



November 30, 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: Markup of H.R. 2572, the "Clean Up Government Act of 2011"

Dear Chairman Smith:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I am writing to share our continued serious concerns with H.R. 2572, the "Clean Up Government Act," notwithstanding the Manager's Amendment that has been offered in good faith to address concerns that have been previously raised about the bill.

I understand that you currently plan to markup H.R. 2572 in your Committee meeting 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 its hearing on July 26, 2011.¹ In fact, at the conclusion of the hearing, the Honorable F. James Sensenbrenner stated: "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"²

The Manager's Amendment does, in fact, help ameliorate some of the concerns that have been raised by numerous individuals and organizations regarding this bill.³ Unfortunately, it does not extinguish our

¹ Please see Written Statement of NACDL Board Member Timothy P. O'Toole Before the House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security on H.R. 2572 (attached).

² 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.].

³ Notably, the Manager's Amendment no longer seeks to expand the existing federal mail and wire fraud laws to cover false statements made in obtaining licenses issued by states and municipalities, which would have meant, for example, that any misrepresentation on a Texas fishing license could have served as a basis for a federal prosecution.

fundamental fairness and due process concerns. As you meet to discuss H.R. 2572, we ask you to carefully consider the following:

- Section 15 of the Manager’s Amendment (originally § 16) would create a federal crime on the basis of “undisclosed self-dealing” by a public official. Significant portions of the hearing on this bill were devoted to the constitutional infirmities relating to such a provision, including a discussion of the “innocent” kinds of conduct that might be unintentionally criminalized by the current draft language. All of those concerns, unfortunately, remain.

This provision would overrule the Supreme Court’s decision in *United States v. Skilling*, in which **every member of the Court agreed that DOJ’s broad and expansive “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.⁴ And yet, H.R. 2572 leaves many of the same questions unanswered and the Manager’s Amendment has offered no changes to address any of these failings. **Specifically, the bill still 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.** As the concerns raised by the Members themselves during the hearing revealed, leaving these questions unanswered is unimaginable.

In addition, state and local jurisdictions often have their own extensive anti-corruption laws, yet this bill would allow the federal government to completely override any criminal, civil or administrative laws that local jurisdictions have adopted to address the conduct of their own officials. Instead, this bill proposes overriding those laws with a federal criminal law that would subject state and local officials to up to twenty years in jail for a non-disclosure that might not have been deemed criminal under their own laws.

- **Section 7 of the Manager’s Amendment (originally § 8) would expand the gratuities law to criminalize the giving of anything with a value of over \$1,000 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*,⁵ 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 (not just because of the public official’s status as a public official). 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 a Representative by a championship sports teams (which could be valued over \$1,000).

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

⁵ *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999).

The Manager's Amendment does attempt to ameliorate some of the potential harm that could be caused by their proposed expansion of the gratuities law by exempting two categories of items: things of value less than \$1,000 and items that are expressly allowed by federal rules and regulations.⁶ Each of these exemptions are helpful in that they do impose some limit on what could otherwise be a law with limitless application; however, NACDL is concerned about this open-ended approach to criminal law-making.

In essence, this law would *de facto* criminalize all things of value given to public officials over \$1,000 unless there is an exemption. In order to provide appropriate notice about what our criminal law prohibits, criminal laws should be written in a precise manner that defines exactly the behavior that is to be prohibited—not written in an overly expansive manner that criminalizes everything first and leaves the details to be sorted out later. This is especially dangerous where the “exemptions” are to be found in bodies of law separate from the criminal code—the rules and regulations of the House of Representatives and the Senate—some of which are not written with the appropriate precision or *mens rea* protection that should exist prior to them being used to criminally prosecute someone and which are frequently changed

⁶ The Manager's Amendment also seeks to amend the gratuities statute to insert the *mens rea* term “knowingly” as a “blanket” or “introductory” term that appears prior to the provisions that set forth prohibited conduct. While NACDL applauds Mr. Sensenbrenner for shining a spotlight on the problem of inadequate *mens rea* requirements in federal criminal offenses, we have some concerns about the use of the term “knowingly.”

Unfortunately, the federal courts have set forth varied definitions of the *mens rea* terms commonly used in federal offenses, including the term “knowingly.” Some courts have defined “knowingly” as conduct done voluntarily and intentionally, not because of mistake or accident. Other courts have stated that “knowingly” requires the defendant to act with knowledge of the facts that constitute the offense. Still others embrace a combination of definitions, requiring an awareness of either one's conduct or the facts constituting the offense. While it can be said that, at a minimum, “knowingly” requires voluntary and intentional conduct, whether and what it requires in addition to that ultimately varies by jurisdiction.

From the perspective of protecting innocent, law-abiding citizens, NACDL believes that the term “willfully” is better than the term “knowingly.” While it too has been subject to different meanings, federal courts have held that, at a minimum, “willfully” requires proof that a person acted with knowledge that his or her conduct was, in some general sense, unlawful. The use of “willfully” in a statute is a mechanism for separating those who act knowingly *and* with a bad purpose, from those who lack that bad purpose. This mechanism is critical both for protecting innocent actors who make every attempt to comply with the law as well as for punishing those who are truly culpable—individuals who engage in conduct knowing that it is unlawful. When an offense involves broad, vaguely defined conduct or complex rules and regulations, as does the proposed expansion of the illegal gratuities statute, the term “knowingly” is inadequate to protect all innocent, law-abiding actors.

Adding “knowingly” to the introductory text of this offense will merely require proof that the individual “know” that he is giving, offering or promising a thing of value and “know” that the person he is giving, offering or promising something to is a “public official, former public official, or person selected to be a public official.” This is a minor improvement because the offense currently does not facially require knowledge of these elements. The impact of this proposed change is rather limited, however, because it does nothing to separate the well-intentioned from the bad actors. NACDL recommends that you consider replacing the term “knowingly” with “willfully,” or that the bill be amended to include a definition of the term “knowingly” that would better protect Americans from being wrongfully prosecuted.

based on changes in political leadership. Any “gray area” under the gift rules will now be rife with criminal exposure. Seeking an “ethics” opinion will not protect anyone from criminal prosecution. And, while the \$1,000 threshold will prevent criminal prosecutions over *de minimis* items, the overly expansive law could still subject people to criminal prosecution for legitimate items that happen to be over the \$1,000 threshold, such as expenditures related to travel and certain honorary items from constituents, or the aggregation of less expensive items.

NACDL wants to remind the Members that accepting bribes and gratuities is already unlawful—our nation’s law enforcers already enjoy incredibly powerful anti-corruption tools. Leaving the gratuities law as it currently stands still prevents things of value from being conferred upon a public official *for or because of* an official act that public official takes—the epitome of the kind of corrupt conduct that should be prevented. There is no need to expand the law further when such an expansion produces an overly broad weapon that could be used to prosecute conduct that ought not to be prosecuted or to prosecute in a selective manner.

- **The numerous sentencing increases and directives contained in H.R. 2572 are not evidence-based, despite the fact that the legislation would significantly increase what are already lengthy maximum prison sentences.** See Sections 3, 4, 5, 9, and 11 of the Manager’s Amendment. 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. NACDL recognizes that the Manager’s Amendment has decreased some of the previously proposed draconian increases, yet there has still been no fact-finding that any increase at all is necessary. No evidence exists that the current lengthy statutory maximum sentences and Guidelines fail to provide adequate punishment and deterrence. Dramatic increases in already lengthy sentences for non-violent offenders will burden taxpayers with no benefit to the public.

Every Member of the House Subcommittee on Crime who took the opportunity to address the witnesses at the hearing for H.R. 2572 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. The Manager’s Amendment has offered some improvements to certain areas of the bill, but has not done enough to assuage well-founded concerns over the bill’s vagueness and overbreadth. We urge you to consider the dramatic and negative consequences that H.R. 2572 would have before taking further action on this bill.

In addition to the concerns listed above, NACDL has other concerns about this bill, including, but not limited to the proposed expansion of the definition of “official act” in Sec. 8 of the Manager’s Amendment that could criminalize non-corrupt acts,⁷ the expansion of RICO and wiretap predicate crimes (Sec. 12 and 13 of the Manager’s Amendment), the increase of the statute of limitations for

⁷ 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”).

public corruption offenses beyond that of the overwhelming majority of other federal crimes⁸ (Sec. 10 of the Manager's Amendment), as well as the lowering of the monetary threshold that would trigger application of 18 U.S.C. § 666(a) in Sec. 3 of the Manager's Amendment—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”⁹

NACDL is concerned because many provisions of H.R. 2572 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 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.

Public corruption is an insidious crime that undermines the public's faith in those who we trust to serve

⁸ 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. In addition, potential trial witnesses remain in criminal jeopardy for the period the statute of limitations remains open and thus would possess a constitutional right not to testify until the expiration of this newly extended time period. As a practical matter, this means that such witnesses would be unavailable to the defense at trial, yet fully available to the prosecution through the exercise of its power to grant immunity. Such disparities in the availability of witnesses 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.

⁹ “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)).

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 statutes¹⁰ that are currently very effectively used by prosecutors to curtail suspected public corruption and fraud on both the federal and state level.** These statutes already impose stern punishments against those found guilty of these corruption offenses. Despite the improvements made in the Manager's Amendment, H.R. 2572 still contains 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.

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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Cc: Members of the House Committee on the Judiciary

¹⁰ **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.