



July 27, 2011

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

The Honorable Charles Grassley
Ranking Republican
Committee on the Judiciary
224 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I am writing to share our serious concerns with S. 401, the Public Corruption Prosecution Improvements Act and S. 995, the "Public Officials Accountability Act." 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 understand that you currently plan to markup S. 401 in your executive committee session tomorrow. I hope you have the opportunity to consider our concerns, each of which were echoed by multiple Members of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security during yesterday's hearing on H.R. 2572, the "Clean Up Government Act of 2011," which is the House companion bill to S. 401 and S. 995. In fact, at the conclusion of yesterday's Hearing, the Honorable F. James Sensenbrenner stated: "[I] would make the observation that I am the author of this bill, with Mr. Quigley of Illinois 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'm afraid that the testimony on the part of all three of our witnesses today indicates that there isn't any agreement on what is a violation and what isn't This bill needs quite a bit of work"**¹

As you meet to discuss S. 401 (and potentially S. 995), we hope that you will carefully consider the following:

- Section 3 of S. 401 would expand the conduct covered by federal mail and wire fraud laws to cover false statements made in obtaining any license issued by states and municipalities. **Any misrepresentation on a Minnesota marriage license, or a Texas fishing license, or a license to sell a hotdog in New York would suddenly serve as a basis for a federal prosecution.** In

¹ H.R. 2572, "The Clean Up Government Act of 2011": *Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. (2011), available at: http://judiciary.house.gov/hearings/hear_07262011.html [at 1:20:29 et. seq.].

Cleveland v. United States,² every member of the Supreme Court rejected such an attempted application of the mail fraud statute concluding that it would dramatically and improperly intrude on areas properly regulated by state and local law. Moreover, this legislative attempt to overrule *Cleveland* has nothing to do with either public corruption or “cleaning up” government.

- **Section 12 of S. 401 would expand the gratuities law to criminalize the giving of any gift to any public official, at any time, in any situation where that gift was given as a result of that public official just being a public official.** In *United States v. Sun-Diamond*,³ a unanimous Supreme Court rejected this overly broad interpretation and limited criminal prosecution to those individuals who had given or received gifts based on actions the public official had taken. As every member of the Supreme Court noted, this limitation properly prevents and punishes illegal gratuities, but avoids **potentially criminalizing many kinds of legitimate gifts that are given to public officials as a result of their positions, such as replica jerseys given to the President by championship sports teams.**
- **The numerous sentencing increases and directives contained in S. 401 are not evidence-based, despite the fact that the legislation would in some cases triple, or even increase by tenfold what are already lengthy maximum prison sentences.** See Sections 5, 6, 7, 8 and 16. The bill includes a directive to the U.S. Sentencing Commission to review and amend current Guidelines for multiple offenses, despite the fact that the Commission recently substantially increased penalties for certain public corruption offenses. **There has been no fact-finding and no evidence exists that the current lengthy statutory maximum sentences and Guidelines fail to provide adequate punishment and deterrence. Instead, such dramatic increases in already lengthy sentences for non-violent offenders will burden taxpayers with no benefit to the public.**
- S. 995, the “Public Officials Accountability Act,” would create a federal crime on the basis of “undisclosed self-dealing” by a public official similar to that proposed in Sec. 16 of H.R. 2572. Portions of yesterday’s hearing were devoted to the constitutional infirmities relating to such a provision, including a discussion of the kinds of conduct that might be unintentionally criminalized by the current draft language. This provision would overrule the Supreme Court’s decision in *United States v. Skilling* in which every member of the Court agreed that a **broad and expansive “undisclosed self-dealing” theory was unconstitutionally vague.** In fact, the Supreme Court identified a host of questions that such a theory would need to answer in order to pass constitutional muster.⁴ And yet, S. 995 leaves many of the same questions unanswered. Specifically, **S. 995 fails to define the significance of the conflicting financial interest; 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 anti-corruption laws, yet this bill would allow the federal government

² *Cleveland v. United States*, 531 U.S. 12 (2000).

³ *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999).

⁴ *Skilling v. United States*, 130 S.Ct. 2896, 2933 n. 44.

to override the criminal, civil and administrative laws that locals have adopted to address the conduct of their own officials.

Every Member of the House Subcommittee on Crime who took the opportunity to address the witnesses at yesterday's hearing for H.R. 2572, the "Clean Up Government Act" (whose provisions are very similar to those set forth in S. 401 and S. 995) shared one or more of these concerns and the consensus among both Democrats and Republicans was that the bill needed additional work before it could go further in the legislative process. We urge you to also consider the dramatic and negative consequences that some of the provisions in these bills would have before taking further action on S. 401 or S. 995.

In addition to the concerns discussed at yesterday's hearings, NACDL has other concerns about these bills, including, but not limited to the proposed expansion of the definition of "official act" in Sec. 13 of S. 401 that could criminalize non-corrupt acts,⁵ as well as the lowering of the monetary threshold that would trigger application of 18 U.S.C. § 666 in Sec. 5 of S. 401—disturbing a threshold set by the initial drafters of that law in order to limit an "unwarranted expansion of Federal jurisdiction into areas of little Federal interest"⁶

NACDL is concerned because many provisions of S. 401 and S. 995 reflect a disturbing trend that NACDL, 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 laws without regard to the plethora of existing federal laws. These new laws often usurp areas that have been competently handled by state and local jurisdictions, ignore legal safeguards such as criminal intent requirements that limit the criminal law to specific cases of criminal wrong-doing, and incrementally toughen the penalties without regard for cost or even any sense of proportionality.

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

⁵ 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 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").

⁶ "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)).

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.

Public corruption is an insidious crime that undermines the public's faith in those who we trust to serve us. But 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 statutes⁷ that are currently very effectively used by prosecutors to curtail suspected public corruption and fraud. These statutes already impose stern punishments against those found guilty of these corruption offenses. S. 401 and S. 995 contain 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 effect on curtailing public corruption.

⁷ **As this non-exhaustive list shows, a host of criminal statutes** (with maximum statutory sentences) **already address federal, state and local public corruption:** 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); 18 U.S.C. § 666, Theft or bribery concerning programs receiving Federal funds (10 years); 18 U.S.C. § 1341, Mail Fraud (20 years); 18 U.S.C. § 1343, Wire Fraud (20 years); 18 U.S.C. § 1346, Honest Services 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); 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); 41 U.S.C. §§ 53 and 54 (10 years); 26 U.S.C. § 7214(a)(9), Offenses by officers and employees of the United States (5 years); 2 U.S.C. § 1606(b) (disclosure of lobbying activities (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 (5 years); 15 U.S.C. §§ 78dd-1, *et seq.* ("The Foreign Corrupt Practices Act") (5 years). In addition, 5 U.S.C. § 7353 prohibits 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 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; and Rule XXVI of the Rules of the House of Representatives governs financial disclosure requirements for Members of Congress.

Thank you for your consideration, and please do not hesitate to contact me if you have any questions or want additional information.

Sincerely,

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