

February 26, 2009

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Public Corruption Prosecution Improvements Act

Dear Chairman Leahy and Ranking Member Specter:

We are writing to express our concern about several provisions of S. 49, the Public Corruption Prosecution Improvements Act (the Act), on the agenda for today's Judiciary Committee Executive Business Meeting. The National Association of Criminal Defense Lawyers and the Heritage Foundation are on opposite ends of the liberal-to-conservative spectrum. As such, we often disagree on a wide range of legal issues, but we concur in our analysis of this Act. While we agree that public corruption can erode the trust that the American people have in those serving the public, almost all of the provisions of this Act are redundant and unnecessary, and many of the provisions are significantly vague and risk overreaching.

Among the over 4,450 criminal offenses already in federal law, Congress has already enacted all of the tools prosecutors need (and far more) to prosecute any conduct that constitutes public corruption. The mail and wire fraud statutes that this Act seeks to amend, 18 U.S.C. §§ 1341 and 1343, read in conjunction with what is commonly referred to as the honest services fraud statute, 18 U.S.C. § 1346, are already able to address any conduct that arguably constitutes public corruption. Just a glance at the recent news stories regarding criminal investigations and prosecutions of public officials confirms that fact.

The federal courts' expansive reading of the mail fraud statute "has made it possible for the federal government to attack a remarkable range of criminal activity even though some of the underlying wrongdoing does not rest comfortably within traditional notions of fraud."¹ Leading commentators agree that "scheme to defraud," the key phrase of the mail fraud and wire fraud statutes, "has long served . . . as a charter of authority for courts to decide, retroactively, what forms of unfair or questionable conduct in commercial, public, and even private life, should be deemed criminal."²

¹ Julie O'Sullivan, *FEDERAL WHITE COLLAR CRIME: CASE AND MATERIALS* 483 (2d ed. 2003).

² John C. Coffee, Jr. & Charles K. Whitehead, *The Federalization of Fraud: Mail and Wire Fraud Statutes*, in 1 Otto G. Obermaier & Robert G. Morvillo, *WHITE COLLAR CRIME, Business and regulatory offense* § 9.01 (2002).

Further, “this phrase has provided more expansive interpretations from prosecutors and judges than probably any other phrase in the federal criminal law.”³

The reach of these statutes is surpassed only by the lengthy sentences they provide. Mail and wire fraud violations already carry a maximum penalty of 20 years imprisonment. In addition, they are predicate offenses under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961(1), and the federal money laundering statute, 18 U.S.C. § 1956(c)(7)(A), both of which authorize sentences of up to 20 years imprisonment. Any RICO sentence is in addition to the sentence imposed for the predicate offense itself. By comparison, the maximum federal penalty for attempted murder is 20 years and the maximum for voluntary manslaughter is 15 years.⁴

Even if it were to be discovered that some specific and egregious conduct related to public corruption is beyond the express reach of the mail and wire fraud statutes, it is likely to be covered by several other federal statutes. Just to name a few, federal prosecutors frequently bring criminal charges for bribery of public officials and illegal gratuities, as well as violations of the Hobbs Act.⁵ According to the FBI, “Numerous federal statutes are utilized in public corruption investigations including bribery, gratuities and ‘kickbacks;’ extortion; obstruction of justice; conflicts of interest; fraud and theft; drug trafficking; money laundering; racketeering crimes (RICO); tax crimes; election and campaign finance crimes; and conspiracy.”⁶

In addition, every law enforcement official knows that criminal conduct generally does not need to go unpunished even if no federal statute reaches it. If conduct is beyond the jurisdiction of federal prosecutors, as unlikely as that is under current laws, it can almost always be prosecuted on the state and local level. Indeed, where the allegedly corrupt conduct directly affects constituents of a state or local public official who committed the conduct, the case is strong for state and local investigation and prosecution.

Aside from expanding several federal criminal statutes, the Act unnecessarily increases the permissible venues for public corruption prosecutions, significantly raises the already high maximum terms of imprisonment for public corruption offenses, and undermines reasoned determinations of the United States Sentencing Commission arbitrarily and without sufficient factual foundation.

³ *Id.*

⁴ 18 U.S.C. §§ 1112 (manslaughter), 1113 (attempted murder).

⁵ 18 U.S.C. §§ 201(b) (bribery), 201(c) (illegal gratuities), 1951 (Hobbs Act).

⁶ Federal Bureau of Investigation, Denver Division, *Public Corruption Program*, available at http://denver.fbi.gov/public_corruption_brochure_dn.htm (last visited Feb. 24, 2009).

Section-by-Section Analysis

Section 3 – Application of Mail and Wire Fraud Statutes to Licenses and Other Intangible Rights

This section unnecessarily expands the conduct prohibited by Title 18, Sections 1341 (mail fraud) and 1343 (wire fraud), to include fraud for the purposes of obtaining “any other thing of value.” Although the current law is limited to “money or property,” under 18 U.S.C. § 1346, the definition of property already includes the “intangible right of honest services.” In fact, when Congress initially passed § 1346, it rejected attempts to expand § 1346 to include all intangible rights⁷ and all public corruption offenses.⁸ This Act makes that same attempt and should be rejected yet again.

Neither the current law, nor the amended law, define “money,” “property,” “intangible right of honest services,” or “any other thing of value.” This lack of definition has resulted in broad and often “creative” judicial and prosecutorial application of these statutes, often to conduct never before considered criminal. Former Attorney General Dick Thornburgh recently testified that prosecutors are already using the broad scope of the current mail and wire fraud statutes to “transform[] common every day events in the public workplace into federal felonies.”⁹ As to the scope of conduct that may be charged criminal, Thornburgh explains that “there is *nothing* done in a state official’s office unrelated to the official function of office which is not capable of being treated as a federal felony, with the power to prosecute for such alleged infractions placed in the discretion of the political party in power.”¹⁰

Section 3 is a blatant attempt to expand the vast breadth of the conduct criminalized by the mail and wire fraud statutes even further. This expansion is unnecessary and, if the issue is properly addressed by the Supreme Court, the expansion should be struck down for its unconstitutional vagueness and overbreadth.

The following concerns further explain why Section 3 should be rejected.

First, it effects a blatant over-federalization of crime and an intrusion upon an area adequately regulated by state law.¹¹ This expansion will jettison the large body of case law that has balanced the competing

⁷ See H.R. 3089, 100th Cong. § 2 (1987), introduced 133 Cong. Rec. 22313 (1987); S. 1898, 100th Cong. § 2, introduced 133 Cong. Rec. 33253 (1987).

⁸ See H.R. 3050, 100th Cong. § 2 (Rep. Mfume), introduced 133 Cong. Rec. 21469 (1987).

⁹ *Allegations of Selective Prosecution: The Erosion of Public Confidence in Our Federal Judicial System*, Hearing Before the Subcomms. on Crime, Terrorism, and Homeland Security and Commercial and Admin. Law of the H. Comm. on the Judiciary, 110th Cong. 3 (2007) (statement of Dick Thornburgh, Counsel, Kirkpatrick & Lockhart Preston Gates Ellis LLP, and former Attorney General of the United States).

¹⁰ *Id.* (emphasis in original).

¹¹ See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 502 (1985) (Marshall, J., joined by Brennan, Blackman & Powell, JJ., dissenting) (quoting *United States v. Weiss*, 752 F.2d 777, 791 (2d Cir. 1985) (Newman, J., dissenting in part) (criticizing the “extraordinary expansion of the mail and wire fraud statutes to permit federal prosecution for conduct that some had thought was only subject to state criminal and civil law”); see also *United States v. Lopez*,

federal and state interests by identifying what is and is not “money or property.” Under Section 3, every license issued by every state and municipality and every action by any state or municipal official would be grounds for a federal felony conviction.

Second, Justice Scalia recently wrote that, as currently written, honest services fraud “has been invoked to impose criminal penalties upon a staggeringly broad swath of behavior, including misconduct not only by public officials and employees but also by private employees and corporate fiduciaries.”¹² For example, courts have upheld convictions of a local housing official who failed to disclose a conflict of interest, students who schemed with their professors to turn in plagiarized work, and city employees who engaged in political-patronage hiring for local civil-service jobs.

The proposed amendment will stretch the definition of mail and wire fraud beyond any recognizable boundary. The Supreme Court has recognized that there is no reason to empower federal prosecutors to bring charges whenever someone allegedly makes a false statement in an application for a state or municipal license or permit.¹³ Hundreds of occupations and professions are regulated by state licensing laws, and countless other activities, including driving a car, hunting, fishing, and building a home, require one or more licenses, permits, or other forms of governmental approval. Because the submission, evaluation, or issuance of a license application almost always involves the United States mail, Section 3 will make all of that conduct subject to criminal liability for federal mail or wire fraud. Federal criminal law should not be concerned with the answers some John Smith writes on his local fishing license application.

Third, mail and wire fraud are predicate offenses under 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 expansion in the conduct criminalized by the mail and wire fraud statutes could dramatically extend criminal liability to a new group of Americans without adequate justification.

Section 4 – Venue for Federal Offenses

Section 4 unnecessarily expands the permissible venues for mail fraud prosecutions in a manner that creates obvious potential for abuse. Expansion is unwarranted because the mail fraud statutes already provide for prosecution in any district “touched” by the fraudulent mailing and, under current law, federal prosecutors rarely have trouble finding an appropriate venue. Of the 31,866 cases federal prosecutors declined to pursue in 2004, only 289 – or less than 1% – were dropped because of problems with jurisdiction or venue.¹⁴

514 U.S. 549, 561 n.3 (1995) (“When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction.”)

¹² *Sorich, et al. v. United States*, 555 U.S. ___, No. 08-410 (2009) (denial of certiorari) (Scalia, J., dissenting).

¹³ *United States v. Cleveland*, 531 U.S. 12 (2000).

¹⁴ See Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2004*, p. 34 (Dec. 2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0402.pdf>. (The compendium for 2004 is the most recent BJS publication.).

Furthermore, the Supreme Court has recognized that tampering with venue is tampering with core principles of the criminal justice system. “Plainly enough,” the Court has stated, “such 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.”¹⁵

Section 5 – Theft or Bribery Concerning Programs Receiving Federal Financial Assistance

Section 5 changes the definition of a bribe from “anything of value” to “any thing or things of value” and lowers the amount triggering the offense from \$5,000 to \$1,000. Read together, these amendments effectively expand criminal liability to every item a public official receives – whether solicited or not – including individual de minimus gifts received over long periods of time and whose value may be totaled to reach the \$1,000 threshold to impose criminal punishment.

Section 12 – Clarification of Crime of Illegal Gratuities

Section 12 significantly expands Section 201(c)(1), the “illegal gratuity statute,” from gifts given “for or because of any official act,” to include gifts given merely “because of” the recipient’s public office. This expansion seeks to overrule the Supreme Court’s unanimous holding in *United States v. Sun-Diamond Growers of California*¹⁶ by imposing liability based solely on an official’s status.

Such broad liability is both impractical and imprudent. In *Sun-Diamond*, the court explained that the Government’s proposed reading of these statutes would produce “peculiar results,” including the criminalization of gifts of 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 lunch provided to the Secretary of Agriculture by a group of farmers in conjunction with a speech on USDA policy.¹⁷

This sweeping expansion will cover any gift, given at any time, to any government official, in any situation, simply because of the official’s position. Such criminal liability is an invitation for prosecutorial abuse and completely removed from the statute’s intent. In addition, the revised statute will almost certainly invite well-founded challenges based on its unconstitutional overbreadth because it reaches protected and legal activity.

Section 13 – Clarification of Definition of Official Act

Section 13 unnecessarily expands the definition of “official act,” for the purposes of the bribery and improper gratuities statutes, to include “any action within the range of official duty.” This expansion is

¹⁵ *United States v. Johnson*, 323 U.S. 273, 275-76 (1944).

¹⁶ 526 U.S. 398 (1999).

¹⁷ *Id.*, 526 U.S. at 406-07.

problematic because courts have already given “official act” a broad definition.¹⁸ This amendment would invite government prosecutors to bring charges under expansive theories of criminal liability that would swallow up legitimate conduct and constitutionally protected activity.

Section 13 perverts the purpose of this statute by criminalizing conduct that is purely innocent and/or currently legal, rather than targeting official acts that pose a real danger of corrupting government, such as introducing or voting on legislation and holding committee hearings. The absence of any limit on criminal liability, as proposed by Section 13, will subject the statute to well-founded challenges for its being unconstitutionally vague and overbroad.

Section 15 – Expanding Venue for Perjury and Obstruction of Justice Proceedings

Section 15 creates a new statute, 18 U.S.C. § 1624, that inappropriately establishes venue regardless of the locus of the criminal conduct. As a practical matter, however, this statute is unnecessary because alleged perjurious statements are usually made in the locus of the other substantive offenses being investigated or tried.

In addition, as with the expansion of venues proposed by Section 4 of the Act, the additional venues proposed in Section 15 raise the likelihood of prejudicial forum-shopping by prosecutors, to the detriment of defendants’ constitutional rights.

Section 17 – Amendment of the Sentencing Guidelines Relating to Certain Crimes

Section 17(a) states that the Commission “shall review and amend its guidelines and its policy statements ... in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by the guidelines and policy statements.” Congress has failed to conduct adequate fact finding to support this conclusion. There is simply no evidence that the current guidelines fail to provide adequate sentences for public corruption offenses or fail to meet the statutory mandate of providing sentences sufficient, but not greater than necessary, to meet all legitimate sentencing objectives. In fact, with regard to the bribery guideline, it is already disproportionately high, when compared to other economic crimes, because it considers not just loss, but the amount of the bribe and

¹⁸ See, e.g., *Valdes v. United States*, 475 F.3d 1319, 1322-23 (D.C. Cir. 2007) (defining official act as any act “established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery”) (quoting *United States v. Birdsall*, 233 U.S. 223, 231 (1914)). However, the same courts have limited the definition by stating that not “every action within the range of official duties automatically satisfies § 201’s definition; it merely made clear the coverage of activities performed as a matter of custom.” *Id.* (quoting *Birdsall*, 233 U.S. at 233)). But see *United States v. Moore*, 525 F.3d 1033, 1041 (11th Cir. 2008) (holding that *Birdsall* is official precedent and was too narrowly construed by *Valdes*); see *United States v. Pommerening*, 500 F.2d 92, 97 (10th Cir. 1974), *certiorari denied*, 419 U.S. 1088, *reh’g denied*, 420 U.S. 939 (“The words ‘corruptly’, ‘value’, and ‘influence’ are applied in their ordinary, everyday sense Clearly a person of common intelligence would understand from reading § 201(b) that giving compensation to a government official in exchange for preferential treatment is not allowed.”).

the gain to the defendants. Recent case law has also inflated these amounts by including theoretical loss or gain, whether or not realized, and benefits received by other more culpable defendants or unindicted co-conspirators.

Sentencing Provisions – Analysis of Sections 5, 6, 7, and 8 with Regard to Sentencing

Sections 5 through 8 of the Act significantly extend the potential maximum terms of imprisonment for several public corruption offenses. In addition to the facial impact of these provisions (i.e., permitting longer sentences for convictions), dramatically increasing the potential penalty provides prosecutors with a troubling degree of leverage when seeking a plea.

Increasing the penalty from one (1) year to ten (10) years for an offense, as certain sections of the Act would do, will have the predictable effect of compelling more defendants, including perhaps some with strong defenses who are nonetheless unwilling to risk a ten-year sentence, to enter guilty pleas. Moreover, these offenses – many of which have low *mens rea* requirements – are transformed by the Act from misdemeanors to severe felonies with serious ramifications under the Federal Sentencing Guidelines (i.e., defendants who were previously eligible for alternative or mixed sentences would no longer be, although many are first-time, non-violent offenders).

Conclusion

We commend the Committee’s interest in ensuring honesty in government and maintaining the public trust. To that end, we agree that criminal enforcement and punishment – when based on offenses crafted to reach specific wrongful conduct and sentences that are proportional to the wrongfulness of the conduct – plays a role. The fact remains, however, that investigators and prosecutors at all levels of government are sufficiently armed with the tools necessary to investigate and prosecute truly wrongful conduct by public officials at all levels of government.

Respectfully,

Kyle O’Dowd
Associate Executive Director for Policy
National Association of
Criminal Defense Lawyers

Brian W. Walsh
Senior Legal Research Fellow
Center for Legal and Judicial Studies
The Heritage Foundation