 206, 222 (1960).

76. 544 F.2d 543 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

77. *Id.* at 546 (citations omitted).

78. *Id.* at 546 n.4. *See also* *Moyer v. Bronwell*, 137 F. Supp. 594, 605-06 (E.D. Pa. 1956) (the fourth amendment does not prohibit the government from using an IRS employee's mandatory financial disclosure report in a prosecution for making false statements on the same report); *Advisory Opinion on Constitutionality of PA 270 (Questions 2-10)*, 396 Mich. at 483, 242 N.W.2d at 21 (if compelled financial disclosure is a search, it is a reasonable search within the fourth amendment if it is accomplished by the least intrusive method).

79. *See Nixon v. Administrator of General Services*, 433 U.S. at 425, 455, 465; *Plante v. Gonzalez*, 575 F.2d at 1135-36.

ulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."⁸⁰ Recent Supreme Court rulings have limited the application of the overbreadth doctrine to the first amendment context, however, and then only if the overbreadth is "substantial [when] judged in relation to the statute's plainly legitimate sweep."⁸¹

Nevertheless, several cases considering the legality of financial disclosure statutes have spoken in terms of overbreadth. In *City of Carmel-by-the-Sea v. Young*,⁸² a California disclosure law was set aside in its entirety because it was overbroad and violative of privacy. Among the provisions at issue was a requirement for public disclosure of the nature and extent of all investments of spouses and minor children in excess of \$10,000. The California Supreme Court found the provision overbroad because "no effort [had been] made to relate the disclosure to financial dealings or assets which might be expected to give rise to a conflict of interest."⁸³ The court required that there be some "rational connection with . . . the functions or jurisdiction of any particular agency, . . . or the functions or jurisdiction of any particular public officer or employee."⁸⁴

In support of its analysis, the California court cited *Shelton v. Tucker*,⁸⁵ a landmark overbreadth decision. There, the Supreme Court held that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."⁸⁶

A subsequent version of the California disclosure statute was upheld in *County of Nevada v. MacMillen*.⁸⁷ The new law was held to contain sufficient assurances against "unnecessary intrusions into personal privacy."⁸⁸ In addition to eliminating an exact dollar amount disclosure requirement, the legislature excepted from disclosure any interest which "could not be affected materially by any action, failure to act or decision taken by the public official acting within the scope of his official duties."⁸⁹

80. NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 307 (1964).

81. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). *See also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 60 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975); Parker v. Levy, 417 U.S. 733, 760 (1974).

82. 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970).

83. *Id.* at 269, 466 P.2d at 232, 85 Cal. Rptr. at 8.

84. *Id.*

85. 364 U.S. 479 (1960).

86. *Id.* at 488.

87. 11 Cal. 3d 662, 522 P.2d 1345, 114 Cal. Rptr. 345 (1974).

88. *Id.* at 672, 522 P.2d at 1350, 114 Cal. Rptr. at 350.

89. *Id.* at 675, 522 P.2d at 1353, 114 Cal. Rptr. at 353.

In an advisory opinion by the Supreme Court of Michigan,⁹⁰ a financial disclosure statute was found overbroad because it demanded the same degree of financial disclosure from the governor of the state as it did from a city clerk, despite differences in their spheres of influence and differences in the ranges of situations presenting potential conflicts of interest.⁹¹

Like the Michigan statute, the E.G.A. takes an across-the-board approach to financial disclosure, such that a GS-16 is obliged to divulge the same categories of information as the President of the United States. It would be simplistic, however, to require less disclosure from the GS-16, simply because his or her position affords fewer possibilities for conflicts of interest. As the court in *Lehrhaupt v. Flynn*⁹² stated:

Overbreadth is not tested by the number of items required to be disclosed or by the depth of inquiry. The constitutional validity of such an ordinance from the viewpoint of overbreadth is rather tested by a rational relationship between the legislative purpose and the disclosure requirements and whether the full objective of the regulation can be achieved by any other more limited means.⁹³

In a different approach to overbreadth, the court in *Hunter v. City of New York*⁹⁴ held that a New York financial disclosure statute violated due process because it failed to allow reporting employees an opportunity to challenge the need for public disclosure of personal financial matters unrelated to employees' jobs. The court recognized that there are financial matters which are so personal and so unrelated to a public servant's responsibilities that no useful purpose could be served by its disclosure. The court noted that "[t]he right to shield from one's friends as well as one's critics details that have no bearing whatsoever upon the performance of the employee's duties should be accorded to the employee."⁹⁵

While allowing up to sixty days for the agency to review the reports,⁹⁶

90. Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich. 465, 242 N.W.2d 3 (1976).

91. *Id.* at 506, 242 N.W.2d at 19-20.

92. 140 N.J. Super. 250, 356 A.2d 35 (Super. Ct. App. Div. 1976) (affirming a lower court's decision to uphold a local financial disclosure ordinance).

93. *Id.* at 264, 356 A.2d at 43.

94. 58 A.D.2d 136, 396 N.Y.S.2d 186 (App. Div. 1977), *aff'd*, 44 N.Y.2d 108, 376 N.E.2d 928, 405 N.Y.S.2d 455 (1978).

95. *Id.* at 141, 396 N.Y.S.2d at 189. *See also* *Evans v. Carey*, 53 A.D.2d 109, 385 N.Y.S.2d 965 (App. Div. 1976), *aff'd*, 40 N.Y.2d 1008, 359 N.E.2d 983, 391 N.Y.S.2d 393 (1976) (upholding an executive order for financial disclosure which established a Board of Public Disclosure to review completed financial reports prior to public disclosure and to evaluate specific privacy claims).

96. 5 U.S.C. app. § 206(a) (Supp. III 1979).

the E.G.A. requires that executive branch financial reports be made available for public disclosure within fifteen days after having been received by the agency.⁹⁷ Thus, there is no statutory requirement that reports be reviewed before they are made available to the public.⁹⁸ Furthermore, the E.G.A. does not provide a generally available mechanism for privacy or relevancy challenges prior to publication.⁹⁹

Thus, a liberal court might be sympathetic to a due process attack on the E.G.A.'s failure either to provide for prepublication agency review or for an opportunity to assert specific privacy claims.¹⁰⁰ Although the legislature could not have tailored the E.G.A.'s disclosure requirements to each covered individual, the Office of Government Ethics could be given authority¹⁰¹ to review employee privacy claims. Opponents of such administrative review probably would argue that such a procedure would be overly burdensome and costly, subject to abuse for delaying tactics, and that a uniform disclosure policy would be fairer to all concerned.

In *Slevin v. City of New York*,¹⁰² members of the New York City Fire Department challenged the constitutionality of a law requiring financial disclosure by all city employees and officials earning more than \$30,000 per year. The plaintiff class of battalion chiefs, deputy chiefs, medical officers and their spouses argued that, because their positions in the fire department gave them little opportunity for graft, they should not be asked to make financial disclosures as extensive as those required of politicians, policy-makers and other officials with greater opportunity for involvement in corrupt practices.¹⁰³

97. *Id.* § 205(b).

98. The Act does not specify deadlines for review of reports filed by legislative (§ 105(a)) and judicial (§ 306(a)) officials.

99. While there is no generally available waiver mechanism, some "special" government employees who work less than 130 days of the calendar year can avoid the entire reporting requirement if the Office of Government Ethics determines that conflicts of interest are unlikely and public financial disclosure is unnecessary. See E.G.A. § 201(i) and 5 C.F.R. § 734.205 (1981). A waiver of the reporting requirement is also available for certain gifts which are determined to be "purely personal." See E.G.A. § 202(a)(2)(D) and 5 C.F.R. § 734.303(g) (1981).

100. See, e.g., *Slevin v. City of New York*, 477 F. Supp. 1051, 1057 (S.D.N.Y. 1979); *American Fed'n of Gov't Employees, Local 421 v. Schlesinger*, 443 F. Supp. 431, 434 (D.D.C. 1978).

101. It may be argued that this authority has already been given. See 5 U.S.C. app. § 402(b)(1) (Supp. III 1979) (Authority and Functions of the Office of Government Ethics). This section permits the Director of the Office of Government Ethics to develop and recommend rules and regulations pertaining to ethics, conflicts of interest and procedures for filing and reviewing financial statements in the executive branch.

102. 477 F. Supp. 1051 (S.D.N.Y. 1979).

103. *Id.* at 1056-57.

The plaintiffs also objected to the requirement that their financial reports be made available for public inspection without any showing of need by persons wanting to see the reports. The court characterized the plaintiffs' concern about unnecessary embarrassment as "especially worthy of careful consideration" despite the fact that the law in question provided for waiver of public disclosure for material determined by the Board of Ethics to be of a "highly personal nature."¹⁰⁴ The court appeared to share the plaintiffs' misgivings that there are "many things that would cause embarrassment which might not be deemed 'highly personal' by the Board of Ethics."¹⁰⁵ Furthermore, the New York law failed "to regulate the handling of the reports and privacy claims or to specify punishments for individuals guilty of mishandling them."¹⁰⁶ The court found the New York law overbroad and vague and preliminarily enjoined the city from enforcing the law against the plaintiffs pending a final decision.¹⁰⁷ At this writing, no final ruling has been issued.

The *Slevin* court's strict scrutiny of a financial disclosure statute is unique. The great majority of courts have refused to second-guess their legislatures as to whether the information required to be disclosed is "necessary," or whether the objectives of the statute could be met by less intrusive means. The majority approach was characteristically set forth in *Goldtrap v. Askew*:¹⁰⁸

It was not necessary that the Legislature experiment with less in-

104. *Id.* at 1057.

105. *Id.* The court cited the following examples: a father who desires to raise his children without disclosing to them that he is relatively wealthy; a divorced individual who is trying to avoid disclosing to a former spouse that he or she has been able to acquire substantial assets; a person who is trying to avoid having friends and relatives ask to borrow money; a person who desires to avoid being solicited by salesmen. *Id.*

106. *Id.* at 1058. By way of comparison, § 205(b)(2) requires those who wish to examine financial disclosure statements filed under the E.G.A. to identify themselves and to acknowledge in writing the statute's prohibitions against misuse of the data disclosed. Section 205(c) prescribes a \$5,000 civil penalty for using a report:

- (A) for any unlawful purpose;
- (B) for any commercial purpose, other than by news and communications media for dissemination to the general public;
- (C) for determining or establishing the credit rating or any individual; or
- (D) for use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

5 U.S.C. app. § 205(c) (Supp. III 1979).

107. 417 F. Supp. 1051, 1058, 1060 (S.D.N.Y. 1979).

108. 334 So. 2d 20, 22 (Fla. 1976). *Accord*, *Illinois State Employees Ass'n v. Walker*, 57 Ill. 2d at 527, 315 N.E.2d at 19; *Stein v. Howlett*, 52 Ill. 2d at 578, 289 N.E.2d at 413; *Montgomery County v. Walsh*, 274 Md. at 519, 336 A.2d at 108; *Lehrhaupt v. Flynn*, 129 N.J. Super. at 333, 323 A.2d at 540; *Hunter v. City of New York*, 88 Misc. 2d at 566-67, N.Y.S.2d at 300; *Fritz v. Gorton*, 83 Wash. 2d at 300-01, 517 P.2d at 926.

trusive or more particularized disclosure laws, or that less rigid disclosure thresholds be established. In this area the Legislature need only adopt a uniform code which requires disclosure of matters reasonably relevant to the duties of public office. We agree with the Supreme Court of Washington that it would be 'an insurmountable legislative task to tailor disclosures to each of literally a myriad of public posts, and an anomaly to require each individual to make a personal determination as to what items of his financial affairs would be relevant.'¹⁰⁹

Accordingly, a court considering the E.G.A. is not likely to utilize the traditional overbreadth analysis of searching for less intrusive alternatives to each disclosure requirement.

Consider, for example, the E.G.A.'s provisions in the problem area of family disclosure. Gifts and reimbursements to the spouse need not be reported if they were received "totally independent of the spouse's relationship to the reporting individual."¹¹⁰ The spouse's business or investment interests need not be reported if they fall within a three-part test for ruling out involvement of the reporting official,¹¹¹ and no disclosure need be made with respect to spouses who are divorced or legally separated from the reporting official.¹¹² Statutory exceptions such as these insure that reporting officials are required to disclose only the information necessary to accomplish one or more of the legitimate purposes of the legislation.

IV. VAGUENESS

A law requiring financial disclosure is not constitutionally valid unless there is a substantial correlation between the information demanded and potential conflicts of interest involving the reporting official.¹¹³ Accordingly, the requisite nexus must be defined in each statute. Several laws which have attempted to insure comprehensive but not overbroad disclosure have resorted to imprecise language and have been challenged on the

109. 334 So. 2d at 22 (citations omitted).

110. 5 U.S.C. app. § 202(e)(1)(B) and (C) (Supp. III 1979).

111. *Id.* § 202(e)(1)(D) excepts from disclosure items:

(i) which the reporting individual certifies represent the spouse's or dependent child's sole financial interest or responsibility and which the reporting individual has no knowledge of, (ii) which are not in any way, past or present, derived from the income, assets, or activities of the reporting individual, and (iii) from which the reporting individual neither derives, nor expects to derive, any financial or economic benefit.

Id.

112. *Id.* § 202(e)(2).

113. *Buckley v. Valeo*, 424 U.S. at 64.

basis of vagueness.¹¹⁴

For example, in *Dunphy v. Sheehan*,¹¹⁵ a state law requiring public financial disclosure was struck down for vagueness. The offending provision required disclosure of real estate interests located “within the jurisdiction of the officer’s public agency”¹¹⁶ but failed to define “jurisdiction.” The court stated:

Apparently, the public officer must make this decision for himself, and at the risk of being charged with perjury should his decision later be found erroneous. . . . The public office holder should not have to guess regarding his duty to disclose. That duty must be expressed clearly if criminal sanctions for breach are authorized.¹¹⁷

In an advisory opinion by the Supreme Court of Michigan,¹¹⁸ a disclosure provision requiring public officials to report “what they know or have reason to know” about the finances of their immediate families, at the expense of criminal penalties—\$1,000 fine, ninety days in jail, loss of office—was found to “present very real problems of vagueness.”¹¹⁹ The court ruled that the statutory language lacked the specificity necessary “to alert individuals to the responsibility imposed upon them *to discover* the information required to be disclosed.”¹²⁰

Only one of the E.G.A.’s disclosure provisions appears to present a seri-

114. A statute is void for vagueness if it “forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). *See also* *Buckley v. Valeo*, 424 U.S. at 76-78; *Illinois State Employees Ass’n v. Walker*, 57 Ill. 2d at 514, 315 N.E.2d at 13-14; *Stein v. Howlett*, 52 Ill. 2d at 575, 289 N.E.2d at 411; *Hunter v. City of New York*, 88 Misc. 2d at 568, 391 N.Y.S.2d at 289.

115. 92 Nev. 259, 549 P.2d 332 (1976).

116. *Id.* at 263, 549 P.2d at 335.

117. *Id.*

118. 396 Mich. 465, 242 N.W.2d 3.

119. *Id.* at 507, 242 N.W.2d at 20.

120. *Id.* (emphasis added). *Cf. Lehrhaupt v. Flynn*, 129 N.J. Super. 327, 323 A.2d 537 (Super. Ct. Ch. Div. 1974) (township ordinance requiring officials to disclose the finances of their spouses—regardless of the potential nonavailability of such information under state law—on pain of criminal penalties and loss of office, held unconstitutional; no specific doctrine cited.) This case is distinguishable because (1) the E.G.A. has no *criminal* penalties for failure to disclose; (2) a provision requiring officials to make “every reasonable effort to obtain the required information” from their spouses, initially found in S. 555, 95th Cong., 1st Sess. § 302(c)(2)(B) (1977), was dropped from the final version of E.G.A.; and (3) the E.G.A. being a federal law, would most likely preempt any state laws protecting the confidentiality of finances as between spouses. *Cf. County of Nevada v. MacMillen*, 11 Cal. 3d at 676 n.11, 522 P.2d at 1354 n.11, 114 Cal. Rptr. at 354 n.11 (“In the rare case in which the information [about the spouse’s financial interests] is withheld or truly unavailable following a good faith effort to ascertain it, the official undoubtedly would be excused from a technical failure to comply with the act.”).

ous question of vagueness. That provision excepts from disclosure gifts and reimbursements received by an employee's spouse when the circumstances are "totally independent of the spouse's relationship to the reporting individual."¹²¹

Based on the legislative history, it appears that the E.G.A.'s "totally independent" reporting exception turns on the donor's motive.¹²² This subjective approach is unfortunate for two reasons. First, neither the reporting individual nor the spouse is in a position to accurately determine the intent of the donor. Second, it would be very difficult to disprove in court a donor's stated donative motive or a donee's stated understanding of the donor's motive. Nevertheless, while the E.G.A.'s "totally independent" provision is of questionable legislative wisdom, it is probably not so unclear as to be unconstitutionally vague.

121. 5 U.S.C. app. § 202(e)(1)(B) (Supp. III 1979).

122. The legislative history indicates that the language in question was taken from the H.R. 1, 95th Cong., 2d Sess. (1978), the House version of the E.G.A., as part of a conference committee compromise on family disclosure. The conference reports, however, are silent on the subject. See H.R. REP. NO. 1756, 95th Cong., 2d Sess. 65 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 4216, 4381; S. REP. NO. 127, 95th Cong., 2d Sess. 65 (1978).

Prior to H.R. 1, the "totally independent" language appeared in the never-enacted Legislative Branch Disclosure Act of 1977. H.R. 7401, 95th Cong., 1st Sess., 123 CONG. REC. 16246 (1977). Section 4(d)(1)(B) and (C) of that bill excepted from disclosure gifts and reimbursements received by a spouse "totally independent of, and . . . not in any way, directly or indirectly, related to the spouse's relationship to the individual reporting." *Id.* The House Ethics Committee explained the provision as follows:

If such items are received by a spouse "because of" the relationship to the reporting individual, then they should be disclosed. However, if gifts or reimbursements are received totally independent of any relationship to a Member of Congress, then they are irrelevant to the purpose of disclosure; and need not be disclosed. For instance, it would be ridiculous to require disclosure of any reimbursements a spouse received while traveling on business trips or to require disclosure of an award which the spouse received for a personal achievement totally unrelated to the public official.

H.R. REP. NO. 574, 95th Cong., 1st Sess. 25 (1977) (citation omitted).

The committee's advisory opinion on the meaning of "indirect" gifts in House Rule XLIII is also instructive:

A spouse or dependent may frequently receive a gift from an employer or another person which is prompted by recognition of their services, friendship, or some other consideration unrelated to the official responsibilities of the Member, officer, or employee. When it is clear that such gifts are truly independent of the Member, officer, or employee and would have been offered regardless of the donee's relation to that person, such gifts would not be considered as indirect gifts for purposes of Rule XLIII. However, when it is apparent that the gift may not have been offered *but for* the donee's relation to a Member, officer, or employee, such a gift would constitute an indirect gift to the Member, officer, or employee.

Id. at 74-75.

V. SELF-INCRIMINATION

The fifth amendment may not be asserted in every instance where the government requires a person to disclose information.¹²³ However, when the government's questions are directed not at the public at large, but at a "highly selective group inherently suspect of criminal activities" and the area of inquiry is "permeated with criminal statutes,"¹²⁴ the fifth amendment privilege is a valid defense to a prosecution for failure to disclose.¹²⁵

The financial report required by the E.G.A. is relatively neutral on its face and is directed not at individuals but at their designated positions, responsibilities or pay rate classifications. Accordingly, a total refusal to file a financial report could not be justified by relying on the fifth amendment. The privilege could, however, be properly asserted for particular questions or in defense in a civil action¹²⁶ brought under E.G.A. section 304(a).

With few exceptions,¹²⁷ an individual's mere assertion of the privilege is not grounds for removal from office. In *Garrity v. New Jersey*,¹²⁸ the Supreme Court held that a public employee who answers investigatory questions knowing that failure to answer would be grounds for removal from office does not answer voluntarily, and in so answering does not waive the fifth amendment right against self-incrimination. Such questioning is said to be inherently coercive because it is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice."¹²⁹ Because the government may not present employees with "a choice between surrendering their constitutional rights or their

123. See, e.g., *California v. Byers*, 402 U.S. 424, 428 (1971) (upholding statute requiring motorists to stop and furnish their names and addresses after involvement in an automobile accident); *United States v. Sullivan*, 274 U.S. 259, 260 (1927) (upholding statute requiring the filing of tax returns).

124. *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79 (1965).

125. *Id.* (registration of communists); *Leary v. United States*, 395 U.S. 6 (1969) (marijuana tax); *Marchetti v. United States*, 390 U.S. 39, 47 (1968); *Grosso v. United States*, 390 U.S. 62, 64 (1968) (wagering tax forms); *Haynes v. United States*, 390 U.S. 85, 98 (1968) (registration of certain firearms used principally by gangsters). In each of these cases, the Court found that mere compliance with the statutory disclosure requirements would give rise to a substantial risk of self-incrimination.

126. The Supreme Court has held that the fifth amendment privilege may be properly invoked in civil proceedings when there is a realistic threat of *criminal* prosecution. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977); *Malloy v. Hogan*, 378 U.S. 1, 11 (1964).

127. Recent Supreme Court dicta suggests that "a government policymaking official holding office at the pleasure of the President" could be fired merely for invoking the fifth amendment. See *Lefkowitz v. Cunningham*, 431 U.S. at 808 and dissenting opinion by Stevens, J. at 811.

128. 385 U.S. 493 (1967).

129. *Id.* at 497.

jobs,"¹³⁰ it has been further held that a public employee may not be forced to answer questions unless he or she is given so-called "use" immunity.¹³¹ According to the use immunity doctrine, an employee may not be compelled to answer potentially incriminating questions unless he is first "duly advised of his options and the consequences of his choice"¹³² and is "adequately assured of protection against the use of his answers or their fruits in any criminal prosecution."¹³³

To summarize, a public employee may not be fired for merely refusing to answer potentially incriminating questions. However, if use immunity is given, the employee must answer. Refusal to answer constitutes grounds for dismissal.¹³⁴ If the employee answers, the information disclosed may not be used in a criminal prosecution. The information may, however, be used in administrative proceedings.¹³⁵

Furthermore, an employee who answers the questions on the financial statement may not subsequently assert the fifth amendment privilege as to the answers. The privilege must be asserted initially by refusal to answer the questions or it is lost permanently.¹³⁶ Moreover, the privilege against self-incrimination is a personal right, which may be asserted only by the person threatened with prosecution.¹³⁷ Thus, in a situation where a third party, such as a spouse, would be incriminated by a required financial disclosure, the reporting individual could not assert the privilege on behalf of the third party. Nor could the third party claim the privilege to prevent the reporting individual from making the incriminating disclosure.

IV. SUMMARY AND CONCLUSION

The Constitution guarantees every person a legitimate expectation of privacy from governmental intrusion.¹³⁸ This concept of a constitutional

130. *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280, 284 (1968).

131. *Kastigar v. United States*, 406 U.S. 441 (1972); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964).

132. *Kalkines v. United States*, 473 F.2d 1391, 1393 (Ct. Cl. 1973), quoting *Uniform Sanitation Men Ass'n v. Comm'r of Sanitation*, 426 F.2d 619, 627 (2d Cir. 1970).

133. *Id.*

134. *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. at 283-85.

135. *Id.* at 284.

136. *Garner v. United States*, 424 U.S. 648, 665 (1976); *United States v. Sullivan*, 274 U.S. 259, 263 (1927).

137. *United States v. Castillo*, No. 75-2168, slip op. at 10 (4th Cir. Sept. 22, 1976) (unpublished per curiam opinion), *cert. denied*, 429 U.S. 1075 (1977); *United States v. Haddad*, 527 F.2d 537, 539 (6th Cir. 1975), *cert. denied*, 425 U.S. 974 (1976), citing *Johnson v. United States*, 228 U.S. 457 (1913), where Justice Holmes said: "[A] party is privileged from producing the evidence, but not from its production." *Id.* at 458.

138. *Olmstead v. United States*, 277 U.S. 438, 471 (1928).

right of privacy has remained largely undefined.¹³⁹

Based upon decisions surveyed, mandatory financial disclosure for public officials may be legislated in a constitutionally permissible fashion. According to the majority view, a financial disclosure statute will not infringe the right of privacy if the required disclosures will reasonably promote one or more compelling governmental interests.¹⁴⁰ A minority of courts would further scrutinize the statutory provisions to ensure that they are the least intrusive means of accomplishing the underlying purposes of the law.¹⁴¹

As noted above, the court rulings on financial disclosure are instructive but not dispositive. For example, *Plante v. Gonzalez* upheld financial disclosure by elected officials and *Duplantier v. United States* upheld financial disclosure by appointed officials. These decisions could be disregarded if the courts consider the E.G.A.'s reporting requirements for career civil servants.¹⁴²

139. *Plante v. Gonzales*, 575 F.2d at 1127.

140. See notes 49-53 and accompanying text *supra*.

141. See notes 55-59 and accompanying text *supra*.

142. It is worth noting that six decisions upholding financial disclosure laws have been upheld by the Supreme Court. Three of these constitutional appeals were dismissed for want of a federal question. See *Stein v. Howlett*, 52 Ill. 2d 570, 289 N.E.2d 409 (1972); *Montgomery County v. Walsh*, 274 Md. 502, 336 A.2d 97 (1975); *Fritz v. Gorton*, 83 Wash. 2d 275, 517 P.2d 911 (1974). Such dismissals are determinations on the merits and are therefore entitled to precedential value as decisions of the Supreme Court. See *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Hicks v. Miranda*, 422 U.S. 322, 344 (1975); *Plante v. Gonzales*, 575 F.2d at 1125. Although the provisions of the disclosure statutes reviewed by the Supreme Court differ from those of the E.G.A., there is sufficient similarity to warrant a conclusion that mandatory public financial disclosure by public servants in positions of high responsibility is not *per se* violative of the Constitution.

