



**Written Statement of
Timothy P. O'Toole**

**on behalf of the
National Association of Criminal Defense Lawyers**

**Before the
House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security**

Re: H.R. 2572, the "Clean Up Government Act of 2011"

July 26, 2011

TIMOTHY P. O'TOOLE, ESQ. defends individuals and companies in white collar criminal prosecutions, conducts internal corporate investigations, and represents potential witnesses and targets in government investigations as a partner at Miller & Chevalier in Washington, D.C. His white collar criminal defense practice includes matters involving the Foreign Corrupt Practices Act, criminal tax, conspiracy, false representations to government agencies, bribery, illegal gratuities, obstruction of justice, and fraud. In addition, Mr. O'Toole has a wealth of experience handling criminal and civil appeals, having presented more than 25 appellate arguments in the state and federal courts, and represented multiple parties and *amici curiae* before the United States Supreme Court in a Fourth Amendment case (*Hudson v. Michigan*), cases involving the Sixth Amendment right to confront witnesses (*Briscoe v. Virginia*; *Melendez-Diaz v. Massachusetts*; *Davis v. Washington*; and *Hammon v. Indiana*), and cases involving federal court jurisdiction (*Slack v. McDaniel*; *Whorton v. Bockting*; *Muhammad v. Close*; and *Rumsfeld v. Padilla*). Mr. O'Toole has also published and lectured nationwide on a variety of topics including the honest services fraud law and the use of the willful blindness doctrine in white collar prosecutions. Prior to joining Miller & Chevalier, Mr. O'Toole served as the Chief of the Special Litigation Division of the Public Defender Service for the District of Columbia, where he supervised and handled complex cases in the local and federal courts. He is also a former Assistant Federal Public Defender in Las Vegas, Nevada, where he represented people under sentence of death in federal proceedings.

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The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's more than 10,000 direct members—and 80 state and local affiliate organizations with another 28,000 members—include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

Introduction

My name is Timothy P. O'Toole and I am writing on behalf of the National Association of Criminal Defense Lawyers (NACDL), an organization of over 10,000 direct members. NACDL is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. I am a practicing criminal defense attorney in Washington, DC, specializing in white collar crime. I sit on NACDL's Board of Directors and am a member of NACDL's White Collar Crime Committee.

It is difficult to stand up and publicly announce myself as being opposed to something that has been named the "Clean Up Government Act." Like you, I believe that public corruption is an insidious crime that undermines the public's faith in those who we trust to serve us. So let me be very plain and very clear. On behalf of the National Association of Criminal Defense Lawyers, I am not here today to defend public corruption nor am I recommending that you do so.

But I am here today, as a practicing lawyer who is actively working in this area of the law, to remind the esteemed Members of this Subcommittee, and the general public, that we already have a very powerful set of federal laws that prevent and punish those public officials who trade on their public office for private gain. There are, in fact, over 20 federal statutes that are currently very effectively used by prosecutors to curtail suspected public corruption and fraud. These statutes impose stern punishments against those found guilty of these corruption offenses. I write to illustrate to you that H.R. 2572 represents a number of unnecessary changes to the law that will create additional confusion, cost, and potentially unintended consequences, while at the same time having no appreciable affect on curtailing public corruption.

In many ways, the proposal reflects a disturbing trend that we, along with organizations on the right and the left, have labeled overcriminalization—a public policy phenomenon that has drawn the attention of a growing number of groups including the Heritage Foundation, the Federalist Society, the ACLU, and Families Against Mandatory Minimums (FAMM). A variety of political, economic and corporate scandals have graced the front pages of our newspapers, and over the past 30 years, Congress has responded to the public's sense of outrage at these events by adopting more and more overlapping laws, often usurping areas that have been competently handled by state and local jurisdictions, ignoring legal safeguards such as criminal intent requirements that limit the criminal law to specific cases of criminal wrongdoing, and incrementally toughening the penalties without regard for cost or even any sense of normative justice. But as Justice Scalia recently noted, that trend must come to an end: "[W]e face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a

national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt.”¹

There are over 4,450 federal crimes scattered throughout the 50 titles of the United States Code. In addition, it is estimated that there are at least 10,000, and quite possibly as many as 300,000, federal regulations that can be enforced criminally. The truth is no one, including our own government, has been able to provide an accurate count of how many criminal offenses exist in our federal code. This is not simply statistical curiosity, but a matter with serious consequences.

The hallmarks of enforcing this monstrous criminal code include a backlogged judiciary, overflowing prisons, and the incarceration of innocent individuals who plead guilty not because they actually are, but because exercising their constitutional right to a trial is all too risky. This enforcement scheme is inefficient, ineffective and, of course, at tremendous taxpayer expense. The cost of incarcerating one of every one hundred adults in America is always troubling, but particularly so during a time of economic instability and ever-increasing federal debt.

NACDL and the Heritage Foundation have analyzed the legislative process for enacting criminal laws in order to provide Congress, and the public, with concrete evidence of the problem. This analytic study formed the basis of a non-partisan, joint report entitled: *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*.² On July 22, 2009, and again on September 28, 2010, this Subcommittee came together, under the bipartisan leadership of Representatives Bobby Scott (D-VA) and Louie Gohmert (R-TX), to learn about our nation’s addiction to overcriminalizing conduct and overfederalizing crime.³ Supported by a broad coalition of organizations—ranging from the right to the left—this Subcommittee explored these issues in hearings that received positive attention from national media⁴ and ignited the overcriminalization reform movement. Justice Scalia’s message that it is “time to call a halt” on overcriminalization was a message made loud and clear by this same Subcommittee in those hearings and one that has been echoed by the media and the public ever since—including on the

¹ *Sykes v. United States*, No. 09-11311, slip op. at 9, (U.S. June 9, 2011) (Scalia, J. dissenting).

² Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (The Heritage Foundation and National Association of Criminal Defense Lawyers) (2010) available at www.nacdl.org/withoutintent.

³ *Reining in Overcriminalization: Assessing the Problems, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2010), available at http://judiciary.house.gov/hearings/hear_100928.html; *Overcriminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009), available at http://judiciary.house.gov/hearings/hear_090722_2.html.

⁴ See, e.g., *Rough justice in America – Too many laws, too many prisoners*, ECONOMIST, July 2010, available at http://www.economist.com/node/16636027?story_id=16636027; *Commentary, Rough justice – America locks up too many people, some for acts that should not even be criminal*, ECONOMIST, July 2010, available at http://www.economist.com/node/16640389?Story_ID=16640389&fsrc=nlw%7Cchig%7C07-22-2010%7Ceditors_highlights; *The Congressional Assault On Criminal Justice*, THE BULLETIN, May 7, 2010; *Editorial, Ignorance of the law, Congress going down a dangerous path*, LAW VEGAS REVIEW-JOURNAL, May 6, 2010; *Guilty, or not, Bipartisan group tackles the overcriminalization of the legal process*, Fredericksburg.com, May 10, 2010; Mark Sherman, *Report: Congress makes too many vague laws*, ASSOCIATED PRESS, May 4, 2010 (reprinted in The Seattle Times, the Cleveland Plain Dealer, the Boston Globe, and many others); Adam Liptak, *Right and Left Join Forces on Criminal Justice*, N.Y. TIMES, Nov. 23, 2009, at A1.

front page of the *Wall Street Journal* just this past weekend.⁵

Duplicative statutes, federalization of conduct traditionally belonging to the states, criminalization of regular business activity or social conduct and interactions, excessive prison sentences—this is overcriminalization. When any of these elements combine with poor legislative drafting, inadequate *mens rea* requirements, or unfettered prosecutorial discretion, the result is inevitably the victimization of more law-abiding citizens. My written testimony contains a discussion of exactly how H.R. 2572 would have such an effect—despite the well-meaning intentions that might have motivated its drafters. The bill proposes to overrule three unanimous Supreme Court decisions that were not only based on sound principles of statutory construction, but what the entire Supreme Court bench thought would be the dramatic and negative policy consequences of doing precisely what H.R. 2572 proposes to do. And disturbingly, the bill would also dramatically increase what are already decades-long sentence lengths for anyone subject to these new, overly broad laws.

A. The bill seeks to overrule *Cleveland v. United States*, by adopting what a unanimous Supreme Court described as a “sweeping expansion” of the term “property” in the fraud laws—one that the Supreme Court noted would greatly encroach on areas that had traditionally been left to the states.

Section 2 would expand the conduct prohibited by 18 U.S.C. §§ 1341 and 1343 (mail fraud and wire fraud) to include fraud for the purposes of obtaining “money, property, or any other thing of value.” Currently the law is limited to the obtainment of “money or property.” As noted in the title of Section 2, this amendment will expand these statutes to cover licenses issued by states and municipalities, amongst other actions and conduct. Any misrepresentation on a Virginia marriage license, or a Wisconsin fishing license, or a license to drive a cab in Illinois, or sell a hotdog in Texas would suddenly serve as a basis for a federal prosecution. These were the very items the Supreme Court construed the mail fraud statute as not applying to in *Cleveland v. United States*, 531 U.S. 12 (2000).

This section is an example of both overcriminalization and overfederalization and certainly has nothing to do with either public corruption or “cleaning up” government. In the *Cleveland* decision, Justice Ginsburg’s unanimous opinion for the Court observed that construing the mail fraud statute to include these sorts of license applications would constitute “a sweeping expansion of federal criminal jurisdiction,” and “would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities.” Every member of the Supreme Court has thus made clear that, if a law like this was enacted, it will vastly and inappropriately increase the federal criminal law’s intrusion upon areas properly regulated by state and local law. In addition, the mail fraud and wire fraud statutes are already predicate offenses under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1961(1), and the money laundering statute, 18 U.S.C. § 1956(c)(7)(A), which authorize sentences of up to 20 years’ imprisonment on top of the underlying offense. Thus, any further expansion of the mail and wire fraud statutes could result in the extension of these dramatic

⁵ Gary Fields and John R. Emshwiller, “As Criminal Laws Proliferate, More Ensnared,” THE WALL STREET JOURNAL, July 23-24, 2011, at A1.

sentences to additional individuals, which was precisely what the government *unsuccessfully* sought to do in the *Cleveland* case.

B. The bill seeks to revive an “undisclosed conflict of interest” theory of criminal liability invalidated by the Supreme Court in *Skilling v. United States*, in which all nine Justices expressed concern about the use of a theory so broad and flexible that it could criminalize a public employee who called in sick in order to go see a ball game.

Section 16 is virtually identical to, and has the same effect as, the various versions of the Honest Services Restoration Act previously introduced by Rep. Anthony Weiner. This section is a direct response to the U.S. Supreme Court’s decision in *Skilling*, which recently brought clarity to twenty years of Circuit Court confusion in interpreting the honest services fraud statute (18 U.S.C. § 1346).⁶ If enacted, it would create a new statute, 18 U.S.C. § 1346A, criminalizing undisclosed self-dealing by public officials. In general, this offense would consist of a “public official” (broadly defined) failing to properly disclose a “financial interest” (undefined) required to be disclosed by any law (broadly defined).

Specifically, for the purpose of Chapter 63 of Title 18, this section defines the phrase “scheme or artifice to defraud” to include “a scheme or artifice by a public official to engage in undisclosed self-dealing.” The section defines “undisclosed self-dealing” as “a public official [who] performs an official act for the purpose, in whole or in material part, of furthering or benefitting a financial interest of” himself, his spouse or minor child, his general business partner, a business or organization in which he has a leadership role, or a business or organization he is negotiating for or has any arrangement concerning prospective employment or compensation, or an individual, business or organization from whom the public official has received any thing or things of value (other than as expressly provided for by law or by rule or regulation) and the public official “knowingly falsifies, conceals, or covers up material information that is required to be disclosed regarding that financial interest by any Federal, State, or local statute, rule, regulation, or charter applicable to the public official, or knowingly fails to disclose material information regarding that financial interest in a manner that is required by [said laws].”

In its *Skilling* decision, every member of the Supreme Court made clear the problematic nature of this “undisclosed conflict of interest” theory of criminal liability, with Justices Scalia, Thomas and Kennedy voting to strike down the entire statute as unconstitutionally vague on its face. In fact, the Court specifically cautioned Congress about the due process concerns inherent in any attempt to revive this theory, and identified a host of troubling and unanswered questions in a proposal set forth by the Department of Justice in its Supreme Court briefing—a proposal that closely resembles Section 16. As the Court explained, the government’s “formulation leaves many questions unanswered.”⁷ And yet, a comparison of the questions posed by the Court in its *Skilling* decision with the language proposed in Section 16 illustrates that this bill would be subject to the same criticism because it too leaves many of the same questions unanswered. The proposed legislation, for example, ignores the Supreme Court’s concerns about (1) the need to

⁶ *Skilling v. United States*, 130 S.Ct. 2896 (2010).

⁷ *Id.* at 2933 n. 44.

define clearly the “significance” of the conflicting financial interest (“how direct or significant does the conflicting financial interest have to be?”); (2) the need to clearly define the extent to which the official action has to further that interest to rise to the level of fraud (“To what extent does the official action have to further that interest in order to amount to fraud?”); and (3) the need to clearly define the scope of the disclosure duty (“to whom should the disclosure be made and what should it convey?”).⁸ As a result, this section does not conform with the Supreme Court’s directive in *Skilling* about the need to exercise “particular care in attempting to formulate an adequate criminal prohibition” if Congress decided to take up the issue again, and it is highly doubtful that this statute could overcome the serious due process concerns identified by the Court in *Skilling*.

The Supreme Court’s questions are not addressed by the addition of paragraph five, which purports to limit the disclosure requirements to “material information.” First, this requirement seems directed only toward the Supreme Court’s concern about defining what must be disclosed and to whom; importantly, it does not address concerns about the lack of definition concerning the scope of the financial interest that triggers the duty of disclosure, nor does it address concerns about what, if any, connection exists between the financial interest and the official act. But even with respect to the disclosure duty, the “material information” requirement does not narrow the scope of the obligations significantly. While it does define the material disclosure obligations to “include” information regarding the self-dealing, it is not limited to such information. Thus, the bill’s definition of what sorts of non-disclosures violate the statute seems to include other information, presumably unrelated to any self-dealing, which could be deemed material. This level of broadness, even in the most specific section of the bill, is unlikely to satisfy the Supreme Court’s concerns raised in the *Skilling* opinion.

These constitutional concerns are not the only problems with Section 16; the proposed new federal law also is another classic example of overcriminalization, overlapping with the many dozens of other federal criminal laws that already reach corrupt conduct by public officials. Indeed, even without mentioning the honest services fraud law, the Supreme Court has already observed that potentially corrupt behavior of public officials is governed by an “intricate web of regulations, both administrative and criminal.” These federal criminal laws include not only the anti-bribery statutes, but also the mail fraud and racketeering statutes, the Hobbs Act, the Travel Act, and the Anti-Kickback laws. Congress has also passed numerous laws and rules specifically prohibiting public officials’ acceptance of gifts. In addition, Congress passed the Honest Leadership and Open Government Act of 2007 (“HLOGA”), which contains a criminal prohibition expressly prohibiting private citizen lobbyists from making gifts or providing travel to government officials if the person has knowledge that the gift or travel may not be accepted by the official under the Rules of the House of Representatives or the Standing Rules of the Senate. I invite you to review the attached list of just some of the vast array of federal prohibitions against corrupt conduct by public officials that already exist.

Section 16 merely duplicates these already-existing prohibitions, which already carry extensive penalties. It is hard to identify any conduct that could not be reached by these existing laws that would be reached by the proposed one, except for innocuous conduct that everyone

⁸ *See id.*

agrees should not be criminal at all⁹ (like a public employee who phones in sick in order to see a ball game because he wants to avoid having his salary docked). A new honest services statute is likewise unnecessary in the state and local context. Many have argued that the primary purpose of reviving a pre-*Skilling* honest services law is to allow federal prosecutors to prosecute corruption that would otherwise be ignored by conflicted and politically weak state and local officials. But federal prosecutors are already able to use existing federal laws such as the Hobbs Act and the Travel Act to reach state and local public corruption and they frequently already do so.

In addition, state and local jurisdictions often have their own extensive anti-corruption laws. Using the federal honest services law to essentially displace this extensive state and local regulatory framework—as Section 16 expressly seeks to do—creates potential federalism concerns, as courts have noted, since it essentially allows the federal government to override the numerous laws that state and local governments have adopted to address the conduct of their own officials.

Finally, state and local jurisdictions often have citizen legislators, who are in a completely different position from the full-time public officials at whom this law appears to be aimed. Take, for example, a state legislator in Texas who, along with his part-time legislative duties, also owns a car dealership. Does this law apply to him when he votes on a state bill to increase highway funding? Such a bill could undoubtedly “further or benefit” his financial interest—more and better roads may make it easier to get to his dealership or may mean more people buy cars. Assuming Texas has some sort of rule that says that a legislator must file a disclosure before voting on any bill on which he has a conflict of interest, if the legislator does not disclose the “conflict”—maybe because he cannot imagine that that provision applies to him and everybody knows he has a car dealership anyway—he could be vulnerable to federal prosecution. And, the federal prosecutors bringing the prosecution can do so even if, as a matter of Texas practice, no state or local prosecutor has ever applied that provision in such a broad fashion (or even if the punishment for such nondisclosure is administrative or civil). Thus, if Section 16 becomes law, federal prosecutors get to decide what state and local disclosure rules mean, and get to bring one-size-fits-all prosecutions without any understanding of the state and local jurisdictions in which these prosecutions are brought.

⁹ Although there is a provision in this section that has been drafted to attempt to prevent this particular criminal law from applying in circumstances that are otherwise expressly allowed by other laws, rules and regulations, this exception will not be able to prevent all potential misuse of the statute, as there are certainly legitimate and lawful types of exchanges that have not yet been expressly blessed by an existing law, rule or regulation. In addition, this exemption provision unfortunately does not have the ameliorative effect it might have if the laws and regulations governing gifts were not so numerous and were more easily understood.

One final concern is raised by Section 16’s paragraph (4)(A)(vi), which includes within the scope of “undisclosed self-dealing” any actions taken by a public official to further the interest of an “individual, business or organization from whom the public official has received any thing or things of value.” On its face, such a provision *could* sweep within its reach any individual, business or organization from whom the public official has received a *bona fide* campaign contribution, by defining it as “self-dealing” for an official to take actions that benefit campaign contributors. Doing so creates a sweepingly broad definition of “self-dealing,” and potentially raises serious constitutional issues, since the Supreme Court has made clear that a public corruption prosecution premised on campaign contributions presents complicated First Amendment issues in our system of privately financed elections.

C. The bill seeks to overrule *Sun-Diamond v. United States* by adopting language in the anti-gratuity statute that the Supreme Court has noted might criminalize the giving of a team shirt to the President by the victorious NCAA or NFL champions.

Section 8 seeks to amend 18 U.S.C. § 201(c)(1), the illegal gratuities portion of the federal bribery statute, to prohibit the giving of anything of value “for or because of the official’s or person’s official position or any official act performed or to be performed by such official or person.” Currently the prohibition is limited to the giving of anything of value for or because of official acts. The proposed law does not provide an exception for *de minimis* gifts nor does it necessarily exempt all items that may be traditionally bestowed on officials.

This section is in response to the holding in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999). In *Sun-Diamond*, the Supreme Court held unanimously that, under the current language of § 201(c)(1), “the Government must prove a link between a thing of value conferred upon a public official and a specific ‘official act’ for or because of which it was given.” In so holding, the Supreme Court rejected the Government’s argument that a conviction could be sustained where a gift was given merely on the basis of the position of a public official.¹⁰

If enacted, this section would impose liability based solely on an official’s status. As the Supreme Court noted in *Sun-Diamond*, this could result in the criminalization of many kinds of gifts that society believes are legitimate and should not be criminalized, such as replica jerseys given to the President by championship sports teams, a baseball cap given to the Secretary of Education by a high school principal on the occasion of the former’s visit to the latter’s school, or a privately catered lunch provided to the Secretary of Agriculture by a group of farmers in conjunction with a speech on USDA policy.¹¹ While the “otherwise than as provided by law” exception set forth in Section 6 of the bill is a good-faith attempt to limit the otherwise unlimited applicability of the provision if this particular amendment becomes law, the exception’s effectiveness in actually ameliorating the harm is unclear. In short, this proposed amendment would, on its face, criminalize any gift given at any time to any public official in any situation where that gift was given as a result of that public official being a public official, unless such a gift was expressly allowed under an existing law or regulation. The civil, criminal and administrative laws and regulations that govern such gifts are numerous, intricate, and do not all provide the clear guidance that should be present before such rules are used as the basis for the imposition of criminal liability, nor do they likely cover all legitimate gift circumstances that may arise.

¹⁰ *Sun-Diamond*, 526 U.S. at 414.

¹¹ *Id.* at 406-07.

D. The bill seeks to redefine an “official act” in the bribery and anti-gratuity statute so broadly that it, in essence, would mean “any act” and would specifically include even a decision not to take any action at all.

Section 9 amends the meaning of the term “official act” as defined by 18 U.S.C. § 201(a)(3). This definition applies to all the provisions of § 201, which prohibits both bribery and illegal gratuities. Currently, this term means “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.” If enacted, this section would expand the definition of “official act” to include “any act within the range of official duty” and also any “recommendation.” Further, this section amends the definition of “official act” to include “a decision or recommendation that a government should not take action.”

Courts have already applied an extremely broad definition to the term “official act.” By expanding the term “official act” to include “any act within the range of official duty,” the statute could criminalize any number of legitimate, non-corrupt acts, as well as those activities that might be ethically undesirable but not the proper target of the bribery and anti-gratuity statute. For example, it could apply where an FBI agent used his government computer to do a background check on a man dating his sister and the sister then takes her brother out to dinner in thanks. *See Valdes v. United States*, No. 03-3066, slip op. at 4 (D.C. Cir. Feb. 9, 2007) (rejecting the same definition of “official act” as the one proposed in this bill because it would have such broad reach that it would apply the bribery and anti-gratuity statute to a situation in which “a Department of Justice lawyer . . . used a government Westlaw account to look up a legal question for a friend”).

Importantly, this amendment would also criminalize a decision or recommendation *not* to take any action, which exponentially increases the breadth of the statute and would lead to absurd prosecutions in which individuals will be forced to justify why they did not take some action or make some decision at any particular moment in time.

E. The bill proposes to dramatically expand already lengthy prison sentences for a variety of offenses without any evidence of whether such an expansion is necessary or what the costs of such an expansion would be.

Sections 4, 5, 6 and 12 increase the maximum terms of imprisonment for certain offenses. Section 4 doubles the maximum term of imprisonment for a violation of 18 U.S.C. § 666(a) (theft or bribery concerning receipt of Federal funds) from ten to twenty years. Section 5 doubles the maximum term of imprisonment for a violation of 18 U.S.C. § 641 (embezzlement or theft of federal money, property, or records) from ten to twenty years. Section 6 increases the maximum term of imprisonment for violations of 18 U.S.C. § 201¹²(b) and (c) from fifteen to

¹² Section 201, titled “Bribery of public officials and witnesses,” prohibits (1) offering or giving anything of value to public officials, (2) demanding or receiving anything of value if a public official, (3) offering or giving anything of value to influence witness testimony, and (4) demanding or receiving anything of value when serving as a witness. Section 201(b), directed at bribery, requires a corrupt intent and an intent to influence an official act (or an intent to

twenty years and from two to five years, respectively. Section 12 more than triples the maximum term of imprisonment from three years to ten years for the following offenses under Title 18: § 602(a)(4) (solicitation of political contributions), § 606 (intimidation to secure political contributions), § 607(a)(2) (solicitation and acceptance of contributions in federal offices), and § 610 (coercion of political activity by federal employees). In addition, Section 12 converts the maximum term of imprisonment from one year to ten years for the following offenses under Title 18: § 600 (promise of employment for political activity) and § 601(a) (deprivation of employment for political activity)—a ten-fold increase.

There is simply no evidence, however, that the current lengthy statutory maximum sentences for these particular offenses fail to provide adequate punishment and deterrence nor, if any increase is necessary, why doubling or tripling these already significant sentences (or more) would be rational. Empirical research has shown that “increases in severity of punishments do not yield significant (if any) marginal deterrent effect.”¹³ This is especially true for white-collar offenders. Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 *Cardozo J. Conflict Resol.* 421, 448-49 (2007) (“[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders.”). Instead, increasing already lengthy sentences for these non-violent offenders will further victimize the already overburdened taxpayer. In light of the extraordinary cost of imprisonment, and lacking any evidence whatsoever that an increase is even necessary, these changes cannot be justified.

Section 10, moreover, orders the U.S. Sentencing Commission (“USSC”) to increase already high penalties for corruption offenses.¹⁴ Congress, however, has failed to conduct adequate fact-finding to support its conclusion that penalties under the USSC’s Guidelines and policy statements must be increased. There is simply no evidence that the current Guidelines fail to provide adequate sentences for these particular offenses or fail to meet the statutory mandate of providing sentences sufficient, but not greater than necessary, to meet legitimate sentencing objectives. In fact, bribery Guidelines are already higher when compared to other economic crimes because they consider not just loss amount, but the amount of the bribe and any gain to the defendant. Recent case law has also increased these amounts by including theoretical loss or gain, whether or not realized, and benefits received by other more culpable defendants or unindicted co-conspirators. Importantly, to the extent the calculated penalty that would be produced under existing Guidelines and case law does not adequately reflect the defendant’s culpability, judges always have the authority to depart upwards when they deem it necessary. Lastly, mandating increases without any actual evidence that such increases are necessary

be influenced), as typically evidenced by a *quid pro quo*. Section 201(c), directed at illegal gratuities, does not require a corrupt intent or specific intent to influence or be influenced.

¹³ Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime & Just.* 1, 28 (2006).

¹⁴ This section directs the USSC to review and amend its Sentencing Guidelines and policy statements applicable to persons convicted of offenses under 18 U.S.C. §§ 201 (federal bribery and illegal gratuities), 641 (theft of federal money/property/records), 666 (bribery related to programs receiving federal funds), 1951 (violations of the Hobbs Act), 1952 (violations of the Travel Act), and 1962 (violations of the RICO Act), “to reflect the intent of Congress that such penalties **be increased** in comparison to those currently provided by guidelines and policy statements” (emphasis added).

undercuts the purpose and independent authority of the USSC. This mandatory directive is inappropriate and cannot be justified.

F. The bill lowers the existing statutory monetary threshold in 18 U.S.C. § 666 from \$5,000 to \$1,000—despite the fact that a previous Congress had purposefully set that threshold in order to limit the otherwise broad scope of the law and in order to curtail excessive federal intervention into state and local matters.

Section 4 lowers the existing statutory monetary threshold from \$5,000 to \$1,000 for a violation of 18 U.S.C. § 666(a) (theft or bribery concerning receipt of Federal funds), which carries an existing ten year maximum sentence. Lowering the existing statutory monetary threshold from \$5,000 down to \$1,000 is problematic. “The monetary threshold requirements of [S]ection 666 constitute a significant limitation on the otherwise broad scope of the statute. Congress included these restricting features ‘to insure against an unwarranted expansion of Federal jurisdiction into areas of little Federal interest [quoting S. REP. NO. 307, 97th Cong., 1st Sess. 726 (1981)].’ Moreover, Congress limited the scope of [S]ection 666 to crimes involving substantial monetary amounts in order to curtail excessive federal intervention into state and local matters.” Daniel N. Rosenstein, *Section 666: The Beast in the Federal Criminal Arsenal*, 39 Cath. U. L. Rev. 673, 686 (1990) (citing S. REP. NO. 225 98th Cong., 2d Sess. 370 (1984)). Unfortunately, if passed, this bill will also increase the statutory maximum term of imprisonment to twenty years for anyone subject to this newly expanded criminal law.

G. The bill seeks to increase the statute of limitations for public corruption offenses beyond that of countless other kinds of criminal laws, which will potentially undermine the truth-finding function of trials for those who stand accused.

Public corruption offenses are currently under the default statute of limitations of five years, as codified at 18 U.S.C. § 3282. If enacted, Section 11 would set the statute of limitations at six years for the following provisions of Title 18: §§ 201, 666, 1341 and 1343 (when charged in conjunction with 1346), 1951, 1952, and 1962 (when charged in conjunction with any of the preceding offenses). It is unclear why an increase in the statute of limitations for these specific types of crimes, as opposed to thousands of other crimes, is necessary. An increase of even one year is not without significant impact. A lingering threat of criminal prosecution does great harm to individual lives and reputations even if criminal charges are ultimately never brought. The current five-year statute of limitations strikes this balance by providing more than ample time for investigation, while ensuring that after five years, the process comes to an end—either through the bringing of charges or through a decision by prosecutors to let the statute of limitations expire. Allowing this uncertainty to extend longer than it does for numerous other criminal offenses serves no identifiable purpose and past experiences have shown that the existing time period has been sufficient to allow complete investigations into public corruption offenses.

By contrast, extending the statute of limitations not only can affect individual lives and reputations, but also carries the potential of undermining the truth-finding function of the trial. Potential witnesses would remain in criminal jeopardy for six years and thus would possess a constitutional right not to testify until the expiration of this six-year period. As a practical matter, this means that such witnesses would be unavailable to the defense at trial, but fully

available to the prosecution through the exercise of its immunity powers. Extending such disparities in the availability of witnesses to a six-year period threatens to present a distorted picture of the facts at trial, which not only undermines the fairness of trials but also the public's respect for the criminal justice system generally.

H. The bill proposes to expand the already-broad venue provisions of federal criminal law to permit additional forum shopping by allowing cases to be brought in districts with the most minimal connection to the offenses since, by definition, it would have to be a district in which the offense was not begun, continued or completed.

Section 3 expands the permissible venue for the prosecution of any federal offense that begins in one district and ends in another (or is committed in more than one district). Currently 18 U.S.C. § 3237, the general venue statute for multi-district offenses, limits venue to “any district in which such offense was begun, continued, or completed.” This section would expand that list to include “any district in which an act in furtherance of an offense is committed.” There are numerous other expansions of venue contemplated in Section 15.¹⁵

The expansion of venue embodied by this section is the type of venue tampering that the U.S. Supreme Court has cautioned against. *United States v. Johnson*, 323 U.S. 273, 275-76 (1944) (“[S]uch leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution.”). If enacted, this section could invite abuse in the form of unfair forum-shopping for friendly locales in which to empanel a jury and far-flung locations to be used as leverage against defendants.

¹⁵ Section 15 expands the permissible venue for the prosecution of violations of various perjury and obstruction of justice statutes. Under current law, prosecutions for obstruction of justice violations are typically covered by the generic venue provisions at 18 U.S.C. §§ 1029, 3237, and 3238, which permit venue where conduct constituting the offense occurred. However, prosecutions under 18 U.S.C. § 1503 (influencing or injuring an officer or juror generally) and § 1512 (tampering with a witness, victim, or informant) are covered by an expanded venue provision located at 18 U.S.C. § 1512(i), which provides that venue “may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.”

If enacted, this section would extend this broader venue provision to the following offenses: § 1504 (influencing a juror by writing), § 1505 (obstruction of proceedings before departments, agencies, and committees), § 1508 (recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting), § 1509 (obstruction of court orders), and § 1510 (obstruction of criminal investigations). Thus, venue for these five additional offenses will not be limited to the district where the conduct constituting the offense occurred. Rather, venue also will be permissible in the district in which the official proceeding was intended to be affected.

This section also adds a new section of code regarding the appropriate venue for certain perjury prosecutions. Specifically, this new section would allow venue for prosecutions under 18 U.S.C. §§ 1621(1), 1622, or 1623, in “the district in which the oath, declaration, certificate, verification, or statement under penalty of perjury is made or in which a proceeding takes place in connection with the oath, declaration, certificate, verification, or statement.”

Conclusion

As the attached list illustrates, there are currently more than twenty federal statutes on the books to deal with corruption by federal and state officials. The Supreme Court's decisions to rein in the government's unfair, overbroad or unconstitutional use of these tools against three particular defendants cannot justify fashioning broad amendments to these laws without a methodical attempt to address all of the concerns identified by the Supreme Court in *Cleveland*, *Skilling*, and *Sun-Diamond*, as well as a reasoned effort to see if any amendments are necessary in the first place. Attempting to revive the invalidated arguments of the federal prosecutors in those cases in a hasty attempt to "fix" a perceived gap in our nation's public corruption laws will almost certainly revive the vagueness and federalism concerns that caused the Supreme Court to unanimously decide those cases as they did. It is difficult to believe that existing federal, state and local criminal laws do not already reach all conduct that is properly criminal. If conduct is still somehow beyond reach, that is likely because the conduct itself is properly beyond the reach of the criminal laws. Before Congress passes new criminal provisions like the ones proposed here, it should ask whether those changes are truly necessary. And before Congress doubles, triples, or decuples already lengthy sentences, increases the statute of limitations for certain crimes, lowers monetary thresholds, and redefines key terms in existing statutes in order to dramatically increase their application to countless more individuals, it should engage in fact-finding into whether such dramatic changes to our existing criminal laws are necessary and beneficial to society at large.

Thank you for this opportunity to express NACDL's concerns. We urge the Committee to thoughtfully consider the wide array of existing federal and state criminal and civil laws that already proscribe misconduct in this arena, as well as the sound Supreme Court precedent that has interpreted such laws, before it acts further.

Respectfully,

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List of Relevant Charging Statutes and Maximum Sentences

As this non-exhaustive list shows, a host of criminal statutes already address federal, state and local public corruption.

Title 18, Chapter 11 - Bribery Offenses

- 18 U.S.C. § 201 - Bribery of public officials and witnesses (15 years)
- 18 U.S.C. § 201(c) - Anti-gratuities statute (2 years)
- 18 U.S.C. § 205 - Activities of officers and employees in claims against and other matters affecting the Government (1 year or 5 years for willful violation)
- 18 U.S.C. § 207 - Restrictions on former officers, employees, and elected officials of the executive and legislative branches (1 year or 5 years for willful violation)
- 18 U.S.C. § 208 - Acts affecting a personal financial interest (1 year or 5 years for willful violation)
- 18 U.S.C. § 209 - Salary of Government officials and employees payable only by United States (1 year or 5 years for willful violation)
- 18 U.S.C. § 217 - Acceptance of consideration for adjustment of farm indebtedness (1 year)

Title 18, Chapter 31 - Embezzlement and Theft Offenses

- 18 U.S.C § 666 - Theft or bribery concerning programs receiving Federal funds (10 years)

Title 18, Chapter 63 - Mail Fraud Offenses

- 18 U.S.C. § 1341 - Mail Fraud (20 years)
- 18 U.S.C. § 1343 - Wire Fraud (20 years)
- 18 U.S.C. § 1347 - Health Care Fraud (20 years)
- 18 U.S.C. § 1348 - Securities Fraud (25 years)
- 18 U.S.C. § 1351 - Fraud in foreign labor contracting (5 years)

Title 18, Chapter 95 - Racketeering Offenses

- 18 U.S.C § 1951 - Interference with commerce by threats or violence (“The Hobbs Act”) (20 years)
- 18 U.S.C § 1952 - Interstate and foreign travel or transportation in aid of racketeering enterprises (“The Travel Act”) (5 years, 20 years or life, depending on applicable subsection)

Title 41 - “The Anti-Kickback Act of 1986”

- 41 U.S.C. § 53
- 41 U.S.C. § 54 (10 years)

Title 26, Chapter 75 - Crimes, Other Offenses and Forfeitures (Internal Revenue Code)

- 26 U.S.C. § 7214(a)(9) - Offenses by officers and employees of the United States (5 years)

Title 2, Chapter 26 - Disclosure of Lobbying Activities

- 2 U.S.C. § 1606(b) - Penalties (5 years)
- 2 U.S.C. § 1613 - Prohibition on provision of gifts or travel by registered lobbyists to Members of Congress and to congressional employees

Title 15, Chapter 2B - Securities Exchanges

- 15 U.S.C. §§ 78dd-1, *et seq.* - “The Foreign Corrupt Practices Act”

Relevant Administrative Provisions

- § 5 U.S.C. § 7353 - Gifts to federal employees (prohibiting federal employees from soliciting anything of value from individuals whose interests may be substantially affected by the performance or non-performance of the individual’s official duties)
- **Rule XXXV** of the Standing Rules of the Senate¹⁶
- **Rule XXVI** of the Rules of the House of Representatives¹⁷

¹⁶ This Rule prohibits senators or their employees—except under defined circumstances—from knowingly accepting a gift from a registered lobbyist or a private entity that retains or employs a registered lobbyist.

¹⁷ This Rule covers financial disclosure requirements for Members of Congress.