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BRIBERY, GRAFT, AND CONFLICTS OF INTEREST: THE SCOPE OF "PUBLIC OFFICIAL"

Dixon v. United States, 104 S. Ct. 1172 (1984)

I. INTRODUCTION

In *Dixon v. United States*,¹ the Supreme Court held that an employee of a private firm, hired by a municipal government to administer the municipality's federal block grant funds, was a public official under Title 18 of the United States Code § 201(a).² Section 201 imposes federal criminal liability on anyone who bribes or attempts to bribe a public official, and on any public official who solicits, accepts, or agrees to take a bribe.³ Section 201(a) helps establish the scope of federal jurisdiction as it applies to official bribery by defining a "public official" as a

Member of Congress, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror⁴

In arriving at its conclusion in *Dixon*, the Court firmly established that the degree of public trust and official federal responsibility inherent in an alleged official's position determines whether that individual is properly classified as a "public official" under § 201(a).⁵ The proper construction of "public official" does not simply consider the formal legal relationship between the individual and the federal government.⁶ The Court's reasoning indicates that all individuals who occupy the same legal relationship to the federal government will not necessarily be similarly classified under § 201(a). Therefore, the truly significant precedent that stems from

¹ 104 S. Ct. 1172 (1984).

² 18 U.S.C. § 201(a) (1962).

³ 18 U.S.C. § 201 (1962).

⁴ 18 U.S.C. § 201(a) (1962).

⁵ *Dixon*, 104 S. Ct. at 1180.

⁶ *Id.*

the decision is the Court's focus on public trust and official responsibility.

This Note analyzes two approaches to construing "public official" under § 201(a) and argues that the approach adopted by the Court in *Dixon* is the approach that Congress intended courts to adopt when construing § 201(a). The Note scrutinizes the Court's application of this approach to determine the proper scope of the holding as it relates to other privately employed individuals whose work involves federally funded programs.

II. FACTS

On July 8, 1982, the Seventh Circuit Court of Appeals upheld a jury's finding in the Central District of Illinois⁷ that both Arthur Dixon and James Lee Hinton had violated §§ 201(c)(1)-(2) of Title 18 of the United States Code.⁸ In reaching its decision, the Seventh Circuit held that Hinton and Dixon were public officials under § 201(a) even though they had no contractual relationship with the federal government.⁹ The Supreme Court granted certiorari to resolve the issue of whether the petitioners, Dixon and Hinton, were "public officials" for purposes of § 201(a).¹⁰

Pursuant to the Housing and Community Development Act of 1974 (HCDA),¹¹ the City of Peoria, Illinois had obtained two federal block grants from the Department of Housing and Urban Develop-

⁷ *United States v. Hinton*, 683 F.2d 195 (7th Cir. 1982), *aff'd sub nom. Dixon v. United States*, 104 S. Ct. 1172 (1984).

⁸ The statute violated by Hinton and Dixon provides that,

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow any fraud, to make opportunity for the commission of any fraud, on the United States . . .

(e) Shall be fined not more than \$20,000 or three times the monetary equivalent of the thing of value whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust or profit under the United States.

18 U.S.C. § 201(c)(1)-(2), (e) (1962).

⁹ 683 F.2d at 199-200.

¹⁰ *Dixon v. United States*, 103 S. Ct. 567 (1982).

¹¹ 42 U.S.C. §§ 5301-20 (1983 & Supp. 1984). The HCDA authorized the Secretary of Housing and Urban Development to make grants not in excess of \$3,650,000,000 for the fiscal year 1979 to establish and maintain viable urban communities. 42 U.S.C. § 5303 (Supp. III 1979) (amended by Pub. L. No. 96-399 (1980) and Pub. L. No. 97-35 (1981) so as to increase appropriations in subsequent years).

ment (HUD).¹² Rather than administer these federal grant funds itself, the City of Peoria contracted with United Neighborhoods Inc. (UNI), a private community-based corporation, for UNI to distribute the funds.¹³ UNI served as a subgrantee of Peoria's HCDA funds. UNI, in turn, employed both Dixon and Hinton to administer the contract between UNI and Peoria.¹⁴ Although the Housing Committee of UNI retained formal responsibility for awarding housing rehabilitation contracts, testimony at trial revealed that this procedure frequently had been bypassed.¹⁵ In reality, Dixon and Hinton, as officers of UNI, administered these grant funds.¹⁶

Hinton and Dixon extracted kickbacks from two contractors, Ora Logsdon and Gerald Lilly, for ten percent of each rehabilitation contract that UNI awarded to the contractors.¹⁷ On at least one occasion, Dixon and Hinton instructed Lilly to bid on certain houses and suggested that Lilly lower one bid.¹⁸ When Logsdon and Lilly received their first draw checks from UNI for twenty percent of the contract price, they turned over one-half of the cash proceeds to Hinton and Dixon.¹⁹ Despite the apparent impropriety of their conduct, the petitioners claimed that they were not "public officials" under § 201(a) and, therefore, were not subject to federal prosecution.²⁰ Petitioners argued that they did not work "for or on behalf of the United States" because they did not have any formal bond

¹² *Dixon*, 104 S. Ct. at 1174. One grant, for \$636,000, was a Metro Reallocation Grant, and the other, for \$400,000, was a Community Development Block Grant. *Id.*

¹³ *Id.* UNI and the City of Peoria actually entered into five separate agreements. The first four agreements provided UNI with \$492,500 and allocated \$31,500 for the petitioners' salaries. Only the fifth agreement for \$669,200 made any initial reference to federal legislation. UNI and the City of Peoria, however, later amended the first four agreements and included explicit references to Community Development Block Grants Regulations. *Id.* at 1176 n.5.

HUD regulations explicitly allow a local government to subcontract the administration of grant funds in this manner. Three types of subrecipients are eligible: neighborhood-based non-profit organizations, such as UNI; small business investment companies; and local development corporations. 24 C.F.R. § 570.204 (1984). *See also* 42 U.S.C. § 5302(a)(1), (c) (1982).

¹⁴ *Dixon*, 104 S. Ct. at 1174. Dixon served as Executive Director of UNI and Hinton served as Housing Rehabilitation Coordinator of UNI. *Id.*

¹⁵ *Id.* at 1176. Although formal responsibility for awarding contracts rested with the Housing Committee, the Committee had approved only one out of the ten contracts awarded by UNI to the one contractor that testified at trial. *Id.* at n.7.

¹⁶ *Id.* at 1174. As part of his responsibility for the general supervision of UNI programs, Dixon controlled fiscal operations and executed contracts. Hinton contracted with both rehabilitation assistance applicants and demolition firms. *Id.*

¹⁷ *Hinton*, 683 F.2d at 197. The kickbacks totaled \$42,604. *Dixon*, 104 S. Ct. at 1174.

¹⁸ *Hinton*, 683 F.2d at 197.

¹⁹ *Dixon*, 104 S. Ct. at 1174.

²⁰ *Id.* at 1175. Illinois conceivably could have prosecuted the petitioners for violation of an Illinois bribery statute. *See* ILL. REV. STAT. ch. 38, § 3301 (1977).

with the United States, such as an agency relationship, an employment contract, or any other direct contractual obligation.²¹ Petitioners emphasized that neither they nor UNI had ever entered into an agreement with the United States or with HUD.²² The government argued conversely that § 201(a) clearly extended to persons "administering federally sponsored activities . . . whether or not those persons have some employment relationship with the United States."²³

III. THE SUPREME COURT'S DECISION

A. THE MAJORITY

Justice Marshall, writing for the majority in *Dixon*, held that the petitioners had acted for or on behalf of HUD in administering block grants, and that they were "public officials" under § 201(a).²⁴ The majority, therefore, rejected the petitioners' claim that an individual must hold a direct relationship to the federal government for that individual to be considered a "public official."²⁵ Although the majority recognized that the specific wording of § 201(a) did not resolve the issue, it noted that the legislative history of § 201(a) showed that Congress intended to include individuals like Hinton and Dixon under this Act.²⁶ The Court found no ambiguity regarding congressional intent and, as a result, did not apply the "rule of lenity," which would have required a narrow construction of "public official."²⁷

Justice Marshall analyzed the legislative history of § 201, and recognized that Congress had drafted earlier bribery statutes in broad jurisdictional terms and had amended these terms when they appeared incapable of encompassing individuals employed by new types of government institutions such as government-owned corpo-

²¹ *Dixon*, 104 S. Ct. at 1177.

²² *Id.*

²³ Brief for the Respondent at 10, *Dixon v. United States*, 104 S. Ct. 1172 (1984).

²⁴ *Dixon*, 104 S. Ct. at 1180.

²⁵ *Id.*

²⁶ *Id.* at 1182.

²⁷ *Id.* at 1182 n.19. The Court previously had held that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). In addition to assuring that citizens have adequate notice of potential criminal liability for contemplated acts, the "rule of lenity" set out by the Court in *Rewis* relates directly to the nation's system of federalism. Because criminal wrongdoing traditionally is punishable under state law, expansive interpretations of federal criminal statutes might "alter sensitive federal-state relationships." *Id.* See also *United States v. Del Toro*, 513 F.2d 656, 662 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975) ("a healthy regard for the federal system of divided powers . . . compels a close scrutiny" of congressional intent in drafting § 201(a)).

rations.²⁸ Moreover, the Court found it significant that Congress, while drafting § 201(a), knew that the judiciary tended to apply broadly the phrase “acting for or on behalf of the United States” when the judiciary interpreted earlier bribery statutes.²⁹ Justice Marshall reasoned that if Congress intended to limit “public officials” to individuals holding a direct relationship with the federal government, Congress would not have adopted language that it knew was subject to broad interpretation.³⁰

Furthermore, the majority considered Congress’ rejection of alternative language as proof that Congress did not intend to restrict the definition of “public official” to individuals who directly contracted with the government.³¹ The Court reasoned that this rejected language already would have covered direct contractors as agents of the United States.³² Thus, according to the majority, Congress would have had no reason to adopt the broader “acting for” language if it intended to include only direct contractors as “public officials.”³³ Congress would not have adopted more expansive lan-

²⁸ *Dixon*, 104 S. Ct. at 1178. Congress, in 1853, passed the first federal bribery statute, which sought to prohibit the bribing of “any officer of the United States, or person holding any place of trust or profit, or discharging any official function under . . . any department of . . . the United States.” An Act to Prevent Frauds on the Treasury, ch. 81, § 6, 10 Stat. 170, 171 (1853). In 1921, the Supreme Court held that an inspector employed by a wholly government-owned corporation was not an agent of the United States because a government corporation was a separate entity from the United States. *United States v. Strang*, 254 U.S. 491, 493 (1921). In response to *Strang*, Congress amended the federal bribery statute, broadened its scope, and guaranteed that the act covered “‘all persons acting for the United States Government in an official function.’” 104 S. Ct. at 1178 n.9 (quoting H.R. Rep. No. 304, 80th Cong., 1st Sess. A14, A15 (1947)).

²⁹ *Dixon*, 104 S. Ct. at 1178. Justice Marshall noted that courts frequently applied the federal bribery statute to employees of government agencies prior to explicit congressional approval of this application. *Id.* at n.10 (citing *United States v. Birdsall*, 233 U.S. 223 (1914); *United States v. Levine*, 129 F.2d 745 (2d Cir. 1942)).

³⁰ *Dixon*, 104 S. Ct. at 1179.

³¹ *Id.* Congress rejected language in earlier bills that defined a “public official” under § 201(a) as a “Member of or Delegate to Congress, or Resident Commissioner, either before or after he has qualified, an officer, agent, or employee of the United States, in the executive, legislative, or judicial branch of the government, or of any agency, or juror.” See H.R. 3411, 87th Cong., 1st Sess. § 201(a) (1961); H.R. 2156, 86th Cong., 1st Sess. § 201(a) (1959); H.R. 12547, 85th Cong., 2d Sess. § 201(a) (1958).

³² *Dixon*, 104 S. Ct. at 1179.

³³ *Id.* Congress adopted the broader “acting for” language as a result of Department of Justice testimony that under certain circumstances, a court might not consider a person who acted on behalf of the Government to be “an officer, agent, or employee of the United States.” The Department of Justice testified that such an individual should, nonetheless, be punished for accepting bribes. See *Federal Conflict of Interest Legislation: Hearings on H.R. 302, H.R. 3411, H.R. 3412, H.R. 3050 and H.R. 7139 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 36 (1961).

guage if it did not intend to expand "public official" beyond direct contractors.

Justice Marshall also found that congressional committee reports indicated that Congress had intended that § 201(a) apply to individuals like Hinton and Dixon even though they had no direct contractual ties to the federal government.³⁴ Committee reports from both the House and Senate stated that the proposed legislation at issue in *Dixon* was not intended to restrict the broad interpretation of bribery statutes.³⁵ The Court found that these reports supported the holding because "[f]ederal courts interpreting federal bribery laws . . . generally avoided formal distinctions, such as the requirement of a direct contractual bond, that would artificially narrow the scope of federal criminal jurisdiction."³⁶

Justice Marshall found it particularly relevant that the House Judiciary Committee had cited *United States v. Levine*³⁷ as an example of proper judicial construction of federal bribery laws.³⁸ In *Levine*, the Second Circuit held that an employee of the Market Administrator for the New York Metropolitan Milk Marketing Area³⁹ was a public official even though the United States neither employed nor paid the employee directly.⁴⁰ The Second Circuit reasoned that because the individual held a responsible position authorized by the United States, he acted on behalf of the United States for purposes of § 201(a).⁴¹ The majority in *Dixon* stated that the Judiciary Committee's support for the construction in *Levine* indicated that an individual need not have a direct contractual bond to the government when acting on behalf of the government.⁴²

Justice Marshall stated that in addition to *Levine*, the majority of recent decisions in federal district courts and courts of appeals supported the holding that a "public official" need not have a formal contractual or agency bond to the federal government to be considered a "public official."⁴³ The Court emphasized that the majority

³⁴ *Dixon*, 104 S. Ct. at 1179.

³⁵ See S. Rep. No. 2213, 87th Cong. 2d Sess. 4, *reprinted in* 1962 U.S. CODE CONG. & AD. NEWS 3852, 3853; H.R. Rep. No. 748, 87th Cong., 1st Sess. 17 (1961).

³⁶ *Dixon*, 104 S. Ct. at 1179.

³⁷ 129 F.2d 745 (2d Cir. 1942).

³⁸ *Dixon*, 104 S. Ct. at 1179.

³⁹ See 7 C.F.R. § 1002.3 (1984). Pursuant to authority granted under the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture created "metropolitan milk marketing areas" and appointed "market administrators" to carry out orders of the Department of Agriculture. See also 7 U.S.C. § 608(c)(3)-(4) (1983).

⁴⁰ *Levine*, 129 F.2d at 747.

⁴¹ *Id.*

⁴² *Dixon*, 104 S. Ct. at 1180.

⁴³ *Id.* at 1181.

of lower courts had found individuals to be "public officials," regardless of whether or not the individuals were privately employed, if the individuals held positions of official responsibility.⁴⁴ In addition, Justice Marshall stated that the majority opinion was "fully consistent" with *Krichman v. United States*,⁴⁵ in which the Court held that a baggage porter employed by a federally controlled railroad had not acted for or on behalf of the federal government in an official function.⁴⁶ The baggage porter, according to the Court's reasoning in *Dixson*, lacked any duties of an official character; in contrast, *Dixson* and *Hinton* did hold positions of national public trust.⁴⁷

Thus, in summarizing its analysis of the legislative history of § 201(a), the Court concluded that whether an individual was a "public official" depended on "whether the person occupie[d] a position of public trust with official federal responsibilities" and not on whether the individual served as an employee, agent, or contractor of the government.⁴⁸ Because *Hinton* and *Dixson* had operational responsibility for the administration of HCDA funds and were required to abide by federal guidelines, the majority concluded that they served as "public officials" for purposes of § 201(a).⁴⁹ The Court, however, emphasized that federal funding did not necessarily subject a local organization or its employees to federal jurisdiction.⁵⁰ Justice Marshall indicated that some employees of block grant recipients, as well as some contractors for grant recipients, would not properly be classified as "public officials" because they did not "assume some duties of an official nature."⁵¹ The degree of "official responsibility for carrying out a federal program or policy"

⁴⁴ *Id.* at 1181-82 (discussing *United States v. Hollingshead*, 672 F.2d 751 (9th Cir. 1982) (an employee of a private banking institution was a public official under § 201(a) because he administered an expenditure of federal funds that placed him in a position of responsibility); *United States v. Kirby*, 587 F.2d 876 (7th Cir. 1978) (two privately employed grain inspectors were public officials under § 201(a) because they implemented a warehouse licensing program established by Congress that placed them in a position of responsibility); *United States v. Gallegos*, 510 F. Supp. 1112 (D.N.M. 1981) (state employee was a "public official" under § 201(a) because he processed federal Farmers Home Administration grant applications and, therefore, was in a position of responsibility)).

⁴⁵ 256 U.S. 363 (1921).

⁴⁶ *Dixson*, 104 S. Ct. at 1182 (citing *Krichman*, 256 U.S. 363).

⁴⁷ *Id.*

⁴⁸ *Id.* at 1180.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1182.

⁵¹ *Id.*

determines whether the individual falls under the jurisdiction of § 201(a).⁵²

B. THE DISSENT

Justice Marshall's opinion, however, failed to obtain the unanimous support of the Court. Justice O'Connor, writing for the dissent, found that the government's evidence was "too weak" to resolve the ambiguity as to which individuals Congress intended to define as "public officials."⁵³ The dissenting Justices relied on the "rule of lenity" and stated that they could not consider Dixon and Hinton to have acted clearly "for or on behalf of the Federal Government."⁵⁴ Although Justice O'Connor recognized that the purpose of the federal bribery statute is to proscribe bribery of individuals who execute a federal trust, she also stated that "[t]o say that the statute is broadly aimed at all persons bearing a federal trust . . . is not to resolve the ambiguity over what constitutes a federal trust."⁵⁵

The dissent analyzed the legislative history of § 201, and agreed with the majority that House Judiciary Committee support for the Second Circuit's construction of § 201(a) in *Levine* demonstrated congressional intent to include within the provisions of the statute individuals who do not possess direct contractual agreements with the government.⁵⁶ Justice O'Connor, however, pointed out that congressional intent to include more than direct contractors under the statute did not indicate exactly who Congress intended to include.⁵⁷ Moreover, the dissent found *Levine*, the Milk Marketing Area employee, distinct from Dixon and Hinton because an agent of the government employed *Levine*, while UNI, which employed Dixon and Hinton, did not clearly have any agency ties to the federal government.⁵⁸ The dissent, therefore, concluded that

⁵² *Id.*

⁵³ *Id.* at 1183 (O'Connor, J., dissenting). Justices Brennan, Rehnquist, and Stevens joined in the dissent.

⁵⁴ *Id.* at 1185 (O'Connor, J., dissenting). Justice O'Connor stated that the Court's holding required "some affirmative reason to believe that Congress thought that employees of federal grant recipients or their subgrantees are acting for or on behalf of the Federal Government even when the grant recipient is a state or local government." *Id.*

⁵⁵ *Id.* at 1183 (O'Connor, J., dissenting).

⁵⁶ *Id.* at 1184 (O'Connor, J., dissenting). See also *supra* notes 37-42 and accompanying text.

⁵⁷ 104 S. Ct. at 1184 (O'Connor, J., dissenting). Justice O'Connor explained that "saying that the class covered by the statute includes more than direct contractors does not begin to define the class actually covered." *Id.*

⁵⁸ *Id.* The dissent stated that a grantee does not necessarily have an agency relationship with the government. Because a subgrantee, such as UNI, would be one step further removed from the government than a grantee, it appears even less clear to the dissent that a subgrantee would have an agency relationship with the government. *Id.*

congressional approval of the construction applied by the *Levine* court offered no support for the majority position in *Dixson*.⁵⁹

The dissent also stated that retention of the broad "acting for or on behalf" language did not necessarily indicate who Congress intended to include within that class.⁶⁰ Justice O'Connor claimed that nothing in the legislative history of the bribery statute indicated that Congress had in mind individuals like Hinton and Dixson when it retained this wording.⁶¹ Justice O'Connor stated that "[t]he most that can be said of Congress's reenactment of the 'acting for' language following the proposal and criticism of alternative bills is that Congress perceived some difference between the enacted and unenacted language and that the pre-1962 language should be retained out of caution."⁶²

Furthermore, the dissent claimed that the earlier cases cited by the majority also did not support the majority construction of "public official."⁶³ Justice O'Connor stated that no other Supreme Court decision could support the majority position because the Court never had held an individual to be a "public official" under the language of § 201(a).⁶⁴ According to the dissent, the lower court decisions that involved grant recipients, on which the majority relied, interpreted the statute's language in an inconsistent fashion.⁶⁵ Justice O'Connor stated that cases relied on by the majority that did not involve grant recipients also did not support the majority's construction because "the person bribed had a more or less direct agency relationship with the Federal Government."⁶⁶

Justice O'Connor rejected the majority's conclusion for reasons

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1184-85 (O'Connor, J., dissenting).

⁶³ *Id.* at 1185 (O'Connor, J., dissenting).

⁶⁴ The dissent claimed that *Krichman v. United States*, 256 U.S. 363 (1921), did not support the majority's decision because the baggage carrier in *Krichman* did not act as a "public official." 104 S. Ct. at 1185 (O'Connor, J., dissenting). See *supra* note 45 and accompanying text.

⁶⁵ *Dixson*, 104 S. Ct. at 1185 (O'Connor, J., dissenting) (comparing *United States v. Loschiavo*, 531 F.2d 659 (2d Cir. 1976); *United States v. Del Toro*, 513 F.2d 656 (2d Cir. 1975); *United States v. Hoskins*, 520 F. Supp. 410 (N.D. Ill. 1981), with *United States v. Hinton*, 683 F.2d 195 (7th Cir. 1982); *United States v. Mosley*, 659 F.2d 812 (7th Cir. 1981)).

⁶⁶ *Dixson*, 104 S. Ct. at 1185 (O'Connor, J., dissenting) (discussing *United States v. Hollingshead*, 672 F.2d 751 (9th Cir. 1982); *United States v. Kirby*, 587 F.2d 876 (7th Cir. 1978); *Harlow v. United States*, 301 F.2d 361 (5th Cir. 1962); *United States v. Gallegos*, 510 F. Supp. 1112 (D.N.M. 1981); *United States v. Griffin*, 401 F. Supp. 1222 (S.D. Ind. 1975), *aff'd sub nom. United States v. Metro Management Corp.*, 541 F.2d 284 (1976)).

other than the fact that little or no support existed for its conclusion in the statute's wording, legislative history, or earlier judicial interpretation.⁶⁷ First, the dissent recognized that Congress had not considered whether employees of grant recipients were "public officials" and that these employees had been rarely prosecuted under federal jurisdiction.⁶⁸ In light of the long history and wide-scale use of federal grant programs, Justice O'Connor found it significant that Congress and prosecutors tended not to recognize explicitly employees of grant recipients as "public officials."⁶⁹ The dissent inferred from the lack of expressed recognition that neither Congress nor federal prosecutors considered employees of grant recipients "public officials" under § 201(a).⁷⁰

Second, the dissent stressed that the principle of grantee autonomy suggested that courts should not construe employees of grant recipients as "acting for or on behalf of the government."⁷¹ Justice O'Connor emphasized that in federal grant programs, the level of federal involvement is minimized and grantees are given wide discretion with which to execute the program.⁷² The level of federal involvement is especially minimized where the federal funds are distributed in block grant form to a state or local government.⁷³ Principles of federalism "demand a strong presumption that state and local governments are carrying out their own policies and are acting on their own behalf, not on behalf of the United States."⁷⁴ The dissent concluded that it would be inconsistent with the general relationship between federal and state governments to consider Hinton and Dixon "public officials" under § 201(a).⁷⁵

Finally, Justice O'Connor stated that the Court should not have construed the bribery statute unfavorably to Dixon and Hinton

⁶⁷ *Dixon*, 104 S. Ct. at 1185 (O'Connor, J., dissenting).

⁶⁸ *Id.* at 1186 (O'Connor, J., dissenting). The dissent emphasized that not until 1975 did the federal government prosecute an employee of a grant recipient for violating a federal bribery statute. See *Del Toro*, 513 F.2d 659 (2d Cir. 1976).

⁶⁹ 104 S. Ct. at 1186 (O'Connor, J., dissenting). Justice O'Connor explained that federal grant programs to state and local governments began in the nineteenth century and, by 1962 when Congress adopted § 201(a), these programs had grown to seven percent of the federal budget. *Id.* at 1185-86 (O'Connor, J., dissenting).

⁷⁰ *Id.* at 1186 (O'Connor, J., dissenting).

⁷¹ *Id.* The dissent stated that federal grant programs generally formed a unique type of government activity whose "main defining characteristic" was the principle of grantee autonomy. *Id.*

⁷² *Id.*

⁷³ *Id.* at 1187 (O'Connor, J., dissenting). The dissent explained that in block grant programs, "federal control over the spending of the distributed funds is minimized and the grant recipient cannot plausibly be said to be acting for anyone but itself." *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

when the Court's construction did not reduce the language's ambiguity.⁷⁶ The dissent refused to support the "public trust" standard because it left employees of grant recipients with no more insight as to whether they would be subject to federal prosecution than the "acting for" language of the statute itself.⁷⁷ Justice O'Connor stated that the "rule of lenity" entitled individuals to know in advance what statutes their contemplated actions might violate, regardless of the obvious impropriety of that action.⁷⁸

IV. ANALYSIS

A. TWO METHODS OF DEFINING A "PUBLIC OFFICIAL"

The majority and dissenting opinions in *Dixson v. United States* reveal two approaches to the classification of a "public official." The majority's approach focuses on the attributes of the individual's position; in particular, the "public trust" and "official responsibility" inherent in the position.⁷⁹ Rather than viewing the issues of whether the individual is a "public official" and whether the individual's position involved an "official function" as separate and distinct, courts adopting this "public trust" approach view the two issues as interrelated.⁸⁰ Scrutiny of the individual's alleged official acts reveals the degree of responsibility and public trust inherent in the position.

The second approach, adopted by the dissent, focuses on the formal, legal relationship between the individual and the government.⁸¹ Courts adopting this approach define "public official" on the basis of who employs the alleged official because this indicates the alleged official's relationship with the government.⁸² For exam-

⁷⁶ *Id.* at 1188 (O'Connor, J., dissenting).

⁷⁷ *Id.* ("[t]he 'public trust' standard adopted by the Court provides no more guidance to employees of a grant recipient or its subgrantee than does the statutory language").

⁷⁸ *Id.* See also *supra* note 27 and accompanying text.

⁷⁹ *Dixson*, 104 S. Ct. at 1180 ("[t]o determine whether any particular individual falls within this category, the proper inquiry . . . is whether the person occupies a position of public trust with official federal responsibilities"). See also *United States v. Griffin*, 401 F. Supp. 1222 (S.D. Ind. 1975), *aff'd sub nom. United States v. Metro Management Corp.*, 541 F.2d 284 (1976) (area management brokers for HUD who solicited kickbacks from contractors were "public officials" as defined in § 201(a) because they held positions of responsibility and exercised discretion on behalf of HUD).

⁸⁰ See, e.g., *United States v. Mosley*, 659 F.2d 812, 815 (7th Cir. 1981) ("[t]o review [defendant's] job specifically further supports the position that he was acting for and on behalf of the federal Government").

⁸¹ *Dixson*, 104 S. Ct. at 1184 (O'Connor, J., dissenting). The dissent emphasized the legal relationship between the defendants and the government and stated, "[i]t is by no means obvious that such a person is acting for the United States, since a grantee does not necessarily have an agency relationship with the United States." *Id.*

⁸² See, e.g., *United States v. Loschiavo*, 531 F.2d 659, 661 (2d Cir. 1976) (the key issue

ple, in *United States v. Del Toro*, the defendants bribed an assistant administrator of a HUD-funded housing project to induce the administrator to rent office space from one of the defendants.⁸³ The Second Circuit held that the administrator was not a "public official," in part because his superior was a city employee.⁸⁴ As a result, the Second Circuit held that the administrator was also a city employee and thus did not act on behalf of the federal government.⁸⁵

In addition, courts adopting the second approach view the individual's alleged "official function" as a separate issue from the person's status as a "public official."⁸⁶ In *United States v. Loschiavo*, the defendant bribed an assistant administrator of a HUD-funded housing project.⁸⁷ The Second Circuit held that the administrator was not a "public official" under § 201(a) and stated that the character of an alleged official's employment relationship with the federal government was of the greatest significance in determining whether the individual served as a "public official."⁸⁸ The court in *Loschiavo*, however, stated that whether the individual actually had allocated federal funds, rather than merely recommending allocations, had no effect on the character of the employee's relationship to the government.⁸⁹ Thus, under the second approach, the relationship depends on the status of the parties and not on the degree of responsibility or public trust held by the alleged official.⁹⁰

B. IDENTIFICATION OF THE APPROACH INTENDED BY CONGRESS

The House Judiciary Committee's analysis of § 201(a) indicates that Congress viewed *United States v. Levine* as the proper construction of "public official" under § 201(a).⁹¹ The Second Circuit in *Le-*

in the determination of whether an individual is a public official is the nature of the individual's employment); *United States v. Del Toro*, 513 F.2d 656, 662 (2d Cir. 1975) (because individual was a city employee and lacked full responsibility to appropriate funds, he did not act on behalf of the United States).

⁸³ *Del Toro*, 513 F.2d at 658.

⁸⁴ *Id.* at 662. *But see* *United States v. Gallegos*, 510 F. Supp. 1112, 1113 (D.N.M. 1981) (the source of the employee's paycheck is not determinative of whether the employee is a "public official").

⁸⁵ *Del Toro*, 513 F.2d at 662 (the administrator was a city employee carrying out a task that his superior, another city employee, had delegated to him).

⁸⁶ *See, e.g., Loschiavo*, 531 F.2d at 661.

⁸⁷ *Id.* at 660. The administrator in *Loschiavo* was also the administrator in *Del Toro*. *See supra* notes 83-85 and accompanying text.

⁸⁸ 531 F.2d at 661.

⁸⁹ *Id.* *But see Mosley*, 659 F.2d at 816 (because the defendant, in effect, had authorized the use of federal funds, he had acted on behalf of the federal government).

⁹⁰ *Dixon*, 104 S. Ct. at 1188 (O'Connor, J., dissenting).

⁹¹ H.R. Rep. No. 748, 87th Cong., 1st Sess. 18 (1961). *See supra* notes 37-42, 56, and accompanying text.

vine held that the defendant was a "public official" under § 201(a) and emphasized that "in view of the *responsible nature of his position* with this governmental agency we think it proper to say that he was a person in an official position acting on behalf of the United States."⁹² Thus, the Second Circuit focused on the responsibility inherent in *Levine's* position, the same approach that the majority adopted in *Dixson*.⁹³ Congressional support for the construction in *Levine* demonstrates that the *Dixson* majority's focus on "public trust" was the analysis intended by Congress and, therefore, the appropriate interpretation of § 201(a).

The dissent in *Dixson* found that the *Levine* court's decision did not help to determine congressional intent, but the *Dixson* dissent adopted the wrong approach to the issue of who is a "public official" under § 201(a). Although the *Dixson* dissent's inquiry focused on the formal relationship between the alleged official and the federal government,⁹⁴ the *Levine* court's inquiry, the one approved by Congress, evaluated the degree of responsibility inherent in the alleged official's position.⁹⁵ Thus, the Second Circuit in *Levine* did not hold, as the dissent in *Dixson* claimed, that "the class covered by the statute [§ 201(a)] includes more than direct contractors."⁹⁶ Rather, it held that individuals who are responsible for the administration of the federal government's programs are "public officials" under § 201(a) despite the absence of any direct contractual relationship with the government.⁹⁷

Because the dissent in *Dixson* ignored the reasoning of the Second Circuit in *Levine*, it distorted the significance of congressional support for the construction of "public official" in *Levine*.⁹⁸ The Second Circuit reasoned that *Levine* was a "public official" because of the responsible nature of his position.⁹⁹ The House Committee on the Judiciary's endorsement of the Second Circuit's decision in *Levine*, therefore, is significant not only because it demonstrates that Congress intended noncontractual parties with the government to

⁹² 129 F.2d 745, 747 (2d Cir. 1942) (emphasis supplied).

⁹³ *Dixson*, 104 S. Ct. at 1180. See *supra* notes 79-80 and accompanying text. In *Levine*, the Second Circuit held that an agent of a state may still act on behalf of the United States, thereby rejecting the notion of focusing on an alleged official's legal status. 129 F.2d at 748. But see *Loschiavo*, 531 F.2d at 661; *Del Toro*, 513 F.2d at 662; *supra* note 82 and accompanying text.

⁹⁴ *Dixson*, 104 S. Ct. at 1184 (O'Connor, J., dissenting); see *supra* notes 81-85 and accompanying text.

⁹⁵ *Levine*, 129 F.2d at 747.

⁹⁶ *Dixson*, 104 S. Ct. at 1184 (O'Connor, J., dissenting).

⁹⁷ *Id.* at 1180.

⁹⁸ See *supra* notes 57-59 and accompanying text.

⁹⁹ *Levine*, 129 F.2d at 747.

be covered under § 201(a), but also because it indicates that Congress intended courts, when applying § 201(a), to focus on the individual's level of responsibility. The dissent in *Dixon* failed to recognize this aspect of congressional intent because the dissent focused on the fact that Levine was employed by an agent of the United States instead of focusing on the Second Circuit's rationale that Levine was responsible for the execution of the government's program.¹⁰⁰

The *Dixon* majority's approach not only is consistent with *United States v. Levine*, but also is consistent with Congress' purpose in adopting a federal bribery statute.¹⁰¹ In elaborating the reasons for federal bribery legislation, the House Committee on the Judiciary stated that "criminal laws seek to preserve to the United States the value of the honest services of its officials and employees by severely punishing their sale."¹⁰² Federal bribery legislation seeks to protect federal programs from the harm caused by disloyalty on the part of those responsible for the program's administration.¹⁰³

When a court focuses on the degree of responsibility inherent in an individual's position, it is more likely to discover how a bribe might undermine a program's execution than when the court focuses on whether the alleged official is properly classified as an agent, employee, or grantee of the government. When both a federal employee and a grantee are responsible for the allocation of federal funds in a single federal program, a bribe to the grantee is just as likely to undermine the federal program that they administer as is a bribe of the federal employee. The alleged official's level of responsibility, not the individual's legal status, determines the harmful impact of bribery on a federal program. Congress' intent in

¹⁰⁰ *Dixon*, 104 S. Ct. at 1184 (O'Connor, J., dissenting).

¹⁰¹ The rule of lenity does not require that a court adopt the narrowest possible construction of a statute. It requires only that a court's construction conform to a statute's fair meaning and purpose. *United States v. Brown*, 333 U.S. 18 (1948). In *Brown*, the Court stated:

The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose Nor does it demand that a statute be given its 'narrowest meaning'; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

Id. at 25-26.

¹⁰² H.R. Rep. No. 748, 87th Cong., 1st Sess. 6 (1961). See also *United States v. Griffin*, 401 F. Supp. 1222, 1230 (S.D. Ind. 1975) ("the purpose of the statute is to protect the public from the evil consequences of corruption in the public service").

¹⁰³ See *United States v. Gallegos*, 510 F. Supp. 1112 (D.N.M. 1981). In *Gallegos*, the court held that a state employee who worked in an office of the federal Farmers Home Administration was a "public official." The court reasoned that improper influence exerted by the official in association with the FHA program harmed the United States, and that Congress intended such an injury to be punished under federal law. *Id.* at 1114.

passing federal bribery legislation, therefore, is best achieved when courts focus on the degree of public trust and official responsibility inherent in an individual's position.

Given that the *Dixon* majority's approach to defining a "public official" under § 201(a) is consistent with both *Levine* and Congress' general purpose in passing bribery legislation, it is not surprising that the majority of courts that have faced the "public official" issue have chosen to focus their inquiries on the degree of the individual's responsibility rather than the individual's formal relationship with the government.¹⁰⁴ Courts that have focused on the formal relationship, however, find the Second Circuit's decision in *United States v. Del Toro*¹⁰⁵ of some significance.¹⁰⁶ The court in *Del Toro* held that a local administrator of a project financed by HUD was not a public official under § 201(a).¹⁰⁷ The Second Circuit emphasized that a local government had employed both the alleged official and his direct superior.¹⁰⁸ In *Del Toro*, however, the court also emphasized that the alleged official lacked responsibility for the appropriation of funds because his recommendations required approval at five different levels before HUD actually would appropriate the funds.¹⁰⁹ Thus, the Second Circuit in *Del Toro* focused on both the formal relationship between the alleged official and the government, and the degree of responsibility and public trust inherent in the employee's position.¹¹⁰ Courts that have relied on *Del Toro* as precedent for an analysis of the formal relationship between the alleged official and the government, however, have failed to recognize the dual focus of *Del Toro* and, as a result, have rendered misguided opinions.¹¹¹ When courts determine whether an individual is acting

¹⁰⁴ See *Dixon*, 104 S. Ct. at 1181.

¹⁰⁵ 513 F.2d 656 (2d Cir. 1975).

¹⁰⁶ See *United States v. Loschiavo*, 531 F.2d 659, 661 (2d Cir. 1976); *United States v. Hoskins*, 520 F. Supp. 410, 413 (N.D. Ill. 1981).

¹⁰⁷ *Del Toro*, 513 F.2d at 662.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* But see *United States v. Hollingshead*, 672 F.2d 751, 754 (9th Cir. 1982) (alleged official was in a position of responsibility because he had recommended the expenditure of federal funds).

¹¹⁰ *Del Toro*, 513 F.2d at 662.

¹¹¹ See, e.g., *Loschiavo*, 531 F.2d at 661, in which the Second Circuit held that an individual was not a public official solely because he was a city employee. A court's focus on the formal relationship between the alleged official and government, however, can result in the court's finding that the individual is a "public official" under § 201(a). See, e.g., *Harlow v. United States*, 301 F.2d 361 (5th Cir. 1962). In *Harlow*, three employees of the European Exchange System, which operated facilities abroad for the benefit of servicemen, solicited kickbacks from vendors. The Fifth Circuit held that the employees were "public officials" because the defendant's employer was "an instrumentality of the Government." *Id.* at 371.

on behalf of the United States, they should adopt the proper approach and focus on the degree of responsibility and public trust inherent in the individual's position.

C. APPLICATION OF THE "PUBLIC TRUST" TEST

The Court in *Dixon* assessed two elements to determine whether the alleged officers "occupie[d] a position of public trust with official federal responsibilities": (1) the degree of responsibility for the administration of the federal program; and (2) the amount of federal supervision over the individual's work.¹¹² The majority's assessment of both of these elements is well supported by the record. Although the formal structure of UNI did not allow Hinton and Dixon to allocate federal funds without committee approval, UNI frequently avoided this organizational structure.¹¹³ Also, the evidence revealed that Hinton and Dixon were subject to financial as well as other types of federal supervision.¹¹⁴ The majority in *Dixon*, therefore, justifiably concluded that Hinton and Dixon occupied positions of public trust with official federal responsibilities.

The majority's application of the "public trust" test also reveals limits to the scope of § 201(a). The Court in *Dixon* emphasized that "[b]y accepting the responsibility for distributing these federal fiscal resources, petitioners assumed the quintessentially official role of *administering* a social service program established by the United States Congress."¹¹⁵ Other grant recipients, although conceivably subject to bribes, do not assume responsibility for the distribution (i.e., the administration) of funds. For example, Lilly and Logsdon, the general contractors from whom Hinton and Dixon solicited kickbacks, conceivably could have been bribed by subcontractors. They did not assume responsibility, however, for the distribution of federal funds; they assumed responsibility only for the use of federal funds.¹¹⁶ When a grant recipient distributes federal funds, the indi-

¹¹² *Dixon*, 104 S. Ct. at 1180.

¹¹³ See *supra* note 15 and accompanying text. See also *United States v. Hollingshead*, 672 F.2d 751, 754 (9th Cir. 1982) (an individual holds administrative responsibility when he recommends expenditures of federal funds); *United States v. Griffin*, 401 F. Supp. 1222, 1230 (S.D. Ind. 1975) (defendant placed in position of responsibility because HUD followed defendant's recommendations 95 percent of the time). But see *United States v. Del Toro*, 513 F.2d 656, 662 (2d Cir. 1975) (where an individual's recommendation requires approval of five other parties, individual is not placed in a position of responsibility).

¹¹⁴ See *Dixon*, 104 S. Ct. at 1175. HCDA subgrantees must abide by equal opportunity, fair labor, environmental, and other requirements. *Id.*

¹¹⁵ *Id.* at 1180 (emphasis added).

¹¹⁶ *Id.* at 1176. Although UNI obligated itself to distribute the grant funds to appli-

vidual *acts* on behalf of the government, but when a grant recipient uses the funds to perform work, the individual merely *benefits* from the federal government. A distinction between administrative and purely operational responsibility is appropriate when a court applies § 201(a). Although all grant recipients are “responsible” for the use of federal funds in accordance with Congress’ purpose in making the funds available, only those grant recipients with administrative responsibility properly can be said to act for the federal government and serve as “public officials” under § 201(a).

V. CONCLUSION

In *Dixon v. United States*, the Supreme Court interpreted the term “public official” for purposes of § 201(a) of Title 18 of the United States Code. Justice Marshall properly focused on the degree of public trust and official federal responsibility inherent in the alleged official’s position. The Court resisted an improper construction of “public official” on the basis of the alleged official’s formal, legal relationship with the federal government. The Supreme Court in *Dixon* established a “public trust” test that compels lower courts to apply § 201(a) in a manner that is consistent with Congress’ intent when it passed the provision. Congress intended § 201(a) to apply to all individuals responsible for the administration of the federal government’s program.

The “public trust” test establishes a method of inquiry for lower courts. It does not provide a rigid classification that lower courts can apply uniformly to all private subgrantees under this legislation. Although lower courts would find it easier to apply a rigid rule that all subgrantees are public officials under § 201(a), such a rule would be contrary to Congress’ intent in enacting the statute. All subgrantees do not hold the same level of responsibility. Congress intended the statute to apply to all individuals responsible for the administration of federal projects, not to all recipients of federal grants. Rather than enacting a uniform classification, the “public trust” test requires lower courts to assess grant recipients’ level of administrative responsibility on a case-by-case basis. Although the “public trust” test is less rigid than a uniform classification of subgrantees, it is not ambiguous. Adjudication necessarily entails the

cants, a contractor like Lilly or Logsdon could perform all of the work itself and need not transfer the funds to subsequent parties. Because a contractor has the option of retaining all grant funds for its own use, it did not assume responsibility for the administration of federal funds.

application of particular facts to an established standard. The “public trust” test establishes such a standard.

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