Section-by-Section Analysis of Clean Up Government Act of 2011 (H.R. 1793)

Introduced by Rep. James F. Sensenbrenner (R-WI)
Co-Sponsored by Rep. Anthony D. Weiner (D-NY)

Section 2 – Application of Mail and Wire Fraud Statutes to Licenses and Other Intangible Rights.

What It Does

This section expands 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." Neither the current law nor the amended law defines "money," "property," or "any other thing of value." As noted in the title of this section, this amendment will expand these statutes to cover licenses issued by states and municipalities, amongst other actions and conduct. These were the very items the Supreme Court construed the statute as not applying to in *Cleveland v. United States*, 531 U.S. 12 (2000).

What's Wrong With That?

This section is an example of both overcriminalization and overfederalization. In its *Cleveland* decision, Justice Ginsburg's unanimous opinion for the Court observed that construing the mail and wire fraud statutes 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 enacted, this section will 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 fraud and wire fraud statutes could result in the extension of these dramatic sentences to additional individuals, which was precisely what the government unsuccessfully had sought to do in the *Cleveland* case.

Section 3 – Venue for Federal Offenses.

What It Does

This section 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."

What's Wrong With That?

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.

Section 4 – Theft or Bribery Concerning Programs Receiving Federal Financial Assistance.
Section 5 – Penalty for Section 641 Violations.
Section 6 – Bribery and Graft.

What They Do

These sections increase the maximum term of imprisonment for certain offenses. Section 4 increases 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 increases 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[1](b) and (c) from fifteen to twenty years and from two to five years, respectively.

What's Wrong With That?

There is simply no evidence that the current ten and fifteen year statutory maximum sentences for these particular offenses fail to provide adequate punishment and deterrence. In addition, empirical research has shown that "increases in severity of punishments do not yield significant (if any) marginal deterrent effect." Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28 (2006). 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

[1] 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 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.

taxpayer. In light of the extraordinary cost of imprisonment, and lacking any evidence that an increase is even necessary, this change cannot be justified.

Section 7 – Addition of District of Columbia to Theft of Public Money Offense.[2]

Section 8 – Clarification of Crime of Illegal Gratuities.

What It Does

This section amends 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. Neither the current law nor the proposed amendment defines "anything of value." The proposed law does not provide an exception for *de minimis* items nor does it exempt honors traditionally bestowed on officials, or even campaign contributions.[3]

This section is in response to the holding in *U.S. v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999). In *Sun-Diamond*, the 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.[4]

What's Wrong With That?

If enacted, this section would impose liability based solely on an official's status. As the Supreme Court noted in *Sun-Diamond*, this would result in 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.[5] In short, the proposed amendment would 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.

[2] This section expands 18 U.S.C. § 641 to prohibit embezzlement or theft (or similar acts) of money, property, or records of the District of Columbia. Currently this section only applies if the conduct involves federal money, property, or records. This section would add a new federal crime to a district whose residents have no vote in Congress.

[3] On its face, the language of this section would criminalize otherwise legal and legitimate campaign contributions, which would be unconstitutional. Also of note, in *McCormick v. United States*, the Supreme Court limited the prosecution of corruption offenses involving campaign contributions to those with an explicit *quid pro quo*.

[4] *Id.* at 414.

[5] *Id.* at 406-07.

Section 9 – Clarification of Definition of "Official Act."

What It Does

This section 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 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 would specifically state that the act "may be a single act, more than one act, or a course of conduct" and "includes a decision or recommendation that a government should not take action."

What's Wrong With That?

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, including the giving of campaign contributions. This section would also make explicit that a violation of § 201 may be based on a continuing course of conduct and not just on a single act.

Section 10 – Amendment of the Sentencing Guidelines Relating to Certain Crimes.

What It Does

This section directs the U.S. Sentencing Commission ("USSC") to review and amend its 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).

What's Wrong With That?

This section directly calls for increased penalties. Congress, however, has failed to conduct adequate fact-finding to support its conclusion that penalties under the USSC's Guidelines and policy statements should be increased. 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 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 undercuts the purpose and independent authority of the USSC. For these reasons, and for the reasons stated in Sections 4-6 and 12, this mandatory directive is inappropriate and cannot be justified.

Section 11 – Extension of Statute of Limitations for Serious Public Corruption Offenses.

What It Does

Public corruption offenses are currently under the default statute of limitations of five years, as codified at 18 U.S.C. § 3282. If enacted, this section would set the statute of limitations at ten 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).

What's Wrong With That?

The purpose of this provision is unclear, as it is hard to imagine any rational reason that public corruption cases differ so greatly from other serious criminal offenses as to require a statute of limitations that is twice as long. The damage from such a change, however, is clear. A lingering threat of criminal prosecution does great harm to individual lives and reputations even if 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 for an additional five years serves no identifiable purpose; certainly there has been no showing that such a time period is insufficient 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 remain in criminal jeopardy for ten years and thus possess a constitutional right not to testify until the expiration of this ten-year period. As a practical matter, this means that such witnesses will be unavailable to the defense at trial, but fully available to the prosecution through the exercise of its immunity powers. Such disparities in the availability of witnesses for a ten year period threaten to prevent 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.

Section 12 – Increase of Maximum Penalties for Certain Public Corruption Related Offenses.

What It Does

This section dramatically increases the statutory maximum term of imprisonment for several offenses. Specifically, it 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, it 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).

What's Wrong With That?

There is simply no evidence that the current ten and fifteen year statutory maximum sentences for these particular offenses fail to provide adequate punishment and deterrence. In addition, empirical research has shown that "increases in severity of punishments do not yield significant (if any) marginal deterrent effect." Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28 (2006). 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 that an increase is even necessary, this change cannot be justified.

Section 13 – Additional RICO Predicates.

What It Does

This section adds three sections of Title 18 as predicates to a prosecution under the RICO Act. These sections are: § 641 (embezzlement or theft of Federal money, property, or records), § 666 (theft or bribery related to programs receiving Federal funds), and § 1031 (major fraud against the United States).

What's Wrong With That?

RICO Act prosecutions authorize statutory sentences of up to 20 years imprisonment on top of the underlying offense.

Section 14 – Additional Wiretap Predicates.[6]

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

What It Does

This section 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

[6] This section adds three sections of Title 18 as predicates for a permissible wiretap. These sections are: § 641 (embezzlement or theft of Federal money, property, or records), § 666 (theft or bribery related to programs receiving Federal funds), and § 1031 (major fraud against the United States).

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."

What's Wrong With That?

The expansion of venue embodied by this section is the type of venue tampering that the U.S. Supreme Court has cautioned against. 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.

Section 16 – Prohibition on Undisclosed Self-Dealing By Public Officials.

What It Does

This section is virtually identical to, and has the same effect as, the Honest Services Restoration Act, H. R. 1468 (pending), and H.R. 6391 (past – 111th Congress), introduced by Rep. Anthony Weiner (D-NY). This section is a direct response to the U.S. Supreme Court's recent decision in *Skilling* limiting the honest services fraud statute (18 U.S.C. § 1346).[7] 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" (broadly defined) 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 performs an official act for the purpose, in whole or in part, of benefitting or furthering 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,

[7] *Skilling v. United States*, 130 S.Ct. 2896 (2010).

or a business or organization he is negotiating for or has any arrangement concerning prospective employment or compensation, **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]."

What's Wrong With That?

In its *Skilling* decision, every member of the Court made clear the problematic nature of this undisclosed conflict of interest theory of criminal liability. 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 briefing—a proposal that closely resembles Section 16. As the Court explained, the government's "formulation leaves many questions unanswered."[8] And yet, a comparison of the questions posed by the Court in its *Skilling* decision with the language proposed in Section 16 suggests 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 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?").[9] 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, and it is highly doubtful that this statute could overcome the serious due process concerns identified by the Court in *Skilling*.

The constitutional concerns are not the only problems with Section 16; the proposed law also is another classic example of overcriminalization, overlapping with the many 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 laws 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.

Section 16 merely duplicates these already-existing prohibitions,[10] which already carry extensive penalties. It is hard to identify any conduct that could not be reached by those laws that would be

[8] *Skilling*, 130 S.Ct. 2896, 2933 n. 44.
[9] *See id.*
[10] For more information regarding the already-existing prohibitions against corrupt conduct by public officials, including a specific list of such provisions, please visit: http://www.nacdl.org/public.nsf/WhiteCollar/Letters_and_

reached by the current one, except for innocuous conduct (like phoning in sick in order to see a ball game but not get docked a salary) that everyone agrees should not be criminal at all. A new honest services statute is likewise unnecessary in the state and local context. Many have argued that the primary purpose of the 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 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 laws that state and local governments adopted to address the misconduct of their own officials.

Section 17 – Disclosure of Information in Complaints Against Judges.[11]

Section 18 – Clarification of Exemption in Certain Bribery Offenses.[12]

Section 19 – Certifications Regarding Appeals By United States.[13]

Testimony/$FILE/TimO%27TooleStatement-092810.pdf.

[11] This section adds another exception to the prohibition of disclosure of information in 28 U.S.C. § 360. Generally, § 360 requires that "all papers, documents, and records of proceedings related to investigations conducted under [chapter 16 of Title 28] shall be confidential and shall not be disclosed by any person in any proceeding." Chapter 16 deals with complaints against judges and judicial discipline. Currently § 360 includes three exceptions to this rule of confidentiality. This section would add an exception where "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."

[12] This section amends 18 U.S.C. § 666(c), which sets forth an exception to the offenses in 18 U.S.C. § 666 (theft or bribery related to programs receiving Federal funds) for bona fide monies paid or reimbursed in the usual course of business. Section 666 includes three separate offenses codified at subsections (a)(1)(A), (a)(1)(B), and (a)(2). The current text sets forth a blanket exception for § 666 in its entirety. The proposed amendment clarifies that the exception only applies to subsections (a)(1)(B) and (a)(2) of § 666, both of which deal with bribery. This leaves out the offense at subsection (a)(1)(A), which prohibits the embezzlement or theft (or similar acts) of property valued at $5,000 belonging to or in the custody of the federal government.

On its face, the current exception generally should not apply to conduct violating subsection (a)(1)(A) because money could not be bona fide if it is taken by theft or embezzlement (or similar acts). However, the current exception does not make that explicitly clear or state that directly. The proposed amendment would make it clear that this exception does not apply to that subsection and only to bribery. While the amended text is drafted in an awkward manner, this appears to be the intent.

[13] This section amends 18 U.S.C. § 3731 to expressly permit Assistant Attorneys General, the Deputy Attorney General, or the Attorney General to certify interlocutory appeals from District Court orders suppressing or excluding evidence. Currently this can only be done by a U.S. Attorney, creating a vacuum for such certification in cases that are handled by the Department of Justice directly. The language of this section is identical to the language in Section 4 of the Leahy-Grassley fraud bill, S. 890. NACDL has no objection to this provision.