THE PUBLIC ADMINISTRATIVE LAW CONTEXT OF ETHICS REQUIREMENTS FOR WEST GERMAN AND AMERICAN PUBLIC OFFICIALS: A COMPARATIVE ANALYSIS

Mark Davies*

"Doch ach! Was hilft dem Menschengeist Verstand,
Dem Herzen Güte, Willigkeit der Hand,
Wenn's fieberhaft durchaus im Staate wütet
Und Übel sich in Übeln überbrütet?"
— Johann Wolfgang von Goethe.**

"This civil service law is the biggest fraud of the age. It is the curse of the nation. There can't be no real patriotism while it lasts."
— George Washington Plunkitt.***

TABLE OF CONTENTS

Introduction ....................................................... 320
I. Structure of Ethics Regulations for American Public Officials ............................................................ 324
II. The Historical Context of German Ethics Laws ...... 330
   A. German Ethics Laws in the Context of German Law............................................................. 331
   B. History of German Public Officials and German Public Officials Laws..................................... 333
      1. The Early Development and the Prussian General State Law of 1794................................. 333

* Visiting Associate Professor, Fordham University School of Law. A.B. Columbia College, 1971; J.D. Columbia University School of Law, 1975; German Academic Exchange Service Fellow, Philipps-Universität, Marburg, Germany, 1974-75. From September 1987 to July 1988, Prof. Davies was assistant counsel to the New York State Commission on Government Integrity, where he was the attorney in charge of the Commission's draft Municipal Ethics Act. The views expressed in this article are solely those of the author, who, however, wishes to express his appreciation to Dr. iur. Günter Weber, Ministerialrat a.d., for his assistance in interpreting the German law, and for his extensive critiques of drafts of this article.

** Faust, part II, act 1, lines 4778-81. "But ah! what good to mortal mind is sense,/What good to hearts is kindness, hands benevolence,/When through the state a fever runs and revels,/And evil hatches more and more of evils?" (George Madison Priest trans.).

2. The Second (Bismarck) Reich (1871-1918) 336
3. The Weimar Republic (1919-1933) and the Reichs Constitution of 1919 337
4. The Third Reich (1933-1945) and the German Public Officials Law of 1937 340
5. The Federal Republic of Germany 344

III. The Public Law Context of German Ethics Laws: The Authority and Rights of German Public Officials 346

A. An Overview of Ethics Laws for German Public Officials 346
1. Political Neutrality and Political Activities 348
2. Confidentiality 351
3. Self-dealing, Conflicts of Interest, and Gifts 351
4. Outside Business Activities 354

B. The Role of German Public Officials among German Public Servants 364

C. Constitutional and Public Law Bases for the German Professional Public Officialdom 371
1. Exercise of Governmental Authority 373
2. Continuation of Professional Public Officialdom 374
3. Special Relationship of Service and Loyalty 375
4. Merit Selection 376
5. Traditional Principles of Professional Public Officialdom 380

D. Rights of German Public Officials 382

Conclusion 389

**INTRODUCTION**

By fits and starts, as they lurch from one ethical crisis to another, American governments—national, state, and local—have sought, thus far largely in vain, to create and implement a coherent framework of ethical standards for government officials. It is the thesis of this article that all such attempts at ethics reform are destined to failure until legislators finally realize that ethical requirements do not exist in a vacuum but are part and parcel of a much larger public administrative law context. American legal writers have wholly failed to apprehend this simple truth: that the rights and obligations, including the ethical obligations, of public officials are but flip sides
of the same coin. One side may not be regulated without affecting
the other. "Rights and duties must counterbalance each other."
This article seeks to drive home that lesson by comparing the public
administrative law context of ethics laws for West German and
American public officials.

It must be emphasized at the outset that this article addresses
only ethics requirements for "public officials"—that is, those higher
level American public servants who, particularly at the state and
local level, are often exempted from many civil service requirements
and protections. Furthermore, it must be stressed that the admittedly
controversial views expressed here are intended not as a program
for reform but as an impetus to discussion, not as manna but as
medicine. There can be no sacred cows in the struggle for ethics
reform: political patronage, employment at will, civil service, and
affirmative action, for example, must all be reexamined.

The stumble-bum approach of American politicians to the revision
of ethics statutes has been demonstrated most recently by the debacle
over a new federal ethics law. On October 21, 1988, Congress passed
H.R. 5043, the Post-Employment Restrictions Act of 1988, which
would have added to existing law further restrictions upon the conduct
of federal officers, employees, and elected officials after they leave
government service.

To his credit, President Reagan, on November 26, 1988, pocket-
vetoed that bill as "flawed, excessive, and discriminatory." The
President was absolutely correct in concluding that "the final pro-
visions of this bill were poorly drafted, would have applied unevenly,
and would discourage from government service America's best talent
because of the unfair burdens it would impose. . . . [The proposed
Act] would have prohibited conduct of former Federal employees
unrelated to genuine ethical concerns." Not surprisingly, in the bill
Congress had seen fit to protect its own by subjecting its members
and employees to restrictions less onerous than those applied to
executive branch employees.4

1 H. Scheerbarth & H. Höffken, Beamtenrecht Lehr- und Handbuch 369
(5th ed. 1985). Translations in this article are by the author.
2 Memorandum of Disapproval for the Post-Employment Restrictions Act of
of Disapproval").
3 Id. at 1561-62.
4 Compare H.R. 5043's proposed amendments to 18 U.S.C. § 207(a)-(d) (1982)
with the bill's proposed amendments to 18 U.S.C. § 207(e) (1982). See also Reagan
Memorandum of Disapproval, at 1562. But see Additional Views of Hon. Peter W.
In a knee-jerk editorial ("An Opportunity on Ethics, Trashed"), the New York Times castigated Mr. Reagan for "throwing away the chance to strike a blow for clean government and repair his own damaged reputation on the 'sleaze' issue.") Common Cause President Fred Wertheimer also lost no time in jerking his knee, proclaiming that the President's veto "leaves the door wide open to further abuses and sleaze in government.

Both the Congress and the Times were in turn chastised by the director of the Washington office of the American Civil Liberties Union, who pointed out that "in seeking to criminalize lobbying and activities intended to influence the Government, Congress [in H.R. 5043] is regulating the freedom of political speech at the core of the First Amendment."

Members of the House Committee on the Judiciary themselves questioned the constitutionality of H.R. 5043, not only on First Amendment grounds but also on grounds of the speech and debate clause and "taking" without due process by prohibiting individuals from earning a living and practicing a profession. Indeed, it was reported that "[d]ozens of House and Senate members made it clear they voted for the bill only because it would have been politically unwise to vote 'no' on an ethics bill just before an election."

This entire charade would be laughable were it not for the desperate need for ethics reform. The Reagan administration itself has been characterized by some as the most corrupt in this century, with the possible exception of Warren Harding's. A popular cartoonist resorted

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7 Halperin & Harris, "On Ethics, Reagan Finally Did Right," N.Y. Times, Dec. 4, 1988, § 4, at 31, col. 1 (stating that "[b]y vetoing the so-called Ethics Bill, President Reagan finally did something that merited applause" but that "[i]nstead, he was denounced reflexively by many liberals and editorial board guardians of the Constitution who should have known better").

8 See Additional Views of Hon. Peter W. Rodino, Jr., Hon. Don Edwards, and Hon. Lamar Smith, accompanying H.R. REP. No. 1068, 100th Cong., 2d Sess., at 47-49, 54-58. Even the House Judiciary Report on H.R. 5043 conceded that post-employment restrictions raise "[a] number of constitutional issues . . . includ[ing] whether the proposed prohibition constitutes a bill of attainder; a 'taking' without due process of law (i.e., as a prohibition on earning a living and practicing a profession); and an unconstitutional prohibition on free speech, free association, and/or the right to petition for redress of grievances." H.R. Rep. No. 1068, 100th Cong., 2d Sess., at 12.

to listing name after name of administration members who had resigned under an ethical cloud; indeed, more than 100 administration officials were accused of wrongdoing, and two of the President’s closest advisers were convicted of ethics violations. Then-Vice President George Bush’s press secretary conceded that “[t]he term ‘politician’ is often a pejorative. People outside Washington curl their lip.” Not surprisingly, ethics—the “sleaze factor”—became an issue in the presidential campaign, as both sides pledged themselves to an administration of high ethical standards. Yet, despite his efforts to make good on his pledge, President Bush’s administration was almost immediately embroiled in controversies over the ethics of key aides. Needless to say, neither party has a monopoly on ethical problems, as former House Speaker Jim Wright could attest.

At the state and local level, ethics are no less in the air. In New York State, where the state legislature and New York City have been

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10 Gannett Westchester Newspapers, July 26, 1988, at A7, col. 1. Lyn Nofziger was convicted of violating the 1978 Ethics in Government Act; Michael K. Deaver was convicted of perjury. H.R. 5043 would have eliminated the compartmentalization of the White House into numerous agencies for ethics law purposes, the loophole that permitted Deaver to avoid an ethics law conviction. See also, e.g., N.Y. Times, Dec. 2, 1988, at A30, col. 1 (“Mr. Deaver’s Compartments”); id., July 19, 1988, at A1, col. 1 (“Prosecutor Finds Meese in the Clear in Major Scandals - Ethics Questioned”).

11 Statement by Sheila Tate, quoted in, Gannett Westchester Newspapers, July 26, 1988, at A7, col. 1.


13 Members of the President-elect’s transition team were required to sign a statement of “Transition Standards of Conduct.” That statement required those individuals to hold in confidence any non-public information; precluded them from using or permitting the use of any non-public information for private gain; required that they disqualify themselves from involvement in any particular transition matter that to their knowledge might directly conflict or appear to conflict with a financial interest of themselves, their family, friends, or business associates; and mandated that they protect federal property entrusted to them and not use it for purposes not directly related to transition activities. Attachment to Memorandum from Pres. Ronald Reagan for Heads of Departments and Agencies, dated Nov. 18, 1988. See also “Bush Plans Tough Ethics Message in First Working Day as President,” N.Y. Times, Jan. 23, 1989, at A1, col. 4; N.Y. Times, Jan. 12, 1989, at A1, col. 3 (describing ethics commission to be appointed by the new president); “Bush Offers Wide-Ranging Legislation on Ethics,” N.Y. Times, April 13, 1989, at B10, col. 3.

racked by scandal, Governor Mario Cuomo appointed a special commission to investigate unethical conduct in government and to make recommendations for reform. Shortly after the formation of that commission, the United States Attorney for the Southern District of New York announced that in an FBI sting operation, 105 of 106 municipal purchasing officials offered bribes had accepted them (the lone holdout wanted more money).15 Thus cynicism pervades the citizenry, and demoralization enfeebles honest public officials.

Yet for all the clamor for ethics reform, American legal writers, with the provincial air of gum-chonking American tourists, have given virtually no thought to how other countries have come to grips with these same, complex problems. West Germany, for example, has a stronger statutory tradition than the United States, a longer history of ethics regulation, and, most importantly, a view of ethics laws as an integral part of public law as a whole. Indeed, this author’s research has revealed that the whole of post-war American legal literature contains not one article on ethical requirements for public officials in civil law countries.16 The present article is meant as a first step toward filling that vacuum and providing some fresh insight into how one might approach ethics requirements for American public officials.

I. STRUCTURE OF ETHICS REGULATIONS FOR AMERICAN PUBLIC OFFICIALS

Before examining the public law context of German ethics laws, one needs as background a general understanding of the structure of ethical requirements for public officials in the United States. Ethics laws in this country have proceeded not from a comprehensive view of the rights and duties of public officials but largely in reaction to specific scandals, and until recently on a piecemeal basis. Thus, for example, "it was an environment of actual fraudulent claims, sale of information, claim chasing, overt sale of influence, improper diversion of public funds, corruption in public office, and wartime

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15 See N.Y. Times, Aug. 12, 1987, at A1, col. 2. It should be noted that the officials to whom the bribes were offered had been specifically targeted by the FBI as likely to accept them. See id.

contract frauds and favoritism” before and during the Civil War that produced the earliest federal statutes on conflict of interest.\textsuperscript{17} Those early statutes prohibited government employees from assisting in the prosecution of any claim against the United States (1853), forbade members of Congress and government officers from accepting payment for procuring a government contract for any person or for helping any person to procure the contract (1862), prohibited government employees from acting as officers or agents for the government in the transaction of business with any business entity of which they are an officer or in which they have a pecuniary interest (1863), and forbade government employees from rendering services for compensation before an executive branch agency in relation to any matter in which the United States is a party or is directly or indirectly interested (1864).\textsuperscript{18}

The Watergate scandal similarly produced a flurry of ethics legislation in federal, state, and local government, including, for example, the 1978 federal Ethics in Government Act,\textsuperscript{19} and numerous state ethics laws, such as Alabama’s Code of Ethics for Public Officials and Employees, which is one of the toughest state ethics laws in the nation and which applies to all Alabama state and local officials alike.\textsuperscript{20} In 1976 the National Municipal League undertook its Ethics Project, which in 1979 produced a Model State Conflict of Interest and Financial Disclosure Law. More recently, in response to the scandals noted at the outset of this article, New York State enacted an Ethics in Government Act covering, primarily, statewide elected officials, state officers and employees, state legislators, and state legislative employees;\textsuperscript{21} and in New York City the Charter Revision Commission proposed sweeping reforms to that municipality’s

\textsuperscript{17} Association of the Bar of the City of New York, Conflict of Interest and Federal Service 36 (1960).


own ethics code, reforms adopted by referendum on election day, November 8, 1988.\textsuperscript{22}

The courts have for the most part upheld carefully drafted ethics statutes. In addition, the Supreme Court has struck down on First Amendment grounds the dismissal of a public employee for political patronage reasons, at least unless the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.\textsuperscript{23}

Ethics laws in the United States usually have four major components: conflicts of interest prohibitions; financial disclosure requirements; penalties; and administrative provisions.\textsuperscript{24} The structure of those laws varies widely.\textsuperscript{25}

\textsuperscript{22} In a companion movement, the Congress and state legislatures have enacted statutes to restrict campaign expenditures, contributions, and political action committees. Most notable of those efforts is the Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3 (1972), codified as amended at 2 U.S.C. § 431 et seq. (1982). See also, e.g., Buckley v. Valeo, 424 U.S. 1, 23-59 (1976) (per curiam) (upholding FECA’s limitations on contributions by individuals and multicandidate political committees to political candidates and their committees, but striking down, as unconstitutional, restrictions on campaign expenditures by candidates from personal or family resources and on expenditures made independent of the candidate), and FEC v. National Conservative Political Action Committee, 470 U.S. 480, 490-501 (1985) (holding unconstitutional 26 U.S.C. § 9012(f) of the Presidential Election Campaign Fund Act, which provision made it a criminal offense for independent political committees to expend more than $1,000 to further the election of a Presidential candidate who has elected to accept public financing).


\textsuperscript{25} See Bigelow [Research Director of the NML Ethics Project], Draft Report to Commission on Government Integrity (Institute of Public Administration, March 1988) (hereinafter “Bigelow Report”).
"There are two basic philosophies regarding conflicts of interest. The first is: if the conflict is disclosed, for the most part that is sufficient. Recusal or disqualification from official action may be required in some cases but it is disclosure that is the true heart of the matter. If the action is a matter of public concern, that will be reflected at the next election. . . . The second philosophy maintains that there are certain activities which should be prohibited and others which should be limited.\(^{26}\) To those three methods of avoiding real or apparent conflicts of interest—disclosure, recusal, and prohibition—may be added a fourth: divestiture by the official of any interest that may cause a conflict.\(^{27}\)

The conflict of interest provisions in a comprehensive ethics law might, for example, prohibit public employees from taking an official action (or failing to take an official action) in order to gain a financial benefit for themselves or their family or business, or from otherwise using their public position for private financial gain. Most ethics acts prohibit public employees from seeking or accepting employment from any business that the employee’s department or agency regulates. Most ethics acts also restrict or prohibit public employees from being a party to, or having an interest in, government contracts, government procurement, or investment of public funds. Restrictions on the solicitation or receipt of gifts from persons having business dealings with the governmental entity are also common, as are restrictions on the use of confidential information for private gain. A general prohibition on public officials acquiring conflicts of interest is also not unusual.\(^{28}\)

More restrictive ethics acts might prohibit public officials from representing anyone before a government agency, except in an official capacity; from counseling persons, except in an official capacity,

\(^{26}\) Id., at 15.

\(^{27}\) See New York State Commission on Government Integrity, Ethics in Government Act: Report and Recommendations 12 (April 6, 1988).

about their business dealings with the government; from appearing in any matter against the interest of the governmental entity; or even from accepting any outside employment during the period of public service. 29 Among the most controversial provisions of any ethics law are post-employment restrictions, also known as "revolving door" provisions. 30 Violations of the revolving door prohibitions of the federal Ethics in Government Act formed the basis of the prosecution of Lyn Nofziger. 31

No less controversial are restrictions on public officials engaging in political activity or soliciting political contributions, for example contributions from other public officials or from persons with bids or applications pending before a government agency. 32 In this writer's experience, such restrictions are opposed by public officials and political party officials less on First Amendment grounds than for practical reasons. The lack of interested individuals to fill local political party positions is already critical; further restricting the pool of potential district leaders or committee persons is viewed as a possibly devastating blow to political organizations at the local level. Many elected officials also believe that they have an absolute right to require their senior advisors to provide financial and other support for re-election efforts.

Disclosure requirements are of two types, transactional and periodic. Transactional disclosure occurs when a public employee, faced


with a potential conflict of interest, discloses that conflict to the appropriate body, such as an ethics board. Transactional disclosure provisions thus only come into play when a specific, actual or potential conflict of interest arises. However, they often require that the affected employee recuse or disqualify himself or herself from acting with respect to the matter.

In this writer’s experience, provisions for periodic (usually annual) financial disclosure are the single most controversial part of an ethics law. However, such provisions

provide a mechanism to check whether the proper actions are taken when disclosure of a conflict or disclosure and recusal are required. They allow a way to discover if prohibited actions are taken. An important purpose is to make available sufficient relevant information to allow citizens to judge whether officials are acting in the public interest or too much in their own personal financial interest. They also serve to remind public officials to examine their actions in light of their holdings and to be aware of possible conflicts of interest or the appearance of conflicts of interest.

The Senate Report on the Ethics in Government Act of 1978 cited as further reasons for public financial disclosure the conclusions that such disclosure will increase public confidence in the government, will demonstrate the high level of integrity of the vast majority of government officials, will deter conflicts of interest from arising, will deter some persons who should not be entering public service from doing so, and will better enable the public to judge the performance of public officials.

The periodic disclosure provisions of ethics laws vary widely. Such laws might require the disclosure, for example, of the identity of the public official’s private employer, the nature of any private employment, professional services rendered, sources of income, clients or customers, investments, real estate interests, debts, leases or contracts with public entities, compensated representation before public entities, offices and directorships, retainers, fees or honoraria, reimbursements

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of travel expenses, and trusts for which the official is a trustee.\textsuperscript{36} Penalties also vary widely among the various ethics acts. Criminal penalties include fines and imprisonment, a maximum of ten years and $10,000 in Alabama, for example.\textsuperscript{37} Civil penalties include civil fines; warning, reprimand, suspension, or removal from office; the payment of damages to the municipality; and civil forfeiture, for example three times the amount of any ill gotten gain.\textsuperscript{38}

Most ethics acts are administered by some kind of board or commission. The structure of those boards, their powers and duties, their degree of centralization, and the qualifications of board members range widely, as do the types of public officials covered by the ethics acts.

Finally, some ethics laws regulate not only the public officials but certain private citizens as well. Bribery prohibitions are the most obvious. At least one state's ethics code for municipal officials requires bidders, or applicants for permits, to disclose family relationships or business dealings with any official who might pass upon the bid or application.\textsuperscript{39} One proposed ethics act would also make it a criminal offense for any person to induce a public official to violate the act, and prescribes debarment from public contracts as a penalty.\textsuperscript{40} Such restrictions on private citizens lie beyond the scope of this article.

\section*{II. The Historical Context of German Ethics Laws}

One cannot understand either German ethics laws or the public administrative law context of those laws without some idea of their historical development. Indeed, to a large extent history dictates


\textsuperscript{40} See N.Y. St. Comm'n Draft §§ 10-11. Cf. 18 U.S.C. § 207(j) (1982) (former officer or employee who violates revolving door provisions may be prohibited from appearing before, or communicating with, his or her former department or agency for up to five years).
Germany's integrated approach to the rights and ethical obligations of public officials.

A. German Ethics Laws in the Context of German Law

As a civil law system, German law derives from statute, not from case law. Like any legal system, Germany's strives for predictability, fairness, and uniformity of result. Similar cases should produce similar outcomes. Yet to achieve that uniformity, a German court, unlike its American counterpart, does not give substantial weight to prior decisions of courts of coordinate jurisdiction. Rather the German court, in interpreting the applicable statute, relies primarily on the views expressed by the various federal supreme courts and, to a lesser extent, on the distillation of cases by commentators on the statutory law. Commentators are accorded a higher status in Germany than in the United States, and several noted commentaries exist on each major area of the law.

Like the United States, West Germany is a federal republic and accordingly has both federal and state statutes. Article 70 of the West German Constitution empowers the German states to legislate “to the extent that this Constitution does not grant legislative authority to the Republic.” In areas that the Constitution has designated as lying within the exclusive jurisdiction of the Republic, states may legislate only to the extent expressly permitted by federal law.

In areas of concurrent jurisdiction, states may legislate to the extent that the Republic has not legislated in the area; however, the Republic may only legislate in such areas to the extent that a need exists for federal regulation, either because the matter cannot be effectively

41 Technically, the Constitution of the Federal Republic of Germany is not a “Constitution” (Verfassung) but a “Basic Law” (Grundgesetz, abbreviated as “GG”). “The Basic Law is provisional to the extent that, by its terms [GG art. 146], in the event of reunification [of the two Germanies] the entire German people would adopt a constitution in a free election. Until that time, however, the Basic Law has the same meaning as a constitution.” PRESSE- UND INFORMATIONSAMT DER BUNDESREGIERUNG, TATSACHEN ÜBER DEUTSCHLAND 90 (1972). The word “Constitution” is used throughout this article to refer to that Basic Law. It should also be noted that the FRG Constitution may be amended by a two-thirds vote of the Bundestag and Bundesrat (art. 79(1)-(2)); however, certain provisions - those establishing basic individual rights and the democratic and federal nature of the government - may not be thus amended (art. 79(3)).

42 GG art. 71. Such matters include, for example, foreign affairs, defense, federal citizenship and immigration, currency, customs, foreign commerce, federal railroads and air traffic, postal and telecommunications services, copyrights, and protection of industrial property rights. GG art. 73.
regulated by state laws, because regulation of the matter by a state could prejudice the interests of other states or of the nation, or because the preservation of legal or economic uniformity, in particular the preservation of the unity of living conditions beyond the territory of a state, so requires.\textsuperscript{43} As a result of the extensive concurrent jurisdiction of the Republic, many areas of law regulated by the states in the United States are regulated by federal statute in Germany, including, for example, civil and criminal procedure (in the Zivilprozessordnung and Strafprozessordnung), contract and tort law (in the Bürgerliches Gesetzbuch), and penal law (in the Strafrecht).\textsuperscript{44} By amendment to the Constitution, the Republic has been given concurrent jurisdiction over the salaries and pensions of public officials of the states.\textsuperscript{45}

Finally, in certain areas, the Republic may only enact "framework laws" (Rahmenvorschriften), which establish minimum standards with which state laws on the matter must comply. A framework law does not preempt consistent state legislation.\textsuperscript{46} In particular, the Republic may enact framework laws regulating the legal relations of members of the public service of the states, municipalities, and other public law bodies.\textsuperscript{47} Accordingly, this article primarily examines three statutes regulating public officials: the Bundesbeamten gesetz (Federal Public

\textsuperscript{43} GG art. 72. Such matters include, for example, civil law, criminal law, courts and court procedure, the legal profession, public welfare, economic law (e.g., mining, industry, crafts, trades, commerce, banking and stock exchanges, private insurance), labor law, the prevention of the abuse of economic power, agriculture, real property law, the medical profession, food, medicines and drugs, navigation and shipping, motor transport, traffic and highways, and environmental protection. GG art. 74.

\textsuperscript{44} See GG art. 74(1).

\textsuperscript{45} GG art. 74a; Bundesgesetzblatt ("BGBl.") I, 206 (March 18, 1971). However, laws regulating these matters require the consent of the Bundesrat. GG art. 74a(2).

\textsuperscript{46} See 4 BVERFGE [Decisions of the Federal Constitutional Court] 115 (1954). See generally W. THIELE, DIE ENTWICKLUNG DES DEUTSCHEN BERUFSBEAMTENTUMS 87-89 (1981). Furthermore, as with the exercise of its concurrent jurisdiction (GG art. 72(2)), the Republic may only enact framework laws to the extent a need exists for federal regulation. GG art. 75. However, in some instances framework laws will apply directly, that is, even in the absence of state legislation on the matter. See, e.g., Beamtenrechtsrahmengesetz (Public Officials Framework Law) ch. II (§§ 121-133).

\textsuperscript{47} GG art. 75(1). That provision would not apply to the extent that art. 74a does. Framework laws may also be enacted to regulate the general principles of higher education; the general legal relation of the press and film; hunting, conservation, and care of the countryside; land distribution, regional planning, and water conservation; and matters relating to registration and identity cards. GG art. 75(1a)-(5).
Officials Law (BBG); the Beamtenrechtsrahmengesetz (Public Officials Framework Law) (BRRG); and the Landesbeamtengesetz (State Public Officials Law) of the German state of North Rhine-Westphalia (LBG(NRW)).

German law is divided into two branches: private law (Privatrecht) and public law (öffentliches Recht). Private law is in turn divided into the general civil law (bürgerliches Recht) and the special private law (Sonderprivatrecht). General civil law includes, for example, contract and tort law (Schuldsrecht), property law (Sachenrecht), matrimonial and family law (Familienrecht), and estates law (Erbrecht). The special private law includes commercial law (Handelsrecht), "economic law" (Wirtschaftsrecht) (e.g., antitrust law), and, in part, labor law (Arbeitsrecht).

Public law may be divided into four areas: constitutional law (Staatsrecht) and international law (Völkerecht); criminal law (Strafrecht); procedural law (Prozessrecht); and administrative law (Verwaltungsrecht). Administrative law is further divided into the general administrative law (allgemeines Verwaltungsrecht) and the special administrative law (besonderes Verwaltungsrecht), together with the "social law" (Sozialrecht) (e.g., social security law) and tax law (Steuerrecht). The law governing public officials (Beamtenrecht), including their ethical obligations, falls into the category of special administrative law and consists of both federal and state statutes and regulations.

B. History of German Public Officials and German Public Officials Laws

1. The Early Development and the Prussian General State Law of 1794

"The history of German officialdom [Beamtentum] is a part of the history of the modern concept of the state." In contrast to

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49 See generally F. Baur & G. Walter, Einführung in das Recht der Bundesrepublik Deutschland (5th ed. 1987).

50 H. Hattenhauer, Geschichte des Beamtenums 1 (1980). A note on trans-
England and France, the German state arose not in the central authority of a kingdom but rather through a varied process in the territories of the Holy Roman Empire of the German Nation. Accordingly, "the birthplace of [German] officialdom was the territories"; and at the center of each territory was the residence of the prince.

In the medieval feudal state, vassals were bound by personal loyalty to the feudal lord. From the 9th century, their position was de facto inheritable. Over time, the fief became an office, and the vassal became a public official. "Officials," as that term is now used, did not exist, however, until the middle of the 17th century. After the Thirty Years War (1618-1648), a transformation began in how the constitution of the state was viewed, a transformation that slowly led to the appointment of employees to fulfill purely governmental functions.

1I The borders of the Empire varied over the centuries, from the crowning of the first German Kaiser, Otto the Great, in 962, to the renunciation of the imperial title by Franz II in 1806 at the demand of Napoleon. See W. Treue, Deutsche Geschichte 76-77, 456-57 (3d ed. 1965). However, the Empire generally included what is now Belgium, Luxembourg, northern Italy, Austria, western Czechoslovakia (Bohemia and Moravia), the two Germanies, and, until 1648 when the Treaty of Westphalia formally recognized their independence, the Netherlands and Switzerland. Id. at 287. See also C. McEvedy, The Penguin Atlas of Medieval History (1969).

2 Hattenhauer, supra note 50, at 57. See also Thiele, supra note 46, at 12.

3 G. Strunk, Beamtenrecht 1.


Modern professional officialdom (Berufsbeamtentum) is a creation of the authoritarian princes; its father is generally regarded as Friedrich-Wilhelm I, King of Prussia (1713-1740). During his reign, there arose a training program for public officials consisting of a set period of preparatory service concluding with a comprehensive examination. Thus, "[t]he roots of modern German administration lie in Prussia." Even so, officials performed their duties for the king; service to the state, as that concept is understood today, did not exist.

As for written regulations for officials, among the earliest were those from the Viennese Court of Emperor Maximilian I during the late 15th and early 16th centuries; and in 1537 Prince Joachim II of Brandenburg issued a regulation for palace officials, addressing, for example, their duties and the length of their work day. However, the first comprehensive public officials law (Beamtenrecht) did not appear until 1794, as part 2, title 10, of the Prussian General State Law (Preussisches Allgemeines Landrecht), entitled "On the Rights and Duties of Servants of the State." "From that point, a public official was no longer a servant of his prince but a servant of the state."

The following principles of that Prussian law were particularly important: public service is a career for life and is grounded not on civil (private) law but on public law; the state may not unilaterally terminate the employment of a public official; a separate disciplinary law applies to public officials; and one receives an office only if adequately qualified and after passing an examination. As Professor Willi Thiele, one of the preeminent scholars in the area, has noted, one can state without exaggeration that this law provides a foundation

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58 APeL, supra note 57, at 1; SCHEERBARTH, supra note 1, at 40.
60 WAGNER, supra note 57, at 6.
61 HATTENHAUER, supra note 50, at 57-61. During this same period, three theoretical works on government appeared that gained lasting importance in European literature: Machiavelli's The Prince (1513), Thomas More's Utopia (1516), and Erasmus of Rotterdam's Institutio Principis Christiani (1516). See generally HATTENHAUER, supra note 50, at 80-84.
62 APeL, supra note 57, at 1.
63 THIELE, supra note 46, at 23-24; H. ZEILER, BEAMTENRECHT 2 (1983); WAGNER, supra note 57, at 7.
and that all later legislation is only a certain process of revaluation to accomplish refinements and improvements and to complete the adaptation of public officialdom to 19th century constitutionalism and 20th century parliamentary democracy.64

The first public officials law to emerge as a separate statute appeared in Bavaria in 1805.65 Other German states followed, from Nassau in 1811 to Oldenburg in 1867.66 The Württemberg Constitution of 1819, in title IV, also regulated state service. That Constitution provided that public officials were to be appointed by the king upon recommendation of the appropriate council, which was to forward to him the complete list of applicants; that no one should be appointed who had not passed the required examination; that the oath of office must require public officials to protect the constitution; that public officials were not to be dismissed or transferred to a lesser position without court order; that transfers without loss of position or pay could be ordered for substantial reasons after a hearing by the head of the department, but in such event moving expenses were guaranteed; that public assistance to public officials who, because of age or illness, became unable to perform their jobs was to be regulated by law; that decrees of the king relating to administration required countersignature by the appropriate minister, who thereby accepted responsibility for the matter; and that all public servants were responsible for determinations made within the area of their authority and were required to comply with orders issued by a competent office in accordance with established procedure.67

2. The Second (Bismarck) Reich (1871-1918)

With King Wilhelm's assumption of the imperial crown in Versailles on January 18, 1871, and the adoption of the Reichs Constitution of April 16, 1871, Germany became a unified nation, the "second German empire."68 On March 31, 1873, a "law relating to the legal relationships of officials of the empire [Reichsbeamten]" was enacted.69 Although that law governed only Reich's officials, who were relatively few, and did not affect state laws or public officials of the states, it acted as a harmonizing influence and remained in effect

64 Thiele, supra note 46, at 22-23.
65 Wagner, supra note 57, at 7; Strunk, supra note 53, at 3.
66 Hattenhäuser, supra note 50, at 237-38.
67 Id. at 236-37.
68 See Reichsgesetzblatt ("RGBI.") 63 (1871); Treue, supra note 51, at 600-601.
69 RGBI. 61 (1873). See generally Hattenhäuser, supra note 50, at 243-49.
until its repeal by the Hitler regime on January 26, 1937.⁷⁰ Among the duties of officials were included the conscientious discharge of one’s office in accordance with the constitution and laws; confidentiality; and refraining from outside business activities, from acceptance of medals, income, or gifts from other governments, and from acceptance of gifts in relation to one’s office.⁷¹ Thus, comprehensive ethics regulations for public officials, as part of a comprehensive public officials law, have existed in Germany for more than a hundred years.

During the second German empire, close association with opposition parties was viewed as incompatible with a public official’s duty of political loyalty. Until 1914 a Social Democrat was an enemy of the Reich and therefore could not become a public official. Indeed, not only membership in the Social Democratic Party but even an acknowledgment that one held social democratic views was a violation of an official’s duty. Moreover, unlike other workers, officials were not allowed to form associations.⁷²

3. The Weimar Republic (1919-1933) and the Reichs Constitution of 1919

On November 28, 1918, seventeen days after the capitulation of Germany brought an end to the First World War, Wilhelm II abdicated as German Kaiser and King of Prussia, thereby releasing all Reich and Prussian public officials of their oath of loyalty.⁷³ However, immediately upon taking office, Friedrich Ebert, the first president of the Weimar Republic, requested public authorities and public officials to offer the new government “a helping hand.”⁷⁴

On August 11, 1919, the Reichs Constitution of the Weimar Republic was adopted. That document, in articles 128-131, specifically

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⁷² Brandt, supra note 56, at 75-76.
⁷³ Thiele, supra note 46, at 40. See also Treue, supra note 51, at 703.
⁷⁴ Thiele, supra note 46, at 40; Wagner, supra note 57, at 8. Ebert was elected Reichs President on February 11, 1919, and on February 16 formed the first Reichs Cabinet, with Scheidemann as Chancellor. That Cabinet was composed of the Weimar Coalition of the Socialist Party of Germany (SPD), the German Democratic Party (DDP), and the Center Party. Treue, supra note 51, at 707.
secured the rights of public officials, state and local as well as federal. Those rights may be grouped into five general categories: job security, protection of financial benefits, protection against undue pressure from superiors or members of the public, rights of association, and personal freedoms.

Security of the public official’s job was guaranteed by appointment for life (except as otherwise provided by law) and by a prohibition against removal from office, temporary or permanent retirement, or transfer to another office with less pay, except pursuant to law (Art. 129). Financial benefits were protected by a requirement that pensions and survivor’s benefits be regulated by law, by a right to assert financial (monetary) claims before civil courts, and by the inviolability of vested rights (Art. 129).

Protection against undue pressure from superiors or from members of the public was provided by a right to appeal penalties or punishments (Art. 129), by the opportunity of an official to address unfavorable facts before they were entered into his or her personnel file and the right to inspect his or her personnel file (Art. 129), and by the guarantee that the state, rather than an individual official, would bear the primary responsibility for violations of duty committed by the official against a third party while carrying out official responsibilities (Art. 131; the state retained the right to seek indemnification from the official, and ordinary legal proceedings were permissible.)

The 1919 Reichs Constitution also guaranteed to public officials the right to form associations and provided that additional federal regulations would be passed to authorize special representatives for public officials (Art. 130). Finally, with respect to the personal rights of public officials, the Constitution eliminated restrictions on women public officials (Art. 128) and guaranteed freedom of political convictions (Art. 130).

With little change, almost all of these same rights were incorporated, explicitly or implicitly, into West Germany’s post-World War II constitution and form the foundation of West Germany’s current public officials laws. Significantly, although the 1919 Reichs Constitution carefully set forth the rights of public officials, it made little

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75 SCHÜTZ, supra note 55, at 3. See also RGBl. 1383, 1407-1408 (1919). Articles 128-131 of the Weimar Republic's Reichs Constitution (hereinafter "1919 REICHSVERF.") are also reproduced in HATTENHAUER, supra note 50, at 320-21.
mention of the duties of public officials. One should hesitate to read too much into that fact; rights may have been stressed more than duties simply to underscore the Republic's commitment to the traditional concept of a professional public officialdom. Yet the emphasis in the 1919 Constitution of rights over duties illustrates that in Germany, to a much greater extent than in the United States, the growth of officials' rights paralleled the codification of specific duties. Though officials' duties preceded officials' rights, perhaps by centuries, legislation in Germany secured and codified those rights at an early date. Accordingly, in Germany, unlike in the United States, ethical obligations have, for at least two hundred years, of necessity been viewed against the backdrop of the rights of public officials.

Indeed, the only duty that the 1919 Reichs Constitution did impose on public officials—an admonition that "officials are servants of the whole, not of a party" (Art. 130)—came to mean increasingly little in the face of the growing political turmoil within the Republic and of the constitutional guarantee of "the freedom of [public officials'] political convictions." Although particularly significant in the development of professional officialdom, the granting of that freedom had serious consequences for the Republic. Off the job, officials could be monarchists or opponents of democracy and could even belong to the communist party or the National Socialist German Workers' Party (NSDAP).

In fact, throughout the life of the Weimar Republic, the desires of political parties weighed ever heavier in the decisions of public officials, at least of those public officials who had been appointed with party backing; yet in the end, all parties but one were abolished, and the NSDAP assumed dictatorial control of officials' actions, with the consequent destruction of individual liberties. That lesson—of

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76 See 1919 REICHSVERF. art. 128-131. See also HATTENHAUER, supra note 50, at 321.
77 ZEILER, supra note 63, at 3.
78 WAGNER, supra note 57, at 9. See also THIELE, supra note 46, at 43-51.
79 See generally THIELE, supra note 46, at 43-67; HATTENHAUER, supra note 50, at 325-28, 369-413; H. MOMMSEN, BEAMTENTUM IM DRITTEN REICH (1966) (the leading work on public officials in Nazi Germany); E. FORSTHOFF, 1 LEHRBUCH DES VERWALTUNGSRECHTS 37-38 (10th ed. 1973) (noting the danger in the Weimar Republic that "party membership rather than professional qualifications would be decisive for the filling of public officials positions, that in general the spoils system would win the upper hand, a system existing in the United States but foreign to German traditions").
the potentially devastating impact that results from mixing party politics and public office—seems largely to have been forgotten by those American politicians who now decry restrictions on patronage and on political party activity by public officials.

Despite the generous treatment afforded public officials by the 1919 Reichs Constitution, they maintained a reserved attitude toward the Republic, for their personal bond to the monarchy, the primary basis for the relationship of service and loyalty, had vanished. To the fears and uncertainties that arose at the end of the First World War was added the apprehension of public officials that the new state could infringe on the concept of professional public officialdom (Berufsbeamten), perhaps by placing all public servants on the same level or by requiring that public officials be elected to office.80

Following the Kapp Putsch (a monarchical coup) in March 1920, the assassination of Matthias Erzberger (a Center Party representative to the Reichstag) in August 1921, and the murder of Walther Rathenau (a Jewish industrialist and cabinet minister) on June 24, 1922, a “Decree for the Protection of the Republic” was promulgated on June 26 and 29, 1922, followed by a “Law for the Protection of the Republic” on July 21, 1922.81 That law added a new section 10a to the Weimar Republic’s public officials law, providing in part, “when carrying out his official duties, a Reich’s public official is obligated to support the constitutional republican government.”82 Even so, the official could still belong to anti-Republic associations.83 “Many observers see in [this boundless tolerance] one of the grounds that in the end led to the destruction of the first German democracy,”84 and thus to the rise of the fascist Third Reich.

4. The Third Reich (1933-1945) and the German Public Officials Law of 1937

As economic and political turmoil in the Republic continued to grow, so did the power of the Nazi Party. On January 30, 1933, President Hindenburg named Adolf Hitler Reichs Chancellor. Less than a month later, on February 28, 1933 (the day following the burning of the Reichstag) Hindenburg, pursuant to Article 48(2) of

80 Wagner, supra note 57, at 8; Strunk, supra note 53, at 4.
81 W. Thiele, supra note 46, at 46; Wagner, supra note 57, at 8. See generally W. Treue, supra note 51, at 710-11.
82 RGBl. 585 (1922) (law). See also RGBl. 521, 532 (1922) (decree).
83 Thiele, supra note 46, at 47.
84 Id.
the 1919 Reichs Constitution, suspended the rights of free speech, free press, and assembly, the secrecy of the post, telegraph, and telephone, and restrictions on searches and seizures. That decree, which remained in effect throughout the Third Reich, "formed the true basis of the Hitler dictatorship and lent it an appearance of legality."

Following the Reichstag elections of March 5, 1933, which gave the Nazis only 44% of the vote, the Reichstag and Reichsrat, on March 24, passed an enabling act ("Law for the Elimination of the Peril to People and Reich") granting the government dictatorial powers for four years, including the right to pass laws, even laws inconsistent with the Constitution, without action by the Reichstag. Since only the socialist party voted against it, the Act garnered the two-thirds vote of the Reichstag necessary to change the Constitution. On July 14, 1933, a federal law declared the Nazi party to be the only legal political party in Germany.

From the outset, the Nazis recognized the importance of the public administration and public officials to the party's aim of achieving absolute dictatorial control of the nation. Indeed, as its first major legislative act, the Nazi regime, on April 7, 1933, enacted a "Law for Restoration of the Professional Public Officialdom" (Gesetz zur Wiederherstellung des Berufsbeamtenums) in order to purge the civil government of actual or potential opponents and to make way for valued national socialists. That law applied to federal, state, and local officials, including retired officials, and permitted their dismissal without regard to existing law (section 1). The Act targeted three groups of officials: those who had entered service since November 9, 1918, without the required qualifications or "other aptitude" (that is, communist officials and so-called "party book" officials, who were generally regarded as having obtained their office as a result of party patronage) (section 2); officials who, because of their previous political activity, could not be counted on to intercede at all times for the national state (section 4); and officials who were not of Aryan descent (i.e. Jews—that is, persons with at least one Jewish grand-parent) (section 3).

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85 TREUE, supra note 51, at 729-30.
86 RGBI. I, 141 (1933).
87 See generally TREUE, supra note 51, at 730-32.
88 MOMMSEN, supra note 79, at 39; BRANDT, supra note 56, at 108; STRUNK, supra note 53, at 5-6. See RGBI. I, 175 (1933).
89 RGBI. I, 175 (1933). See generally HATTENHAUER, supra note 50, at 378-79.
The law has been characterized as "one of the most important instruments in [Hitler's] seizure of power." Savage in its effect, the law resulted even in the dismissal of blind Jewish employees of a state institution for the blind. "Ruthlessness became a virtue." More important than the termination of employees, however, was the intimidating effect the Act had upon public officials, who were now all the more careful to conduct themselves in a politically unimpeachable manner.

Three months later, on June 30, 1933, the regime enacted the "Public Officials Law Amendments Act" (Beamtenrechtsänderungsge setz), which added a new section 1a to the Reichsbeamtengesetz of March 31, 1873. That new section prohibited the appointment of any official who was a non-Aryan, who was married to a non-Aryan, or who could not be counted on "to intercede, without reservation, at all times for the national state." On January 30, 1934, the New Organizational Law (Neuaufbaugesetz) removed the distinction between Reichs officials and state officials, thereby making all public officials servants of the Third Reich; and on August 1, 1934, the Head of State Law (Staatsoberhauptgesetz) designated the Führer as the sole head of all German officials. Thenceforth, all German public officials were bound by this oath: "I swear that I will be loyal and obedient to the Führer of the German Reich and people, Adolf Hitler, complying with the laws and conscientiously fulfilling my duties of office, so help me God." "[U]nconditional, blind obedience thereby became a virtue for public officials."

Finally, on January 26, 1937, the Third Reich enacted a new German Public Officials Law (Deutsches Beam tengesetz ("DBG")), the only substantial legislative work of the Reichs Ministry of the Interior in this area. Ironically, that law enjoys a special rank in the history of German public officialdom. Despite the heavy overlay of Nazi prin-
ciples, the Act contains the core of a modern public officials law for a democratic state—for example, with respect to the rights and duties of officials—as demonstrated by the decision of the occupying forces to continue the DBG in effect, without the Nazi contents.\textsuperscript{101}

Accordingly, the DBG deserves discussion, both for its importance to the development of German public officials laws and for the warnings it provides to the drafter of a modern ethics code for public officials. As noted above, the Reichs Public Officials Law of March 31, 1873, which remained in effect until repealed by the DBG in 1937, contained the first comprehensive regulation of the duties of public officials. The second chapter of the DBG (§§ 3-20) greatly refined the statement of those duties, regulating, for example, the oath of office (§ 4), conflicts of interest (§ 5), confidentiality (§§ 8-9), outside business activities (§§ 10-11), gifts (§ 15), working hours (§ 16), vacations (§ 17), and uniforms (§ 20). The third chapter of the DBG (§§ 21-23) addressed the consequences of failing to fulfill those duties. The DBG also regulated appointment and transfer (§§ 24-35); protection of the legal position of officials (§§ 36-42); provisional retirement (§§ 43-49); termination of the relationship between the official and the state (§§ 50-78); and payments to retired and provisionally retired officials, death and survivor's benefits, and assistance in the event of an accident (§§ 79-141).

As before, salaries were regulated in a separate law.\textsuperscript{102}

However, to make it consistent with national socialist tenets, the DBG contained a heavy Nazi overlay, incorporating elements from earlier Nazi laws regulating public officials. Indeed, in its preamble, the DBG stated that: "A professional public officialdom, rooted in the German people, permeated with the national socialist world view, and bound in loyalty to the Führer of the German Reich and people, Adolf Hitler, forms a foundation pillar of the national socialist state."\textsuperscript{103}

That statement has been characterized as "radically contradicting all of the tradition of German public officials."\textsuperscript{104}

\textsuperscript{101} See E. WICHERT, BUNDESBEAMTENRECHT 1-5 (1950) (public officials laws and implementing regulations); THIELE, supra note 46, at 61-62; BRANDT, supra note 56, at 131-32; SCHEERBARTH, supra note 1, at 45; SCHÜTZ, supra note 55, at 3.

\textsuperscript{102} See Reichsbesoldungsgesetz, RGBl. I, 349 (1927), as amended throughout the Third Reich. See also SCHÜTZ, supra note 55, at 2-3.

\textsuperscript{103} See THIELE, supra note 46, at 62. See generally A. BRAND, DAS DEUTSCHE BEAMTENGESETZ 62-66 (4th ed. 1942) (hereafter BRAND 1942) (commentary on DBG). Impervious to irony, Professor Brand, in his commentary on that preamble, quoted Hitler's Mein Kampf: "The body of German public officials and the administrative apparatus is . . . particularly distinguished by its independence from individual governments." Id. at 63.
The Nazi overlay was not merely cosmetic. For example, the first section of the DBG proclaimed that German public officials stood in a relationship of service and loyalty to the Führer and the Reich, based on public law; that German public officials were the implementors of the will of the State that was sustained by the NSDAP; and that the State exacted from public officials unquestioning obedience and uttermost performance of duty, in return for which the State secured for the official his position for life. The official was to be “until death loyal to the Führer” and to “intercede, without reservation, at all times for the national socialist State” (§ 3). Doubt about one’s willingness thus to intercede for the Nazi state precluded appointment and justified early “retirement” (§§ 26(1), (3) and 71(1)). Indeed, on April 26, 1942, the Reichstag decreed that the Führer, without regard to any existing law, could at any time remove any German public official from his office or position. “Officials had completely lost all rights.”

The DBG’s treatment of Jews was consistent with the Nürnberg Laws. Section 25 of the DBG permitted only those of German or race-related blood, and with spouses of German or race-related blood, to become public officials (an exception could be allowed where the spouse was a “half-breed of the second degree”). Under section 59, an official who married a Jew without permission would be discharged.

5. The Federal Republic of Germany

Following the capitulation of the fascist German regime in May 1945, the allied forces formed an Allied Control Committee, which on June 5 assumed complete control throughout Germany. Although that Committee made no changes in the DBG directly, denazification

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109 DBG § 1. See generally BRAND 1942, at 77-88.
106 See RGBI. I, 247 (1942).
107 BRANDT, supra note 56, at 109.
109 See generally BRAND 1942, at 328-35; H. WITTLAND, 1 BEAMTENRECHTLICHE GESETZE A110-19 (2d ed. 1943) (containing relevant implementing regulations for the DBG and the Nürnberg Laws).
110 See also DBG § 72. See generally BRAND 1942, at 515-18 and 469-70.
laws had the effect of amending the DBG to remove the Nazi overlay. The British and American occupation forces sought, but failed, to establish a German public officers law on the Anglo-Saxon civil service model, and in particular to abolish, at least in part, the distinctions between public officials, public employees, and public laborers—distinctions discussed below.

After the collapse of the Third Reich, the newly created states accepted as state officials those former Third Reich public officials who were permitted to continue in office, and, under authority of the occupying powers, established the legal relationships of those officials. Those state laws in part substantially changed the DBG and differed from state to state. Hesse's state constitution of 1946 even established a single labor law for public officials, public employees, and public laborers. Thus, before 1950 the following German states enacted their own public officials laws (Beamtenbesetze): Bavaria (October 28, 1946), Württemberg-Baden (November 19, 1946), Hesse (June 25, 1948) (reestablishing the traditional role of public officials), Rhineland-Palatinate (December 13, 1949), and Württemberg-Hohenzollern (April 8, 1949). In the other states, the DBG continued to apply.

On May 23, 1949, the Constitution of the Federal Republic of Germany became effective. Article 33 of that Constitution, discussed in detail below, provides that "as a rule, only members of the public service who stand in a relationship of service and loyalty governed by public law shall be assigned, as an ongoing responsibility, the exercise of governmental authority," and that "public service law shall be regulated with due regard to the traditional principles of the profes-

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111 See WICHERT, supra note 101, at 1-7.
112 See STRUNK, supra note 53, at 6-7; HATTENHAUER, supra note 50, at 470-74; SCHEERBARTH, supra note 1, at 46; THIELE, supra note 46, at 71-72; WAGNER, supra note 57, at 10-11; APEL, supra note 57, at 1. See also Law No. 15 of the Military Government (March 15, 1949). The German Democratic Republic (East Germany) abolished the institution of the professional public officialdom and the distinction between public officials, public employees, and public laborers. See F. KUNZ, ARBEITSRECHT VON A BIS Z 235 (Staatsverlag der DDR 1983); SCHEERBARTH, supra note 1, at 46, 581-86; STRUNK, supra note 53, at 7.
113 THIELE, supra note 46, at 89.
114 Id. at 86, 89.
115 Art. 29(1). See STRUNK, supra note 53, at 6; WAGNER, supra note 57, at 11; APEL, supra note 57, at 1.
116 See, respectively, Gesetz- und Verordnungsblatt [GVBl.] Nr. 24; Regierungsblatt [RegBl.] Nr. 22; GVBl. Nr. 20; GVBl. Nr. 80; RegBl. 169.
117 THIELE, supra note 46, at 73.
118 BGBl. 1 (1949).
sional public officialdom." Article 137 permits restrictions on the right of public officials to run for office.

The Federal Public Officials Law (Bundesbeamtengesetz (BBG)), also discussed at length below, was enacted on July 14, 1953, effective September 1, 1953. However, it applied only to federal public officials, not to state or local public officials. Indeed, in a subsequent dispute over the validity of the North Rhine-Westphalia law on salaries of public officials (Besoldungsgesetz), the Federal Constitutional Court (Bundesverfassungsgericht), on December 1, 1954, held that in this area the federal government could only establish a framework law (Rahmengesetz), pursuant to Article 75(1) of the Constitution; the Republic possessed no concurrent jurisdiction with the states in matters relating to state and local public officials. As noted above, in matters where its jurisdiction is limited to enacting a framework law, the federal government may not preclude the states from enacting other legislation consistent with the federal framework.

Wishing to prevent German public officials law from developing in different directions as a result of diverging state laws, the federal government enacted, on July 1, 1957, a public officials law (Beamtenrechtsrahmengesetz (BRRG)) that provided a framework for state public officials laws. That framework law, which not surprisingly bears a strong resemblance to the federal public officials law (BBG), restored the uniformity of German public officials laws, at least in fundamental areas.

III. The Public Law Context of German Ethics Laws: The Authority and Rights of German Public Officials

A. An Overview of Ethics Laws for German Public Officials

It is not the purpose of this article to compare the substantive ethical obligations of German and American public officials; that

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119 BGBl. I, 551, 585 (1953).
120 See 4 BVERFGE 115 (1954). See generally Thiele, supra note 46, at 87-89. The court's decision, with respect to state compensation laws, was overruled by the 1971 Constitutional amendment noted above. See GG art. 74a.
121 4 BVERFGE 115 (1954).
123 Thiele, supra note 46, at 89. Public officials, or at least certain kinds of public officials, are subject to a number of other federal and state laws, such as laws regulating salaries (Besoldungsgesetze), discipline (Disziplinarordnungen), and representation (Personalvertretungsgesetze), and laws regulating public police officials and college teachers. See generally Schütz, supra note 55, at 4-6.
comparison must await another day. Yet a passing familiarity with those laws is necessary for an understanding of the public law context of German ethics laws.

The ethical obligations of German public officials are embodied in the chapter of German public officials laws entitled "Duties" (Pflichten). Although Germany has traditionally regulated some aspects of the lives of its public officials to an extent unthinkable in the United States, most of the ethical obligations of German public officials would not be out of place in American ethics statutes. German public officials laws restrict political activity, outside employment, self-dealing, and receipt of gifts, and require that public officials maintain the confidentiality of information and avoid conflicts of interest.

124 BBG §§ 52-76; BRRG §§ 35-44a, 124; LBG(NRW) §§ 55-82. The consequences of failing to fulfill those duties are set forth in BBG §§ 77-78, BRRG §§ 45-47, and LBG(NRW) §§ 83-84. See also BBG § 60, BRRG § 41, LBG(NRW) § 63 (provisional suspension). See generally U. Batti, Bundesbeamtenreform 302-439 (1980) (commentary on BBG); A. Bocchialli, Landesbeamtenreform von Nordrhein-Westfalen 128-86 (2d ed. 1963) (commentary on LBG(NRW)); Schütz, supra note 55, at 292-499 (same); W. Wiese, Beamtenrecht 102-64 (1979); Scheerbarth, supra note 1, at 170-71, 344-68; Zeiler, supra note 63, at 95-104; I. von Münch (ed.), Besonderes Verwaltungsrecht 37-46 (7th ed. 1985); Apel, supra note 57, at 48-53; Wagner, supra note 57, at 81-94; Strunk, supra note 53, at 60-94; H. Schnei-

125 For example, "[a public official's] conduct, both on and off the job, must do justice to the respect and trust that his profession requires" (BBG § 54, BRRG § 36, LBG(NRW) § 57). "His entire conduct must be such that it will also not violate the unwritten rules of honor, propriety, and decency to the extent his official position so requires. . . ." Schütz, supra note 55, at 309 (commentary on LBG(NRW) § 57). Thus, for example, although in principle adultery is no longer a breach of duty, it has been held that entering into a notoriously adulterous relationship with the wife of a colleague is. See Battis, supra note 124, at 321 (commentary on BBG § 54). But cf. Battis, supra note 124, at 318-20; BBG § 77(1) ("Conduct of a public official off the job is a breach of duty if that conduct, under the circumstances of the individual case, is particularly likely to impair respect and trust in a way that is significant for his office or for the appearance of public officialdom"). With respect to American federal government counterparts to those provisions, see 5 U.S.C. § 7352 (1982) (excessive and habitual use of intoxicants); 5 C.F.R. § 735.207 (1988) (indebtedness); 5 C.F.R. § 735.209 (1988) ("An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government"); Exec. Order No. 12564, 51 F.R. 32889 (1986), reprinted following 5 U.S.C.A. § 7301 (West 1988 Supp.) (Drug-Free Federal Workplace); Federal Employee Substance Abuse Education and Treatment Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-157 (1986).

126 Also included among the duties of German public officials is a requirement
1. Political Neutrality and Political Activities

A German public official "serves the entire people, not a party. He shall fulfill his duties lawfully and in a nonpartisan manner and that public officials dedicate themselves with complete devotion to their profession. BBG § 54; BRRG § 36; LBG(NRW) § 57. They must take an oath of office (BBG § 58; BRRG § 40; LBG(NRW) § 61), a requirement that Germans have traditionally taken quite seriously.

In view of Germany's fascist experience, BBG §§ 55 and 56 are of particular interest. BBG § 55 requires that public officials advise and support their superiors and carry out superiors' orders. See also BRRG § 37; LBG(NRW) § 58. However, a public official "bears complete personal responsibility for the lawfulness of his official acts," unless, as he is required to do, he promptly brings the question of the legality of an order to the attention of his immediate superior and that immediate superior's superior, and both superiors affirm the order's lawfulness; in that event, the public official must obey the order, unless it requires the official to commit a criminal act or violation (Ordnungswidrigkeit) or unless the order violates human dignity. BBG § 56. See also BRRG § 38 and LBG(NRW) § 59.

The duties of federal and North-Rhine Westphalia public officials also include an average work week of forty hours; when compelling circumstances require it, officials must work additional hours without compensation, provided that such additional work is the exception, and further provided that compensatory time must be given when ordered or approved overtime exceeds five hours in any one month. BBG § 72; Working Hours Regulation for Federal Public Officials of Sept. 24, 1974, as amended (Arbeitszeitverordnung), § 1(1); BRRG § 44; LBG(NRW) § 78-78a. Public officials must avoid unexcused absences (BBG § 73; BRRG § 47; LBG(NRW) § 79), select a residence sufficiently close to their work so as "not to impair the orderly performance of [their] official duties" (BBG § 74; LBG(NRW) § 80), remain, even off the job, in the vicinity of their place of work if required by compelling circumstances (BBG § 75; LBG(NRW) § 81), and, if required, must wear a uniform (see BBG § 76; LBG(NRW) § 82).

The consequences of failing to perform one's duties as a public official are addressed in BBG §§ 77-78 and Bundesdisziplinarordnung of July 20, 1967, as amended; BRRG §§ 45-47; LBG(NRW) §§ 83-84 and Disziplinarordnung des Landes Nordrhein-Westfalen (DO NW) of May 1, 1981, as amended. See also laws and regulations reprinted in BUNDESBEAMTENGESETZE No. 30-43 (Beck 1986) (federal), and H. REHORN (ed.), GESETZE DES LANDES NORDRHEIN-WESTFALEN No. 40-40c (Beck 1987) (North Rhine-Westphalia). See generally WIESE, supra note 124, at 125-64; STRUNK, supra note 53, at 79-94; SCHEERBARTH, supra note 1, at 405-16; K. EBERT, DAS RECHT DES ÖFFENTLICHEN DIENSTES 97-110 (1965); BATTIS, supra note 124, at 414-39; VON MÜNCH, supra note 124, at 43-46; ZEILER, supra note 63, at 100-104; WAGNER, supra note 57, at 91-94; APFEL, supra note 57, at 53, 107-14.

With respect to the restrictions upon the individual constitutional rights of public officials, "[o]n the one hand, it cannot be doubted that in principle constitutional rights (GG art. 2ff.) also demand recognition in the public official relationship. On the other hand, the sphere of duties of a public official limits the . . . possibilities for making use of those rights." SCHNELLENBACH, supra note 124, at 87. Those limitations, however, are narrowly interpreted. See generally SCHNELLENBACH, supra note 124, at 87-99; STRUNK, supra note 53, at 32-43; VON MÜNCH, supra note 124, at 57-64; ZEILER, supra note 63, at 37-50; WAGNER, supra note 57, at 107-110.
shall conduct his office with regard for the welfare of the whole."127 This "duty of neutrality," together with the other duties specified in the BBG, implements the public official's constitutional duty of service and loyalty,128 and applies not only with respect to partisan politics but also with respect to special interest groups, such as unions.129 The Germans have recognized that party patronage seriously undermines the ability of a public official to remain neutral,130 a conclusion that many American politicians still reject. Indeed, the public official "must avoid even the appearance of being politically partisan based on objective circumstances, without regard to the actual subjective position of the public official."131

Off the job, a public official may engage in political activities, but in doing so must "maintain that moderation and discretion required by his position vis-à-vis the whole and by respect for the duties of his office."132 Thus, for example, although public officials are by law entitled to time off to run for the Bundestag,133 upon election they must resign their position as a public official.134

Broad pronouncements that a public official must "serve the entire people," fulfill his or her duties "lawfully and in a nonpartisan manner," and maintain a relationship of "service and loyalty" to

127 BBG § 52(1); BRRG § 35(1); LBG(NRW) § 55. See also 1919 REICHSVERF. ART. 130; VON MÜNCH, supra note 124, at 40.
128 See Battis, supra note 124, at 303-304. The public official "must, by his entire conduct, acknowledge the free and democratic basic order, in the constitutional sense, and intercede to preserve it." BBG § 52(2); BRRG § 35(1); LBG(NRW) § 55(2). See also WEIMAR RBG art. 10a; ZEILER, supra note 63, at 95-96. "The service of the whole, which characterizes the public official's relationship, prohibits strikes by public officials." ZEILER, supra note 63, at 6. See also id. at 97; WIESE, supra note 124, at 107. Indeed, the German Federal Constitutional Court has held un-constitutional the assertion of any right of public officials to strike. 8 BVERFGE 1, 17 (1958). Cf. 5 U.S.C. § 7311 (1982) (loyalty and striking); Code of Ethics for Government Service, H.R. Con. Res. 175, 85th Cong., 2d Sess. (1958), reprinted following 5 U.S.C.A. § 7301 (West 1980) ("Any person in Government service should: 1. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government Department. 2. Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion").
129 Battis, supra note 124, at 306; ZEILER, supra note 63, at 96.
130 See ZEILER, supra note 63, at 96.
132 BBG § 53. See also BRRG § 35(2); LBG(NRW) § 56.
133 BBG § 89(2). See also BRRG § 33(1); LBG(NRW) § 101(3).
134 BBG § 57. See also BRRG §§ 33(3), 34; AbgG(NRW) § 31. See generally SCHEERBARTH, supra note 1, at 170-78.
the state are appropriate to a civil law country but hardly sufficient to regulate the conduct of American public officials, even assuming that such broad statutory language would pass constitutional muster. Yet when discussing with municipal officials the restrictions on political activity contained in the draft Municipal Ethics Act of the New York State Commission on Government Integrity, this writer was unable adequately to articulate the reasons for those restrictions because at that time he failed to appreciate either their relationship to other ethics law provisions or to public administrative law as a whole. In contrast to the Hatch Act and its antecedents, which were enacted largely in response to political corruption and ethical crises, the German model provides, at least by analogy, both theoretical underpinnings for restrictions on the political activity of public officials and a means of integrating those restrictions into the larger body of public administrative law.

135 See generally Biller v. United States Merit Systems Protection Board, 863 F.2d 1079 (2d Cir. 1988):

The advent of Jacksonian democracy witnessed the rise of partisan politics and political corruption, a trend that continued and increased up to and after the Civil War and culminated in the Grant administration. . . . Public outcry against the 'spoils system,' by which federal jobs were doled out to reward political loyalty, prompted the executive branch attempt to eliminate this pernicious system. Presidents Grant in 1873 and Hayes in 1877 issued executive orders to mandate political neutrality for federal employees. Neither order succeeded. . . . Congress . . . enacted in December of 1882 the Pendleton or Civil Service Act, which President Arthur signed into law in January, 1883. . . . This Act aimed to diminish political partisanship in federal hiring and to limit political activity by federal civil service employees. Early in this century, President Theodore Roosevelt issued an Executive Order forbidding anyone 'in the competitive classified service' from taking 'active part in political management or in political campaigns.' . . . This Executive Order remained in effect until enactment of the Hatch Act. . . . The Hatch Act was originally enacted in 1939, . . . and amended in 1940, . . . as a response to disclosures of improper political practices among the Works Progress Administration (W.P.A.) and other relief agencies during the 1938 election campaign.

Id. at 1084-85.

136 This is not to say that German scholars do not sometimes overindulge their penchant for theoretical foundations, a temptation to which even student extremists submit. When this writer studied in Germany, during the heyday of the student movement, the story was told of an American student radical in Berlin who was shocked by the refusal of his German colleagues to demonstrate against the impending demolition of a playground for workers' children until the students had firmly grounded their proposed action in Marxist-Leninist dogma. By that time the playground was gone. This article does not propose that American lawmakers thus treat the adoption of ethics laws. Rather, it suggests that American legislators' haphazard approach to those laws could benefit from a thoughtful attempt to analyze ethics statutes in the light of the larger purposes of public administrative law as a whole.
2. Confidentiality

American ethics laws often require that public officials maintain the confidentiality of all non-public information they obtain during the course of their duties. The German public officials laws hold such confidentiality in particularly high regard. "The duty of confidentiality of office [Amtsverschwiegenheit] is, along with the duty of loyalty, the duty of obedience, and the duty of complete devotion of one's labor, one of the basic duties of the relationship of a public official." Their lifelong obligation of confidentiality even prohibits German public officials, in certain limited circumstances, from disclosing confidential information in testimony before a court. German public officials, or their heirs or next of kin, must also, upon request, return all copies of any documents in their possession that relate to the official's office.

In the United States a tension exists between freedom of information laws, which promote public access to government documents, and the government's need for confidentiality. Although the United States has a stronger tradition of openness in government than does Germany, that relationship between openness and privacy could profitably be examined in light of the German approach to the problem.

3. Self-dealing, Conflicts of Interest, and Gifts

German public officials laws contain a general prohibition of conflicts of interest: "[A public official] shall administer his office in good conscience without benefit to himself." Significantly, that admonition is viewed as an extension of the prohibition against public officials acting in a partisan manner. In other words, from the German perspective a public official who acts in the interest of a political party (or a special interest group) has engaged in a conflict

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137 See, e.g., N.Y. GEN. MUN. LAW § 805-a(1)(b) (McKinney 1988) (no municipal officer or employee shall "disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests"); NML MODEL § 19; N.Y. ST. COMM’N DRAFT § 4(1)(j). See also 5 C.F.R. §§ 735.206, 735.303 (prohibiting use of nonpublic information to further private interests).
138 See generally WIESE, supra note 124, at 114-18.
139 EBERT, supra note 126, at 93.
140 BBG §§ 61(2), 62; BRRG § 39(2)-(4); LBG(NRW) §§ 64(2), 65. See also BBG § 63 and LBG(NRW) § 66 (both providing that information may be given to the press only by the head of an agency or by his or her designated representatives).
141 BBG § 54; BRRG § 36; LBG(NRW) § 57.
142 See BATTIS, supra note 124, at 317; EBERT, supra note 126, at 85.
of interest that is just as serious as the conflict of interest committed by the public official who takes an official action for his or her own personal gain. That conclusion would come as a revelation to many American legislators, who tend to regard acting for one's own gain as a much more serious offense than acting on behalf of one's party. In Germany, there is no distinction.

According to Professor Ulrich Battis, one of the leading commentators on the BBG, BBG § 54 “[p]rohibits not only the acceptance of small gifts or other advantages that do not fulfill the elements of common bribery[, unless prior approval has been granted pursuant to BBG § 70,] but even conduct that suffices only to raise the suspicion of corruption.” German public officials are thus subject to a standard not unlike the “appearance of impropriety” standard applicable to American attorneys.

Indeed, even under current law, American public officials who are also attorneys—for example, former Attorney General Edwin Meese—are bound by two sets of ethical obligations: those ethics laws governing all public officials and the applicable code of conduct for the legal profession. Thus, “[a] lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.” Furthermore, “[a] lawyer who holds public office shall not . . . use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.”

Consideration must be given to whether similar requirements, and an “appearance of impropriety” standard, should not be applied to all American public officials, provided that the concomitant rights of the officials are properly secured. Such a proposal is, in fact, hardly revolutionary. The International City Management Association (ICMA) subjects its members, appointed professional municipal ad-

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144 Battis, supra note 124, at 317.
145 See, e.g., N.Y. LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY, Canon 9 (“A lawyer should avoid even the appearance of professional impropriety”). That Canon specifically restricts the revolving door activities of attorneys who have served as public officials: “A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.” DR (Disciplinary Rule) 9-101(B).
146 Id., EC (Ethical Consideration) 8-8.
147 Id., DR 8-101(A)(1).
ministrators, to a code of ethics that is at least as stringent as lawyers’
codes.\textsuperscript{148} The obligation of German public officials to administer their office
without benefit to themselves is secured by the protections of BBG § 59,\textsuperscript{149} which provides:

1. The public official shall be excluded from taking any official
   actions that would affect him or a relative adversely.

2. “Relative,” within the meaning of paragraph (1), means persons
   for whose benefit the public official possesses, as a result of lawful
   familial relationships, a testimonial privilege in criminal proceedings.

3. Laws that prohibit a public official from engaging in specific
   official actions remain unaffected.\textsuperscript{150}

This provision is the obverse of BBG § 54 and is intended to protect
public officials from “conflicts of conscience” that would arise if
the officials were required to take an action disadvantageous to
themselves or their families.\textsuperscript{151} Section 59 recognizes that inaction by
a public official, in order to avoid a detriment to the official, may
present a conflict of interest that is just as significant as an action
by an official to obtain a benefit. American ethics laws rarely address
that issue, at least directly.\textsuperscript{152}

\textsuperscript{148} See ICMA CODE OF ETHICS, reprinted in 69 PUBLIC MANAGEMENT, August
1987, at 12-13. Other organizations have promulgated codes regulating specific types
of municipal officials, including the International Association of Chiefs of Police,
the Building Officials & Code Administrator’s International, Inc., and the American
Association of School Administrators. Cf. Code of Ethics for Government Service,
§ 7301 (West 1980); 5 C.F.R. § 735.201a (“An employee shall avoid any action,
whether or not specifically prohibited by this subpart, which might result in, or
create the appearance of: (a) Using public office for private gain; (b) Giving prefer-
tential treatment to any person; (c) Impeding Government efficiency or economy;
(d) Losing complete independence or impartiality; (e) Making a Government decision
outside official channels; or (f) Affecting adversely the confidence of the public in
the integrity of the Government”).

\textsuperscript{149} BATTIS, supra note 124, at 317.

\textsuperscript{150} BBG § 59. Accord: LBG(NRW) § 62. Pursuant to Criminal Procedure Law
(Strafprozessordnung (StPO)) § 52(1), those individuals constituting “relatives” are:
a fiance or fiancee; a spouse or former spouse; direct ancestors and descendants by
blood or marriage; and certain other persons closely related by blood or marriage.
See also Civil Code (Bürgerliches Gesetzbuch (BGB)) §§ 1589-1590.

\textsuperscript{151} See EBERT, supra note 126, at 85.

\textsuperscript{152} The proposed Municipal Ethics Act of the N.Y. State Commission on Gov-
ernment Integrity does prohibit public officials from “refrain[ing] from taking any
action . . . in order to obtain a pecuniary or material benefit” for themselves, their
German public officials laws specifically regulate public officials' receipt of gifts. Many American ethics laws also limit or prohibit acceptance of gifts, though sometimes only if they exceed a specified amount. In contrast to the gift provisions in many American ethics laws, the German gift provisions are quite straightforward:

The public official, including after the termination of the public official relationship, may accept rewards or gifts, with respect to his office, only with the approval of the highest authority or [in the case of a former public official, the highest authority at the official's former place of employment or the authority's designated representative].

Although government regulations generally permit acceptance of small gifts, the approval requirement is interpreted broadly. "Even the suspicion of bias or corruption should be avoided." Here again, American legislators would profit from a study of the German approach.

4. Outside Business Activities

German public officials laws devote substantial attention to the regulation of those activities of an official, both on and off the job,
that are not encompassed within the official’s job description.\footnote{See BBG §§ 64-69a; BRRG § 42-42a; LBG(NRW) §§ 67-75a. Pursuant to BBG § 69, the subsidiary activities of federal public officials are further regulated in part by the Federal Subsidiary Activities Regulation of Aug. 28, 1974, as amended (Bundesnebentätigkeitsverordnung (BNV)), reprinted in BUNDESBEAMTENGESETZE (Beck 1986); pursuant to LBG(NRW) § 75, the subsidiary activities of public officials in North Rhine-Westphalia are further regulated in part by the Subsidiary Activities Regulation of Sept. 21, 1982, as amended (Nebentätigkeitverordnung (NtV(NRW))), and the University Subsidiary Activities Regulation of Dec. 11, 1981, as amended (Hochschulnebentätigkeitsverordnung (HNtV(NRW))), both reprinted in H. REHBRON (ed.), GESETZE DES LANDES NORDRHEIN-WESTFALEN (1987). See generally SChNELLENBACH, supra note 124, at 100-117; SCHEERBARTH, supra note 1, at 357-68; Battis, supra note 124, at 358-83; EBERT, supra note 126, at 88-90; STRUNK, supra note 53, at 65-66; WIESE, supra note 124, at 120-23; VON MÜNCH, supra note 124, at 38-40; Wagner, supra note 57, at 87; APEl, supra note 57, at 51. Diagram No. 14 in SCHEERBARTH sets forth an overview of the law governing subsidiary activities of public officials.} When requested by a senior official, a German public official must undertake an activity (Nebentätigkeit) that is subsidiary to the official’s primary duties, provided that the activity is within sphere of activities of the public service, the public official possesses the requisite training or education, and the activity does not make undue demands on him or her,\footnote{BBG § 64; LBG(NRW) § 67. See generally SCHEERBARTH, supra note 1, at 360-61. See also BNV § 3 and NtV(NRW) §§ 4 and 5 (restrictions on use of public officials for subsidiary activities); BBG § 67, LBG(NRW) § 73, and Battis, supra note 124, at 376-78 (right of public officials to indemnification for liability resulting from the performance of subsidiary activities at the direction or request of superiors); BBG § 68, LBG(NRW) § 74, NtV(NRW) § 21, and Battis, supra note 124, at 378-79 (termination of subsidiary occupation or subsidiary office upon termination of the public official relationship); BBG § 69, LBG(NRW) § 75, and Battis, supra note 124, at 380-85 (promulgation of regulations on subsidiary activities).} a sui generis determination governed by the abilities of the individual public official.\footnote{See 29 BVerwGE 191, 194 (1968). See also Battis, supra note 124, at 363. SCHEERBARTH, supra note 1, at 360.} Such undue demands are prohibited by the government’s duty to care for the public official (Fursorgepflicht),\footnote{See BBG § 64; LBG(NRW) § 67. See generally Battis, supra note 124, at 361-63. The distinction between a subsidiary occupation and a subsidiary office has} a further example of the Yin-Yang approach of German public officials laws to the rights and duties of public officials. Therefore, “[a] police public official may not be compelled to become a translator [merely] because, by chance, he has passed a translator’s exam.”\footnote{BBG §§ 64-69a; BRRG § 42-42a; LBG(NRW) §§ 67-75a. Pursuant to BBG § 69, the subsidiary activities of federal public officials are further regulated in part by the Federal Subsidiary Activities Regulation of Aug. 28, 1974, as amended (Bundesnebentätigkeitsverordnung (BNV)), reprinted in BUNDESBEAMTENGESETZE (Beck 1986); pursuant to LBG(NRW) § 75, the subsidiary activities of public officials in North Rhine-Westphalia are further regulated in part by the Subsidiary Activities Regulation of Sept. 21, 1982, as amended (Nebentätigkeitverordnung (NtV(NRW))), and the University Subsidiary Activities Regulation of Dec. 11, 1981, as amended (Hochschulnebentätigkeitsverordnung (HNtV(NRW))), both reprinted in H. REHBRON (ed.), GESETZE DES LANDES NORDRHEIN-WESTFALEN (1987). See generally SChNELLENBACH, supra note 124, at 100-117; SCHEERBARTH, supra note 1, at 357-68; Battis, supra note 124, at 358-83; EBERT, supra note 126, at 88-90; STRUNK, supra note 53, at 65-66; WIESE, supra note 124, at 120-23; VON MÜNCH, supra note 124, at 38-40; Wagner, supra note 57, at 87; APEl, supra note 57, at 51. Diagram No. 14 in SCHEERBARTH sets forth an overview of the law governing subsidiary activities of public officials.} A subsidiary activity may be either a subsidiary occupation (Nebenbeschäftigung) or a subsidiary office (Nebenamt).\footnote{See 29 BVerwGE 191, 194 (1968). See also Battis, supra note 124, at 363. SCHEERBARTH, supra note 1, at 360.} Under certain
circumstances, a public official requested to perform a subsidiary activity may be entitled to additional compensation from the public employer.\textsuperscript{164}

Although by definition a public official only undertakes a subsidiary office within the context of the public service, he or she may engage in a subsidiary occupation either within or without the public service.\textsuperscript{165} Significantly, German public officials laws make no broad distinction between subsidiary occupations performed within and without the public service. The propriety of a municipal public official teaching a few hours a week in the municipality's vocational school or teaching a vocational course in the evening in a private school raises, at least initially, the same questions.

That approach contrasts sharply with most American public officials laws in general and with American ethics laws in particular, which treat as entirely different questions the propriety of an official performing activities for another public agency, for example, and the permissibility of an official engaging in a private outside business. The German approach again illustrates the extent to which German public officials laws, in contrast to their American counterparts, seek to integrate the ethical obligations of public officials into public administrative law as a whole.

"With the exception of the subsidiary activities definitively specified in [BBG] section 66(1), a public official requires prior approval to undertake every subsidiary activity, to the extent he is not required to perform it pursuant to [BBG] section 64."\textsuperscript{166} In particular, public

\textsuperscript{164} See BBG § 69(2) and BNV §§ 4, 6-8; LBG(NRW) § 75(6) and NtV(NRW) §§ 11-15, 22. See generally Scheerbarth, supra note 1, at 365-66; Battis, supra note 124, at 381-85. "If a public official receives compensation for undertaking a subsidiary activity that [in fact] belongs to his official duties (primary office ['"Hauptamt'\textsuperscript{]}, subsidiary office ['"Nebenamt'\textsuperscript{]}), he shall pay the compensation over to his employer."' LBG(NRW) § 75a. Cf. BNV § 6(3); NtV(NRW) § 13(2); Battis, supra note 124, at 383-84 (payment to employer of compensation for subsidiary activities that exceeds yearly maximum). See generally von Münch, supra note 124, at 39-40.

\textsuperscript{165} See BNV § 1; NtV(NRW) § 2. See generally Scheerbarth, supra note 1, at 357-58.

\textsuperscript{166} BBG § 65. See also BRRG § 42(1). The public officials law of North Rhine-Westphalia sets forth specific subsidiary activities for which permission is required. See LBG(NRW) § 68(1). See also NtV(NRW) § 8 (permission for subsidiary activities in medical care). See generally Scheerbarth, supra note 1, at 363-64; Battis, supra note 124, at 364-69.
officials must obtain permission to engage in any compensated occupation or employment—whether public or private—except as specifically provided by law. The determination of which types of subsidiary activities require permission, and which do not, appears to depend upon the likelihood that the particular kind of activity will result in a conflict with the duties of the public official, such as the duty of complete dedication to one’s profession and freedom from partisanship and bias.

BBG § 66(1) provides that permission is not required in certain specified instances, although even there “a subsidiary activity that does not require permission shall be prohibited, in whole or in part, if by engaging in that activity the public official will violate his official duties.” Thus, for example, a conflict of interest exists when a tax official undertakes a subsidiary activity in a society for income tax assistance. On the other hand, the public authorities have been required to grant a policeman permission to give driving lessons at a private driving school on his own time. The instances specified in section 66(1) are exclusive, not merely illustrative.

Most important, under section 66(1), as a general rule, no permission is required when the public official receives no compensation for the subsidiary activity. Most American ethics laws similarly

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167 See BBG § 65(1); BRRG § 42(1); LBG(NRW) § 68(1)(3).
169 BBG § 66(2); BRRG § 42(1) (emphasis added). See also LBG(NRW) § 69(2).
170 Subsidiary activities have also been prohibited on separation of powers grounds.
171 See, e.g., 41 BVerwGE 195 (1972) (judge as member of public saving bank’s board of administrators). See also von Münch, supra note 124, at 38.
172 Schnellenbach, supra note 124, at 115. See also von Münch, supra note 124, at 39.
173 See BBG § 65(1) (“with the exception of the subsidiary activities definitively specified in section 66(1)”). See also Schnellenbach, supra note 124, at 112.
174 BBG § 66(1)(1); BRRG § 42(1)(1). The Landesbeamten gesetz of North Rhine-Westphalia contains no general exemption for uncompensated activities. See LBG(NRW) § 69. No permission is required to administer one’s own assets; to engage in literary, scientific, artistic, or lecture activities; for a professor to engage as an expert in independent activities that are related to the professor’s teaching or research duties; or to be active in unions, professional organizations, or self-help institutions for public officials. BBG § 66(1)(2)-(5); BRRG § 42(1)(2)-(5). Freedom from obtaining permission in those four instances is constitutionally compelled by
contain no restrictions upon uncompensated outside activities of public officials, unless a conflict of interest exists. However, under German public officials laws even certain gratis activities require permission: undertaking a subsidiary office; becoming a guardian (Vormundschaft) or trustee (Pflegschaft); acting as the executor of a will; undertaking a commercial activity or engaging in a profession (freien Beruf) (e.g., doctor or architect) or collaborating in either; joining the executive body of an enterprise, except a cooperative society (in which case permission is still required if compensation will be received); and undertaking a trusteeship (Treuhanderschaft). Although it has been said that the reason for requiring permission in those instances is the likelihood that such activities will make excessive demands on the public official, it would seem that many of those same activities also raise the specter of actual, potential, or apparent conflicts of interest. American legislators should give further consideration to whether certain outside activities of public officials, even if uncompensated, should nonetheless be restricted or proscribed.

When permission for a subsidiary activity is required, that permission must be refused if "it appears [zu besorgen ist] that official interests will be impaired by the subsidiary activity." The standard is one of probable impairment; a mere possibility is not sufficient, but a high degree of probability within a reasonable time is not necessary. The public officials laws then lay out specific factors

GG art. 2(1) (right to free development of one's personality), GG art. 5(3) (freedom of art, science, research, and teaching), and GG art. 9(3) (right to form associations). See Battis, supra note 124, at 373; von Münch, supra note 124, at 38-39. See also LBG(NRW) § 69(1); NtV(NRW) § 9. See generally Schnellenbach, supra note 124, at 112-15; Battis, supra note 124, at 372-76.

In addition, "general permission" has been granted for subsidiary occupations that occur outside of working hours, are not otherwise prohibited, and which, together with all other subsidiary occupations of the official, result in compensation not exceeding 200 DM per month; however, the public official must still notify his superior of the subsidiary activity. BNV § 5(1). See also NtV(NRW) § 7 (subsidiary activities; 100 DM per month limit). "Compensation" (Vergütung) is defined in BNV § 4 and NtV(NRW) § 11.

See BBG § 66(1)(1); BRRG § 42(1)(1). See also LBG(NRW) § 68(1). See generally Ebert, supra note 126, at 89-90.

See Schnellenbach, supra note 124, at 112.

BBG § 65(2); BRRG 42(2). See also LBG(NRW) § 68(2) ("permission shall be denied if the subsidiary activity can impair [beeinträchtigen kann] official interests"); NtV(NRW) § 6(2).

Schnellenbach, supra note 124, at 108. See also Scheerbart, supra note 1, at 362-63; Battis, supra note 124, at 371 ("the mere fear of an impairment is insufficient").
that the superior is to consider in determining whether to deny the public official's request.\textsuperscript{179}

First, the request may be denied if the nature and extent of the subsidiary activity will employ the energies of the public official to such an extent that it may hinder the orderly performance of his or her official duties, which hindrance is, as a rule, found when the official's subsidiary activities in a week exceed by one fifth the usual weekly work time. Permission may also be denied when the subsidiary activity could bring the public official into a conflict with his or her official duties or when the activity will occur in a matter in which the office to which the official belongs is or could become active. A ground for denial of permission will exist if the activity could influence the nonpartisanship or impartiality of the official or if the activity could lead to a substantial limitation on the future availability of the official. Finally, permission may be denied if the activity may be injurious to the appearance (Ansehen) of public administration.\textsuperscript{180}

\textsuperscript{179} BBG § 65(2)(1)-(6); BRRG § 42(2)(1)-(6). See also BNV § 5(2)-(3); LBG(NRW) § 68(2). See generally Schnellenbach, supra note 124, at 108-11; BATTIS, supra note 124, at 369-71.

\textsuperscript{180} BBG § 65(2)(1)-(6); BRRG § 42(2)(1)-(6). See also BNV § 5(2)-(3); LBG(NRW) § 68(2); BBG § 72a(2), LBG(NRW) § 68a, and LBG(NRW) § 78b(2) (the latter three restricting compensated subsidiary activities by part-time public officials, public officials with reduced work time, and public officials on leaves of absence). It should be noted, however, that "only public interests related to official matters" will serve as a basis for prohibiting, or denying permission for, a public official to engage in a subsidiary activity. SCHNELLENBACH, supra note 124, at 106 (emphasis original). The official, at least the federal official, has a right to the permission, unless a ground for denying it exists. Id. at 107. See also BATTIS, supra note 124, at 369; SCHEERBARTH, supra note 1, at 361-63. A contrary rule might run afoul of the right to free development of one's personality, guaranteed by article 2(1) of the German Constitution. See BATTIS, supra note 124, at 359-60. Schnellenbach also questions the constitutionality of refusing permission solely on the ground that the public official may then compete with others in the labor market. SCHNELLENBACH, supra note 124, at 106-107. But see LBG(NRW) § 68(3) (authorizing denial of permission when the subsidiary activity may impair substantial interests of the labor market); NtV(NRW) § 6a (definition of substantial impairment); SCHEERBARTH, supra note 1, at 363. Cf. SCHEERBARTH, supra note 1, at 363 (noting that purpose of restrictions on compensated subsidiary activities by part time public officials is to relieve the labor market); BATTIS, supra note 124, at 371 (discussing circumstances under which a third person has standing to oppose the granting of permission to a public official for a subsidiary activity); VON MÜNCH, supra note 124, at 39 (same); SCHNELLENBACH, supra note 124, at 116-17 (same). If permission once granted is subsequently revoked, the official must be accorded time to wind up the subsidiary activity. BNV § 5(4); NtV(NRW) § 6(4). Revocation of permission, in contrast to denial of permission, presupposes not a prediction that the subsidiary activity will impair official interests but an actual impairment of those interests. SCHNELLENBACH, supra note 124, at 108.
That final restriction must be viewed within the context of the duty of public officials to conduct themselves, both on and off the job, in a manner that will do justice to the respect and trust that their profession requires. Thus a public official would be refused permission to operate a bordello, to work as a doorman at a hotel of bad repute, or to peddle goods on the street.

As local ethics boards in the United States are given increasing authority to investigate and punish ethical improprieties by public officials and to issue advisory opinions on the propriety of proposed actions, those factors contained in the German public officials laws should prove instructive and helpful. In particular, consideration should be given to restricting an outside activity of a public official when that activity, though presenting no present conflict of interest, might likely preclude the official from acting on some matter in the future, whether as a result of transfer to a different position or the delegation of additional responsibilities. When a public official is in fact a career public servant, then any outside activities which restrict his or her future usefulness as a public official must viewed as suspect. It must be emphasized, however, that that restriction, under German law, only comes into play when the official might be transferred or delegated the additional duties “with some probability within a reasonable time.”

In addition, before undertaking a compensated subsidiary activity for which no permission is required or of a type for which general permission has been given, a public official in some German states must give prior written notification of the activity to his or her superior unless the activity is a one-time occurrence. The notification must set forth the nature and anticipated scope (number of hours per week) of the activity. Such a procedure is thus akin to the transactional disclosure requirements contained in many American ethics laws. However, those American requirements are usually triggered when an official must take an official action that might produce an actual or potential conflict with his or her existing private interests. By contrast, the German notification procedure is directed at the

181 SCHNELLENBACH, supra note 124, at 110. See also BBG § 54; BRRG § 36; LBG(NRW) § 57.

182 See SCHNELLENBACH, supra note 124, at 110.

183 Id.

184 See NtV(NRW) § 10. Some members of the Commission to Study the Reform of the Public Service Law proposed that notification, but no permission, be required for all private subsidiary activities. See WIESE, supra note 124, at 123.
outside activity, rather than at official action, and occurs before the outside activity produces any conflict of interest. Furthermore, the American approach to transactional disclosure almost always requires that the official recuse himself or herself from taking the official action. The German notification procedure would ordinarily not require recusal—since the notification occurs before the conflict exists—although the German official’s superior could prohibit the subsidiary activity if it would impair official interests.

Therefore, on the whole the German approach to outside business activities of public officials encompasses a broader range of options than does the approach of most American ethics laws. In contrast to those laws, German regulations focus less on outright prohibition of specified private business activities and more on disclosure and permission. The German approach is thus far more flexible, allowing public officials to obtain permission (and sometimes merely to give notice) before engaging in compensated outside activities that might technically violate an ethics law but that are in fact, under the circumstances, entirely appropriate. Indeed, the German model is more in accord with American ethics laws’ general emphasis on disclosure.

However, it should be noted that the German approach places far greater reliance upon the administrative discretion of a superior than does the American approach, which is largely self-regulating. Moreover, American government, at least at the local level, lacks a highly institutionalized civil service and is dominated at the top by politicians. Those differences between the two countries would restrict the wholesale adoption of the German model in the United States. Yet American legislators should at least examine the German notification and permission procedure as an alternative to the current all-or-nothing prohibitions on outside business activities. Perhaps, for example, that German model could be modified to require that notification be made to, and approval obtained from, the appropriate ethics board rather than a superior.

As a general rule, under German law, subsidiary activities—whether official or private—must be performed outside of working hours, unless they are required or suggested by the public official’s superior or acknowledged by the superior as fulfilling an official interest. In performing a subsidiary activity, a public official may use the

185 BBG § 65(3); BRRG § 42(3). See also LBG(NRW) § 70(1). See generally SCHEERBARTH, supra note 1, at 364.
facilities, personnel, or material of the public employer only with its permission, upon a showing of a public or scientific interest, and upon reimbursement for the employer’s costs. For example, a doctor with the public health service might use public facilities to treat private patients after hours. Significantly, therefore, German public officials laws, to a much greater extent than American laws, specifically contemplate the use of public resources for nonpublic activities that benefit the public or advance scientific knowledge. In this writer’s experience, it is not unusual for an allegation of unethical activity lodged against an American public official to be based upon activities of the official which, though nonpublic, in fact benefit the public. For example, the supervisor of a village highway department might use village materials and village employees to help him repair the driveway of his daughter’s parochial school or nursery school. If such activities were not prohibited but merely strictly regulated, then the public interest might be advanced while appearances of impropriety were reduced.

Some German public officials laws contain an annual financial disclosure requirement with respect to subsidiary activities. Thus, at the end of each fiscal year, public officials in North Rhine-Westphalia must forward to their superiors a statement of the income from those private subsidiary activities requiring permission, and from subsidiary activities in public service, when the official’s income from all such subsidiary activities exceeds 1200 DM for that year.

That requirement provides some corroboration for the assertion that the financial disclosure provisions in American ethics laws are needed. However, unlike their American counterparts, the North Rhine-Westphalia requirements entirely dispense with disclosure of income from a broad range of private subsidiary activities, namely from those activities which the public official need not disclose to

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186 BBG § 65(5); BRRG § 42(4). See also BBG § 69(4) and Richtlinien für die Entrichtung des Nutzungsentgelts für Inanspruchnahme von Personal, Einrichtungen und Material des Dienstherrn (Arbeitgebers) insbesondere aus Anlass einer Nebentätigkeit (RHO § 41) of July 31, 1968 (Richtlinien); LBG(NRW) § 72 and NtV(NRW) §§ 16-20. Under certain circumstances the public employer may dispense with reimbursement. See BBG § 69(4); Richtlinien Nr. 2(4); NtV(NRW) § 17(2). See generally SCHNELLENBACH, supra note 124, at 111; SCHEERBARTH, supra note 1, at 367-68.

187 LBG(NRW) § 71; NtV(NRW) § 15. For these purposes, activities for certain publicly held entities are deemed to be activities in public service. NtV(NRW) §§ 3(2), 15(1). See also BNV § 8 (requiring public officials to notify their superiors at close of calendar year of gross income from subsidiary activities in public service to the extent such income exceeds 1000 DM).
his or her superiors. As noted above, in this writer's experience, disclosure requirements are the provisions most objectionable to American public officials. The North Rhine-Westphalia approach would obviate some of those objections by exempting from disclosure income from those outside activities that are unlikely to produce any conflicts of interest or to impair an official's ability to perform his or her job efficiently and impartially. Indeed, that approach could be modified for purposes of American ethics laws to exempt from disclosure income from those activities for which an official must obtain permission but which the appropriate ethics board determines do not warrant further disclosure.

Finally, German laws regulating subsidiary activities contain certain revolving door restrictions. Retired public officials, or former public officials who receive pension benefits from the public employer, must notify their former agency of any occupation or employment they undertake that relates to any of their official activities during the last five years of their public service, if the occupation or employment could impair official interests. "If it appears that the occupation or employment will impair official interests, it shall be prohibited." 

This provision is noteworthy in two regards. First, it establishes a notification procedure for former public officials. That approach, though rarely utilized in American ethics statutes, has much to commend it. Indeed, virtually all of the arguments in favor of transactional disclosure by current public officials apply with equal force to notification by former public officials. The German notification procedure not only protects the public from former officials engaging in activities in possible conflict with their former duties as public servants, but also protects the former public officials themselves by requiring them to obtain the imprimatur of their former employer upon any activities that could conceivably result in charges of a conflict of interest.

Second, unlike analogous provisions in some American ethics laws, the German notification requirement, and any consequent prohibition on employment, extends only until five years after the termination of the official's public service, and relates only to activities performed by the public official during the last five years of public service.

188 BBG § 69a(1); BRRG § 42a(1).
189 BBG § 69a(2); BRRG § 42a(2).
190 BBG § 69a(1), (3); BRRG § 42a(1), (3). In the case of public officials who retire at age 65, the notification requirement extends for only three years after
When this writer toured New York State discussing ethics laws with municipal officials and concerned citizens, he discovered that public officials were particularly concerned about any revolving door restriction that places any permanent bar upon their post-public employment activities. That even German public officials laws, restrictive as they otherwise are, contain no permanent bar on such activities suggests that permanent bars in American ethics statutes for public officials should be reconsidered; at the very least, the matter warrants further study.

B. The Role of German Public Officials Among German Public Servants

As noted above, this article addresses the public law context of the ethical duties not of every German governmental employee but only of German public officials (Beamten), who by law are accorded a special place in the hierarchy of persons employed by federal, state, and local governments. A word about that hierarchy is in order.

German public law has traditionally distinguished among three groups of public servants: public officials (Beamten), public employees (Angestellten), and public laborers (Arbeiter). Article 33(4) of the FRG Constitution would appear to provide that public employees and public laborers, as a general rule, may not exercise governmental authority as such and do not stand in any special relationship to the state. Unlike public officials, they are regulated not by public law but by collective bargaining agreements pursuant to private labor law. For public employees and public laborers, the state is little different from a private employer.

Public officials, on the other hand, stand in a special relationship to the state. Furthermore, appointment of someone as a public official is only permissible when that person is to exercise either governmental authority or responsibilities that for reasons of state or public security

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191 See, e.g., N.Y. ST. COMM’N DRAFT § 4(1)(k).
192 Of the 26 million employees in Germany, approximately 3.8 million are employed full-time, 500,000 part-time, in government service. WAGNER, supra note 57, at 3.
193 See BBG § 191. See generally WAGNER, supra note 57, at 2.
194 SCHERBARTH, supra note 1, at 66.
may not be committed exclusively to persons whose relationship to the state is governed by private law. 195

As a matter of practice and constitutional interpretation, however, the line between the functions exercisable by public officials and those exercisable by public employees has grown increasingly fuzzy. Public employees now often exercise the same responsibilities as public officials. Indeed because the collective bargaining agreements of public employees contain some duties that are the same as those of public officials; those agreements also grant public employees substantial job security. Thus, by contract, public employees have, in effect, a relationship to the state that extends beyond the relationship of private employee to private employer. 196 The fact remains, however, that the relationship between the public official and the state is a special one, expressly mandated by the Constitution. Moreover, "despite some advance toward the public officials law (for example, in collective bargaining agreements of the public service), employees and laborers in public service stand in a labor relationship governed by the labor law, even when they exercise governmental authority." 197

A public official 198 may be one of several types. 199 First, public officials may be grouped according to the nature of their employer;

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195 See BBG § 4; BRRG § 2(2).
196 See, generally, Deutscher Beamtenbund [Association of German Public Officials], DBB ABC 100-101 (1978); Wiese, supra note 124, at 10-11; Zeiler, supra note 63, at 14-15; Scheerbarth, supra note 1, at 66, 164-65.
197 Wiese, supra note 124, at 11.
198 The word "Beamte," translated in this article as "public official," differs in German law according to the context in which it is used: the constitutional context; the liability context; and, at least formerly, the criminal law context. The constitutional context, which is addressed in the next section, is the narrowest and refers to those individuals who have received a certificate of appointment and stand in a relationship of service and loyalty to the state, governed by public law. This context excludes, for example, public employees and public laborers; judges; the federal President; the federal Chancellor and federal ministers, state minister presidents and state ministers (Mitglieder der Bundes- und Landesregierung); church officials; soldiers; and independent notaries. The liability context is broader and encompasses all persons, including public employees and public laborers, to whom in a particular instance the exercise of a public office has been entrusted, as a consequence of which the state, rather than the individual, bears primary responsibility for violations of duty committed by that person against a third party while carrying out the official responsibilities (GG art. 34; BGB § 839(1)). The criminal law context is the broadest of the three and includes, for example, for purposes of corruption in office statutes, the constitutional public officials, judges, and other persons whose activities fulfill a function of public administration. See von Münch, supra note 124, at 15-17;
thus there are federal public officials, state public officials, municipal public officials, and public officials of other public law entities (e.g., foundations). Second, a federal public official may be either a direct (unmittelbarer) public official (that is, employed directly by the federal government) or an indirect (mittelbarer) public official (that is, employed by a federal juridical entity, such as the Bundesbank).

Third, public officials are classified according to their career paths (Laufbahngruppen), which in turn depend on the officials’ training and education—namely, public officials of higher, high, middle, and simple service. Thus, for example, the educational minimums for those four groups are, respectively, a university degree; completion of a university preparatory high school (Gymnasium); completion of a middle school (Realschule), or completion of basic school (Hauptschule) and vocational training; and completion of basic school (Hauptschule).

Fourth, a public official is either a public official for life (that is, until retirement) (Beamter auf Lebenszeit), a public official for a term (Beamter auf Zeit), a probationary public official (Beamter auf Probe), or a public official at will (Beamter auf Widerruf). Appointment of public officials for a term is far less common in Germany than in the United States, a fact that is attributable to the Germans’ emphasis upon a professional public officialdom. In the German federal government, public officials for a term are rare. In the German states, such public officials include, primarily, elected local government officials during their term of elected office. An office may be held by a public official for a term only when specifically provided for by law. Thus, restricting the number of public officials

Zeiler, supra note 63, at 24-27; Scheerbarth, supra note 1, at 133-135; Wagner, supra note 57, at 20-21; Ebert, supra note 126, at 54-55.

199 See generally Ebert, supra note 126, at 57-61; Apel, supra note 57, at 12-14; Wagner, supra note 57, at 27-31; Zeiler, supra note 63, at 27-32; von Münch, supra note 124, at 17-21; Scheerbarth, supra note 1, at 135-159.

200 See BBG § 2. Compare LBG(NRW) § 2 (making no such distinction for public officials of North Rhine-Westphalia). See generally Wagner, supra note 57, at 27; Zeiler, supra note 63, at 27; Bochalli, supra note 124, at 8.

201 BBG §§ 15-19; BRRG § 13; LBG(NRW) §§ 15-20.

202 See BBG §§ 5, 6(2); BRRG §§ 3(1), 5(2), 95-98; LBG(NRW) §§ 5, 8(2), 30.

203 See Wagner, supra note 57, at 29. An example would be a managing member of the college of the armed forces.

204 Id.; Apel, supra note 57, at 14; von Münch, supra note 124, at 18; Zeiler, supra note 63, at 29-30. University presidents are also public officials for a term. See Wagner, supra note 57, at 29.

205 BRRG § 95(1). See also Apel, supra note 57, at 14; Zeiler, supra note 63, at 29.
for a term substantially reduces the need for complex ethics laws aimed at preventing the evils inherent in the American revolving door approach to public service.

With respect to public officials at will, it must be emphasized that such officials are very much the exception in Germany, not the rule. They are not to be equated with those American public employees who serve at the pleasure of an elected official. Rather, in Germany public officials at will include only public officials who have not completed the required preparatory service or who are exercising only incidentally or temporarily the kind of responsibility (in particular, governmental authority) that as a rule must be exercised by a public official. Indeed, as stated by the federal law setting minimum standards for state public officials laws, "The rule is public official relationship for life." 207

Finally, certain special categories of public officials exist, including honorary public officials (Ehrenbeamten), elected public officials (Wahlbeamten), and political public officials (politische Beamten). Honorary public officials, such as honorary mayors or aldermen (Stadtrat), play a significant role in municipal administration but have some other primary occupation. An honorary public official is not entitled to compensation or to many of the benefits of the usual public official and is regulated according to the particular law governing his or her type of office. Elected public officials include those individuals elected to govern a municipality or municipal organization.

Political public officials hold an office in which they must be in continuous agreement with the essential political views and goals of the government. They may be relieved of their office at any time, but not arbitrarily. 211

206 See BBG § 5(2); BRRG § 3(1)(4); LBG(NRW) § 5(1)(4).
207 BRRG § 3(1).
208 One might also note the relatively recent development of part-time career public officials. See BBG §§ 72a, 79a. See also Wagner, supra note 57, at 28.
209 State municipality laws determine whether a mayor is an honorary public official or an elected public official. Where the mayor is an honorary public official, the city director, an elected public official, heads the public administration.
210 See BBG § 177; BRRG § 115; LBG(NRW) § 183. See also Wagner, supra note 57, at 28; Zeiler, supra note 63, at 29; von Münch, supra note 124, at 20-21; Ebert, supra note 126, at 58; Scheerbarth, supra note 1, at 139.
211 See BRRG § 95(1); LBG(NRW) §§ 5(3), 10(2), 15(2), 31(2); Scheerbarth, supra note 1, at 145-47; Ebert, supra note 126, at 58.
212 BRRG § 31. See also BBG § 36; LBG(NRW) § 38; Zeiler, supra note 63, at 28-29; Scheerbarth, supra note 1, at 144-45; Ebert, supra note 126, at 58-59; Wagner, supra note 57, at 28.
The nature and limited role of political public officials are particularly instructive for students of American public administration. By mandating, as a general rule, that public officials be appointed for life, Article 33 of the West German Constitution restricts the appointment of political public officials to the highest levels of government, basically the first one or two levels below the cabinet itself, such as deputy and assistant secretaries and close advisors of the federal Chancellor or of the heads of individual states.213 Indeed, the law sets forth an exclusive list of those offices which may be filled by political public officials.214 Even so, there have been periodic calls for the abolition of this category of public officials.215 Furthermore, the vast majority of political public officials are career public officials and must comply with the relevant educational, training, and examination requirements.216

In sharp contrast to this scheme, the view has often been expressed in the United States that, in the words of the Chairman of the House Judiciary Committee:

the so-called "revolving door" between private life and government service is a distinctly American institution that is one of the real strengths of our government. By attracting top people from the private sector to serve the nation every four or eight years, we infuse new blood and new ideas into the bureaucracy.... We are also able to infuse new blood into all levels of the bureaucracy, so that even the career civil service is not made up exclusively of permanent office holders. This strengthens our system of government by making it more vital and by tying it more closely to the people it serves.217

With all due respect, in the face of repeated revelations of ethical improprieties by political appointees at all levels of government, that

213 See BBG § 36; BRRG § 31; LBG(NRW) § 38(1); DBB ABC, supra note 196, at 53. The German Association of Public Officials has questioned the constitutionality of LBG(NRW) § 38, to the extent that it classifies as political public officials heads of provincial governments (Regierungspräsidenten), directors of prosecutions (Generalstaatsanwälte), chief commissioners of police (Polizeipräsidenten), and directors of police (Polizeidirektoren). See DBB ABC, supra note 196, at 53.

214 See BBG § 36(1); LBG(NRW) § 38(1). See also SCHEERBARTH, supra note 1, at 144.

215 WAGNER, supra note 57, at 28. Some German states, for example Bavaria, have no political public officials. ZEILER, supra note 63, at 29.

216 See BBG § 36; BRRG § 31; LBG(NRW) § 38. See also DBB ABC, supra note 196, at 53.

217 Additional Views of Peter W. Rodino, Jr., accompanying H.R. REP. No. 1068, 100th Cong., 2d Sess., at 45. See also Supplemental Views of Mr. Sensenbrenner, id., at 51 ("I am loath to turning the government over to full-time bureaucrats").
view is at best simplistic and at worst utter nonsense. At the very least, one must question whether the price of this new blood has become unacceptably high.

Revolving doors create serious ethical problems that give rise to ill-considered legislation, such as the now defunct Post-Employment Restrictions Act of 1988 (H.R. 5043), discussed at the outset of this article.\textsuperscript{218} Revolving doors demoralize career public officials, who see the politically connected promoted over the dedicated and highly experienced professional, and institutionalize inefficiency by requiring new middle- and low-level political appointees to reinvent the wheel every four or eight years.

Moreover, this revolving door policy is completely unnecessary. If the bureaucracy is moribund, then the answer lies in radically restructuring that bureaucracy, a task for which a political appointee, here today and gone tomorrow, has neither the knowledge nor the time to undertake. Even the best new blood is of little help if it is leeches out of the vein of the body politic in the next election. Rather, public service must become sufficiently attractive to induce top people to make a long-term career change from the private into the public sector.

No one would seriously dispute the right of an elected chief executive, whether President of the United States or mayor of a city, to appoint top level advisors whose political philosophy is compatible with the executive’s own. However, by analogy to the German model, consideration should be given to requiring that all local government political appointees, and all federal and state political appointees below the cabinet level, be drawn from the ranks of career public officials. Such an approach, when combined with a revitalized public service, would increase morale among public servants, promote efficiency in government, minimize ethical problems resulting from the revolving door syndrome, and obviate the need to pay off campaign supporters with political appointments. Thus, for example, ambassadorships would no longer be for sale to substantial campaign contributors, who now all too often lack diplomatic experience or proficiency in the relevant foreign language.

In short, under the German system, the vast majority of public officials are public officials for life. With few exceptions, positions that in the United States are held by individuals appointed for a term

\textsuperscript{218} See, e.g., H.R. REP. No. 1068, 100th Cong., 2d Sess., at 15-16.
or who serve at the pleasure of an elected executive or legislative body, whether or not as a result of their political affiliation, are in Germany held by public officials for life. Furthermore, in Germany few positions other than those of chief executive and legislator are filled by election. Thus, for example, under the German system, federal and state assistant attorneys general, city clerks, town highway superintendents, and building inspectors would all be public officials for life.

Whether American governments, particularly municipal governments, should adopt such a system of career public officials raises significant, and complex, philosophical and economic questions, questions that have far too rarely been addressed. In particular, one must examine the tradeoffs between that system and the present American system, which is often dominated by volunteer boards, political appointees, elected officers even in administrative posts, and relatively short-term officials in important administrative positions.

On the one hand, it is becoming increasingly difficult in the American system to fill positions on volunteer boards that are vital to the functioning of the local government (e.g., legislative bodies, planning boards, zoning boards). The American system of local government also tends to be inefficient and overly sensitive to political and community pressure. Small communities, which in many states are almost wholly dependent on volunteers and part-time employees, are finding it difficult to provide increasingly complex services and to comply with increasingly complex laws. Failures in services and inadvertent violations of the law are not infrequent results. Finally, as noted above, the revolving door approach to American government tends to foster ethical problems.

On the other hand, imposing a German-type career public official system on American local governments would prove enormously expensive, at least in the short run, and would, to some extent, remove those governments from the control of the people. Dispersal of power (home rule) and citizen participation are among the hallmarks of

219 The devastating results that can occur when a municipality caves in to community pressure have recently been vividly illustrated by the Yonkers desegregation fight. See, e.g., United States v. Yonkers Board of Education, 837 F.2d 1181 (2d Cir. 1987), cert. denied, ___ U.S. ___, 108 S. Ct. 2821, 100 L. Ed. 2d 922 (1988).

220 For example, in the course of representing various municipalities, this author found, among other municipalities, widespread failure to obey New York’s complex regulations governing environmental review. In the majority of cases, that failure appeared inadvertent.
American government, at least at the local level. Yet one must question whether in the long run a career system is not cheaper, whether citizen participation has in any event become difficult to sustain, and whether direct community control is as necessary, or desirable, when public officials are less subject to pressure from individuals, political parties, special interests, and monetary concerns.

C. Constitutional and Public Law Bases for the German Professional Public Officialdom

Whatever position American federal, state, and local governments take on the issue of career public officials, the current approach of those governments to the ethical duties of public officials is wholly untenable. In particular, legislators cannot continue to impose increasingly stringent ethical duties without enacting corresponding rights. The Germans have long understood this relationship of duties and rights. Indeed, German public officials laws describe the position of the public official vis-à-vis the public employer as the “public official relationship” (Beamtenverhältnis). “Duties and rights of public officials are interrelated; they correlate to each other. As a rule, a duty of the public official corresponds to a right of the public employer, a duty of the public employer to a right of the public official. Thus is the principle of mutuality, the principle that determines the shaping of the duties and rights of the public official relationship as a relationship of service and loyalty governed by public law.”

Accordingly, the ethical obligations of public officials cannot be regulated, or even understood, independently from those officials’ rights, an immutable fact that American legislators, at least at the state and local level, have thus far almost entirely failed to appreciate.

German public officials, in sharp contrast to public employees and public laborers, stand in a special relationship to the state, a relationship that is enshrined in Article 33 of the German Constitution:

1. Every German in every state has the same rights and duties as a [German] citizen.

2. Every German, according to his aptitude, qualifications, and professional achievement, is equally eligible for every public office.

3. The enjoyment of civil and citizenship rights, the admission to public office, and the rights acquired in public service are independent of religious persuasion. No one may suffer a disadvantage

221 Wiese, supra note 124, at 164.
because of his adherence or lack of adherence to a religious persuasion or ideology.

(4) As a rule, only members of the public service who stand in a relationship of service and loyalty governed by public law shall be assigned, as an ongoing responsibility, the exercise of governmental authority ["hoheitsrechtlicher Befugnisse"].

(5) Public service law shall be regulated with due regard to the traditional principles of the professional public officialdom ["Berufsbeamentum"].

(The consideration of other groups that stand in a special relationship to the state, such as judges, soldiers, cabinet ministers, parliamentary state secretaries, and college professors, is beyond the scope of this article.)

Article 33 establishes the fundamental public administrative law context for the ethical obligations of German public officials. From that article, certain characteristics of public officials may be extracted. First, as a general rule such officials are the only members of public service who may exercise governmental authority, at least as an ongoing responsibility, although, as noted above, that rule varies in practice. Second, the German tradition of a professional public officialdom shall continue. Third, public officials stand in a special relationship of service and loyalty to the state and are governed not by the usual principles of private labor law but by public law. Fourth, public officials shall be selected (and advanced) according to merit (the so-called "Leistungsprinzip"); and, concomitantly, their religious and ideological persuasion shall play no part in their selection or

222 Other provisions of the Constitution relevant to public officials are: GG art. 34 (establishing that the state is primarily responsible for violations of duty committed by an official against a third party while carrying out official responsibilities), GG art. 36 (requiring that, at the highest levels of the federal government, public officials be drawn proportionately from all states), GG art. 60(1) (providing that the federal President shall appoint and dismiss federal judges, federal public officials, officers, and noncommissioned officers, except as otherwise provided by law), GG art. 131 (providing that federal law shall regulate those who were members of the public service on May 8, 1945), GG art. 132 (authorizing the retirement or transfer of unqualified public officials and judges who, at the time the Constitution became effective, possessed appointments for life), and, in particular, GG art. 137(1) (providing that the right of public officials, public employees, professional soldiers, volunteer soldiers for a term, and judges to stand for election to federal, state, or local office may be restricted by law).

223 See generally SCHEERBARTH, supra note 1, at 66.
advancement. Article 33 applies to all public officials in Germany, federal, state, and local.224

1. Exercise of Governmental Authority

A good deal of scholars' blood has been spilled over the difficult concept of "hoheitsrechtliche Befugnisse"—here translated as "governmental authority"—which, by constitutional mandate, may regularly be exercised only by public officials (Beamten), not by any other type of public servants. Certainly, the meaning of the phrase "governmental authority" is unclear. Commentators speak in terms of acting in a governmental capacity, of performing state activities in accordance with public law, of exercising state authority in an intrusive manner (Eingriffsverwaltung) through command and compulsion, or of undertaking activities of surpassing interest to the public.225 Such formulations provide little assistance and merely beg the question of what governmental authority means.

However, the purpose of the "governmental authority" requirement is generally considered to be two-fold. First, it insures that matters within the scope of that authority are handled only by individuals who are not only qualified but who also stand in a particularly close relationship of dependency with the state (for example, public officials have no right to strike). Second, the requirement helps to prevent the dissipation of the traditional principles of the professional officialdom and to preserve a substantial area of meaningful activity for public officials.226

Analogous concepts exist, of course, in American government, but in a curiously perverted form. In the United States, especially in state and local government, many higher level governmental officials who clearly exercise "hoheitsrechtliche Befugnisse," and who would therefore be public officials (Beamten) under German law, are exempt from many of the protections, and requirements, of civil service. Many of those higher level officials are either employees at will (for example, deputy department heads or town clerks) or elected public officials (for example, in New York State, many town highway superintendents, the primary target of the FBI sting operation mentioned

224 See Apel, supra note 57, at 3; Scheerbarth, supra note 1, at 69.
225 See, e.g., T. Maunz, G. Dürig 2 Grundgesetz Kommentar 21-22 (1987) ("Maunz-Dürig Kommentar") (commentary on FRG Constitution); Zeiler, supra note 63, at 15-16; von Münch, supra note 124, 21-22; Ebert, supra note 126, at 55-56; Wiese, supra note 124, at 10; Scheerbarth, supra note 1, at 76.
226 See 2 Maunz-Dürig Kommentar, supra note 225, at 21.
in the introduction to this article). Accordingly, many members of
the very class of public servants to which the West German Consti-
tution accords special protections, and concomitantly from which it
exacts special commitments, are, in the United States, left to swing
in the winds of superiors' whims or voter caprice. It should thus
come as no surprise when American public officials balk at the
imposition of additional ethical restrictions. Platitudes such as "a
public office is a public trust" carry little weight for the public
official who may be dismissed at will.

The answer to this problem, it is suggested, lies not in the blind
extension of the civil service system to cover public officials but rather
in the acknowledgment of two basic facts. First, public officials fulfill
a special function in the exercise of governmental authority. Second,
the public is best served and protected when that special function is
recognized and when its exercise is limited to licensed, qualified
professionals to whom certain privileges are accorded and from whom,
therefore, certain concessions may be exacted.

The entire structure of the German officialdom mirrors that prin-
ciple: because so many substantial duties are imposed upon public
officials, they must be accorded certain substantial rights. As stated
by the Association of German Public Officials (Deutscher Beamten-
bund), "[t]his function [of governmental activity—to realize the com-
mon good—] requires that as a rule only those persons shall carry
out the duties of government administration who, to a high degree,
may be viewed as trustees of governmental authority and of the entire
people."\textsuperscript{227} Until American governments accord public officials trust,
protection, and exclusive authority commensurate with their position,
those governments cannot justifiably expect public officials to act as
trustees of the public good. At least in this instance, without trust,
there will be no trustee.

2. Continuation of Professional Public Officialdom

Paragraph 5 of Article 33, together with paragraph 4, constitutes
the so-called "institutional guarantee of a professional public official-
dom."\textsuperscript{228} "The Constitution is concerned with securing the pro-
fessional public officialdom as an institution," in accordance with
principles laid down before the war, during the Weimar Republic.\textsuperscript{229}

\begin{footnotes}
\footnotetext[227]{DBB ABC, supra note 196, at 9.}
\footnotetext[228]{See, e.g., WAGNER, supra note 57, at 12;}
\footnotetext[229]{WAGNER, supra note 57, at 12-13.}
\end{footnotes}
Analogous provisions, regulating civil service, are not uncommon in state constitutions in the United States.\textsuperscript{230}

It was not the intent of this institutional guarantee to enshrine particular principles in a particular form but rather to ensure that the essence of professional officialdom would be preserved. Despite its precatory language—"with due regard to"—the traditional principles—Article 33(5) is regarded as mandating respect for those traditional principles.\textsuperscript{231}

This institutional guarantee of a professional public officialdom addresses a problem the very existence of which has gone virtually unrecognized in the United States. American governments for the most part simply do not stand behind their non-civil service public officials as an institution. Indeed, there is no such institution. Many public officials, like this author during his year-long stint with the New York State government, appear to drift in and out of public service with little sense of cohesiveness as a group and with little continuity.

3. Special Relationship of Service and Loyalty

Included among the traditional principles of a professional public officialdom referred to in Article 33(5) is the "relationship of service and loyalty governed by public law" set forth in Article 33(4); indeed, there has been a tendency to draw additional principles from that quoted phrase itself.\textsuperscript{232} Out of that relationship arise certain duties, especially loyalty and obedience. Among public servants, only public officials stand in that relationship.\textsuperscript{233}

The relationship of service is characterized by complete dedication and a constant readiness to serve. The Federal Constitutional Court has ruled that that duty to serve precludes strikes by public officials and requires administration of office without regard to partisan politics.\textsuperscript{234} Significantly, that duty of service "is legally and financially secured by an appointment for life."\textsuperscript{235} Again, for the German public official, rights and duties, including ethical obligations, remain two sides of the same coin.

\textsuperscript{230} See, e.g., N.Y. Const., art. V, § 6.

\textsuperscript{231} See, e.g., MAUNZ-DÜRIG KOMMENTAR, supra note 225, at 32; WAGNER, supra note 57, at 13; ZEILER, supra note 63, at 18.

\textsuperscript{232} See, e.g., WAGNER, supra note 57, at 13; WIESE, supra note 124, at 9-11.

\textsuperscript{233} WIESE, supra note 124, at 11.

\textsuperscript{234} See 44 BVERFGE 249, 264 (1977); 9 BVERFGE 268, 286 (1959). See also WIESE, supra note 124, at 12.

\textsuperscript{235} WIESE, supra note 124, at 12.
The relationship of *loyalty* mandates that a public official maintain confidentiality and always intercede for the state, the constitutional order, the interests of the whole, and the interests of the official's employer. That same relationship, however, requires the government to provide for the welfare of the public official.

Although in this author's experience many American public officials, particularly at the local level, are enormously dedicated public servants striving to provide service and maintain loyalty under often difficult conditions, that service and loyalty is seldom mandated by law and is rarely, if ever, viewed as reciprocal to the government's duty of service and loyalty to the public official. Whatever rights the law may grant to public officials, whatever duties it may exact, the law neither mandates nor recognizes a special relationship of mutual service and loyalty between American governments and their public officials.

4. *Merit Selection*

Finally, Article 33 mandates that public officials be selected and advanced solely according to merit. That requirement not only secures individual rights but protects the institution of professional officialdom. In particular, sex, parentage, race, language, homeland, origin, faith, and religious or political views may not be considered in appointing or promoting public officials. The tension between this guarantee, to the extent it protects freedom of expression and political beliefs, and the duty of loyalty has engendered substantial debate in Germany, particularly over the question of "radicals in public service." If a sort of professional public officialdom were to be adopted in the United States, this principle of merit selection for public officials might clash with three of the holiest sacred cows of American public service: affirmative action, political patronage, and, ironically, the civil service system itself. Merit selection in the United States is generally viewed either as an end in itself, as a means of promoting rather vague notions of equality, or as a way of preventing political patronage or other irrelevant factors from interfering unduly with

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236 Id. at 12-14.
237 Id. at 14.
238 Id. supra note 124, at 16.
239 See GG art. 3(3), 33(2)-(3). See also WIESE, supra note 124, at 16.
240 See, e.g., SCHEERBARTH, supra note 1, at 70-76.
the appointment of the best qualified candidate. The guarantee of merit selection of public officials in Germany is far more significant, for without merit selection the entire structure of a professional public officialdom, based upon the mutual loyalty of the public official and the state, would collapse.

To the extent it is not legally compelled—in order to remedy past discrimination—any affirmative action program that countenanced the promotion of any female or minority candidate who was less qualified than a male or non-minority candidate would seem seriously to undermine this principle of merit selection and thus to undermine the entire structure of a professional officialdom. Yet discrimination on the grounds of race, sex, religion, political beliefs, or national or family origin—including any discrimination reflected in qualifying examinations—would be absolutely antithetical to the concept of a professional public officialdom and would be intolerable, not only because such discrimination is offensive, unfair, and unjust, but also because it would threaten the entire system of a professional officialdom.

Accordingly, the scope and methods of implementing affirmative action programs would have to be reevaluated to determine whether their potentially deleterious impact upon the principle of merit selection, and therefore upon the underpinnings of a comprehensive structure of professional officialdom, outweighed the benefits of those programs in aiding minorities and establishing equal representation of races and sexes in public service. In particular, since the principle of merit selection for a professional officialdom would preclude any consideration of such factors in the advancement of public officials, affirmative action programs would have to focus upon post-appointment education and training to an extent heretofore virtually unknown among government agencies. However, such education and training can only be given after the individual has joined the public service, presumably in a provisional capacity. To ignore race and sex in the appointment of public official positions would sound the death knell for affirmative action in public service since the public service cannot be responsible for pre-appointment education and training; factors

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241 As noted above, however, a public official "must, by his entire conduct, acknowledge the free and democratic basic order, in the constitutional sense, and intercede to preserve it." BBG § 52(2); BRRG § 35(1); LBG(NRW) § 55(2). See also Weimar RBG art. 10a; Zeiler, supra note 63, at 95-96. This duty is also one of the traditional principles of professional officialdom and arises out of the duty of loyalty. See Wiese, supra note 124, at 12.
such as race and sex would therefore continue to be considered in the initial (provisional) appointment.

Likewise, one must question whether civil service in its present form could, or should, survive if a system of professional public officialdom were adopted. Certainly, civil service employees should not enjoy more rights, while being subject to fewer duties, than public officials themselves, for the very basis of a professional public officialdom lies in the special relationship in which such public servants, and no others, stand with the state. Perhaps, for example, many of the rights, privileges, and duties that are now governed by civil service laws should increasingly be left to individual contract negotiations. Consideration of such matters—or of the substantial rights enjoyed by German public employees and laborers—is, however, beyond the scope of this article.

Patronage is generally regarded in Germany as antithetical to professional public officialdom. Indeed, the Association of German Public Officials calls patronage (Ämterpatronage) "a cancer in government." Although particularly understandable in view of the Nazi party's control of public officials during the Hitler regime, that belief in fact antedates Hitler. Indeed, it would seem to be traceable to the fact that in Germany, in contrast to the United States, public service as a profession first arose not in the context of a government controlled by an elected party but rather in a monarchy. The king, not parties, appointed public officials. Thus, it is hardly surprising that political patronage would later be frowned upon as contrary to professional officialdom.

Although, as noted above, public officials were expected to be loyal to the ruling political party, it has not been suggested that the duty of political loyalty extended to performing favors for the party in violation of one's obligations as a public official.

One might thus be tempted to distinguish between patronage (appointing or advancing an official because of his or her political beliefs and activities), a requirement that public officials be loyal (or at least not disloyal) to the ruling political party, and actual personal or political payoffs by the official to the party. However, the distinction ultimately collapses, as the role of party politics in twentieth century German public officialdom dramatically demonstrates.

242 DBB ABC, supra note 196, at 37.
243 One might, however, consider the extent to which nobles might have been favored over commoners and members of the upper classes over members of the lower classes. See Thiele, supra note 46, at 18.
The national assembly that formulated the 1919 Reichs Constitution regarded party influence on the appointment of public officials as "unavoidable and necessary" in the Weimar Republic, Germany's first real experiment with democracy. Article 130(1) of the 1919 Reichs Constitution, which stated that "public officials are servants of the whole, not of a party," was intended to remind parties and public officials that the officials were not party functionaries and that their appointment did not give their supporters claim on the officials. Not infrequently, the admonition fell on deaf ears.

Unlike the situation in Bismarck's Germany, where public officials, like the state, were politically one-sided, in the Republic both public officialdom and the state were splintered by political parties. As the stakes for political influence rose, so did the pressures for personal and political payoffs by public officials to party officials. In 1921 the Prussian Supreme Administrative Court (Oberverwaltungsgericht) already felt compelled to uphold the dismissal of a public official who had imparted confidential information to party officials on various matters, thus violating his duty of confidentiality. As a powerless minority party, the Nazis railed unrelentingly against "partybook public officials" (Parteibuchbeamten). Yet as the NSDAP gained power, "[t]he struggle against the 'partybook public officialdom' was forgotten when it came time to provide for the party's own followers." When the Nazis finally seized control, they dismissed not merely partybook public officials but all public officials who were actual and potential opponents of the regime—and replaced them with valued national socialists. Thus in Prussia 28% of the senior public officials were dismissed; in the other states, almost 10%. As noted above, party loyalty and public duty became synonymous. "One should finally perceive that patronage leads in a very risky way to the equating of parties and state. . . . The more that offices

244 HATTENHAUER, supra note 50, at 325.
245 Id.
246 See THIELE, supra note 46, at 49.
247 76 OVGE 476 (Prussia 1921). See also HATTENHAUER, supra note 50, at 325.
248 HATTENHAUER, supra note 50, at 373.
249 See MOMMSEN, supra note 79, at 45; HATTENHAUER, supra note 50, at 375-382.
250 HATTENHAUER, supra note 50, at 381.
251 See generally id. at 382-413; MOMMSEN, supra note 79, at 66-90; THIELE, supra note 46, at 65-67.
in public service (in particular in the critical positions) are filled in accordance with purely partisan viewpoints, the less that public service is in the position to fulfill its public responsibilities in a fair and nonpartisan manner." For these reasons, consideration must be given to the complete abolition of patronage appointments in American government, except at the highest, cabinet level positions.

5. **Traditional Principles of Professional Public Officialdom**

German courts and commentators have identified certain principles of professional public officialdom as being mandated by Article 33 of the West German Constitution. Many of the most important of those principles are derived directly from the 1919 Reichs Constitution, including the right to become a public official for life; the right to pensions and survivors benefits, regulated by law; rights of appeal and the protection of the law; the right to retirement; the prohibition against temporary loss of position except in accordance with legally established conditions and formalities; the right to a hearing before adverse facts are entered in one's personnel file; the right to review one's personnel file; and the requirement that public officials serve the public as a whole, not a party or person.

Among the other principles of professional officialdom are the relationship of service and loyalty regulated by public law; the principle of superiors and subordinates; the principle of education, training, and examination; the career principle (Laufbahnprinzip); the principle of maintenance and support of the public official (Alimentationsprinzip); the principle of documentation; and the principle of merit selection and advancement (Leistungsprinzip). Lists might vary somewhat from one commentator to another—for example, some might separately cite the prohibition on strikes or the regulation of rights and duties by law rather than by contract or the duty to maintain confidences or the right to form associations—but the basic principles remain the same.

Furthermore, it is apparent that traditional principles of professional public officialdom, as enshrined by the West German Con-

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252 DBB ABC, supra note 196, at 37.
253 See, e.g., Zeiler, supra note 63, at 20; Wagner, supra note 57, at 13-14; Wiese, supra note 124, at 9-22; Scheerbarth, supra note 1, at 77-84; Apel, supra note 57, at 3.
254 See id. and 1919 REICHSVERF. art. 128-131.
255 See, e.g., Apel, supra note 57, at 3
256 See, e.g., Zeiler, supra note 63, at 20; Wagner, supra note 57, at 13-14; Wiese, supra note 124, at 9-22; Scheerbarth, supra note 1, at 77-84.
stitution, include at least as many rights of public officials as duties. Yet on its face Article 33 is intended, first and foremost, to protect professional public officialdom, not individual public officials. One can, therefore, only conclude that the authors of the West German Constitution, and the courts that have interpreted it, have determined that the preservation of professional public officialdom lies in the protection of the independence of public officials themselves. As stated by the Association of German Public Officials, "A strong and independent professional public officialdom guarantees that the public administration [öffentlich Verwaltung] will act solely in accordance with the law and that that public administration can thereby preserve the legality and neutrality to which it has been enjoined."

American legislators have largely failed to appreciate that relationship between the independence of public officials and their ethical standards. Yet it would seem axiomatic that political appointees, or indeed any officials serving at will, would tend to accede to the desires of those at whose will they serve. The experience of German public officials during the Third Reich illustrates that fact with shocking clarity; as the Nazi party increasingly encroached upon the independence of those officials and made them increasingly beholden to the party for their livelihood, the party's wish became the official's command.

Moreover, American public officials who are encouraged to view themselves as only temporary holders of public office can hardly be faulted for keeping one eye open for employment opportunities with the private companies that appear before them—and perhaps for occasionally providing those companies with special attention. Without political and financial independence—including, in many instances, and particularly at the municipal level, substantially increased salaries and benefits—public officials simply cannot be expected to conduct themselves with "the punctilio of an honor the most sensitive" while constantly confronting the "morals of the market place." After all, as one municipal official told this writer, public officials "are not a cadre of priests."

257 See ZEILER, supra note 63, at 20.
258 See 9 BVERFGE 261, 286 (1959) ("the intent of the Constitution [GG] is not to protect subjective rights of the public official in the first instance but rather to preserve the institution of the professional public officialdom in the interest of the general public").
259 DBB ABC, supra note 196, at 9.
In failing to establish and maintain the independence of public officials, American public officials laws virtually guarantee that an unacceptable number of officials will succumb to political and financial pressures and take actions that at least in spirit violate the ethics laws. The answer to this problem lies, however, not in more ethics laws but in fewer pressures—that is, in greater independence for American public officials.

D. Rights of German Public Officials

The independence of German public officials rests in the protection of their rights. Those rights are specifically laid down in numerous laws and regulations.261 Among the most important are: the Federal Public Officials Law (Bundesbeamtengesetz (BBG)), which regulates only officials of the Federal Republic of Germany itself; the Public Officials Framework Law (Beamtenrechtsrahmengesetz (BRRG)), which provides the minimum standards for non-federal public officials with which all state public officials laws must comply; the Federal Disciplinary Procedure (Bundesdiziplinarordnung), which sets forth the procedure regulating disciplinary proceedings against federal public officials; the Federal Compensation Law (Bundesbesoldungsgesetz), which regulates compensation for all public officials, judges, professional soldiers, and teachers in public schools and universities; and the individual state public officials laws, such as the State Public Officials Law (Landesbeamtengesetz (LBG)) of North Rhine-Westphalia, which regulate state and local public officials within the state. Other statutes, orders, decrees, and regulations address such matters as benefits, assistance, and vacations.262

Sections 79-92 of the BBG set forth in detail the rights of German federal public officials. Those sections address eight topics: welfare and protection (Fürsorge- und Schutzpflicht) (§§ 79-80b); official title (§ 81); salary and pension payments (§§ 82-87a); travel and moving expenses (§ 88); vacations and election of a public official to a legislative or municipal body (§§ 89-89a); personnel files (§ 90); associations (§ 91); and proof of public service (§ 92).263

261 See generally Scheerbarth, supra note 1, at 104-125.
263 See also BRRG §§ 48-58; LBG(NRW) §§ 85-104. “The legal status of a public official may not be altered under conditions, or in any form, not prescribed or permitted by this law.” BRRG § 59.
BBG § 79 requires that the federal government, "in the context of the relationship of service and loyalty," provide for the well-being of the public official and his or her family, including the period following the conclusion of the public official relationship. This right of the public official is one of the traditional principles of professional officialdom guaranteed by Article 33(5) of the Constitution. 264 "That principle [that the government must provide for the welfare of the public official] is the correlative of the traditional principle of the duty of loyalty of the public official [to the state]." 265

Although a number of individual statutory provisions regulate specific rights of officials, such as vacations and compensation, the obligation of the state to provide for the welfare of its public officials is not limited to such provisions. Section 79 establishes that obligation as a general principle. This section has been held to mandate, for example, the provision of a safe work place, the protection of the official's property, the protection of the official against political pressure, and even efforts by the government to obtain the correction of an untrue newspaper story directed against the official. 266 Section 79 would also include, for example, the duty of the federal government to conduct itself in an open and trusting manner toward the official, the duty to provide for the continued training and education of the official, including periodic reviews of performance, and the duty to advise the official. 267 BRRG § 48 and LBG(NRW) § 85 mandate those same rights for state and local public officials. 268

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264 43 BVerfGE 154 (1976); 58 BVerfGE 68 (1981). See generally Schnellenbach, supra note 124, at 118.
266 See Wagner, supra note 57, at 95-97.
267 See generally Scheerbarth, supra note 1, at 370-81, 397-403; Schnellenbach, supra note 124, at 118-142; ApeL, supra note 57, at 54; von Münch, supra note 124, at 46-49; Wagner, supra note 57, at 95-97.
268 See also LBG(NRW) § 104(1) (specification requiring periodic review of an official's performance). BBG § 79a permits public officials who are actually caring for a child under 18 years, or for another dependent in actual need of care, to reduce their work time by up to one half or to obtain a leave of absence of up to three years, with the possibility of extensions. Such leaves of absence may not exceed a total of nine years; the periods of reduced work time and leaves of absence may together not exceed 15 years. See also BRRG § 48a; LBG(NRW) § 85a. See generally Apel, supra note 57, at 54-55. BBG § 80 states that special provisions for mothers will be provided by regulation. See also LBG(NRW) § 86. See generally Apel, supra note 57, at 55; Scheerbarth, supra note 1, at 380-81. BBG § 80a contains special provisions for young public officials. See also BRRG § 55a. See generally Apel, supra note 57, at 55; Scheerbarth, supra note 1, at 380-81.
"The duty [of the state to provide the public official with] welfare and protection means, above all, that the [public] employer, in its decisions and other actions—and therefore also in the exercise of its rights—must take into account the well-being and the legitimate interests of the public official; that duty prohibits, in particular, consideration of immaterial influences."269 A violation of that duty may in some instances entitle the official to assert a claim for damages.270 State public officials laws may contain specific guarantees of assistance in the event of illness, birth, and death.271

For present purposes, the other rights of public officials specifically laid down in the BBG, BRRG, and various state laws need only be listed. Such rights include, for example:
- The right to use an official title;272
- Regulation of compensation by the Compensation Law;273
- Allowances for, and restrictions on, the assignment, attachment, or garnishment of the official's salary, or use of the official's salary as security;274
- Regulation of pension payments by the Public Officials Pension Law;275
- Prohibition against changing a public official's salary, pension payments, or compensation level under the compensation laws, except by law;276
- Prohibition against the state recovering salary overpayments when a public official's compensation is reduced retroactively;277

269 SCHEERBARTH, supra note 1, at 371 (footnotes omitted).
270 13 BVerfGE 17 (1961). See also SCHEERBARTH, supra note 1, at 372. See generally BBG §§ 171-175; BRRG §§ 60, 126-127; LBG(NRW) §§ 179-181 (regulating proceedings by federal, state, and local public officials, retired public officials, and their dependents against the public employer for claims arising out of the public official relationship); SCHNELLENBACH, supra note 124, at 142-44 (discussing same).
271 See, e.g., LBG(NRW) § 88.
272 BBG § 81; LBG(NRW) §§ 92-93. See generally ZEILER, supra note 63, at 105-106; WAGNER, supra note 57, at 98; APFEL, supra note 57, at 56; SCHEERBARTH, supra note 1, at 382-85.
273 BBG § 83; LBG(NRW) §§ 94-95. See also BBG § 80b and LBG(NRW) § 90 (anniversary gifts). See generally WAGNER, supra note 57, at 104-105; VON MÜCH, supra note 124, at 49-52; SCHNELLENBACH, supra note 124, at 121-23.
274 BBG § 84; BRRG § 51. See also Civil Procedure Law (Zivilprozessordnung (ZPO)) §§ 850-850k.
275 BBG § 85; LBG(NRW) § 96. See also BRRG § 50. See generally WAGNER, supra note 57, at 105.
276 BBG § 86; BRRG § 50.
277 BBG § 87; BRRG § 53; LBG(NRW) § 98. See generally VON MÜCH, supra note 124, at 52-54.
- Prohibition against an official, a retired official, or one of their dependents being disadvantaged when that individual’s claim against a third person for personal injury or death is subordinated to the state for recovery of compensation or benefits paid by the state on account of the injury or death;278

- Regulation of travel and moving expenses by law;279

- Right to an annual paid vacation, a two-month unpaid leave of absence to campaign for the Bundestag or a state office, a leave of absence for participation in local government;280

- Right to a reduction of work hours or to an unpaid leave of absence upon election to a state legislative body if the elective office is compatible with the public official’s employment;281

- Right to view the entire contents of one’s personnel file, to be heard before a matter adverse to the official is entered in the personnel file, and to include a statement in the file;282

- Right to unionize or form associations; right to authorize the union or association to represent the official to the extent permitted by law; guarantee against repercussions for participation in a union or association;283

- Right upon request, after conclusion of the public official relationship, to a certificate stating the nature and length of the offices held by the official.284

278 BBG § 87a; BRRG § 52; LBG(NRW) § 99. See generally von Münch, supra note 124, at 54.
279 BBG § 88; LBG(NRW) § 100. See generally Wagner, supra note 57, at 105-106; Schnellenbach, supra note 124, at 123, 137.
280 BBG § 89; LBG(NRW) § 101. See also BRRG § 55 (annual paid vacation). See generally Zeiler, supra note 63, at 106; Wagner, supra note 57, at 99-100; Scheerbarth, supra note 1, at 387-92.
281 BBG § 89a.
282 BBG § 90; BRRG § 56; LBG(NRW) § 102. See also LBG(NRW) § 104(1) (right of public official to discuss and respond to reviews of his or her performance before the review is entered in the official’s personnel file). See generally Zeiler, supra note 63, at 106-107; Wagner, supra note 57, at 100-101; von Münch, supra note 124, at 54-57; Apel, supra note 57, at 56-57; Schnellenbach, supra note 124, at 125 n.53a; Scheerbarth, supra note 1, at 392-97.
283 BBG § 91; BRRG § 57; LBG(NRW) § 103. See also BBG § 94; BRRG § 58; LBG(NRW) § 106 (requiring that the government inform unions of the preparation of general rules relating to public officials). See generally Wagner, supra note 57, at 101; Apel, supra note 57, at 57; Scheerbarth, supra note 1, at 386-87.
284 BBG § 92; LBG(NRW) § 104(2). See generally Zeiler, supra note 63, at 107-108; Wagner, supra note 57, at 102; Apel, supra note 57, at 57; Scheerbarth, supra note 1, at 403-04.
Guaranteeing the rights of public officials in these ways serves three functions critical to the establishment and maintenance of ethical standards among those public officials: (1) preserving their independence; (2) raising the stakes for ethical improprieties to an unacceptable level; and (3) encouraging ethical conduct rather than merely discouraging unethical conduct.\(^{285}\)

First, Germany has concluded that only by protecting such rights can the state ensure the independence of its public officials. "The personal independence of public officials (appointment for life) and their independence in office (professional responsibility solely to the law) [enable them to fulfill] the function and purpose of professional officialdom: to realize the demands of a state governed by law and social welfare, to nurture equality, security, continuity, and social justice, to secure the political and social neutrality of public administration, and to guarantee balance and stability in the face of political forces."\(^{286}\)

To exempt from such protection, as is done in the United States, precisely that class of public servants—namely, public officials—who exercise the greater authority is completely counterproductive. Indeed, the recognition by American legislative bodies that they must subject public officials to special ethical requirements in effect concedes that the law does not sufficiently protect the independence of public officials from political, financial, and other pressures. Yet consistent with their tradition of treating the symptoms while ignoring the disease, American legislatures have imposed one ethical requirement after another upon public officials without securing the officials' ability, as a practical matter, to comply with those requirements. Indeed, if public officials were provided with sufficient protection from outside pressures, and with sufficient incentive to withstand such pressures as do exist, then perhaps the need for layer upon layer of ethics legislation would be obviated.

Thus, for example, this author has repeatedly been told by municipal officials that prohibitions upon political contributions and activities by public officials provide insufficient protection against

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\(^{285}\) Cf. Wiese, supra note 124, at 164-65: "If the duties of public officials . . . have as their purpose assuring that the state will fulfill its responsibilities [to the public], so is the purpose of the rights of public officials a double one: (a) Those rights are also to guarantee the fulfillment of duties [to the public]. . .; (b) Of equal importance, [the rights] are appropriately to secure the significant interests of the public official as a dependent employee." (Emphasis added).

\(^{286}\) DBB ABC, supra note 196, at 9-10.
pressures to engage in those activities because the jobs of many such officials depend upon the will of politicians. Perhaps the answer to undue political influence upon public officials lies not in restricting their political activities but in protecting their jobs. Such a proposal is hardly revolutionary. As Alexander Hamilton stated with respect to proposed life tenure for federal judges, "[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence." It is suggested that independence from political and financial pressures is no less necessary for public officials if they are properly to perform their jobs, and that employment at will is no less fatal to that independence. Indeed, the civil service system itself strives to some extent to fulfill that goal for middle and lower level public employees. Life tenure (that is, guaranteed employment until retirement) for American public officials should be seriously considered.

Second, in trips around New York State on behalf of that state's Commission on Government Integrity, this writer was repeatedly told that the stakes for unethical conduct must be raised. Yet increased criminal penalties, a solution suggested by many legislators and executives, are not the answer. In an area fraught with ambiguities, the imposition of heavy fines or prison sentences is unjust, even if permissible constitutionally and otherwise. Such a course casts a pall over public service, thereby discouraging honest individuals from becoming public servants. It sends a message to honest public officials that their actions are suspect, their every move subject to strict scrutiny, and their every misstep punishable by criminal sanctions. Harsh penalties, combined with the traditionally low salaries and often low prestige of public service, severely undermine the morale of public officials and devastate recruitment efforts. "Who needs this grief" is a common, and justified, complaint—a complete rejection of the admonition that "[w]hoever would command, must in commanding find happiness."

Instead, the stakes must be raised not by threatening public officials with jail but by threatening them with the loss of secure, well-paying positions, with loss of a career, with loss of any hope of obtaining any position as a public official anywhere in the United States. As

287 *The Federalist*, No. 78.
288 J. von Goethe, *Faust*, part II, act 4, lines 10252-53 ("Wer befehlen soll,/Muss im Befehlen Seligkeit empfinden"). It might be noted, however, that those words are spoken by Faust.
one municipal attorney informed this writer, the need is for more carrots and fewer sticks. Such an approach is not without precedent in this country. Even now, for example, any member of the International City Management Association (ICMA) who is expelled from that organization for violating its strict code of ethics is, as a practical matter, barred from obtaining a municipal management position (e.g., a city manager) anywhere in the country, for a municipality is unlikely to hire any manager who has been banished from ICMA, and many jurisdictions make ICMA membership a condition of employment.\textsuperscript{289} Although the ICMA model could not automatically be extended to all public officials—the number of municipal managers forms but a minute percentage of the total number of public officials, who would have to be regulated by law not by a private organization—that model at least points the way to the establishment of a professional public officialdom in the United States, an officialdom comprised of licensed, well-paid, tenured, career public officials.

Third, ethics laws in the United States, by focusing almost entirely on the duties of public officials without recognizing their concomitant rights, have failed to acknowledge that such laws can only succeed, at most, in prohibiting unethical conduct. They do not, nor can they, promote, much less ensure, ethical conduct. If true peace, as Dr. King once said, is not merely the absence of war but the presence of justice, then, too, ethics in government is not merely the absence of corruption but the presence of trust; and trust cannot be mandated, it must be nurtured. Enacting ethics law after ethics law not only fails to deter corruption; it destroys trust and thus, ultimately, undermines ethics in government.\textsuperscript{290}

In short, the time has come for a moratorium on the enactment of any additional ethics legislation. Instead, what must first be considered and enacted is a bill of rights for American public officials. The American people, through their elected representatives, must reestablish a bond of mutual trust, loyalty, and dedication between

\textsuperscript{289} Expulsion from ICMA also includes “notification to the . . . state association, appropriate local governing bodies, and news media, that the respondent has been found to have violated the Code of Ethics, that ICMA strongly disapproves of the respondent's conduct, and that the respondent has been expelled from the organization.” Rules of Procedure for enforcing the ICMA Code of Ethics, \textit{reprinted in} 69 \textit{Public Management}, Aug. 1987, at 14.

\textsuperscript{290} See Little, \textit{Abolishing Financial Disclosure to Improve Government}, 16 \textit{Stetson L. Rev.} 633, 634 (1987) (concluding that “the Florida system of financial disclosure has deeply eroded the idea of ‘trust’” between the public and its officials).
their public officials and themselves. Without that bond, ethics laws are not only futile, they are injurious to the ethical health of American government.

Of course, there is a quid pro quo for higher salaries and more secure jobs. In return for life tenure and the accompanying benefits, German public officials are subject to strict educational, training, and examination requirements,291 as well as exacting ethical standards.292 No less should be demanded of American public officials.

CONCLUSION

Officials' duties presuppose officials' rights. The German model for public officials laws conclusively demonstrates that immutable fact. One can neither expect nor demand that American public officials avoid even the appearance of impropriety unless one gives them the tools with which to do so, and the most important tools are independence in office and a mutual relationship of trust and obligation between public officials and their public employer.

That independence and that mutual relationship are grounded upon the establishment and protection of the rights of the public officials. For German public officials, those rights include welfare and protection; adequate compensation; the creation of an area of activity where only public officials may exercise authority; appointment and advancement solely upon the basis of merit and without regard to race, sex, religion, or political affiliation; and, most importantly, tenure in office.

The American people, and their elected representatives, must step back and decide just how important a trusted and trustworthy government is, whether it is sufficiently important to grant to American public officials rights analogous to those enjoyed by their German counterparts. In particular, American legislators must consider the establishment of a professional public officialdom, comprised of licensed, well-paid, tenured, career public officials. That issue raises a host of complex questions and problems—of lessening the people's

291 See generally BBG §§ 6-14, BRRG §§ 5-10, LBG(NRW) §§ 8-14a (appointment); BBG §§ 15-25, BRRG §§ 11-16, LBG(NRW) §§ 15-26 (career paths (education and training)); and BBG §§ 28-34, BRRG §§ 22-24, LBG(NRW) §§ 30-37 (termination of employment); and accompanying executive orders and regulations, collected in BUNDESBEAMTENGESETZE (Beck 1986) (federal) and H. REHBORN (ed.), GESETZE DES LANDES NORDRHEIN-WESTFALEN (Beck 1987) (North Rhine-Westphalia).

292 See BBG §§ 52-78; BRRG §§ 35-47; LBG(NRW) §§ 55-84.
and the politicians' control over a large segment of government; of decreasing citizen participation in government; of concentrating, rather than dispersing, power throughout government; of restricting "new blood" from entering the body politic; of increasing, or decreasing, government's efficiency, cost, and bureaucracy; of undermining the political party system by destroying patronage; of redefining affirmative action and civil service.

Those questions and problems can no longer be ignored. Repeated instances of ethical violations by government officials have created the perception, unjustified in fact, that American public officials are generally untrustworthy and corrupt. Confidence in the integrity of government has fallen to a new low.

Yet that crisis in confidence cannot be combatted by the imposition of more and more ethics laws. That fact has been recognized, at least implicitly, by President Reagan in pocket-vetoing the Post-Employment Restrictions Act of 1988 and by the politicians, public officials, and handful of scholars who have opposed more ethics legislation. Indeed, additional ethics laws not only "discourage from Government service America's best talent because of the unfair burdens [they] . . . impose,"293 those laws also further undermine the efforts and ability of public officials to avoid even the appearance of impropriety. The end result is further erosion of citizens' confidence in government.

Thus, the imposition of additional ethical obligations must cease—until American legislators secure those rights of public officials necessary to enable their compliance with existing ethics legislation, necessary to establish and maintain a vital and independent public service. And secure those rights they must. Inaction will only accelerate the dizzying downward spiral of ethical crises in American government.

Finally, wholly apart from the dictates of political necessity, a nation that claims concern for the rights and welfare of its people should, at the very least, demonstrate that concern for its public servants. Of them has much been demanded. To them should at least a little be given in return.

293 Reagan Memorandum of Disapproval, at 1561.