CLEAN-UP GOVERNMENT ACT OF 2011

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

ON

H.R. 2572

JULY 26, 2011

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JULY 26, 2011

CLEAN-UP GOVERNMENT ACT OF 2011

TUESDAY, JULY 26, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10 a.m., in room 2141, Rayburn Office Building, the Honorable F. James Sensenbrenner, Jr. (Chairman of the Subcommittee) presiding.

Present: Representatives Sensenbrenner, Gohmert, Poe, Marino, Adams, Quayle, Scott, Conyers, Cohen, Jackson Lee, and Quigley.

Staff present: (Majority) Caroline Lynch, Subcommittee Chief Counsel; Sam Ramer, Counsel; Lindsay Hamilton, Clerk; (Minority) Bobby Vassar, Subcommittee Chief Counsel; Joe Graupensberger, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. SENSENBRENNER. The Subcommittee will come to order. Without objection, the Chair will be authorized to recess the Subcommittee during votes today.

The Chair recognizes himself for 5 minutes for an opening statement.

On November 19, 1863, Abraham Lincoln delivered the Gettysburg Address. In dedicating a portion of the battlefield, President Lincoln said that the dead did not die in vain; that the Nation would have a new birth of freedom; and that government of the people, by the people, for the people shall not perish from the Earth.

A government that is by the people and for the people is the very foundation of a democracy. If elected officials decide to pursue a course of greed, to profit from their positions, they betray the sacred trust and responsibility of the office, and weaken the very foundation of our democracy.

While citizens may have differing views as to how much the government should be involved in their daily lives, and they may have differing opinions of their government and of their elected officials, every citizen has the right to expect an honest government.

Ideally, an oath of office or the ballot box should be sufficient to hold public officials accountable to their constituents. But in reality, it is not.

The criminal justice system, with its ability to investigate and prosecute public corruption and related frauds, is a necessary component to ensure an honest government. Our criminal justice sys-

tem investigates and prosecutes public corruption and related frauds in order to ensure an honest government.

The FBI identified the investigation of public corruption as a top priority and recognized that public corruption poses a fundamental threat to our national security and way of life. It impacts everything from how well our borders are secured and our neighborhoods protected to verdicts handed down in courts, to the quality of our roads, schools and other government services. And it takes a significant toll on our pocketbooks, wasting billions in tax dollars every year.

Today's hearing examines the gaps in our Federal corruption laws that limit their effectiveness and allow corruption to persist.

I and my colleague from Illinois, Mr. Quigley, introduced H.R. 2572, the "Clean Up Government Act of 2011," to strengthen our public corruption laws. This bill restores tools that prosecutors had previously relied upon that have been eroded over the years by the courts. The bill also enhances other Federal statutes used to fight and deter public corruption. Additional penalties and more robust investigative techniques will ensure that public corruption and related offenses are addressed.

A significant statute for prosecuting corruption was diluted as a result of the Supreme Court's decision in *Skilling v. the United States*. In this case, the Court held that the honest services fraud statute does not apply to prosecutions involving undisclosed self-dealing by a public official, but only to cases that involve traditional bribery or kickback schemes.

Both types of honest services fraud prosecutions are equally essential to maintaining government integrity while ensuring that decisions made by public officials are made in the best interests of the people. Many instances of public corruption do not involve a classic bribery or extortion scenario, but, rather, public officials who exploit their positions and influence to benefit outside entities or individuals.

Undisclosed self-dealing is not covered by any other area of Federal law. It is imperative that Congress restore the statute to its original intent. Although the *Skilling* decision seriously eroded the ability to prosecute both public officials and corporate officers for their undisclosed self-dealings, this bill restores the honest services fraud statute only as it relates to public officials.

The bill also improves the government's ability to prosecute public officials who accept gifts because of their official position, and amends the definition of "official act" to include conduct that falls within the range of official duties of a public official. The bill extends the statute of limitations for serious public corruption offenses, increases the penalties for certain public corruption offenses, and gives investigators additional tools to address these related crimes in the form of additional wiretap and RICO predicates.

There is bipartisan support from both houses for reforming our Federal public corruption laws, and this bill proposes commonsense and straightforward reforms to achieve this goal.

The bill, H.R. 2572, follows:]

I

112TH CONGRESS
1ST SESSION

H. R. 2572

To amend title 18, United States Code, to deter public corruption, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 15, 2011

Mr. SENSENBRENNER (for himself and Mr. QUIGLEY) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 18, United States Code, to deter public corruption, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Clean Up Government Act of 2011".

SEC. 2. APPLICATION OF MAIL AND WIRE FRAUD STATUTES TO LICENCES AND OTHER INTANGIBLE RIGHTS.

Sections 1341 and 1343 of title 18, United States Code, are each amended by striking "money or property"

and inserting "money, property, or any other thing of value".

SEC. 3. VENUE FOR FEDERAL OFFENSES.

Section 3237(a) of title 18, United States Code, is amended by inserting after "begun, continued, or completed" the following: "or in any district in which an act in furtherance of an offense is committed".

SEC. 4. THEFT OR BRIBERY CONCERNING PROGRAMS RECEIVING FEDERAL FINANCIAL ASSISTANCE.

Section 666(a) of title 18, United States Code, is amended—

(1) by striking "10 years" and inserting "20 years";

(2) by striking "$5,000" each place it appears and inserting "$1,000";

(3) by striking "anything of value" each place it appears and inserting "any thing or things of value"; and

(4) in paragraph (1)(B), by inserting after "any thing" the following: "or things".

SEC. 5. PENALTY FOR SECTION 641 VIOLATIONS.

Section 641 of title 18, United States Code, is amended by striking "ten years" and inserting "20 years".

SEC. 6. BRIBERY AND GRAFT.

Section 201 of title 18, United States Code, is amended—

(1) in subsection (a)—

(A) in paragraph (2), by striking "and" at the end;

(B) in paragraph (3), by striking the period at the end; and

(C) by adding at the end the following:

"(4) the term 'rule or regulation' means a Federal regulation or a rule of the House of Representatives or the Senate, including those rules and regulations governing the acceptance of campaign contributions.";

(2) in subsection (b), by striking "fifteen years" and inserting "20 years";

(3) in subsection (c)—

(A) by striking "two years" and inserting "five years"; and

(B) in paragraph (1), in the matter preceding subparagraph (A), to read as follows: "otherwise than as provided by law for the proper discharge of official duty, or by rule or regulation—"; and

(4) by striking "anything of value" each place it appears and inserting "any thing or things of value".

SEC. 7. ADDITION OF DISTRICT OF COLUMBIA TO THEFT OF PUBLIC MONEY OFFENSE.

Section 641 of title 18, United States Code, is amended by inserting "the District of Columbia or" before "the United States" each place such term appears.

SEC. 8. CLARIFICATION OF CRIME OF ILLEGAL GRATUITIES.

Subparagraphs (A) and (B) of section 201(c)(1) of title 18, United States Code, are each amended by inserting "the official's or person's official position or" before "any official act".

SEC. 9. CLARIFICATION OF DEFINITION OF "OFFICIAL ACT".

Section 201(a)(3) of title 18, United States Code, is amended to read as follows:

"(3) the term 'official act'—

"(A) includes any act within the range of official duty, and any decision, recommendation, 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 pub-

lic official's official capacity or in such official's place of trust or profit;

"(B) may be a single act, more than one act, or a course of conduct; and

"(C) includes a decision or recommendation that a government should not take action.".

SEC. 10. AMENDMENT OF THE SENTENCING GUIDELINES RELATING TO CERTAIN CRIMES.

(a) DIRECTIVE TO SENTENCING COMMISSION.—Pursuant to its authority under section 994(p) of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission forthwith shall review and amend its guidelines and its policy statements applicable to persons convicted of an offense under section 201, 641, or 666 of title 18, United States Code in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by guidelines and policy statements.

(b) REQUIREMENTS.—In carrying out this subsection, the Commission shall—

(1) ensure that the sentencing guidelines and policy statements reflect Congress's intent that the guidelines and policy statements reflect the serious nature of the offenses described in paragraph (1),

the incidence of such offenses, and the need for an effective deterrent and appropriate punishment to prevent such offenses;

(2) consider the extent to which the guidelines may or may not appropriately account for—

(A) the potential and actual harm to the public and the amount of any loss resulting from the offense;

(B) the level of sophistication and planning involved in the offense;

(C) whether the offense was committed for purposes of commercial advantage or private financial benefit;

(D) whether the defendant acted with intent to cause either physical or property harm in committing the offense;

(E) the extent to which the offense represented an abuse of trust by the offender and was committed in a manner that undermined public confidence in the Federal, State or local government; and

(F) whether the violation was intended to or had the effect of creating a threat to public health or safety, injury to any person or even death;

(3) assure reasonable consistency with other relevant directives and with other sentencing guidelines;

(4) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges;

(5) make any necessary conforming changes to the sentencing guidelines; and

(6) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

SEC. 11. EXTENSION OF STATUTE OF LIMITATIONS FOR SERIOUS PUBLIC CORRUPTION OFFENSES.

(a) IN GENERAL.—Chapter 213 of title 18, United States Code, is amended by adding at the end the following:

"§ 3302. Corruption offenses

"Unless an indictment is returned or the information is filed against a person within 6 years after the commission of the offense, a person may not be prosecuted, tried, or punished for a violation of, or a conspiracy or an attempt to violate the offense in—

"(1) section 201 or 666;

"(2) section 1341 or 1343, when charged in conjunction with section 1346 and where the offense

involves a scheme or artifice to deprive another of the intangible right of honest services of a public official;

"(3) section 1951, if the offense involves extortion under color of official right;

"(4) section 1952, to the extent that the unlawful activity involves bribery; or

"(5) section 1962, to the extent that the racketeering activity involves bribery chargeable under State law, involves a violation of section 201 or 666, section 1341 or 1343, when charged in conjunction with section 1346 and where the offense involves a scheme or artifice to deprive another of the intangible right of honest services of a public official, or section 1951, if the offense involves extortion under color of official right.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 213 of title 18, United States Code, is amended by adding at the end the following new item:

"3302. Corruption offenses.".

(c) APPLICATION OF AMENDMENT.—The amendments made by this section shall not apply to any offense committed before the date of enactment of this Act.

SEC. 12. INCREASE OF MAXIMUM PENALTIES FOR CERTAIN PUBLIC CORRUPTION RELATED OFFENSES.

(a) SOLICITATION OF POLITICAL CONTRIBUTIONS.—Section 602(a)(4) of title 18, United States Code, is amended by striking "3 years" and inserting "10 years".

(b) PROMISE OF EMPLOYMENT FOR POLITICAL ACTIVITY.—Section 600 of title 18, United States Code, is amended by striking "one year" and inserting "10 years".

(c) DEPRIVATION OF EMPLOYMENT FOR POLITICAL ACTIVITY.—Section 601(a) of title 18, United States Code, is amended by striking "one year" and inserting "10 years".

(d) INTIMIDATION TO SECURE POLITICAL CONTRIBUTIONS.—Section 606 of title 18, United States Code, is amended by striking "three years" and inserting "10 years".

(e) SOLICITATION AND ACCEPTANCE OF CONTRIBUTIONS IN FEDERAL OFFICES.—Section 607(a)(2) of title 18, United States Code, is amended by striking "3 years" and inserting "10 years".

(f) COERCION OF POLITICAL ACTIVITY BY FEDERAL EMPLOYEES.—Section 610 of title 18, United States Code, is amended by striking "three years" and inserting "10 years".

SEC. 13. ADDITIONAL RICO PREDICATES.

(a) IN GENERAL.—Section 1961(1) of title 18, United States Code, is amended—

(1) by inserting "section 641 (relating to embezzlement or theft of public money, property, or records)," after "473 (relating to counterfeiting),";

(2) by inserting "section 666 (relating to theft or bribery concerning programs receiving Federal funds)," after "section 664 (relating to embezzlement from pension and welfare funds),"; and

(3) by inserting "section 1031 (relating to major fraud against the United States)" after "section 1029 (relating to fraud and related activity in connection with access devices),".

(b) CONFORMING AMENDMENTS.—Section 1956(c)(7)(D) of title 18, United States Code, is amended—

(1) by striking "section 641 (relating to public money, property, or records),"; and

(2) by striking "section 666 (relating to theft or bribery concerning programs receiving Federal funds),".

SEC. 14. ADDITIONAL WIRETAP PREDICATES.

Section 2516(1)(c) of title 18, United States Code, is amended—

(1) by inserting "section 641 (relating to embezzlement or theft of public money, property, or records), section 666 (relating to theft or bribery concerning programs receiving Federal funds)," after "section 224 (bribery in sporting contests),"; and

(2) by inserting "section 1031 (relating to major fraud against the United States)" after "section 1014 (relating to loans and credit applications generally; renewals and discounts),".

SEC. 15. EXPANDING VENUE FOR PERJURY AND OBSTRUCTION OF JUSTICE PROCEEDINGS.

(a) IN GENERAL.—Section 1512(i) of title 18, United States Code, is amended to read as follows:

"(i) A prosecution under section 1503, 1504, 1505, 1508, 1509, 1510, or this section may be brought in the district in which the conduct constituting the alleged offense occurred or in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected.".

(b) PERJURY.—

(1) IN GENERAL.—Chapter 79 of title 18, United States Code, is amended by adding at the end the following:

"§ 1624. Venue

"A prosecution under section 1621(1), 1622 (in regard to subornation of perjury under 1621(1)), or 1623 of this title may be brought 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.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 79 of title 18, United States Code, is amended by adding at the end the following:

"1624. Venue.".

SEC. 16. PROHIBITION ON UNDISCLOSED SELF-DEALING BY PUBLIC OFFICIALS.

(a) IN GENERAL.—Chapter 63 of title 18, United States Code, is amended by inserting after section 1346 the following new section:

"§ 1346A. Undisclosed self-dealing by public officials

"(a) UNDISCLOSED SELF-DEALING BY PUBLIC OFFICIALS.—For purposes of this chapter, the term 'scheme or artifice to defraud' also includes a scheme or artifice by a public official to engage in undisclosed self-dealing.

"(b) DEFINITIONS.—As used in this section:

"(1) OFFICIAL ACT.—The term 'official act'—

"(A) includes any act within the range of official duty, and any decision, recommendation, 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 public official's official capacity or in such official's place of trust or profit;

"(B) may be a single act, more than one act, or a course of conduct; and

"(C) includes a decision or recommendation that a government should not take action.

"(2) PUBLIC OFFICIAL.—The term 'public official' means an officer, employee, or elected or appointed representative, or person acting for or on behalf of the United States, a State, or a subdivision of a State, or any department, agency or branch of government thereof, in any official function, under or by authority of any such department, agency, or branch of government.

"(3) STATE.—The term 'State' includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

"(4) UNDISCLOSED SELF-DEALING.—The term 'undisclosed self-dealing' means that—

"(A) a public official performs an official act for the purpose, in whole or in material part, of furthering or benefitting a financial interest of—

"(i) the public official;

"(ii) the spouse or minor child of a public official;

"(iii) a general business partner of the public official;

"(iv) a business or organization in which the public official is serving as an employee, officer, director, trustee, or general partner;

"(v) an individual, business, or organization with whom the public official is negotiating for, or has any arrangement concerning, prospective employment or financial compensation; or

"(vi) an individual, business, or organization from whom the public official has received any thing or things of value, otherwise than as provided by law for the

proper discharge of official duty, or by rule or regulation; and

"(B) the public official knowingly falsifies, conceals, or covers up material information that is required to be disclosed by any Federal, State, or local statute, rule, regulation, or charter applicable to the public official, or the knowing failure of the public official to disclose material information in a manner that is required by any Federal, State, or local statute, rule, regulation, or charter applicable to the public official.

"(5) MATERIAL INFORMATION.—The term 'material information' includes information—

"(A) regarding a financial interest of a person described in clauses (i) through (iv) paragraph (4)(A); and

"(B) regarding the association, connection, or dealings by a public official with an individual, business, or organization as described in clauses (iii) through (vi) of paragraph 4.".

(b) CONFORMING AMENDMENT.—The table of sections for chapter 63 of title 18, United States Code, is amended by inserting after the item relating to section 1346 the following new item:

"1346A. Undisclosed self-dealing by public officials.".

(c) APPLICABILITY.—The amendments made by this section apply to acts engaged in on or after the date of the enactment of this Act.

SEC. 17. DISCLOSURE OF INFORMATION IN COMPLAINTS AGAINST JUDGES.

Section 360(a) of title 28, United States Code, is amended—

(1) in paragraph (2) by striking "or";

(2) in paragraph (3), by striking the period at the end, and inserting "; or"; and

(3) by inserting after paragraph (3) the following:

"(4) such disclosure of information regarding a potential criminal offense is made to the Attorney General, a Federal, State, or local grand jury, or a Federal, State, or local law enforcement agency.".

SEC. 18. CLARIFICATION OF EXEMPTION IN CERTAIN BRIBERY OFFENSES.

Section 666(c) of title 18, United States Code, is amended—

(1) by striking "This section does not apply to"; and

(2) by inserting "The term 'anything of value' that is corruptly solicited, demanded, accepted or agreed to be accepted in subsection (a)(1)(B) or cor-

ruptly given, offered, or agreed to be given in subsection (a)(2) shall not include", before "bona fide salary".

SEC. 19. CERTIFICATIONS REGARDING APPEALS BY UNITED STATES.

Section 3731 of title 18, United States Code, is amended by inserting after "United States attorney" the following: ", Deputy Attorney General, Assistant Attorney General, or the Attorney General".

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Mr. SENSENBRENNER. And before recognizing the gentleman from Virginia, Mr. Scott, for his opening statement, let me ask unanimous consent to insert in the appropriate part of the record a letter from the FBI Agents Association and a letter from the Citizens for Responsibility and Ethics in Washington, or CREW for short, in support of this legislation.

[The information referred to follows:]

Federal Bureau of Investigation
Agents Association

July 22, 2011

The Honorable James Sensenbrenner
Chairman
Subcommittee on Crime, Terrorism, and Homeland Security
House Committee on the Judiciary
B-370B Rayburn House Office Building
Washington, DC 20515

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

Dear Chairman Sensenbrenner:

On behalf of the FBI Agents Association (FBIAA), I write to express our support for the provisions of H.R. 2572, the *Clean Up Government Act of 2011*, which would add the crime of theft from government programs to the list of serious crimes that Congress previously recognized could be investigated using court-authorized wiretaps. The FBIAA is a voluntary professional association currently representing over 12,000 active duty and retired FBI Special Agents.

Current law makes it difficult to use wiretaps in the investigation of crimes involving funds from government programs. It is an unfortunate reality that in these difficult economic times criminals are taking advantage of programs intended to help hardworking Americans. In order to effectively fight fraud related to large government programs such as the Troubled Asset Relief Program (TARP) and programs using stimulus funds, Congress should include crimes against taxpayers in the statutory list so that courts will have specific authority to grant wiretaps.

The FBIAA applauds you and Congressman Mike Quigley (D-IL) for including this important provision in the bill and hopes that Congress will enact this legislation in a timely manner in order to help protect U.S. taxpayers from predatory criminals.

The FBIAA greatly appreciates your leadership on this issue. If we can be of assistance, please do not hesitate to contact me.

Sincerely,

Konrad Motyka

Konrad Motyka

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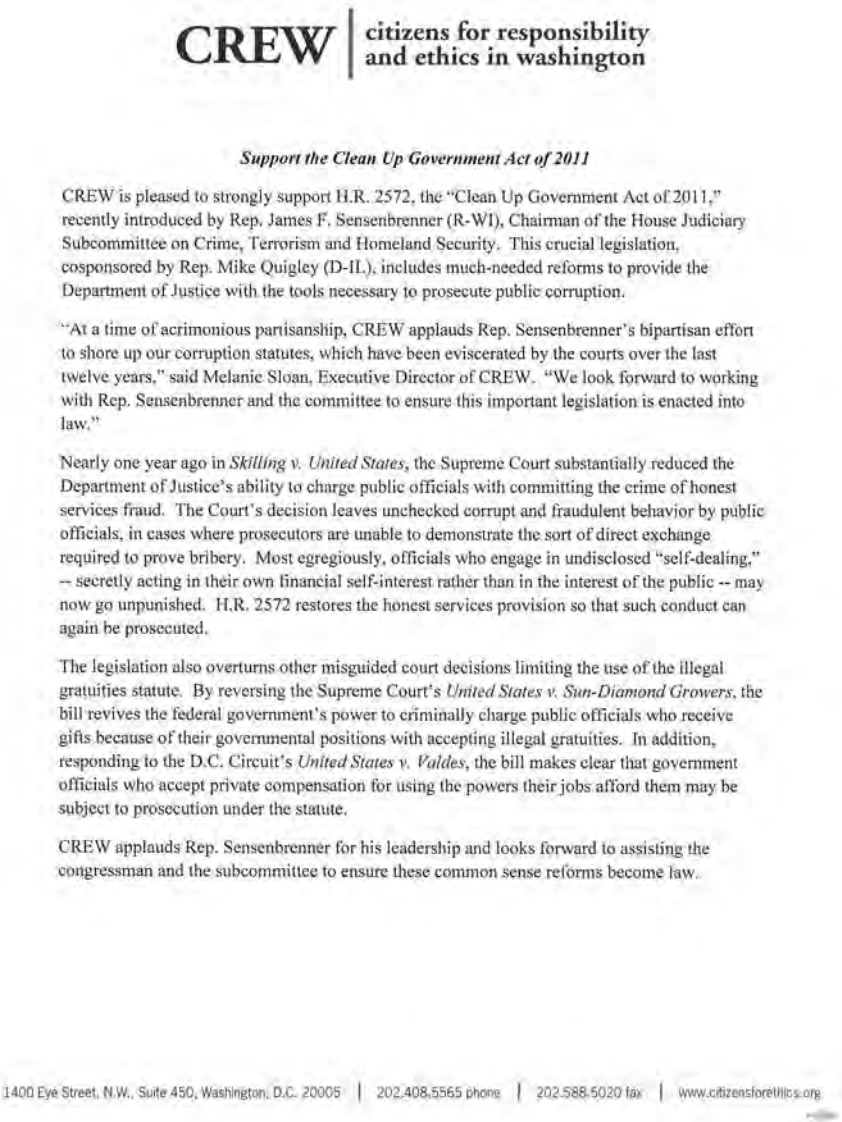

CREW | citizens for responsibility and ethics in washington

Support the Clean Up Government Act of 2011

CREW is pleased to strongly support H.R. 2572, the "Clean Up Government Act of 2011," recently introduced by Rep. James F. Sensenbrenner (R-WI), Chairman of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security. This crucial legislation, cosponsored by Rep. Mike Quigley (D-IL), includes much-needed reforms to provide the Department of Justice with the tools necessary to prosecute public corruption.

"At a time of acrimonious partisanship, CREW applauds Rep. Sensenbrenner's bipartisan effort to shore up our corruption statutes, which have been eviscerated by the courts over the last twelve years," said Melanie Sloan, Executive Director of CREW. "We look forward to working with Rep. Sensenbrenner and the committee to ensure this important legislation is enacted into law."

Nearly one year ago in *Skilling v. United States*, the Supreme Court substantially reduced the Department of Justice's ability to charge public officials with committing the crime of honest services fraud. The Court's decision leaves unchecked corrupt and fraudulent behavior by public officials, in cases where prosecutors are unable to demonstrate the sort of direct exchange required to prove bribery. Most egregiously, officials who engage in undisclosed "self-dealing," -- secretly acting in their own financial self-interest rather than in the interest of the public -- may now go unpunished. H.R. 2572 restores the honest services provision so that such conduct can again be prosecuted.

The legislation also overturns other misguided court decisions limiting the use of the illegal gratuities statute. By reversing the Supreme Court's *United States v. Sun-Diamond Growers*, the bill revives the federal government's power to criminally charge public officials who receive gifts because of their governmental positions with accepting illegal gratuities. In addition, responding to the D.C. Circuit's *United States v. Valdes*, the bill makes clear that government officials who accept private compensation for using the powers their jobs afford them may be subject to prosecution under the statute.

CREW applauds Rep. Sensenbrenner for his leadership and looks forward to assisting the congressman and the subcommittee to ensure these common sense reforms become law.

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Mr. SENSENBRENNER. And I now recognize the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman, and thank you for calling today's hearing.

I welcome today's hearing about proposed changes in our laws against public corruption. Certainly the fight against public corruption is one of the most important functions of our Federal prosecutors.

As we consider whether to modify the existing laws in this area, or whether to adopt new ones, I want to make sure we carefully examine these proposals.

Before discussing the proposals to expand these laws, I want to caution that we should resist calls to increase statutory levels without specific evidence that current sentences are too low. The Justice Department's prepared statement supports increased penalties for public corruption offenses, but does not provide specific justification for raising the statutory maximums, in some cases, drastically.

So while we may want to ask the U.S. Sentencing Commission to review the current sentencing guidelines for certain offenses and make changes if appropriate, we should not direct the commission to adjust sentences upward if, upon review, they calculate that it is not warranted.

At least we know that the Sentencing Commission will study the need for sentences before acting, which is more than Congress usually does when we increase maximum levels.

I will note, Mr. Chairman, that you do not require in your bill mandatory minimums, so intelligent, well-prepared, and well-reasoned sentences can be applied by the Sentencing Commission and judges. Even if the maximum sentence is increased significantly, or even unreasonably, intelligent sentences can still prevail.

In regard to proposals to expand the public corruption laws, I note that there are a number of statutes on the books that Federal law enforcement uses to prosecute public corruption offenses, such as antibribery statutes, anti-gratuity statutes, anti-extortion statutes, and the mail and wire fraud statutes. Mail and wire fraud statutes are already extremely broad and allow Federal authorities to pursue public corruption related to fraud or if someone uses a mail or wire communication to obtain money or property.

Expanding these laws even further raises concerns that we are overcriminalizing behavior that is properly investigated by State authorities. When we broaden the terms of a criminal statute even just a little bit, with language which prohibits in generalities and not too specific, we invariably end up covering a range of conduct sometimes unforeseen, which may arguably be covered but we did not intend to cover.

The vagueness stemming from lack of notice to the public as to about what specifically is prohibited is unfair, and it is our job to avoid it.

This has been a problem with some well-intentioned statutes on the books dealing with various issues of bribery and public corruption. If a statute is too broad, reasonable people may disagree about how the statute should be applied, and sometimes it is applied in an overzealous and unfair way. The courts are left to sort out the mess, and we are called up to clarify the law.

In many respects, that is what brought us here today. And the bill, in large part, is a response to several court cases which limited the scope of existing statutes.

In the *Cleveland* case, the Supreme Court ruled that fraudulent schemes to obtain business licenses did not violate the mail fraud statute, because such licenses were not considered property; they did not obtain property or money. In response to this, the bill ex-

pands coverage to mail and wire fraud, to cover schemes to obtain anything of value.

The Sun-Diamond Growers case, the Supreme Court ruled that prosecutors must prove a link between the gratuities and a specific act performed by the official accepting the gratuities. In response, this bill expands the anti-gratuity statute to those given because of an official's position, and not just because of an official act performed.

In the Valdes case, the Court of Appeals for the D.C. Circuit ruled that the police officer who provided information about citizens from a police database to someone who paid him for the information was not criminally liable because his action was not deemed to be an official act. This bill would extend liability for receiving gratuities received for any act within the official's duties.

And as you mentioned in the *Skilling* case, the Supreme Court held that the honest services fraud statute only applies to bribes and kickbacks and may not be used to prosecute other schemes. In response, the bill establishes a new crime of undisclosed self-dealing.

We obviously need to address these cases, but if we act, I hope we will do so in a way that avoids problems that leads to courts having to step in to limit them.

Today our witnesses will present opinions about whether or not we should update the laws. If there is reason to expand the coverage of some of these statutes, I want to make sure that we do so in a way that is not overbroad and gives clear notice to the public of the conduct which violates the statutes.

If there are criticisms of the bill, we need to hear them, and we need the Justice Department to respond. And I hope that any criticisms will also be constructive, in that alternatives will be presented when possible.

Thank you, Mr. Chairman. I look forward to the witnesses.

Mr. SENSENBRENNER. The Chair recognizes the Ranking Member of the full Committee, the gentleman from Michigan, Mr. Conyers?

Mr. CONYERS. Thank you, Chairman Sensenbrenner and Subcommittee Ranking Member Scott. I am happy to be here today to join you in this discussion.

You would think that public corruption legislation would have been taken care of long before now, I mean all the public corruption cases we have. But my hat is off to Chairman Sensenbrenner, who works closely with me on civil rights cases; on the data retention bill; on the issue of Haiti, the poorest country in the Western Hemisphere; and Bobby Scott, with whom I work regularly.

Now, there is only one problem with this bill, so we might as well get down to business on it, and that is it increases sentencing in at least five or six areas. And that has prevented me from cosponsoring the bill, and I am now more disposed to voting for this bill when it comes out of Committee.

But we incarcerate more people, proportionately, than any country on Earth. So why in the world would I come here and vote to lengthen and toughen sentences? That is why Scott isn't on the bill, and he probably has even more and better reasons than I for not being a cosponsor.

But that, I say to my good friend, the Chairman, is the problem that we have.

Now, what is good about the bill? Well, the first thing is that Sensenbrenner and Quigley use some restraint in the extension of the statute of limitations for prosecuting certain public-corruption offenses. This bill originally sentenced from 5 to 10 years; they lowered it from 5 to 6—they increased it from 5 to 6. That was a good thing.

It is a good thing in this bill that we prohibit public officials from receiving bribes to perform any act within their official duties. Maybe you will explain to me why, on July of 2011, we are proposing to prevent public officials from receiving bribes. I mean, is that saying that there is no law about that? That unless we do this, public officials can bribe and get away with it? Well, I don't think so.

And then I think there is a good case to be made in the law that we expand the law to prohibit undisclosed self-dealing; that is, when a public official conceals material information, when their conduct or their acts would benefit their financial interests, and when the official has a duty to disclose it.

I would like to work with Chairman Sensenbrenner and Ranking Member Scott on a statute that covers that particular area.

And then, of course, I am always watching to make sure that the Department of Justice doesn't overreach too frequently. My history, my experience, tells me—am I over time?

Mr. SENSENBRENNER. You can——

Mr. CONYERS. I am getting there. The light isn't on. Oh, okay. All right. I get the message.

Oh, now somebody turned the red light on.

Mr. SENSENBRENNER. It was the machine that did that. The yellow light isn't working.

Mr. CONYERS. Oh, I see.

Okay, but let me just conclude by counseling my friends at DOJ, and I have lots of them, that they are always using the law to overrule or curtail a court's interpretation of the law, or to try to make the criminal law fit some unusual case that may be before them. And I wanted to give that friendly warning as well.

Thank you for the additional time, if that is what you gave me, Chairman Sensenbrenner.

Mr. SENSENBRENNER. You are welcome, and it was.

Let me say that the Chair is very willing to work with the gentleman from Michigan, the gentleman from Virginia, and others, because there have been some holes that have been blown into the public corruption statutes by the Court that need to be plugged, and the quicker, the better.

It is now my pleasure to introduce today's witnesses.

Mary Pat Brown has been with the U.S. Department of Justice since 2009, first acting as the acting counsel for the Office of Professional Responsibility. She currently serves as the Deputy Assistant Attorney General overseeing the Criminal Division's Public Integrity Section and the Office of Enforcement Operations.

After law school, she worked as a litigation associate at the firm of Dickstein Shapiro until she joined the U.S. Attorneys' Office for the District of Columbia in 1989 as Assistant U.S. Attorney. She

became a supervisor in 1997, serving first as the Deputy Chief of the Appellate Division in the Fraud and Public Corruption Section, and then as Executive Assistant U.S. Attorney for Operations, and, finally, as Chief of the Criminal Division.

She received both her bachelor of science in Foreign Service and her juris doctor degrees from Georgetown University.

Ms. Lisa Griffin has been professor of law at Duke University since 2008. She teaches courses on a variety of topics, such as criminal procedure, investigation, and evidence. Before coming to Duke University, she was a lecturer at the UCLA School of Law. And prior to her work as a professor, Ms. Griffin was an Assistant U.S. Attorney from 1999 through 2004 in Chicago.

After law school, she clerked for Judge Dorothy W. Nelson in the U.S. Court of Appeals for the Ninth Circuit and also for Justice Sandra Day O'Connor in the Supreme Court.

She received her bachelor of arts and master of arts degree in Georgetown University, and her juris doctor degree at Stanford.

Timothy O'Toole is a partner at Miller & Chevalier in Washington, D.C. Prior to joining Miller & Chevalier, he served as the chief of the Special Litigation Division of the Public Defenders Service for the District of Columbia, where he supervised and handled cases in local and Federal courts.

He is also a former assistant Federal public defender in Las Vegas, Nevada. And he served as a member of the board of directors of the National Association of Criminal Defense Lawyers and co-Chair at large of the NACDL White Collar Crime Committee.

He received both his bachelor of arts and juris doctor from the University of Virginia.

Each of the witness statements will be entered into the record in its entirety.

I will ask that each witness summarize his or her testimony to 5 minutes or less.

And I recognize Ms. Brown.

TESTIMONY OF MARY PATRICIA BROWN, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Ms. BROWN. Mr. Chairman, Vice Chairman Ranking Member Scott, and distinguished Members of the Subcommittee, thank you for the opportunity to discuss the Department of Justice's efforts to combat public corruption and to speak to you about H.R. 2572, the "Clean Up Government Act of 2011."

The Department strongly supports the bill, and we appreciate the Subcommittee's efforts to strengthen our ability to fight public corruption in all of its forms.

Protecting the integrity of our government institutions is one of the highest priorities for the Department of Justice. Our citizens are entitled to know that their public servants are making decisions based upon the best interests of those they serve, not based on bribes, extortion, or hidden financial interests.

Let me give you just a few examples of the Department's sustained efforts to prosecute public corruption in all its forms.

Last month, the Department's Public Integrity Section began a trial of several Alabama State legislators, businessmen, and lobby-

ists for their roles in a wide-ranging conspiracy to buy and sell votes on pro-gambling legislation. They also recently obtained a jury conviction against a senator from Puerto Rico and a local business owner for engaging in a bribery scheme in which a lavish trip was given to the senator in exchange for his vote on certain pieces of legislation.

As we all know, the U.S. Attorney's Office in Chicago recently convicted the State's former Governor on substantial public corruption charges.

And right next door to us in Maryland, the U.S. Attorney's Office recently secured the conviction of former Prince George's County executive and others in connection with a scheme involving extortion and evidence tampering.

Despite the Department's successes, we believe there are some gaps in our public corruption statutes that must be closed, and we thank the Subcommittee for its leadership on this issue. Let me mention some of the key elements of the bill.

First, the bill would remedy problems that have arisen from judicial interpretations of the Federal bribery statutes. For example, right now a corrupt police officer who searches restricted law enforcement databases in exchange for money slipped to him under the table can act without fear of Federal prosecution. This bill ensures that this corrupt behavior falls within the meaning of "official act" in the statute.

Likewise, under current law, a Federal public official may repeatedly accept, without fear of repercussions, lavish gifts such as plane tickets, sports tickets, expensive art objects, and cash that are given to him in a general effort to curry favor.

Because of the Supreme Court's decision in *Sun-Diamond*, the government must prove that there is a direct link between a payment and a specific official act. This is almost, and often, impossible to establish a one-to-one link.

The bill would ensure that public officials cannot cash in on their official positions. To be clear, this last category of payments does not, and never has, included lawful campaign contributions. Nor does it include de minimis gifts that are permitted by existing government rules and regulations.

The bill would also allow government to use court-ordered wiretaps to gather evidence in cases involving Federal program bribery, theft of United States Government property, and major fraud against the United States. It would also make clear that these crimes can form predicate offenses under the RICO statute.

The bill also would expand the statute of limitations for public corruption offenses. Public corruption allegations, by their very nature, may not surface until years after the crimes were committed. Expansion of the statute of limitations, even modestly, will help ensure that we are able to uncover and address the full extent of these schemes, and to address the corruption allegations fairly and thoroughly.

Finally, the bill would fill the substantial gap left by the Supreme Court's decision last year in *Skilling v. United States.*

For decades before *Skilling*, honest services fraud covered schemes involving bribes and kickbacks and hidden financial dealings. However, the Supreme Court held that the honest services

fraud statute was vague, and limited it only to kickbacks and bribes. But not all public corruption is about bribes or kickbacks.

If a mayor were to solicit tens of thousands of dollars in bribes in exchange for giving city contracts out to unqualified bidders, unquestionably that would be bribery. But if that same mayor wants to make even more money, he could instead secretly create his own company and funnel those same city contracts to his company.

Although this second type of scheme is clearly corrupt and plainly undermines public confidence in the integrity of government, it can no longer be reached after *Skilling*.

The Department of Justice is committed to prosecuting public corruption offenses at all levels of government, using all the tools available to us. We support the Subcommittee's effort to bolster the Department of Justice's ability to carry out this mission.

Thank you for the opportunity to testify here today, and I would be pleased to take any questions.

[The prepared statement of Ms. Brown follows:]

Department of Justice

STATEMENT OF

MARY PATRICE BROWN DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

FOR A HEARING ENTITLED

"H.R. 2572, THE CLEAN UP GOVERNMENT ACT OF 2011"

PRESENTED

JULY 26, 2011

Statement for the Record of
Mary Patrice Brown
Deputy Assistant Attorney General
Criminal Division
Department of Justice

For a Hearing Entitled
"H.R. 2572, THE CLEAN UP GOVERNMENT ACT OF 2011"

Before the
Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
United States House of Representatives

Mr. Chairman, Vice-Chairman, Ranking Member Scott, and distinguished Members of the Subcommittee: thank you for your invitation to address this Subcommittee. I appreciate the opportunity to discuss the Department of Justice's ongoing efforts to combat public corruption and to speak with you about the Subcommittee's important legislation, H.R. 2572, the Clean Up Government Act of 2011. The Department strongly supports H.R. 2572 and the Subcommittee's efforts to bolster our ability to investigate and prosecute public corruption offenses. We are committed to working with the Subcommittee to ensure that the final bill is as clear, comprehensive, and effective as possible, and we appreciate the Subcommittee's leadership on this important issue.

I. INTRODUCTION

Protecting the integrity of our government institutions is one of the highest priorities for the Department of Justice. Our citizens are entitled to know that their public servants are making their official decisions based on the best interests of the citizens who elect them and pay their salaries, and not based on bribes, extortion, or a public official's own hidden financial interests.

The Department's commitment to fighting corruption at every level – federal, state, and local – is evidenced by the extraordinary and sustained efforts that are undertaken every day by

the 94 United States Attorneys' Offices around the country, the Criminal Division's Public Integrity Section, the Federal Bureau of Investigation, and our many other law enforcement partners. Our recent successes speak volumes about the tenacity of our prosecutors and investigators in rooting out corruption wherever it exists.

Let me give you just a few examples of the breadth of our public corruption efforts. As you know, the Criminal Division of the Department of Justice has a dedicated group of prosecutors – in the Public Integrity Section – whose sole task is to prosecute corruption cases involving federal, state, and local officials. As its record demonstrates, the Public Integrity Section has been extraordinarily busy in recent months. In June, the Public Integrity Section began a trial of several Alabama state legislators, local businessmen, and lobbyists for their roles in an alleged, wide-ranging conspiracy to buy and sell votes on pro-gambling legislation. Prior to that, prosecutors from that Section obtained jury convictions against a Senator from Puerto Rico and a local business owner for engaging in a bribery scheme involving the exchange of a lavish trip for votes on specific pieces of legislation. In January, the Public Integrity Section and the United States Attorney's Office in the Eastern District of Virginia secured a 27-month sentence for Paul Magliocchetti, the founder and former president of PMA Group Inc., a lobbying firm, who admitted to using his friends and family to make hundreds of thousands of dollars in illegal campaign contributions for the purpose of enriching himself and his firm. And the Criminal Division recently secured convictions against former Jack Abramoff associate Kevin Ring for his long-running bribery scheme, and a former staff member in the U.S. House of Representatives on corruption charges relating to his acceptance of an all-expenses paid trip to the first game of the 2003 World Series; those convictions were part of the Criminal Division's long-running and extraordinarily successful investigation into Abramoff's activities, which led to

the convictions here in Washington of more than twenty defendants, including public officials and lobbyists.

Across the country, the United States Attorneys' Offices are aggressively pursuing corruption at all levels of government as well. In the Northern District of Illinois, the United States Attorney's Office recently convicted the state's former Governor on substantial public corruption charges, and is aggressively pursuing a long-running scheme involving bribery and extortion by local police officers. Right next door to us, in the District of Maryland, the United States Attorney's Office recently secured the conviction of a former Prince George's County Executive and two others in connection with a scheme involving extortion and evidence tampering . In the District of New Jersey, the United States Attorney's Office has secured the convictions of 27 defendants, including a state assemblyman, city council president, and mayor, in connection with a wide-ranging undercover operation. In Massachusetts, the United States Attorney's Office secured the convictions of a state senator and Boston city councilor for their acceptance of cash bribes in connection with an undercover investigation. Likewise, the United States Attorney's Office for the Southern District of Florida secured the convictions of three high-level officials in Broward County on substantial public corruption offenses, also as a result of an extensive undercover investigation.

To be clear, these are just a few examples of the numerous corruption cases that the Department is currently prosecuting. But as even these few examples illustrate, the Department is committed to combating public corruption at all levels of government, and we will use all of the investigative tools at our disposal to follow the evidence wherever it leads us.

II. H.R. 2572, THE CLEAN UP GOVERNMENT ACT OF 2011

Despite our successes, we believe that there are some gaps in our public corruption statutes that must be closed. For that reason, we appreciate the Subcommittee's leadership in

ensuring that the Department of Justice and FBI have all of the necessary tools to carry out our important mission, and we are pleased to have worked with staff members in both the House and Senate for several years in an effort to address the need for public corruption legislation. H.R. 2572, like S. 401 in the Senate, will bolster our ability to investigate and prosecute public corruption offenses in a variety of important ways, and we strongly support those improvements. Let me mention some of the key elements of this bill that will strengthen our hand in prosecuting public corruption.

First, allegations of public corruption may not surface until years after the crimes were committed, and a thorough and fair investigation of corruption can sometimes be a lengthy process. As a result, the five-year statute of limitations is frequently a barrier to bringing public corruption charges. While we all share an interest in resolving public corruption allegations promptly, H.R. 2572's extension of the statute of limitations for public corruption offenses will help ensure that we are able to uncover and address the full extent of significant public corruption schemes.

Sections 13 and 14 of the bill would provide the Department with two important tools in the investigation and prosecution of Federal program bribery (*see* 18 U.S.C. § 666), theft and embezzlement of United States government property (*see* 18 U.S.C. § 641), and major fraud against the United States (*see* 18 U.S.C. § 1031). Specifically, the legislation would make these offenses predicates for the use of court-ordered wiretaps to gather evidence, and predicates for charging violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO"). Prosecutors often have lamented their inability to use these tools in such cases. The bill would significantly enhance our ability to investigate and prosecute these offenses.

Sections 8 and 9 of the bill would remedy problems that have arisen from judicial interpretations of the federal bribery statute in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), and *United States v. Valdes*, 475 F.3d 1319 (D.C. Cir. 2007) (*en banc*). In particular, *Sun-Diamond*'s requirement that the Government establish a direct link between a specific official act and the payment of a thing of value is a substantial obstacle to the use of the bribery statute, 18 U.S.C. § 201(c). The bill would eliminate that requirement by clarifying that a public official violates section 201(c) when he or she accepts a thing of value that is given for, or because of, the defendant's official position. This was a well-established interpretation of section 201(c) prior to *Sun-Diamond*, and the amendment would return the law to its earlier status.

Section 9 of the bill would amend the definition of the term "official act" in 18 U.S.C. § 201(a)(3) to ensure that the bribery statute applies to all conduct of a public official within the range of the official's duties. This amendment would reverse the damaging interpretation of paragraph 201(a)(3) in *United States v. Valdes*, which held that a law enforcement officer did not violate section 201 when he accepted cash payments in exchange for obtaining information from a sensitive law enforcement database. The *Valdes* case can be a serious impediment to our public corruption enforcement efforts, and the amendment would eliminate it. The revised definition of "official act" would also bolster the Department's ability to address "course of conduct" bribery under section 201, by making clear that the official action that is corrupted may consist of a single act, more than one act, or a course of conduct. While the Department and several courts have interpreted the current law to cover such schemes, the proposed amendment would shore up our ability to reach this conduct under section 201.

Section 15 of the bill would enhance our ability to prosecute obstruction of justice and perjury by expanding the number of districts in which such prosecutions may be brought. The amendment of 18 U.S.C. § 1512(i) would enable the Department to prosecute obstruction of justice either in the district in which the obstructive acts were committed or in the district in which the obstructed proceeding was pending. The addition of 18 U.S.C. § 1624 would enable the Government to bring charges for perjury in either the district in which the defendant took an oath or the district in which the relevant proceeding was pending. This expansion of the available venues in obstruction of justice and perjury cases would give the Department greater flexibility in charging these offenses, which are often closely tied to public corruption.

Section 17 of the bill would help ensure the integrity of the judicial branch by authorizing the release of information to the Department of Justice regarding potential criminal violations by federal judges.

Finally, the bill would increase the statutory maximum penalties for many public corruption offenses and direct the United States Sentencing Commission to review the sentencing guidelines for such offenses. Public corruption is a serious matter and presents a substantial threat to the integrity of government functions. The Department believes that public corruption warrants stiff punishment, and we support increased penalties for these offenses.

III. UNDISCLOSED SELF-DEALING

Unfortunately, one of the corruption-fighting tools that our prosecutors have relied on for more than two decades was substantially eroded as a result of the Supreme Court's decision in *Skilling v. United States* in June of last year. In short, the *Skilling* decision removed an entire category of deceptive, fraudulent, and corrupt conduct from the scope of 18 U.S.C. § 1346, the honest services fraud statute, and placed that conduct beyond the reach of Federal criminal law. The Department of Justice believes that this creates a substantial gap in our ability to address the

full range of corrupt and fraudulent conduct by public officials, and we urge Congress to pass legislation to close that gap.

For many decades, the two core forms of honest services fraud under 18 U.S.C. § 1346 that were recognized by the courts remained the same: first, schemes involving bribery and kickbacks and, second, schemes involving undisclosed self-dealing. In *Skilling*, the Supreme Court eliminated this entire second category of schemes from the reach of the honest services fraud statute, holding that section 1346 covers only bribery and kickback schemes, but does not cover schemes involving undisclosed self-dealing. The Supreme Court rejected the defendant's argument that the entire statute was unconstitutionally vague, but limited section 1346 to bribery and kickbacks schemes to avoid vagueness concerns.

By eliminating undisclosed self-dealing from the scope of the honest services fraud statute, the *Skilling* decision created a significant gap in the Department's ability to address public corruption. While I cannot comment on any investigations that have not led to criminal charges, I can assure you that the impact of *Skilling* is real, and that there is conduct that would have been prosecuted under the honest services fraud statute that can no longer be prosecuted under the federal criminal law.

As any prosecutor can attest, corrupt officials and those who corrupt them can be very ingenious, and not all corruption takes the form of flat-out bribery. Let me give you an example. If a mayor were to solicit tens of thousands of dollars in bribes in return for giving out city contracts to unqualified bidders, that mayor could be charged with bribery. But if that same mayor decides that he wants to make even more money through the abuse of his official position, he might secretly create his own company, and use the authority and power of his office to funnel city contracts to that company. This undisclosed self-dealing or concealed conflict of

interest is not bribery, and is no longer covered by the honest services fraud statute after the *Skilling* opinion. Although this second kind of scheme is plainly corrupt, and clearly undermines public confidence in the integrity of their government, it can no longer be reached by the honest services fraud statute, and there is no other Federal criminal law to address this conduct.

Section 16 of H.R. 2572 is designed to fill that gap by creating a new undisclosed self-dealing offense, 18 U.S.C. § 1346A, and the Department strongly supports this amendment. In sum, the amendment would restore our ability to use the mail and wire fraud statutes to prosecute state, local, and federal officials who engage in schemes that involve undisclosed self-dealing. Let me provide a few key points regarding this amendment:

First, because of its clarity and specificity, the new section 1346A follows the direction given by the Supreme Court in *Skilling* that any legislation in this area should provide clear notice to citizens as to what conduct is prohibited.

Second, the new provision uses the mail and wire fraud statutes, which provide a reliable and well-established jurisdictional basis, and enable prosecutors to capture the full scope of an expansive criminal scheme in an appropriate criminal charge.

Third, in order to define the scope of the financial interests that underlie improper self-dealing, the provision draws content from the well-established federal conflict-of-interest statute, 18 U.S.C. § 208, which currently applies to the federal Executive Branch.

And finally, under the proposed statute, no public official could be prosecuted unless he or she knowingly conceals, covers up, or fails to disclose material information that he or she is already required by law or regulation to disclose. Because the bill would require the government to prove knowing concealment and that any defendant acted with the specific intent to defraud, there is no risk that a person can be convicted for unwitting conflicts of interest or mistakes.

We believe that this bill would restore our ability to address the full range of criminal conduct by state, local, and federal public officials, whether the corrupting influence comes from an outside third party, or from the public official's own concealed interests.

IV. CONCLUSION

The Department of Justice is committed to prosecuting public corruption offenses at all levels of government using all of the tools available to us. We support the Subcommittee's efforts to bolster our ability to carry out this important mission

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Mr. SENSENBRENNER. The time of the gentlewoman has expired. Ms. Griffin?

TESTIMONY OF LISA K. GRIFFIN, ESQ., PROFESSOR OF LAW, DUKE UNIVERSITY

Ms. GRIFFIN. Chairman Sensenbrenner, Ranking Member Scott, Ranking Member Conyers, Members and staff of the Sub-

committee, thank you for the opportunity to testify about the purpose and shape of public corruption prosecutions.

The criminal statutes enforcing public integrity now fail to reach a significant group of cases in which public officials abuse their positions for personal gain.

The Supreme Court's decision in *Skilling v. United States* limited prosecutions for honest services fraud to cases of bribes and kickbacks, and excluded concealed conflicts of interest from the reach of the fraud statutes. When it did so, it created a rare Federal criminal shortfall.

Congress can act not only to close that gap, but also to clarify the scope of Federal enforcement and address problems of vagueness and over-breadth in the statutory scheme. Let me illustrate with some examples.

Consider a public official who accepts a substantial and unreported sum of money with no particular strings attached, who is later moved to take action favorable to the benefactor; or an individual who takes advantage of public office to steer contracts to a company in which he has a concealed financial interest; or a politician seeking private-sector employment, who fails to disclose that connection, yet votes favorably on legislation that affects her prospective employer.

These are all acts that would no longer fit within the statutory scheme or any other statute of which I am aware. Yet in each case, there is leverage over the public officials, self-interested deception, and hidden financial motivation every bit as corrosive as straightforward bribery.

The harm of secret self-dealing is serious, because it distorts official action and detracts from the legitimacy of government. It deprives the public of neutral decisionmaking and of the information it needs to determine whether public officials are faithful agents. A conflict of interest provision focuses on the source of that harm, financial gain that is knowingly concealed from the public.

Accordingly, I support the provisions of the proposed legislation that restore the government's ability to prosecute undisclosed conflicts of interest and also refine the definition of self-dealing. Overturning the restrictive interpretations of bribes and gratuities in *United States v. Sun-Diamond*, and expanding that concept to include benefits conferred because of official position, is one step toward closing the enforcement gap, but it does not address all of the scenarios I described.

More importantly, I urge Congress to deal directly with the problem of undisclosed self-dealing. A freestanding conflict of interest offense modeled on the prohibitions in 18 U.S.C. Section 208 that govern Federal employees would accomplish that. Alternatively, I agree that the fraud enforcement scheme should be enlarged through the proposed Section 1346(a) to include self-enriching conduct by public officials.

Overcriminalization is a real concern when confronting new or expanded Federal crimes, and it is critical for public officials to know the boundaries of the law. It should be clear what prosecutors must prove and what officials can and cannot do.

This statute has the potential, though, to rein in prosecutorial overreaching. It does not reinstate the very spare terms of the

former honest services provision, but rather makes an effort to be quite specific about the harm that justifies criminal sanction.

First, tying the offense to a preexisting disclosure requirement under Federal, State, or local law addresses a major inconsistency in the application of the honest services provision pre-*Skilling*. That requirement, paired with an official act taken to benefit the concealed interest, protects against liability for unwitting deception.

A defendant who knowingly conceals material financial information is aware that disclosure is mandated and acts with the requisite specific intent to defraud can hardly claim a failure of notice.

I also believe it would be helpful to add an exemption for small benefits falling below a certain threshold. One of the reasons the Supreme Court was moved to curtail honest services fraud was that the statute could be read to reach ordinary and harmless exchanges. It might be prudent to take benefits like restaurant reservations and team jerseys off the table, to preempt that obvious criticism and ensure that the statute does not extend to de minimis interests in disclosure.

If a public official is acting to benefit or further her own financial interests, then there is presumptively a breach of the public's trust. But the criminal sanctions should extend only to nontrivial harms, and therefore cover only those gains that could actually give rise to hidden incentives.

Some of the ethics codes and disclosure obligations already folded into the proposed legislation would include such thresholds, but the statute might also establish a general Federal standard that provides a safe harbor.

[The prepared statement of Ms. Griffin follows:]

Written Testimony of
Lisa Kern Griffin
Professor, Duke University School of Law

Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Crime, Terrorism and Homeland Security

Hearing on: H.R. 2572, "The Clean Up Government Act of 2011"

July 26, 2011

Chairman Sensenbrenner, Ranking Member Scott, Members of the Subcommittee, and Subcommittee staff:

Thank you for the opportunity to testify today about pending legislative responses to recent Supreme Court decisions that affect public corruption prosecutions. I am a professor of law at Duke University, where my research and teaching focus on federal criminal justice policy, as well as evidence and constitutional criminal procedure. Before teaching law, I served as an Assistant United States Attorney in Chicago for five years, including two years in the Public Corruption Division. I submit this statement and appear before the Subcommittee on behalf of no organization, and the views expressed are entirely my own.

My testimony will focus on the specific provisions of H.R. 2572 that seek to clarify the federal prohibition on self-dealing in the public sector. A core question about the proposed legislation is this: Why should the federal criminal law, and in particular a revised definition of fraud, be used to enforce disinterested decisionmaking by public officials? I will suggest first that the loss caused by undisclosed conflicts of interest justifies fraud sanctions and second that a carefully constructed new offense could actually rein in overreaching and reduce the inconsistencies in public corruption prosecutions.

It is unusual to identify an enforcement gap in the federal criminal law, but recent decisions by the Supreme Court cut off prosecutions of at least one category of public officials who abuse their positions to achieve personal gain. The result is serious wrongdoing, affecting substantial federal interests, that is beyond the reach of any statute.

I believe the inquiry into whether and how to close that gap should begin with an assessment of the harm that flows from self-dealing. The victim is constructed, and the social costs are broadly distributed; the damage is to the political process itself. The cases about public corruption often express aspirations like fidelity and integrity and describe the loss in terms of these abstract concepts. But even though difficult to measure, the harm is nonetheless significant. Self-interest distorts the decisions of public officials. It puts private gain before public good. It degrades our ideals about government and detracts from its legitimacy.

Just as the harm can only be described in dynamic terms, the wrongful conduct takes on varying forms. Existing laws clearly cover the case where a vote is promised in exchange for a briefcase full of cash. But it is exceptional to see such a case. Instead, corruption often lies hidden in layers of transactions. And both the benefits conferred on public officials and the actions taken in exchange may be deferred or disguised.

Sophisticated actors and intricate wrongdoing characterize modern fraud as well. And the central purpose of the mail and wire fraud statutes is to prevent various forms of harmful deception. Fraud is also a sufficiently adaptable concept to capture concealed self-interest and keep pace with the normative harms I have described. It thus makes sense that prohibitions on

fraud have long been the principal vehicle for corruption enforcement. This has been true even though the social costs to corruption typically transcend material economic losses.

Until the Supreme Court's recent decision in *Skilling v. United States*, federal prosecutors relied on honest services fraud, as defined in 18 U.S.C. § 1346, to address both undisclosed self-dealing and cases of bribes and kickbacks. Today's hearing forms part of an inter-branch conversation that has been going on for half a century. The idea that there is a species of fraudulent conduct that imperils intangible but valuable rights emerged through common law rulemaking and then expanded and contracted through judicial interpretation, legislative clarification, and prosecutorial initiative. When the Supreme Court's 1987 decision in *McNally v. United States* limited fraud prosecutions to offenses involving the deprivation of property, Congress responded with the current version of section 1346. The statute expanded the definition of mail and wire fraud to include not only deprivations of money and property but also schemes to "deprive another of the intangible right to honest services." In the decades of honest services adjudication that followed, those terms acquired layers of meaning and were subject to some conflicting interpretations. The *Skilling* Court seemed poised last year to offer needed clarifications, but instead excluded concealed conflicts of interest from the reach of the fraud statute altogether.

That decision created a rare federal criminal shortfall. Consider a public official who accepts a substantial and unreported sum of money, with no particular strings attached, who is later moved to take action favorable to the benefactor. Or an individual who takes advantage of public office to steer contracts to a company in which he has a concealed financial interest. Or a politician seeking private-sector employment who fails to disclose that connection yet votes favorably on legislation that affects her prospective employer. These are all examples of acts that would no longer fit within the statutory scheme. Yet in each case there is leverage over the public officials and self-interested deception.

The *Skilling* Court confirmed that such conduct is harmful regardless of economic injury. The Court acknowledged, for example, that accepting a bribe in exchange for the award of a public contract is corruption even when the provider offers the lowest price or most advantageous terms. The Court shifted focus, however, from the nature of the harm to the formal contours of the wrongdoing. Now, only where there is a direct exchange of benefits for official action—or a *quid pro quo*—has the public been deprived of honest services. That definition of fraud excludes many varieties of dishonest conduct by public officials. But even when no immediate economic harm ensues, *and* there is no direct link to a bribe or kickback, withheld information can be a fraudulent taking. Indeed, divided loyalties and secret interests may cause substantially more harm than small kickbacks.

How, though, can we define an offense that captures this particular wrongdoing? Again, a focus on harm helps. The case law and commentary concerning corruption has a through line. It converges on the theme of transparency. When the *Skilling* Court recognized that a personal pecuniary interest in official action causes harm even if the decision itself is sound, it

underscored the real social cost of corruption: the loss of information about an official's potential motivations.

Of course, it can be tricky to isolate and evaluate motivations. As you well know, official decisionmaking is complicated, and it involves intertwined personal, practical, and political factors. Sometimes those influences are evident, and other times they are more opaque. In some cases it is hard to distinguish private gain from the public good. Which end is served by an official's actions taken to ensure reelection? There, private and public motivations might align. At least one incentive, however, should be fully disclosed, and that is personal financial gain. Pocketing money is presumptively unrelated to the public interest. And when officials deviate from a baseline position of neutrality because of money, the public is entitled to know. No law could compel officials to act in the public interest at all times, but the proposed legislation at least ensures that the public is informed about the most corrosive conflicting motivations.

One section of the proposed statute would overturn restrictive interpretations of bribes and gratuities. Prosecutors turned to honest services charges in corruption cases in part because the Supreme Court rejected a retainer theory of illegal gratuities in *United States v. Sun Diamond Growers*. Expanding 18 U.S.C. § 201 to proscribe gratuities given because of an official position, as well as those given in exchange for or to reward official acts, would significantly enlarge liability. Section 201 would then cover the official who accepts a gift with no specific strings attached but later takes action to aid the giver. Between *Sun Diamond* and *Skilling*, that retainer theory of corruption surfaced only in honest services prosecutions, including, for example, some of the cases arising from lawmakers' relationships with lobbyist Jack Abramoff.

That change does not, however, address the public official who conceals a personal financial interest in vendors who receive state contracts, or the conflict that arises when a public official takes actions that benefit a prospective employer. The advantage of focusing clearly on the problem of undisclosed self-dealing is that it would capture these situations and the secret retainer scenario—the stream of favors that later produces a stream of benefits—as well. Targeting undisclosed self-dealing also responds to the core harm of lost information in its various forms. This could be accomplished by a freestanding disclosure statute similar in structure to 18 U.S.C. § 208, which criminalizes undisclosed conflicts of interest by federal employees of the Executive Branch. The proposed addition of section 1346A, which responds to the *Skilling* decision and reinstates the undisclosed self-dealing theory of fraud also fulfills that objective.

An important point about harm is that it provides not only the justification for self-dealing prosecutions but also a limitation on them. Any expansion of the prosecutorial mandate must be sensitive to the problem of "overcriminalization." Opponents of a new—or renewed—self-dealing crime will question the need to add any further offenses to the approximately 4500 federal criminal statutes already scattered throughout the federal code, many of them vaguely drafted, poorly constructed, or plainly duplicative. Honest services fraud has often been labeled

a leading example of this phenomenon, and sometimes the label fits. Without question, there have been honest services cases in which prosecutors brought rash charges or engaged in harsh plea bargaining.

The proposed self-dealing provision would not actually create a new crime, however. Rather, it would reinstate a theory of prosecution that has been in use for decades. And while it is true that several other statutes address aspects of public corruption, they do not reach concealed self-enrichment as they are currently construed. Although many state and local jurisdictions have parallel schemes, local enforcement institutions may also labor under resource issues, political vulnerabilities, or conflicts of interest.

Identifying the purpose of the statute and targeting the specific harm sought to be avoided also has the beneficial effect of clarifying the scope of honest services fraud. A measure of disquiet about any statute that allows prosecutors to be entrepreneurial is appropriate. Pre-*Skilling*, there were occasional cases in which prosecutors applied the honest services provision to factual scenarios where the harm was not just intangible but nonexistent. Legislative action that defines undisclosed self-dealing also refines the distinction between frivolous and meritorious cases.

In other words, the proposed legislation would mean less vagueness about the liability of public officials and less potential for overreaching. The *Sun Diamond* decision restricting the use of the illegal gratuities provision led to fewer prosecutions for that offense, but an increase in honest services prosecutions for the same conduct. In the aftermath of *Skilling*, prosecutors are seeking alternative routes, for example by recasting information as property that fits within traditional mail and wire fraud theories, or by expanding the definition of bribery to include implicit exchanges. The advantage of a new self-dealing provision is that it actually reduces prosecutorial opportunism.

Congress can maximize this sorting effect by ensuring that the legislation is clear and specific, as the Court in *Skilling* admonished that any effort to restore the honest services theory must be. It is possible, however, for legislation to be too specific. Very narrow drafting can put wrongdoers on notice not only of the boundaries of criminality but also of the safe spaces for continued self-dealing. It can also over-deter prosecutors and preclude the exercise of discretion or the application of the provision to novel schemes.

Tying the offense to a preexisting disclosure requirement under state, federal, or local law addresses one of the major inconsistencies in the application of the honest services provision pre-*Skilling*. And that requirement, combined with the element of knowing concealment, protects against liability for unwitting deception. A defendant who knowingly conceals material financial information, is aware that disclosure is mandated, and acts with the requisite specific intent to defraud, can hardly claim a failure of notice.

A further refinement the Members may wish to consider is some threshold amount of gain that would signal a potential distortion. If a public official is acting to benefit or further her own

financial interests, then there is presumptively a breach of the public's trust. But the criminal sanction should extend only to nontrivial harms and therefore cover only those gains that could actually give rise to hidden incentives. It might be prudent to take benefits like restaurant reservations and team jerseys off the table to preempt that obvious criticism and ensure that the statute does not extend to de minimis interests in disclosure. Some of the ethics codes and disclosure obligations already folded into the proposed legislation would include such thresholds, but the legislation might also establish a general federal standard that only benefits valued in excess of some amount like $5,000 presumptively imperil impartiality. Although any numeric threshold will necessarily be both over- and under-inclusive, setting one mitigates the danger of overcriminalization.

Public corruption is complex, sometimes subtle, but always harmful. And a particularly harmful form of corruption now lies beyond the reach of federal law. Enlarging the terms of the current statutory scheme in response to recent Supreme Court decisions will also clarify its scope and thus decrease vagueness and overbreadth.

The questions are challenging because the statute protects dynamic values, and the offense conduct has normative contours, but few initiatives are more significant. Corruption degrades representative government at every level. Fair and effective enforcement ultimately makes your work easier, because it increases public confidence in elected officials and enhances the legitimacy of the government as a whole.

Thank you again for the invitation to appear today and to discuss these important issues. I am happy to respond to any questions the members of the Subcommittee may have.

Mr. SENSENBRENNER. The gentlewoman's time has expired. I grant you that the yellow light hasn't gone on. We have a mechanical aberration up here.

Ms. GRIFFIN. Thank you, Chairman Sensenbrenner.

Mr. SENSENBRENNER. Thank you.

Mr. O'Toole?

TESTIMONY OF TIMOTHY P. O'TOOLE, ESQ.,
PARTNER, MILLER & CHEVALIER

Mr. O'TOOLE. Good morning. My name is Timothy O'Toole, and I am a practicing criminal defense lawyer at the law firm of Miller & Chevalier. I am appearing today on behalf of the National Association of Criminal Defense Lawyers.

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 trust in those who serve us.

So let me be very plain, I am not here today to defend public corruption, nor am I recommending that you do so. But I am here today to remind the esteemed Members that we already have a very powerful set of over 20 Federal laws that punish those public officials who trade on their public office for private gain, just as we heard in some of the earlier statements.

Twice over the past 2 years this Subcommittee came together, under the bipartisan leadership of Bobby Scott and Louie Gohmert, to learn about the problem of overcriminalizing conduct.

Duplicative statutes, federalization of conduct traditionally belonging to the States, vague laws that can be applied to innocent conduct, excessive prison sentences, this is overcriminalization.

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.

Specifically, the bill proposes to overrule three decisions in which the entire Supreme Court bench thought there would be dramatic and negative consequences to doing precisely what this bill proposes, and the bill would also substantially increase what are already decades-long sentence lengths.

Section 2 would expand the conduct covered by Federal mail and wire fraud to cover false statements made in obtaining licenses issued by States and municipalities. Any misrepresentation on a Virginia marriage license, or a Wisconsin fishing license, or a license to sell a hotdog in Illinois, would suddenly serve as a basis for Federal prosecution.

In *Cleveland v. the United States*, every member of the Supreme Court rejected such an application of the mail fraud statute, concluding it would dramatically intrude on areas properly regulated by State and local law. This attempt to overrule *Cleveland* is an example of overcriminalization and certainly has nothing to do with either public corruption or cleaning up government.

Section 16 would create a Federal crime of undisclosed self-dealing by any public official. This decision, as we have heard, would overrule the Supreme Court's decision in the *United States v. Skilling*, in which every member of the Court agreed that this undisclosed self-dealing theory was unconstitutionally vague. In fact, the Court identified a host of questions that such a theory would need to answer in order to pass constitutional muster.

And yet Section 16 leaves many of these same questions unanswered. The bill fails to define the significance of the conflicting financial interests. It fails to define the extent to which the official action has to further that interest. And it fails to explicitly define the scope of the disclosure duty.

In addition, State and local jurisdictions often have their own extensive anticorruption laws, yet this bill allows the Federal Government to override the laws that locals have adopted to address the conduct of their own officials.

Take the part-time citizen legislator in Texas who also owns a car dealership. Does this law apply to him when he votes on a State bill to increase highway funding, because better roads mean more people buying cars? It could, if the legislator does not disclose the interest, maybe because he cannot imagine that a disclosure rule applies to him, because everybody knows he owns the car dealership.

The Federal prosecutors could pursue this charge even if the punishment for such nondisclosure would normally be administrative and the rule had never been construed to require disclosure like this one. Thus, if Section 16 becomes law, Federal prosecutors get to decide what Texas disclosure rules mean and get to bring one-size-fits-all prosecutions without any understanding of the jurisdictions in which these prosecutions are brought.

Section 8 is a response to *United States v. Sun-Diamond*, in which the Supreme Court unanimously held that that the gratuities law could only be used to prosecute individuals who had given gifts based on their official acts. The proposed amendment adopts the government's losing position in *Sun-Diamond*, criminalizing any gift given at any time to any public official in any situation where that gift was given as a result of the public official just being a public official.

As the Supreme Court unanimously noted in *Sun-Diamond*, the broader provision urged by the government could result in the criminalization of many kinds of legitimate gifts, such as replica jerseys given to the President by championship teams.

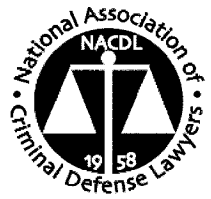
Section 6 seems to attempt to avoid this absurd result by permitting gifts that are expressly allowed under existing laws or regulation. But the vast network of administrative rules weren't written to serve that purpose, and the effect Section 6 will actually have in preventing unfair prosecutions is unclear.

Sections 4, 5, 6, and 12 substantially increase the maximum terms of imprisonment for certain offenses. Section 10, moreover, orders the Sentencing Commission to increase already high penalties for corruption offenses. But there is simply no evidence that the current lengthy statutory maximums and guidelines fail to provide adequate punishment and deterrence.

Thank you for the opportunity to express NACDL's concerns. My written statement sets forth several other serious concerns we have about the bill, but which I did not have time to address with you this morning.

We urge the Committee to consider the wide array of existing criminal laws that already prevent and punish public corruption before it acts further.

[The prepared statement of Mr. O'Toole follows:]



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 wrong-doing, 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 media[4] 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

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[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%7Chig%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 all[9] (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.

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[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. § 201[12](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 over-burdened 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

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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.

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[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 Senate[16]
- **Rule XXVI** of the Rules of the House of Representatives[17]

[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.

Mr. SENSENBRENNER. Thank you very much. The gentleman's time has expired.

The Chair will defer his round of questions until the end.

And for the first 5 minutes of questioning, the Chair recognizes the gentlewoman from Florida, Ms. Adams.

Mrs. ADAMS. Thank you, Mr. Chairman.

Ms. Brown, you said something earlier, and I am confused, and I have listened to all three of you. You said that if a police officer searches a database, there is no way to prosecute him. However, there are NCIC rules and regulations in States, and local agencies will prosecute, is that not correct?

Ms. BROWN. For——

Mrs. ADAMS. For using the database illegally. In other words, going in and getting information because, if I remember my days, and it has been a while since I have been a police officer, my training and my certification through NCIC, there was prosecution available if you abuse that system, correct?

Ms. BROWN. There may be prosecution or administrative remedies when a police officer or law enforcement officer abuses that privilege, but in this way, the police officer and the person who is doing the bribing can be brought together under one statute and prosecuted for it.

So I don't know what the State law is in Florida, but I do know here, in the District of Columbia, where I work with the Metropolitan Police Department and with the U.S. Attorney's Office, we would have brought that matter in Federal court, and we did in that particular case.

Mrs. ADAMS. Okay. Well, I just wanted to make sure that I was remembering correctly, and it is possible things have changed since I was a police officer.

Ms. Griffin, from your perspective, what if anything is not being prosecuted that should be?

Ms. GRIFFIN. I think the cases of undisclosed self-dealing that both Ms. Brown and I described. Probably the most serious offense is the example given of a public official who steers public contracts into a company in which that official has an interest. I am not aware of a Federal statute that currently would criminalize that conduct, and I believe that this legislation closes that gap.

Mrs. ADAMS. Is that the only thing that you can think of that wasn't already covered currently?

Ms. GRIFFIN. Other varieties as well. One aspect of it would be closed in terms of the gap by another part of the proposed legislation, and that is the retainer theory of bribery, or a stream of benefits conferred on a public official with no immediate strings attached that later produces a stream of favors. That theory is currently not accessible to Federal prosecutors, because of *Sun-Diamond* and *Skilling*. This statute remedies that either through overturning the limitation on bribes and gratuities in *Sun-Diamond* or, more broadly, criminalizing undisclosed self-dealing.

And then of course there is the example of an official who is seeking employment in the private sector subsequent to public service who acts to benefit the potential employer and has not disclosed the future interest in that employment.

Mrs. ADAMS. Well, what about the part-time legislator who owns the car dealership? Is this language vague enough that they could be pulled in, based on the comments that Mr. O'Toole said?

Ms. GRIFFIN. I actually do not believe that a legislator whose interests in a car dealership is known to constituents would be criminalized.

There are two important elements to the new or renewed provision in the statute. One is to tie it to actual disclosure requirements that have not been met, so we are talking about, let's say, a mayor of a small town who works part time and also happens to own the car dealership. If everyone is aware of that interest in the car dealership, then I don't believe there is corruption, if voters can assess whether that mayor is a faithful public agent when making decisions that might affect the car dealership.

Mrs. ADAMS. Mr. O'Toole said something different. What he said was, as a car dealership owner, a part-time legislator votes on a transportation bill, could it be construed as not disclosing and, therefore, cause this person to be charged, even though there was really no intent to violate the law?

Because I know a lot of States, a lot of localities, have their own corruption laws, and he may have complied to those requirements but may not have realized, based on the Federal law, could he then be charged?

Ms. GRIFFIN. As I read the provision, the mental state standards are quite stringent. The official would need to know of the mandatory disclosure of the interests, knowingly fail to disclose that interest, and then act as well with the specific intent to further his or her own personal financial interests and conceal that from the public.

I think by combining each of those steps with the strict mental state requirement actually does go quite a long way toward preventing prosecutorial overreaching.

Mrs. ADAMS. Ms. Brown, you look like you wanted to answer.

Ms. BROWN. Yes, I do. Thank you so much.

I want to emphasize that this is not like the citizen legislator, because for the exact same reasons. It is all about transparency, these public corruption laws. The voters need to know what their public officials are doing.

Mrs. ADAMS. Agreed.

Ms. BROWN. In this case, under this statute, you must show that he knew it, he intended to violate it, he kept it secret. The car dealership analogy just doesn't fit.

Mrs. ADAMS. Thank you.

Mr. SENSENBRENNER. The gentlewoman's time is expired.

The gentleman from Michigan, Mr. Conyers?

Mr. CONYERS. Thank you, Mr. Chairman, and Mr. Scott, for allowing me to precede you both.

I wanted to commend all of the witnesses. First, I want the representative of the Department of Justice to know that I appreciate her career in DOJ and being here today.

And, of course, Attorney Griffin, you did a great job. I think you have raised some very good points.

But the consideration that I am raising to Chairman Sensenbrenner is the comments of Attorney O'Toole.

Now, I didn't hear anybody refute the fact that we may be overcriminalizing this whole area.

Does anybody contradict his assertion that the way this bill is written, a mistake on a marriage license or the seeking of a fishing permit would make you subject to the law?

Ms. BROWN. I would be happy to answer that.

Mr. CONYERS. All right, please do.

Ms. BROWN. Thank you.

This honest services fraud statute was never intended, and never covered in the past, someone who gets a fishing license in the State of Texas, or operates the local hotdog stand.

Again, one must show that the misrepresentation on that was intentional. It was intended to defraud. It was intended to be kept secret.

Those stringent things do not cover those sort of situations and never have.

It is all about public officials taking actions in secret for their own financial gain, so the average citizen who goes and gets a fishing license is not a public official hiding something on the fishing license for personal gain.

Mr. CONYERS. Okay.

O'Toole is talking about the *Cleveland* case, and you are talking about the *Skilling* case, right?

What do you say, Counsel O'Toole?

Mr. O'TOOLE. Yes, my testimony was directed toward Section 2, which is the provision of the bill which would overrule the *Cleveland* case by defining an application for a license as a form of property that would be subject to the fraud laws. And then the *Cleveland* case was specifically about a misrepresentation on a gambling license, and there is no reason that this definition wouldn't apply to the sorts of licenses that I had in my testimony.

It is not about the undisclosed conflict of interest theory, which I think has other problems, but that was not one of them.

Ms. BROWN. If Professor Griffin wants to jump in here about the *Cleveland* case, I am happy to defer to her, but my response to that stands. You can't read the *Cleveland* case without reading the *Skilling* case and *Sun-Diamond*.

And I don't want to repeat myself, but it goes back to the issue of it is undisclosed self-dealing by a public official who intends to do that.

So an honest mistake on any type of license is not going to be covered by the statute, and it never has been.

Now, we are not overcriminalizing or overfederalizing, because this legislation really is to fill gaps that have been created over the course of judicial interpretation.

As I mentioned, judicial interpretation of the bribery statutes in the *Skilling* decision—the *Skilling* decision was very careful when it said absolutely does the legislator, does Congress, have to be careful in how this fix is made. And we agree with that. But it didn't say there is no possible fix available.

That is why the Department of Justice is happy to work with the Subcommittee to make it fit, back to the way it was 20 years ago.

Mr. CONYERS. You are pretty persuasive.

Now, Chairman Sensenbrenner, would it meet with your approval that your staff and mine continue working on this important bill that you and Judge Louie Gohmert and Quigley all participated in, so that—I am moving more to a supportive position and——

Mr. SENSENBRENNER. Will the gentleman yield?

Mr. CONYERS. Yes.

Mr. SENSENBRENNER. The gentleman knows that my door is always open. It has been in the past. You haven't made me mad enough to slam it yet. [Laughter.]

Mr. CONYERS. Well, yeah, but we come pretty close to it sometimes. [Laughter.]

But at any rate, I appreciate your response, and I will continue to work with it.

And I'd like to bring the former Chairman of the Subcommittee on Crime in on this too, because, you know, let's face it, he's got some reservations and we would like Sensenbrenner's name to get on another bill here, if we can, during this session of Congress.

Mr. SENSENBRENNER. Well, with the caveat that Senator Durbin said negotiating with me is like eating somebody for lunch and spitting out the bones, I will be happy to negotiate with you. [Laughter.]

Mr. CONYERS. Thank you. I yield back my time.

Mr. SENSENBRENNER. The gentleman from Texas, the Vice-Chairman of the Committee, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman.

And I am trying to muddle my way through the legislation. I didn't participate in the preparation of it, so I am just trying to understand some of these things.

But, Ms. Brown, you had mentioned that when someone searches a crime data for money, and they cannot be federally prosecuted, that that is a problem. You are not saying there are not State laws against doing such a thing, are you?

Ms. BROWN. Sometimes there are State laws. In the District of Columbia, we——

Mr. GOHMERT. But if they are not, then you feel the Federal Government needs the use of that power and jump in for the States?

Ms. BROWN. That is one reason. The other reason——

Mr. GOHMERT. Would you feel the same way if a State didn't have a burglary statute, that then we would need to federalize burglary and make it a Federal crime if the States chose not to?

Ms. BROWN. No. What I think that is appropriate is that there are Federal statutes and State statutes that cover the same thing——

Mr. GOHMERT. Well, let me ask you, do you think the language that says inserting, quote, "anything or things of value," unquote, is a T-shirt a thing of value, or a baseball cap? Would those be things of value?

Ms. BROWN. Well, that is where the State and local regulations do come in, Congressman, because——

Mr. GOHMERT. So if they don't have a de minimis exception in State or local regulations, then that would be something of value, correct?

Ms. BROWN. It is not a matter of whether it is a de minimis. It is a matter of transparency and reporting.

Mr. GOHMERT. Right. And I am familiar with the fact that the public normally assumes, if someone is a legislator in a State or Federal legislature, the public just kind of presumes that since they make the law, they surely must know them, and the presumption normally goes against a legislator.

Because I am thinking you had pointed out that a legislator must know of disclosure requirements, but if the evidence shows that someone is a member of the legislature and didn't disclose something, then usually the public will say, well, he surely knew, he makes the laws.

But I want to get to something else.

You, Mr. O'Toole, mentioned one example, but here on page 14 of the bill, where it defines undisclosed self-dealing: A public official performs an official act for the purpose in whole or in material part of furthering or benefitting a financial interest of.

And then I come down, and like you all talked about, it involves self-interest: The public official; the spouse; a minor child; a general business partner of a public official; a business or organization in which the public official serves as an employee, officer or director, trustee, or general partner.

So if a Member of Congress, Mr. O'Toole, were a director of a charitable organization, and I understand there are a lot of Members of Congress that are, and he were to commit the official act of cosponsoring or voting for a charitable donation to be deductible, do you have any concerns that that might be subject to meeting this definition of a corrupt act?

Mr. O'TOOLE. I do. I think this is part of the problem that I described before, which is that the law doesn't describe the significance of the financial interest, which is what the Supreme Court said must be defined. And so here there may be some——

Mr. GOHMERT. Wouldn't it be clear in that situation that charitable organization would definitely benefit, and benefit in a financial way, correct?

Mr. O'TOOLE. That is correct.

Mr. GOHMERT. There is no doubt, right?

Mr. O'TOOLE. Right. And so, since this law defines any benefit, I certainly think that a creative prosecutor could easily look at this and find it covered by the law.

And I am not even sure it takes a creative prosecutor, because I do think the plain language of the law, as you point out, does cover exactly the sort of conflict of interest situation where someone is——

Mr. GOHMERT. Do you think that is a conflict of interest? That if you think, in your heart, that a charitable institution should be able to have donors deduct, that that is good for the overall benefit of the entire country, that even though that benefits one—he's a director, or she's a director on that, that that is corrupt?

Mr. O'TOOLE. Absolutely not corrupt. I think that that is part of the problem, is that this law would criminalize ordinary conduct that the average, everyday person would recognize is not corrupt, and is an important and completely legitimate part of the way that our government does business.

Mr. GOHMERT. Well, it sounds like, then, as long as the prosecutors are not ever upset with a legislator, there shouldn't be any problem.

Mr. O'TOOLE. And I am sure that never happens.

Mr. GOHMERT. Okay, thank you.

I yield back.

Mr. SENSENBRENNER. Mr. O'Toole, do you want to qualify that, before I say that Mr. Gohmert's time is up?

Mr. O'TOOLE. Qualify?

Mr. SENSENBRENNER. That it never happens.

Mr. O'TOOLE. I will——

Mr. SENSENBRENNER. I think all of us on the Committee know it has.

Mr. O'TOOLE. And I'd say, I guess I should qualify by saying I hope it never happens.

Mr. SENSENBRENNER. Conceded. Without objection, the gentleman may revise and extend his remarks.

I am happy to announce that the yellow light is now working, and recognize the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, obviously we need to make some changes. But as I said, we need to be careful about what we do.

And I wanted to ask, we have gone back and forth on this business license thing, where if a guy lied and got a business license, if he lied and committed fraud to get the business license unbeknownst to the agency or any official, does this law address that?

Ms. BROWN. The honest services fraud addresses, as do the mail and wire fraud statutes, always involve a specific intent to defraud, regardless of the property at issue.

Mr. SCOTT. Wait a minute. If the business license is obtained by fraud, lying on the form, and you got your business license, that is obviously something of value. But it was unbeknownst—if you bribe the official to get it, colluded with the official, that is easy.

Ms. BROWN. Yes.

Mr. SCOTT. Is the person who lied on the form guilty for having illegally obtained a business license, because he did it by lying and fraudulent activity?

Ms. BROWN. If he intended to commit that, yes.

Mr. SCOTT. Right. Does this bill cover that?

Ms. BROWN. Yes.

Mr. SCOTT. And the person who obtained the license by fraud would be guilty?

Ms. BROWN. If he had the specific intent.

Mr. SCOTT. Right, he lied. He straight up lied.

Ms. BROWN. Well, there is a lie and then there is——

Mr. SCOTT. He lied. He fraudulently——

Ms. BROWN. Yes, then this bill covers that.

Mr. SCOTT. Now, why wouldn't that same—and we went to the fishing license, why wouldn't the person, the individual lying on a fishing license, be in the same boat?

Ms. BROWN. Is the person applying for the fishing license a public official?

Mr. SCOTT. No. The person getting a business license wasn't a public official.

Ms. BROWN. Yes. It has to be a public official.

Mr. SCOTT. Okay, you didn't say that. If an individual, not a public official, lied to get a business license——

Ms. BROWN. I am not bringing that case in Federal court.

Mr. SCOTT. Well, I am not sure—that is you. Does this bill cover it?

Ms. BROWN. No.

Mr. SCOTT. Okay.

Ms. GRIFFIN. I think that there is a provision of the bill which would enlarge the definition of money and property in Sections 1341 and 1343, and thereby extend the definition of mail and wire fraud. And it would include within the definition of property licenses as a thing of value, as property.

That is a separate provision from the ones that have been the primary——

Mr. SCOTT. Well, let's back up a step.

If you lie and mail the application in on a form, you are not a public official, you lied to get your business license, does this legislation cover that individual? Now Ms. Brown said no.

Ms. BROWN. That would be mail fraud. That would be under 1343.

Mr. SCOTT. So the bill would cover that, so if you mail in the application, if you mail in your fishing license, you are now covered?

Ms. BROWN. If you are a public official——

Mr. SCOTT. No, wait a minute. Wait a minute. You are going back to——

Ms. BROWN. You want a private citizen?

Mr. SCOTT. A private citizen——

Ms. BROWN. Sure. A private citizen——

Mr. SCOTT [continuing]. Mails in the fraudulent license. That is wire fraud.

Ms. BROWN. That is mail fraud.

Mr. SCOTT. And if we change it under this bill, and now we are covering that situation, the fishing license?

Ms. BROWN. This bill does not cover private individuals. It covers public officials.

Mr. SCOTT. Okay, but Ms. Griffin said you just did cover the private official, because he mailed it in.

Now is a private official covered under this legislation? Is he now at risk? He's not at risk now, would he be at risk if we changed this for lying on the fishing license?

Ms. GRIFFIN. It is a separate section of the bill. It has not been the subject of our testimony or the thrust of most of the discussion today.

There is a section of the proposed legislation that separately makes a change. That refers back to the earlier discussion——

Mr. SCOTT. So, well, maybe you can respond in writing, since I am having trouble, I don't want to use my 5 minutes on a simple question: Is a fishing license covered or not?

Mr. O'TOOLE. If I could try to clarify this? Section 2 of the bill does expand Section 1341 and Section 1343, which I believe Professor Griffin will confirm applies to private individuals. Those are the mail and wire fraud——

Mr. SCOTT. So if you mail in your fishing license, two out of three think it is covered?

Ms. BROWN. No, I agree with that. I said that mail fraud——

Mr. SCOTT. Okay, so the fishing license is covered now?

Ms. BROWN. Under mail fraud.

Mr. SCOTT. Under the bill.

Ms. BROWN. Under the bill, under the honest services fraud, it could, as in the *Skilling* case. In the *Skilling* case——

Mr. SCOTT. Well, wait a minute. That is a simple yes or no question, and I'd like to ask another question——

Ms. BROWN. Then I will answer yes.

Mr. SCOTT. And you answered no to begin with, and now it is yes.

Ms. BROWN. I am saying, yes, but——

Mr. SCOTT. Thank you.

There is a difference between bribes and gratuity. Under the bribes section, the bill reduces the threshold for a bribe from $5,000 to $1,000. But the gratuities section, as we have noted, covers any kind of gratuity.

There are no exceptions for the gratuities? We talked about baseball caps and T-shirts. What about written material?

Ms. BROWN. I am sorry, what about written?

Mr. SCOTT. Written material. If a lobbyist comes in with research that cost him $1,000 to put together, he gives it to me to support his position on a bill, is that a gift?

Ms. BROWN. No.

Mr. SCOTT. Why?

Ms. BROWN. Because he's lobbying. It is not a gift. A gift is something that is given personally to an individual.

And the ones we were talking about in the statute, the ones that were involved in *Sun-Diamond*, were things like tickets to the World Series, free plane tickets, cut-crystal balls, artwork.

Mr. SCOTT. Well, I mean, I know what's covered, but what else is covered?

Ms. BROWN. Things like that.

Mr. SCOTT. But written material is not, and there is no written exception to it?

Ms. BROWN. No.

Mr. O'TOOLE. I actually would disagree. I think, based on the broad language of the statute, if it is anything of value, which I think written material would clearly be, and it is given because of your official position under this bill, which it would be, because it would be given to you as a congressman, it would seem to clearly be governed by the new gratuities law of the bill.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Illinois, Mr. Quigley?

Mr. QUIGLEY. Thank you, Mr. Chairman, and thank you for your efforts on this legislation.

Mr. O'Toole, forgive me, let me ask you a question. What did one Illinois prisoner say to the other Illinois prisoner?

Mr. O'TOOLE. I have no idea.

Mr. QUIGLEY. The food was better here when you were Governor.

I mention that for a reason. I am from Illinois, and I know the association you work for, and I suppose I am a traitor to the cause, because I was a criminal defense attorney for 10 years at 26th Street, so I get what you are getting to.

But I hear those jokes all the time, right? Hunting for corruption in Illinois is like hunting for cows.

So we have to recognize that the public is strongly desirous of getting something done. And so what I am getting to with you is,

you and your association may be uniquely suited to help us clear up that which you have concerns about.

So what I am asking you, and I would mention to Ms. Brown, is what I hear most concerns about with this legislation are making sure it is not vague, that we don't repeat the same mistakes. And the questions today seem to evoke those same concerns, some sense of uniformity of what is de minimis.

And I know transparency is first and foremost. But from transparency there appears to be a need for some uniformity in what is disclosed.

I remember a colleague of mine at the county. They showed her disclosure statement as a county elected official and what she had to disclose, and then when she ran for senate, what she had to disclose. And it was a whole different game.

And across this country, it is extraordinary the difference of what elected officials have to disclose, and what that means for transparency.

And wouldn't you agree that those aspects of uniformity are critical to having the public's trust that they know what's happening and that the prosecution is on an equal playing field?

Ms. BROWN. Yes, I do. But one of the things I wanted to emphasize in response to that remark, Congressman, is that one of the things we have to be careful about is making sure that the public official knows what needs to be reported and knows what is illegal.

But each State, each legislature, each local community, and the Federal Government agencies and Congress, you are right, has different disclosure forms.

But at least the way that this bill is designed is that those disclosure obligations are linked to what is required. So when you take your ethics course at your new employer, or when you become a State legislator, presumably you are advised of those things.

But you are right, it is certainly a problem that there are all different kinds of reporting requirements.

Mr. QUIGLEY. There is no way to help, in this legislation, protect those that you are prosecuting, and also give the American public a sense of what is being done uniformly across the country?

Ms. BROWN. Well, I think that the first instance is there is a specific reporting requirement under law and that has been violated. Then the public will know that has been violated.

There was a reporting requirement—I mean, your average citizen doesn't go online to see the financial disclosure forms for people who are running for public office, or who are public employees.

Mr. QUIGLEY. Yes, but the editorial boards do, and others——

Ms. BROWN. Right.

Mr. QUIGLEY [continuing]. That will help trumpet this and get it out there.

Ms. BROWN. Right.

Mr. QUIGLEY. It makes it easier. And it is part of the same sense of continuity.

Mr. O'Toole, you talked about the auto dealer. Is it the uniformity of what is private interest versus public interest? And obviously in the example you gave, the fact of the matter is, and what seems to be the dividing line in our ethics rules, is that, you know,

you may be or have friends who are auto dealers, but improving all the roads helps everyone.

So while it may help you, but it is also helping many others, and that seems to be the dividing line.

Don't you see an opportunity to create sharper lines and prevent problems with court enforcement?

Mr. O'TOOLE. Well, I think the sharper lines are important. And I think that with that example, I was trying to point out a problem with the lack of sharp lines that are in the current bill. Because I think the language of the bill would include the State legislator who owns a car dealership as someone who is taking action to benefit themselves.

I know that my colleagues here pointed out the other reasons that they think that that legislator wouldn't be prosecuted. But I think the bill is very clear that that sort of interest, even though I think you and I may well agree that it is not something that the public would call a conflict of interest, would be classified as a conflict of interest under this bill.

Mr. QUIGLEY. I am sorry. Go ahead.

Ms. GRIFFIN. I think precisely because motivations can be difficult to disentangle, in terms of the difference between the public and the private, that a focus on private financial gain at a certain level is important.

I mean, I agree with you, and I think the thrust of your question is, can there be clarity in this legislation——

Mr. QUIGLEY. Yes.

Ms. GRIFFIN [continuing]. Over and above the clarity that comes from State and local disclosure laws?

And I think it is something to consider, that I think is important, whether there might be a general Federal safe harbor for things that are insignificant, because we are looking for those motivations that give rise to distorted decisionmaking. And very minor benefits, like the team jerseys, and the restaurant reservations, and some of the things in the parade of horribles that have not actually been prosecuted, but certainly get mentioned in a lot of pieces and commentary, could be taken off the table with a general Federal safe harbor.

Mr. QUIGLEY. Mr. Chairman, thank you for the extended time.

I appreciate your efforts on this bill. I apologize for the weak attempt at humor, but unfortunately there is more jokes about Illinois corruption than we have time for.

You know, I will be here all week. [Laughter.]

Mr. SENSENBRENNER. Well, the Chair recognizes himself for 5 minutes to say that usually the retirement home for Illinois Governors is in Wisconsin, in Adams County, in particular.

That is where one of them is and one of them may be going.

I want to get some clarification. I agree with both what Mr. Scott and Mr. Quigley have been saying relative that there be need for clarification.

Ms. Brown, you talked about having a secret arrangement as one of the predicates for this crime. Congress and most state legislators have to file financial disclosure statements, which are public. Does that completely blow apart the secrecy business, if you disclose that you are a car dealer and you still take some type of gratuity?

Ms. BROWN. Yes.

Mr. SENSENBRENNER. It does? Okay.

Ms. BROWN. Yes, it does, because it lets the public know.

Mr. SENSENBRENNER. Okay.

Now we all know that a state legislator who owns a car dealership can vote for more money for roads. We have gone through that. What about if the legislation before the general assembly talks about changing the laws for disputes between car dealerships and the manufacturer from a judicial remedy to an arbitration remedy, which applies specifically to car dealerships as a class, and he does not recuse himself. Would that be a violation, if he voted in favor of that legislation?

Ms. BROWN. Not if he had disclosed it on his form. I think in those circumstances he would do well to recuse himself from being part of that legislation, because the interests are so closely related.

Mr. SENSENBRENNER. Now let me talk about de minimis exceptions. I think we have gone through the T-shirt example issue as de minimis, and maybe written material, which I assume would be a coffee table book that would talk about the wonderful things that a specific industry does. But how about a volunteer fire department awarding a legislator or a Member of Congress a coat with that legislator's name embroidered on it, and the coat would probably cost a couple hundred dollars?

Ms. BROWN. To me, it depends upon the reporting requirement for that particular Member of Congress. If the rules and regulations under which that congressmen or State legislator operates permits that—for example, I am allowed to have a friend take me to lunch, so long as it is less than $20—if those regulations allow it, he certainly could keep it.

And he reports it. That is the other thing. I could go on something that is more expensive than that, but I have to report it.

And so it is all, again, it is all about the transparency. Can he keep it? Sure, but he has to report it

Mr. SENSENBRENNER. Well, I think that this was in the instance involving one Member of Congress after the definition of gift or gratuity was changed here, where the Member of Congress didn't know that he or she was going to get this embroidered jacket. And there was such a question about it, that everybody ended up getting embarrassed when the fire chief presented her with the jacket and said it is illegal for me to take that in front of a whole crowd of people.

Are we setting up traps where people can end up embarrassing themselves?

Ms. BROWN. I think these, particularly the honest services fraud statute, is not a trap for the unwary. In these circumstances when we have been talking about, you don't know——

Mr. SENSENBRENNER. We are talking about the gratuity statute here.

Ms. BROWN. Oh, well, the gratuity statute certainly. If there are reporting requirements—excuse me, I thought we were talking about the honest services fraud. Forgive me.

But again, it is all about the reporting requirements. And if that is reported as a gift and on the forms, as opposed to—and the other thing is, you have to think about, is it something that is going to

go in someone's office, that is going to go on the wall for everybody to see when the citizens——

Mr. SENSENBRENNER. A $200 volunteer fire department jacket, that would be pretty tough to hang on the wall of one of our offices.

Ms. BROWN. We have fire hats all over the place in the department.

Mr. SENSENBRENNER. I am not talking about hats.

Ms. BROWN. No, no, I know—I am not being frivolous. I am just saying that if it is reported, if it is not secret, personal gain in exchange for a favor, if it is not a thank you under the gratuity statute, or a quid pro quo under the bribery statute, then it is fine to be able to receive that.

Then you move into different things about conflict of interest and reporting requirements and things like that. But under gratuities and bribery, if there is no link between secret dealing between the legislator and the volunteer fire department, then it is not going to be——

Mr. SCOTT. Mr. Chairman, I ask unanimous consent that you be given an additional minute to follow through on this.

Mr. SENSENBRENNER. Without objection.

Mr. SCOTT. And because——

Mr. SENSENBRENNER. I yield to the gentleman from Virginia.

Mr. SCOTT. And because the question on the gratuity statute is just a gratuity. You are given a particular gift because of your position. And this fire jacket is given to you because of your official position. There is no disclosure requirement. There is no disclosure connection on that section. It is a violation.

Ms. BROWN. What is it for, is the real question.

Mr. SCOTT. No, the gratuity—that is the bribery section, "What is it for?" The gratuity section is that you got a gift because of your position.

Mr. SENSENBRENNER. Well, my time has expired.

I guess I would make the observation that I am the author of this bill with Mr. Quigley of Illinois. You know what I can say is that the whole purpose of this bill is to try to have very clear definitions, so that public officials know what is a violation and what isn't. And I am afraid that the testimony on the part of all three of our witnesses today indicate that there isn't any agreement on what is a violation and what isn't.

We have got to update the statute, as a result of a couple court decisions. But when we do the updating of the statute, I hope that we will be able to put this issue to rest, so that everybody, including the courts, knows what is inbounds and what is out-of-bounds.

So this bill needs quite a bit of work, and as I told the gentleman from Michigan, Mr. Conyers, we are going to have to work on this, and I hope to get some constructive input from the Justice Department.

The gentleman from Tennessee, Mr. Cohen?

Mr. COHEN. Thank you, Mr. Sensenbrenner.

I understand and certainly appreciate and favor, and always have, trying to make laws as specific as possible.

But what has been thrown up here by Mr. O'Toole about a marriage license or a fishing license, and you mentioned a jersey, the honest services statute has been on the books for how many years?

Ms. BROWN. Twenty.

Mr. COHEN. Twenty. How many times has it ever been used for somebody that got a jersey or restaurant reservations or any of these other innocuous, de minimis things that you all have thrown out here, that now seems to be a problem with the law?

Ms. BROWN. I don't have those——

Mr. COHEN. Do you know of any times it has ever been used for something like that?

Ms. BROWN. I don't. But I can't——

Mr. COHEN. Mr. O'Toole, do you know of any times that a wedding license, a fishing license, a jersey has been the basis of a prosecution in a Federal court?

Mr. O'TOOLE. Well, it cannot currently be. Under the *Cleveland* decision, the fraud laws do not apply to State and local applications. That is the holding of *Cleveland*.

And so currently, the Federal statutes cannot apply to that. This change would allow that. And so I know of none, because the law currently doesn't apply to——

Mr. COHEN. But under honest services, which is *Skilling*, right?

Mr. O'TOOLE. Yes.

Mr. COHEN. That anything that you do that gets some public, you get some benefit for yourself—and Ms. Griffin, Professor Griffin, talked about having a big business, and you are shuffling contracts, you could have a small business and shuffle a jersey over there.

But that has never happened, has it, Professor Griffin?

Ms. GRIFFIN. Well, there are examples of cases in which prosecutors brought charges under the former honest services provision, where it is difficult to identify the harm, where we are not just talking about an intangible harm, but an insubstantial harm.

I think one of the better examples is the Thompson case from the Seventh Circuit, where an official acted in a way that the prosecutors construed as intended to impress her supervisors. She received a salary bonus because she directed some contracts toward approved contractors who were favored for political reasons by her supervisors. But she did not gain financially in any direct way from that. And the only benefit that could be articulated that she received was institutional benefit of pleasing her supervisors. And that is literally the way it was articulated by prosecutors.

And her conviction was reversed. And it is one of the cases that is often cited as abusive under the former honest services provision.

That type of case led to the parade of horribles that, for example, Justice Scalia cited in his dissent from the denial of cert in the Sorich case, which is another Illinois case, which really primed the Supreme Court to take the *Skilling* case and reach the decision that it did.

So there are some cases where the harm is quite insignificant, and therefore could hardly be said to distort the political process in a way that Congress would have——

Mr. COHEN. And how could you possibly draw a statute to distinguish between the two?

Ms. GRIFFIN. Well, I think there are two answers to that. It is absolutely the case—Mr. O'Toole is right in much of what he says.

It is definitely the case that there are due process concerns with any new statute, and the Supreme Court articulated those in the *Skilling* decision, and Congress should be responsive to those.

But it can do so in a variety of ways, including by clearly linking liability to the failure to disclose under an existing requirement.

And it is not the failure to disclose itself that is being punished. That is why there shouldn't be so much concern about patchwork requirements in State and local jurisdictions. It is the failure to disclose combined with taking advantage of the official position to then benefit financially from whatever that undisclosed interest might be.

Mr. COHEN. And, Ms. Brown, what do you think, in the decision in *Skilling*, do you think it needs to be more clear?

Ms. BROWN. I agree 100 percent with what Professor Griffin just said, that the gist of this bill is to link those actions to reporting requirements, whether they be State, local, municipal.

That is the limit that it has provided. That is the knowledge to the individual legislator or public official to know——

Mr. COHEN. What if there is no reporting requirement in this at all in a city or—I mean, States have it. They may or may not affect a municipal official. Sometimes they cover municipal officials, sometimes they don't.

What if the city doesn't have any disclosure requirement? Is it "Olly, Olly, in free" for the mayor?

Ms. BROWN. I don't know the answer to that question. I am sorry. I'd be happy to get back to you, but I——

Mr. COHEN. Why do we need to increase the penalty provisions? Don't you think—I mean, I am all for the bill and for the concept, and I think if a public official does any of these acts, they ought to be prosecuted and they ought to be convicted, and they ought—but they lose their reputation, they lose their job, they are probably never going to get elected again.

I don't know what the sentences are now, but why do they need to be increased? I mean, is that really going to be more of a deterrent than this public shame, embarrassment, loss of office and prestige?

Ms. BROWN. We think so, because that could be said in any white-collar case.

Mr. COHEN. What is the penalty now for a violation? What was it under honest services?

Ms. BROWN. It was 5 years.

Mr. COHEN. Five years——

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from Texas, Ms. Jackson Lee?

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

And I think all of us have a sense of understanding for the legislation. You have a sense of pride regarding the importance of public service and the necessity of ensuring that we are held to the highest standards.

I raised questions, and I have been listening to my colleagues, and so let me pursue some, sort of, out-of-the-ordinary kinds of questions.

To the representative from the Department of Justice, how extensive is public corruption? Do you have some statistics? Have you been in this for a long time? What is your sense of it?

Ms. BROWN. I don't have statistics at my fingertips. But having worked on public corruption cases for over 20 years, I can say that it is quite widespread and quite common.

Just today I read in the newspaper about a police officer here in Washington, D.C., who agreed to plead guilty and was sentenced to 7 months in prison, in addition to having to resign from her job.

We know what is happening in Prince George's County. We know what is happening in Chicago. I know what is happening in the case today in Alabama. There are many, many cases about this.

And I will tell you, as a prosecutor who has been in court for these sentencings, that it really undermines the public's confidence in their public officials when they see that people who are convicted of these offenses, who have been taking hundreds of thousands of dollars, or even less, are getting, in essence, a slap on the wrist.

Ms. JACKSON LEE. What was the police officer's charge?

Ms. BROWN. The police officer was charged, in the District of Columbia, for aiding and abetting a burglary. She acted as a lookout.

Ms. JACKSON LEE. Would that almost be like a mass murderer, where he draws the attention of the world, but yet there are millions of individuals walking the Earth and walking in America that are not mass murderers?

I mean, don't the cases that are most conspicuous draw the most attention, while there are throngs who are doing their job every day?

Ms. BROWN. There are throngs who are doing their jobs——

Ms. JACKSON LEE. But when you say widespread—let me do it this way: Are 90 percent of the public servants in America corrupt?

Ms. BROWN. I don't have any statistics for you, Congresswoman. I would be happy to get statistics for you about how many public corruption cases the 94 U.S. Attorney's Offices handle across the country.

Ms. JACKSON LEE. Yes, I would appreciate it. And I would also appreciate—and I guess that will be under the Federal system, because I guess it would be important to note as well how they are addressed in the present framework of the legal system, meaning the tools that you have.

So what is the one tool that you believe this legislation gives you that you need?

Ms. BROWN. I think restoring the honest services fraud post-*Skilling* is one of the most important things that——

Ms. JACKSON LEE. Say it again?

Ms. BROWN. Restoring the concept of honest services fraud as applied to undisclosed financial interests. That existed before *Skilling*. I think that is the most important thing that we are talking about.

Ms. JACKSON LEE. So if you are involved in some actions in your company, or involved in that you don't let it be known publicly that you have a vested interest or someone has an interest?

Ms. BROWN. Right, that you are keeping it secret. You are doing it to defraud, and you are——

Ms. JACKSON LEE. So the clear delineation of that language is what you think is helpful as notice to the public servant, and then notice—or basis upon which you can bring a case? Is that what you are saying?

Ms. BROWN. Yes.

Ms. JACKSON LEE. Let me go to Mr. O'Toole.

I think you see my line of questioning. It is not so much embedded in this bill. I think we all need to have a level of oversight. But what are the Achilles' heels?

My Achilles' heels for all of these is that, no matter what you are standing, you deserve due process. And the broader the bill, the lesser due process, even if there is clarity.

Mr. O'Toole, what do you say?

Mr. O'TOOLE. Yes, if I could respond to a couple of things. I mean, first, we at the National Association of Criminal Defense Lawyers believe that 99 percent of public servants are honest, hardworking people who do not fall into the area of public corruption at all. And so I do think that it is a problem that is limited to a small number of people.

Second, those people, as everyone agrees, are currently being prosecuted, and pleading guilty and getting long sentences.

And if I could correct one statement earlier, the honest services maximum sentence is already 20 years. It is not 5 years. It is 20.

And so those sentences are already very long, very tough. People go to jail when they do these sorts of things.

And so what we are concerned most about is that if you are going to change the law, that you do so in a way that is very clear.

Because, again, these are unanimous Supreme Court decisions that are being overruled. It is not a 5-4 decision, where the liberals or the conservatives split.

These are decisions that all nine justices, bipartisan, came together and said not only is this not the law, but it would be a very bad situation if it was the law.

And so I think going slow is really what we would urge here.

Mr. SENSENBRENNER. The gentlewoman's time is expired.

Ms. JACKSON LEE. Thank you.

Mr. SENSENBRENNER. The gentleman from Pennsylvania, Mr. Marino?

Mr. MARINO. Mr. Chairman, I have no questions.

Mr. SENSENBRENNER. Okay.

Well, thank you very much, everybody. Let me say what I said a few minutes ago, that I think this bill needs to be fine-tuned to provide clarity.

Again, as long as the gentleman from Virginia and his mentor, the gentleman from Michigan, don't make me angry, the door is open. And I hope that we can have some input from all of you as we try to make this bill much clearer, so that everybody, from the Justice Department, to a school board member in a very small school district, realize what can be done and what can't be done.

I would ask unanimous consent that the witnesses respond promptly to any questions that Members of the Subcommittee may send to them, in order that we may complete the record.

And hearing that, the purpose of the Committee's session this morning having been completed, without objection, the Committee stands adjourned.

[Whereupon, at 11:23 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 3, 2011

The Honorable Lamar S. Smith
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find responses to the questions for the record arising from the appearance of Mary Patrice Brown, Deputy Assistant Attorney General for the Criminal Division, at a hearing held on July 26, 2011, regarding H.R. 2572, the Clean Up Government Act of 2011. We hope that this information is of assistance to the Committee.

Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program there is no objection to submission of this letter.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable John Conyers, Jr.
Ranking Member

Hearing on H.R. 2572, the "Clean Up Government Act of 2011"
Questions for Record Submitted by Congressman Robert C. "Bobby Scott"

Question for DOJ Only:

1. **Section 13 of H.R. 2572 proposes to expand the already-long list of offenses which are predicates for prosecution under the RICO Act. RICO was enacted to deal with unusually difficult situations, but we are now expanding it so that its scope covers situations which are more routine. What crimes may the Department of Justice not pursue now that you could pursue if RICO were changed?**

Response: The Clean Up Government Act of 2011 would enhance the Department's ability to combat public corruption by helping to ensure that all of the law enforcement tools that are available for the investigation and prosecution of other serious criminal offenses are also available for the investigation and prosecution of public corruption offenses. The Racketeering Influenced and Corrupt Organizations Act (RICO) is a powerful and effective tool in federal criminal law enforcement. In particular, it enables prosecutors to include in a single charge or a single indictment a range of related conduct that is carried out by a criminal enterprise which might otherwise be split into several cases or be barred by the statute of limitations. As a result, RICO has been used to address a wide variety of criminal enterprises, including those involving public corruption. The use of RICO requires that the underlying offenses be included in the list of "predicates," and Section 13 would ensure that two key corruption violations (theft of government property and bribery/fraud in programs receiving federal funds) are included in that list. This sensible addition will simply ensure that public corruption offenses are treated on par with other serious crimes that are already included as RICO predicates.

Questions for all of the witnesses (including DOJ):

2. **The federal anti-gratuity statute, found in 18 U.S.C. 201, does not contain any exceptions based on the type or value of the gratuity given to someone. Section 8 of H.R. 2572 proposes to expand the statute to gratuities given because of someone's official position. If a Member of Congress is allowed to receive written research materials under the ethics rules, but those materials obviously have value, and those materials are obviously given because of the Member's official position, would their transfer or receipt violate the statute as amended by this bill?**

Response: It is difficult to anticipate all of the factual scenarios that may arise, but the receipt of written research materials would not, standing alone, be a violation of the gratuity statute, 18 U.S.C. 201(c), either as it is now written or under the proposed amendment in Section 8 of H.R. 2572. Written research materials are an important, permissible, and constitutionally protected vehicle for the transfer of information to Members of Congress. Indeed, House Rule XXV, clause 5(a)(3)(I) expressly permits Members and their staff to accept such written materials. As such, the receipt of such materials would not fall within the scope of the gratuity statute, which

requires that the thing of value be given or received "otherwise than as provided by law for the proper discharge of official duty."

3. At the hearing, the example was given of a championship team visiting the White House giving the President a jersey with his name on it, and it appears absurd that such a thing would be prohibited by federal anti-gratuity laws. What is your view? Should there be a de minimis exception to the gratuity rule to cover such situations? What about written material?

Response: The Department agrees that de minimis items provided to public officials in a context such as a visit to the White House should not, without more, subject anyone to criminal prosecution. The rules and regulations governing gifts to employees in executive branch agencies, and those applicable to Members of Congress and their staffs, provide a clear indication of which items may be deemed de minimis. See, e.g., House Rule XXV, clause 5(a)(3)(W) (permitting Members and staff to accept "[a]n item of nominal value such as a greeting card, baseball cap, or a T-shirt."); 5 C.F.R. § 2635.204(a) (permitting government employees to accept gifts valued at $20 or less); 5 C.F.R. § 2635.204(j) (permitting the President or Vice President to accept any gift not intended to influence official action, such as a replica sports jersey). Accordingly, the proposed amendment to the gratuity provision, 18 U.S.C. 201(c), would make clear that there is no violation if the receipt of the gift or thing of value is permissible under the applicable rules.

We also note that for many years prior to United States v. Sun-Diamond Growers, 526 U.S. 398, 404-05 (1999), section 201(c) was interpreted by the Federal courts to apply to things of value that were given "for or because of" the person's official position, as would be the case under H.R. 2572. See United States v. Bustamante, 45 F.3d 933 (5th Cir. 1995); United States v. Evans, 572 F.2d 455 (5th Cir. 1978); United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979) (en banc), aff'd, Standefer v. United States, 447 U.S. 10 (1980). The purpose of Section 8 of H.R. 2572 is simply to return the law to its status under those earlier cases, and not to expand the application of the statute to reach de minimis gifts.

4. Does federal criminal law, as it stands now or as it would be amended by H.R. 2572, prohibit situations in which a public official commonly might find himself or herself, such as:

a. An official attending a convention finds that he or she is going to the same hotel as another convention guest, so they share a cab, but the guest pays the entire fare when they reach their destination?
b. In the same situation as above, does the answer change if the guest gives the official a ride in their car, which saves the official from having to pay a $20 cab fare?
c. An official attends what the ethics rules describe as a widely attended event, at which hors d'oeuvres and drinks are served, which clearly have some value?
d. An official receives a plaque for which the grantor paid $80?

Response: Again, it is impossible to anticipate every factual scenario that may arise, but as discussed in response to question number 3, above, the rules and regulations governing gifts to employees in executive branch agencies, and those applicable to Members of Congress and their staffs, provide a clear indication of which items may be deemed de minimis, and the proposed amendment to the gratuity provision would make clear that there is no violation if the receipt of the gift or thing of value is permissible under the applicable rules. As to Members of the House and their staffs, each of the items listed in Question 4 (a)-(d) are permissible under House Rule XXV, clause 5(a), and accordingly, the receipt of those items would not be covered by the gratuity statute.

5. **Under the proposed offense of undisclosed self dealing in section 16 of H.R. 2572, among other things, the prosecution must show that a public official failed to disclose information required under an existing "Federal, State, or local statute, rule, regulation, or charter applicable to the public official." Why should a local official be prosecuted under federal law for violating a state or local statute, rule, or regulation?**

Response: Under the undisclosed self dealing provision contained in section 16 of H.R. 2572, no public official would be prosecuted for violating a state or local statute, rule or regulation. Rather, in order to establish a violation, the government would be required to prove that a public official took official action to benefit a personal financial interest, and that the public official failed to disclose that financial interest in a manner that was required by the applicable law, rules, or regulations, and that the public official acted with the intent to defraud the government and the citizens for whom the public official works, and that the defendant used the interstate wires or United States mail to carry out the scheme. Each of these elements must be satisfied under the proposed statute. The fact that the public official failed to satisfy local disclosure requirements would serve as important evidence of his or her concealment of the personal financial interest, but would not constitute a crime in and of itself.

6. **As the federal criminal code as it currently exists, does it prohibit acts of undisclosed financial self enrichment by public officials? Under current law, or as it would be amended by Section 16 of H.R. 2572, would such acts be prohibited if they were disclosed by the official? For instance, if a mayor owned a car dealership and directed that all of the city's police cruisers be purchased from his dealership, but he disclosed his ownership of the dealership, would he be in violation of the undisclosed self dealing provision of H.R. 2572?**

Response: Following the Supreme Court's decision in Skilling v. United States, 130 S.Ct. 2896 (2010), there is no general federal prohibition on undisclosed self-dealing. Under the proposed undisclosed self-dealing provision contained in Section 16 of H.R. 2572, the concealment or non-disclosure of the public official's financial interest would be an essential element of the offense. Accordingly, if a mayor fully disclosed his ownership interest in a car dealership, that ownership interest could not be a subject of criminal prosecution under the new undisclosed self-dealing provision.

September 8, 2011

The Honorable Lamar S. Smith
Chairman
Committee on the Judiciary
2138 Rayburn House Office Bldg.
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
2138 Rayburn House Office Bldg.
U.S. House of Representatives
Washington, DC 20515

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

Dear Chairman Smith:

Thank you for the opportunity to respond to the questions submitted to the Subcommittee by Congressman Robert C. "Bobby Scott." My responses (along with the questions) are set forth below. Please feel free to contact me with any additional questions.

Question:

The federal anti-gratuity statute, found in 18 U.S.C. 201, does not contain any exceptions based on the type or value of the gratuity given to someone. Section 8 of H.R. 2572 proposes to expand the statute to gratuities given because of someone's office position. If a Member of Congress is allowed to receive written research materials under the ethics rules, but those materials obviously have value, and those materials are obviously given because of the Member's official position, would their transfer or receipt violate the statue as amended by this bill?

Response:

The transfer or receipt of written research materials would most likely violate the amended statute. As the question notes, Section 8 of H.R. 2572 would change the law to now include within the scope of the gratuities statute "any thing of value" provided to a public official because of someone's official position. The written research materials discussed in the question would clearly fall within in the scope of this prohibition assuming they were provided because of the person's official position, as they almost certainly would be. The proposed amendment would thus seem to make the provision of written research materials to a public official a crime.

However, Section 6 of H.R. 2572 also proposes to amend the preface to the gratuities statute to say "otherwise as provided by law for the proper discharge of official duty, or by rule or regulation," and then defines the terms "rules or regulations" to include "a Federal regulation

or a rule of the House of Representatives or the Senate." Although the language is far from clear, my assumption has been that the intention of this provision is to *exclude* gifts permitted under pertinent federal ethics rules or federal regulations from the gratuity statute. Unfortunately, however, Section 6's language is very indirect, and is unlikely to have its intended effect. Linking criminal code violations to the federal regulations and providing federal agencies the authority to criminalize or de-criminalize conduct through regulation itself creates potential notice problems and threatens to make different government officials subject to different gratuity provisions depending upon the scope of their agency rules. In addition, many ethics rules or regulations prohibit the giving or receipt of "gratuities" regardless of whether the type of gift or the dollar amount is otherwise permitted. This sets up a circular conundrum: Since the revised statute will define a gratuity as any gift given for or because of official position, the revised statute may still prohibit the receipt or giving of things of value that are permitted by the ethics rules or regulations, since those gifts could still fall within the scope of the gratuities statute.

As my testimony reflected, it is NACDL's position that the "for or because of official position" language not be added to the existing gratuities law. Or, if Congress wishes to amend that language while still permitting all gifts that would otherwise be allowed under ethics rules or regulations, it should say so directly, rather than using the language that is currently in the bill. That language is not only indirect; it is also likely to be ineffective.

Question:

At the hearing, the example was given of a championship team visiting the White House giving the President a jersey with his name on it, and it appears absurd that such a thing would be prohibited by federal anti-gratuity laws. What is your view? Should there be a de minimus exception to the gratuity rule to cover such situations? What about written material?

Response:

In my view, Congress should not criminalize gifts given based on official position; the current gratuities statute, which bans gifts based on official acts, does a far better job of prohibiting the sort of conduct that should be criminalized without sweeping in gifts that are simply not corrupt in any meaningful sense of the term. If Congress chooses to criminalize gifts based on official position, however, a *de minimus* gift exception would at least prevent the sort of absurd results that arise when the law sweeps within its reach gifts such as championship jerseys or the written research materials referenced in the previous question.

Question:

Does federal criminal law, as it stands now or as it would be amended by H.R. 2572, prohibit situations in which a public official commonly might find himself or herself, such as:

a. *An official attending a convention finds that he or she is going to the same hotel as another convention guest, so they share a cab, but the guest pays the entire fare when they reach their destination?*

Response:

Current law permits this conduct so long as the cab fare was not paid for or because of an official act or pursuant to a *quid pro quo*, which seems extremely unlikely under this hypothetical. If amended, it would be easy for a prosecutor to allege that such conduct would constitute a gratuity if the cab fare was provided simply based on someone's official position.

b. In the same situation as above, does the answer change if the guest gives the official a ride in their car, which saves the official from having to pay a $20 cab fare?

Response:

Current law permits this conduct so long as the ride was not provided for or because of an official act or pursuant to a *quid pro quo*, which seems extremely unlikely under this hypothetical. If amended, it would be easy for a prosecutor to allege that such conduct would constitute a gratuity if the ride (a "thing of value") was provided simply based on someone's official position.

c. An official attends what the ethics rules describe as a widely attended event, at which hors dourves and drinks are served, which clearly have some value?

Response:

Current law permits this conduct so long as the items were not provided for or because of an official act or pursuant to a *quid pro quo*, which seems extremely unlikely under this hypothetical. If amended, it would be easy for a prosecutor to allege that such conduct would constitute a gratuity if the hors d'ouvres and drinks ("things of value") were provided based on someone's official position.

d. An official receives a plaque for which the grantor paid $80?

Response:

Current law permits this conduct but if amended, a prosecutor could allege that such conduct constitutes a gratuity if the plaque was provided based on someone's official position.

Question:

Under the proposed offense of undisclosed self dealing in Section 16 of H.R. 2572, among other things, the prosecution must show that a public official failed to disclose information required under an existing "Federal, State, or local statute, rule, regulation, or charter applicable to the public official." Why should a local official be prosecuted under federal law for violating a state or local statute, rule, or regulation?

Response:

This question highlights one of the principal flaws in the "undisclosed conflict of interest" portion of the bill (Section 16 of H.R. 2572). State and local laws contain literally thousands of disclosure rules—almost all of which apply to conflict of interest situations. Often those rules provide their own penalties, many of which are administrative, not criminal in nature. The proposed amendments would ignore whatever penalties that state and local authorities have attached to their own disclosure laws, in favor of the creation of a new federal crime that imposes sentences of up to 20 years for violations of these same rules.

It is hard to imagine a greater intrusion by the federal government on policy choices made by state and local officials. It is virtually certain that many of these disclosure rules would not have been adopted had the state and local authorities realized that a consequence of their violation would subject their public officials to federal criminal prosecution, sometimes for trivial violations that those decision-makers thought worthy only of administrative sanctions. One consequence if the proposed language becomes law may be that state and local officials repeal existing disclosure requirements and/or adopt fewer disclosure requirements going forward, since state and local authorities will be deprived by this new law of any ability to formulate penalties for violation of such requirements.

Question:

As the federal criminal code as it currently exists, does it prohibit acts of undisclosed financial self enrichment by public officials? Under current law, or as it would be amended by Section 16 of H.R. 2572, would such acts be prohibited if they were disclosed by the official? For instance, if a mayor owned a dealership and directed that all of the city's police cruisers be purchased from his dealership, but he disclosed his ownership of the dealership, would he be in violation of the undisclosed self dealing provision of H.R. 2572?

Response:

Improper self-enrichment by public officials, of any meaningful size, is almost always a federal crime under current law. Such conduct almost always is reachable by the many anti-corruption laws on the books, either as a bribe, kickback, mail or wire fraud, a violation of the Hobbs Act (frequently used to prosecute government officials who use their position for financial gain) or a violation of the federal false statements law. My testimony of July 26, 2011 contains an attachment that lists various anti-corruption provisions that may already prohibit such conduct. Most of these federal laws already apply to state and local officials.

The question also puts its finger on another weakness inherent in Section 16 of H.R. 2572. A mayor who directed that the city purchase police cruisers from his auto dealership would not be in violation of Section 16 if he properly complied with any and all applicable disclosure provisions. However, he *may* be subject to prosecution under a number of the anti-corruption provisions cited in the paragraph above and in my earlier written testimony—provisions that focus on improper self-enrichment, and not on whether or not state and local disclosure provisions were or were not violated.

Question:

Is an individual who is not a public official, such as someone who lies on a fishing license that they submit by mail, covered by H.R. 2572?

Response:

Yes. Section 2 of H.R. 2572 would amend the general mail and wire fraud statutes by adding "any thing of value" to the objects of fraud that fall within the scope of these existing federal criminal laws. As I noted in my testimony, that additional language is designed to overrule *Cleveland v. United States*, 531 U.S. 12 (2000), in which a unanimous Supreme Court held that the current language of the mail and wire fraud laws, which prohibit schemes to defraud involving "money or property," does not reach false representations on state and local licenses.

If adopted, Section 2 would accordingly apply to any individual who lies on a state fishing license (or a marriage license, or a taxi license, etc.) regardless of whether that individual is a public official. The mail and wire fraud laws apply to everyone—not just public officials.

Thank you for the opportunity to respond to these questions on behalf of NACDL. 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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Testimony of Julie Stewart
President, Families Against Mandatory Minimums (FAMM)

Hearing on H.R. 2572, the Clean Up Government Act of 2011

Crime, Terrorism, and Homeland Security Subcommittee
House Judiciary Committee

July 26, 2011

Chairman Sensenbrenner, Ranking Member Scott, and members of the subcommittee, thank you for the opportunity to submit this statement on behalf of Families Against Mandatory Minimums (FAMM). FAMM is a national nonprofit, nonpartisan organization that supports fair and proportionate sentencing laws that allow judicial discretion while maintaining public safety.

Sentences should be individualized, fair, and proportionate while advancing the purposes of sentencing: deterrence, public safety, just punishment and rehabilitation. To determine whether sentencing policies meet these standards, we examine empirical evidence, historical sentencing data, analyses of outcomes and other relevant information. If a sentencing structure is not moored to this type of evidence and research, there is no basis to judge whether the sentences and sanctions provided for will achieve the purposes of sentencing.

We are concerned that the sentencing increases and directives contained in H.R. 2572 are not evidence-based. We note that the legislation:

- ***Doubles*** the maximum prison term, from 10 to 20 years, for theft or bribery involving federal programs;
- ***Doubles*** the maximum penalty, from 10 to 20 years, for Section 641 violations;
- ***Increases*** the maximum penalty for federal bribery from 15 to 20 years;
- ***More than doubles*** the maximum prison sentence for violations of the federal gratuity law, from two to five years;
- ***More than triples*** the maximum sentence, from three to ten years, for illegal solicitation of political contributions;
- ***Increases tenfold*** the maximum prison term, from one to ten years, for "promise of employment for political activity";
- ***Raises tenfold*** the maximum penalty for illegally depriving an individual employment because of political activity, from one to ten years;
- ***More than triples*** the maximum prison term, from three to ten years, for unlawfully intimidating an individual in order to secure a political contribution;

- ***More than triples*** the maximum sentence, from three to ten years, for coercing political activity by a federal employee.

Increasing the statutory maximums for these offenses alone would not necessarily result in higher sentences. That said, section 10 of the bill includes a directive to the U.S. Sentencing Commission to review its current guidelines for these offenses and amend them "to reflect the intent of Congress that such penalties be increased in comparison to those currently provided" by the guidelines.

Mr. Chairman, as you noted in your remarks on the House floor during last year's vote on the Fair Sentencing Act, the United States Sentencing Commission is the agency charged with collecting sentencing data, evaluating it and developing sentencing recommendations to Congress that reflect that research. Perhaps the most important lesson to be learned from the harsh crack penalties is that Congress must collect and analyze adequate empirical evidence before enacting new criminal penalties.

The Sentencing Commission was created by the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984. The sentencing guidelines established by the Commission are designed to:

(1) incorporate the purposes of sentencing (*i.e.*, just punishment, deterrence, incapacitation, and rehabilitation);

(2) provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct, while permitting sufficient judicial flexibility to take into account relevant aggravating and mitigating factors;

(3) reflect, to the extent practicable, advancement in the knowledge of human behavior as it relates to the criminal justice process.

The Commission is charged with the ongoing responsibilities of evaluating the effects of the sentencing guidelines on the criminal justice system, recommending to Congress appropriate modifications of substantive criminal law and sentencing procedures, and establishing a research and development program on sentencing issues.

Despite this charge, to the best of our knowledge Congress has not consulted the Commission's expertise or solicited their views on appropriate sentence lengths for public corruption offenses. It is unclear why these sentence-lengthening provisions are necessary given that the Sentencing Commission recently reviewed and increased sentences for all public corruption offenses. In 2004, the Commission studied the existing penalties and concluded that, "in general, public corruption offenses previously did not receive punishment commensurate with the gravity of such offenses." As a result, the Commission substantially increased penalties for all offenses involving bribery of illegal gratuities to public officials. A substantial enhancement was added for defendants who are elected public officials with a smaller enhancement for being any type of public official. According to a press release it issued at the time, the Commission said it expected that "the average sentence for a public official who takes a bribe will increase by more than 50 percent, with the prospect of a much greater increase." In fact, according to Sentencing Commission statistics, bribery sentences have increased through the advisory guideline era.

These across-the-board increases and specific offense characteristic enhancements were imposed on top of the enormous increases the Commission added before and after the Sarbanes-Oxley law was enacted for economic fraud cases generally. The result is a dangerous multiplier effect that puts sentences much higher than anyone seems to have contemplated. Months, if not years, can be added to a sentence based on the value of the bribe, the number of victims (which could be deemed all the residents of a state or electoral district), and the mere fact that the state representative is an elected official. These enhancements turn what should be inquiry into blameworthiness into a problem of arithmetic where certain factors tend to be double-counted. All of these changes were made in the last ten years.[1]

We appreciate the constitutional and historical role Congress plays in setting criminal penalties for federal crimes. However, we do not think Congress should hold itself to a lower standard than the Sentencing Commission when it comes to tying its penalties to empirical data. Congress has at least an equal obligation to conduct, or rely on the Commission to conduct, careful study before proposing new sentencing policies. We believe the American public deserves to know the empirical basis, if any, for Congress's decisions.

With regard to H.R. 2572, in particular, we think the public has a right to know the following in relation to each proposed sentence increase:

- Why was specific prison term – whether it is 5, 10 or 20 years – chosen for the specific offense? What factors did you consider and deem relevant?
- What is the average sentence currently imposed for the offense?
- What is the recidivism rate for individuals who commit the offense?
- What was the effect of the Sentencing Commission's 2004 amendments? Has the average sentence for public corruption offenses increased, decreased, or remained the same?
- Is there evidence to suggest that courts are failing to punish this crime appropriately?

Finally, at a time of extreme budget pressures, citizens want to know what they are getting for increases in our budgets. Before adding to the burden, Congress should take a note from the requirement of 18 U.S.C. sec. 4047 and enquire what the impact on prison bed spaces will be made by the proposed sentence increases. Given that the Bureau of Prisons is currently 37 percent over capacity and the cost of housing federal prisoners now exceeds $28,000 per prisoner per year, such an inquiry will help lawmakers assess whether this change is prudent.

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[1] FAMM has grown increasingly concerned that sentences for fraud offenses are no longer proportional to the severity of the offense or to individual culpability and circumstances. We recently put together a working group of former policymakers, legal experts and attorneys to promote four reforms to restore common sense to the fraud guideline. Those reforms are outlined in an op-ed written by FAMM Vice President and General Counsel Mary Price and James Felman, a partner at Kynes, Markman & Felman in Tampa, Fla., and serves as co-chair of the ABA Section of Criminal Justice Committee on Sentencing that can be found in an op-ed published in the July 26th *National Law Journal*. The article can be found online at: http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202504720046&Outofcontrol_fraud_guidelines.

FAMM recently joined The Heritage Foundation, Texas Public Policy Foundation, Washington Legal Foundation, and National Association of Criminal Defense Lawyers as sponsors of the "Criminal Checklist for Federal Legislators." After asking lawmakers to first determine whether an offense belongs under federal jurisdiction, the checklist asks lawmakers to consider what punishment is "appropriate." Unfortunately, since H.R. 2572 contains no factual findings and neither sponsor made a statement upon introduction of the bill, we are therefore unaware of any empirical evidence supporting the enormous proposed increases in prison sentences.

Mr. Chairman, H.R. 2572 does not exist in a vacuum. We imagine that the penalty increases here will be justified by some as necessary to keep up with penalties for other, similar crimes. If the bill is enacted, we can then expect future proposals to increase penalties for other crimes and note the penalties provided by this bill as a point of comparison. In this way, federal sentencing operates like a one-way ratchet, with sentences getting longer and longer even where no purpose of punishment is served by the increases.

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November 30, 2011

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20510

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

Dear Chairman Smith:

I write to extend the strong endorsement of the National Association of Assistant United States Attorneys of the Clean Up Government Act of 2011, H.R. 2572.

Our association represents the interests of the 5,500 Assistant United States Attorneys responsible for enforcement of the nation's laws and the pursuit of justice. Assistant United States Attorneys and their law enforcement partners every day are undertaking aggressive and sustained efforts to fight theft, bribery, extortion and other forms of public corruption at the local, state and federal level. Despite these efforts, prosecutors are stymied by gaps in the federal corruption statutes, brought about in part by recent court interpretations. The Clean Up Government Act will restore the tools and authority available to prosecutors and law enforcement authorities to more fully pursue public corruption offenses.

Protecting the integrity of our government institutions is one of the highest priorities of the Department of Justice. Americans are entitled to know that their elected public servants are making their official decisions based upon the best interests of the public at large.

We urge the Judiciary Committee to approve the Clean Up Government Act. Thank you for your leadership in assuring the prompt passage of this legislation.

Sincerely,

Steven H. Cook
President

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