



Prosecution of Public Corruption: An Overview of Amendments Under H.R. 2572 and S. 401

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Summary

The Public Corruption Prosecution Improvements Act (S. 401) and the Clean Up Government Act (H.R. 2572) amend federal law governing the prosecution of federal, state, and local officials. They would

- Expand the scope of federal mail and wire fraud statutes to reach undisclosed self-dealing by public officials—in response to *Skilling*.
- Modify the mail and wire fraud statutes to encompass any thing of value not just money or property—in response to *Cleveland*
- Amend the definition of official act for bribery purposes—to overcome the *Valdes* decision.
- Adjust the federal gratuities provision to reach “goodwill” gifts—in response to *Sun Diamond*.
- Bring District of Columbia employees within the coverage of the federal embezzlement statute.
- Increase the criminal penalties that attend various bribery, illegal gratuities, embezzlement statutes, and related provisions.

They would also change several related procedural provisions.

- Extend the statute of limitations from five to six years for several corruption offenses.
- Authorize the trial of perjury and obstruction charges in the district of the adversely effected judicial proceedings.
- Authorize the trial of multi-district cases in any district in which an act in furtherance is committed.
- Increase the number of public corruption offenses considered racketeering and wiretap predicate offenses.

This report is available in an abridged version, as CRS Report R42015, *Prosecution of Public Corruption: An Abridged Overview of Amendments Under H.R. 2572 and S. 401*, by Charles Doyle, which lacks the footnotes, attributions, and citations to authority found in this report. Related CRS Reports include CRS Report R40852, *Deprivation of Honest Services as a Basis for Federal Mail and Wire Fraud Convictions*, by Charles Doyle, and CRS Report R41930, *Mail and Wire Fraud: A Brief Overview of Federal Criminal Law*, by Charles Doyle.

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Introduction

The Public Corruption Prosecution Improvements Act (S. 401) and the Clean Up Government Act of 2011 (H.R. 2572) are virtually identical proposals, one introduced by Senator Leahy and the other by Representative Sensenbrenner. They would expand the scope of the federal criminal statutes under which public corruption is prosecuted, increase the penalties for public corruption, and amend related procedures to facilitate prosecution.¹ Many of the bills' proposals have been under consideration since 110th Congress.² Several would extend the reach of federal anti-corruption statutes read narrowly in *Skilling*, *Sun Diamond*, *Cleveland*, and *Valdes*.³

Mail and Wire Fraud

Public Officials: Undisclosed Self-Dealing

Federal public corruption statutes have a long history. Federal bribery statutes date back almost to the dawn of the Republic.⁴ The mail fraud statute, which forbids the use of the mail in conjunction with a scheme to defraud another of money or property, originated in the mid-eighteenth century.⁵ The mail fraud statute's companion, the wire fraud statute, was enacted in the mid-twentieth century.⁶ Shortly thereafter, federal officials had begun to prosecute corrupt state and local officials under the federal mail and wire fraud statutes.⁷ Application of the statutes to public corruption was based on the theory that the mail and wire fraud statutes protected both

¹ S. 401 was reported out of Committee with an amendment in the nature of a substitute without written report, 157 *Cong. Rec.* S5017 (daily ed. July 28, 2011). References here and hereafter are to H.R. 2572 as introduced and to S. 401 as reported out of the Senate Judiciary Committee.

² The 110th Congress saw the introduction of the Effective Corruption Prosecutions Act of 2007 (S. 118 /H.R. 1872), offered by Sen. Leahy and Rep. Johnson of Georgia, respectively. During the same Congress, the Senate Judiciary Committee approved the Public Corruption Prosecution Improvement Act, S.Rept. 110-239 (2007). In the 111th Congress, the Committee also approved, without written report, the Public Corruption Prosecution Improvements Act (S. 49), 155 *Cong. Rec.* S3073 (daily ed. March 12, 2009). Related proposals in the 111th Congress included the Clean Up Government Act of 2009 (H.R. 1825)(Rep. Jordan of Ohio); the Public Corruption Prosecution Improvements Act (H.R. 2822)(Rep. Johnson of Georgia); and the Honest Services Restoration Act (H.R. 6391/S. 3854)(Sen. Leahy/Rep. Weiner). Hearings were held in the 111th Congress and in this Congress: *Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's Skilling Decision*, *Hearing Before the Senate Comm. on the Judiciary*, 111th Cong., 2d sess. (2010); *H.R. 2572, The "Clean Up Government Act of 2011": Hearing Before the House Judiciary Subcomm. on Crime, Terrorism, and Homeland Security*, 112th Cong., 1st sess. (2011).

³ *Skilling v. United States*, 130 S.Ct. 2896, 2907 (2010)(holding that honest services mail and wire fraud covers only bribery and kickbacks); *United States v. Sun Diamond Growers of California*, 526 U.S. 398, 414 (1999)(holding that conviction under the illegal gratuities subsection of the bribery statute required a showing that the gratuity was given in appreciation of a particular official act); *Cleveland v. United States*, 531 U.S. 12, 20 (2000)(holding that an unissued license is not property in the hands of the state for purposes of the mail fraud statute); *Valdes v. United States*, 475 F.3d 1319, 1324 (D.C. Cir. 2007)(holding that official act for purposes of the bribery and illegal gratuities statute refers to matters presented to the government for disposition).

⁴ E.g., §21, Act of April 30, 1790, 1 Stat. 117 (1790).

⁵ Section 302 of the Act of June 8, 1872, 17 Stat. 323 (1872).

⁶ Section 18 of the Act of July 16, 1956, 66 Stat. 722 (1952).

⁷ E.g., *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976)(city plumbing inspector); *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976)(city building commissioner); *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979)(state governor).

tangible as well as intangible property and that such intangible property included the right of an employer or the public to the honest services of an employee or public official:

An increasing number of courts ... have held that a recreant employee can be prosecuted [for mail fraud] under §1341 if he breaches his allegiance to his employer by accepting bribes or kickbacks in the course of his employment, since such conduct defrauds the employer of his right to the employee's honest and faithful services. Similar schemes devised by public officials have been viewed as defrauding state or municipal citizens of the same intangible right.⁸

The Supreme Court, however, found that interpretation too open ended. In *McNally*, it declared that, “[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read §1341 as limited in scope to the protection of property rights.”⁹

Congress answered *McNally* with the enactment of 18 U.S.C. 1346, which defines the term “scheme to defraud” in mail and wire fraud statutes to include schemes to “deprive another of the intangible right to honest services.”

Faced with vagueness challenges, the lower federal courts devised a number of standards to limit the scope of honest services mail and wire fraud.¹⁰ Rather than endorse any of these standards, the Supreme Court in *Skilling* opted for a narrow construction of honest services fraud. It concluded that “[i]n proscribing fraudulent deprivations of ‘the intangible right to honest services,’ §1346, Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning ... would encounter a vagueness shoal.”¹¹ As it had done in *McNally*, the Court in *Skilling* urged Congress to speak clearly should it elect to expand the reach of honest services mail and wire fraud.¹²

⁸ *United States v. McNeive*, 536 F.2d at 1249 (here and hereafter internal citations and quotation marks are generally omitted).

⁹ *McNally v. United States*, 483 U.S. 350, 360 (1987).

¹⁰ E.g., *United States v. Sorich*, 523 F.3d 702, 708-709 (7th Cir. 2008)(emphasis added)(public corruption honest services fraud requires proof of an intent to “deprive a governmental entity of the honest services of its employees for *personal gain* to a member of the scheme or another”); *United States v. Brumley*, 116 F.3d 728, 734-36 (5th Cir. 1997) (holding a public servant’s honest services fraud must involve a violation of some obligation imposed by state law); *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997)(honest services fraud requires a showing “that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of” his failure to provide honest services). For a more detailed discussion see CRS Report R40852, *Deprivation of Honest Services as a Basis for Federal Mail and Wire Fraud Convictions*, by Charles Doyle.

¹¹ *Skilling v. United States*, 130 S.Ct. 2896, 2907 (2010).

¹² *Skilling v. United States*, 130 S.Ct. at 2933 (n. 45 of the opinion in brackets)(“‘If Congress desires to go further,’ we reiterate, ‘it must speak more clearly than it has.’ *McNally*, 483 U.S. , at 360. [If Congress were to take up the enterprise of criminalizing ‘undisclosed self-dealing’ by a public official or private employee, it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns. The Government proposes a standard that prohibits the ‘taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty,’ so long as the employee acts with a specific intent to deceive and the undisclosed conduct could influence the victim to change its behavior. That formulation, however, leaves many questions unanswered. How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.]”).

H.R. 2572 and S. 401 both would expand the mail and wire fraud definition of the term “scheme to defraud” to include a scheme “by a public official to engage in undisclosed self-dealing.”¹³ The proposals cover federal, state, and local officials, employees, and agents.¹⁴ “Undisclosed self-dealing” has two components. One involves a conflict of interest; the other an obligation to disclose it.

The first encompasses a public official’s performance of an official act for the purpose, at least in material part, of furthering his own financial interest or that of a spouse, minor child, close business associate, or in some instances, from someone whom the official has received something of value.¹⁵ Official acts include those actions, decisions, and courses of action that come within the official’s duties.¹⁶

The second element of undisclosed self-dealing consists of the public official’s knowingly failing to disclose material information that he is required by law to disclose.¹⁷ “Material information,” as the term is used in the second element is defined to include information relating to pertinent financial matters of the covered officials and those covered by virtue of their relation to those officials.¹⁸

The proposal defines neither “material,” “any thing or things of value,” nor “financial interest,” as those terms are used in the first element. The omissions may not be problematic. In the absence of

¹³ H.R. 2572, §16(a)(proposed 18 U.S.C. 1346A); S. 401, §18(a)(proposed 18 U.S.C. 1346A).

¹⁴ “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,” H.R. 2572, §16(a)(proposed 18 U.S.C. 1346A(b)(2))(language in italics appears only in the House bill); S. 401, §18(a)(proposed 18 U.S.C. 1346A(b)(3)).

¹⁵ “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,” H.R. 2572, §16(a)(proposed 18 U.S.C. 1346A(b)(4)(A)); S. 401, §18(a)(proposed 18 U.S.C. 1346A(b)(4)(A))(otherwise the same, the Senate bill words the definition up to the second dash as follows: “The term ‘undisclosed self-dealing’ means—(A) the performance of an official act by a public official for the purpose, in whole or in material part, of furthering or benefitting a financial interest of”).

¹⁶ “The term ‘official act’—(A) *includes/[means]* 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*,” H.R. 2572, §16(a)(proposed 18 U.S.C. 1346A(b)(1))(language in italics appears only in the House bill); S. 401, §18(a)(proposed 18 U.S.C. 1346A(b)(2)).

¹⁷ “(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,” H.R. 2572, §16(a)(proposed 18 U.S.C. 1346A(b)(4)(B)); S. 401, §18(a)(proposed 18 U.S.C. 1346A(b)(4)(B)) is substantively the same.

¹⁸ “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,” H.R. 2572, §16(a)(proposed 18 U.S.C. 1346A(b)(5)); S. 401, §18(a)(proposed 18 U.S.C. 1346A(b)(1)).

a statutory definition, interpretation begins with the ordinary meaning of a term,¹⁹ and may take into account how the term is defined or understood in similar contexts.²⁰ The dictionary describes “material” as something “having real importance or great consequences.”²¹ In the context of other statutes relating to fraudulent conduct, something is considered material “if it has a natural tendency to influence” a decision.²² The bills speak of a public official performing an act for “the purpose, in whole or in *material* part, of furthering or benefitting a financial interest.” This would seem to mean that an intent to further or benefit a particular financial interest must play an important or influential part in the official’s decision to perform the act.

The terms “thing of value,” or “anything of value” are likewise used with some regularity elsewhere in federal criminal law.²³ There is some suggestion that “anything of value” should be read more broadly as “all things of value.”²⁴ In any event, the terms “thing of value” and “anything of value” are understood to refer to a diverse range of both tangible and intangible things including campaign contributions, employment, sex, expunged criminal records, and casual pretrial release supervision.²⁵

The meaning of “financial interest” may be a little less transparent. It is not a term regularly used or defined in federal criminal law, but it is a familiar concept in federal conflict of interest provisions.²⁶ A Justice Department witness emphasized this point when she testified at a congressional hearing on the House bill, “[I]n 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

¹⁹ *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S.Ct. 1885, 1891 (2011); *United States v. Santos*, 553 U.S. 507, 511 (2008).

²⁰ *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *United States v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008).

²¹ MERRIAM WEBSTER’S COLLEGIATE DICTIONARY, 717 (10th ed. 1996).

²² *Neder v. United States*, 527 U.S. 1, 15 (1999); *United States v. Gaudin*, 515 U.S. 506, 509 (1995); *Kungys v. Unites States*, 485 U.S. 759, 770 (1988).

²³ The term “thing of value” is found in more than twenty sections of title 18 alone, e.g., 18 U.S.C. 210 (offer to procure appointive public office); 641 (theft of U.S. property); 876 (extortionate threats); 1030 (computer extortion); 2113 (bank robbery). “Anything of value,” appears almost as regularly, e.g., 18 U.S.C. 201 (bribery); 666 (theft of federal property); 1030 (computer fraud); 1591 (sex trafficking).

²⁴ *United States v. Townsend*, 630 F.3d 1003, 1010 (11th Cir. 2011) (“The United States Supreme Court and this Court have recognized on many occasions that the word ‘any’ is a powerful and broad word, that that it does not mean ‘some’ or ‘all but a few,’ but instead means ‘all’”).

²⁵ E.g., *United States v. Siegelman*, 640 F.3d 1159, 1172 (11th Cir. 2011) (“In this case, the jury was instructed that they could not convict the defendants of bribery unless they found that ‘the Defendant and official agreed that the official will take specific action in exchange for a thing of value.’ This instruction required the jury to find an agreement to exchange a specific official action for a campaign contribution.... [W]e find no reversible error in the bribery instruction given by the district court”); *United States v. Douglas*, 634 F.3d 852, 858 (6th Cir. 2011) (employment in a high paying job is a thing of value); *United States v. Moore*, 525 F.3d 1033, 1047-48 (11th Cir. 2008) (upholding bribery conviction of prison guard who traded contraband for sex); *United States v. Townsend*, 630 F.3d at 1010 (“The bribes were given in connection with Febles’ freedom on pretrial release.... [I]ntangibles, such freedom and incremental increases in it, may be considered ‘any thing of value’.... See *United States v. Hines*, 541 F.3d 833, 836-37 (8th Cir. 2008) (deputy sheriff’s prompt assistance in offering his services for evictions was a thing of value); *United States v. Zimmerman*, 509 F.3d 920, 926-27 (8th Cir. 2007) (city councilman’s favorable recommendation to zoning committee was thing of value); *United States v. Fernandes*, 272 F.3d 938, 944 (7th Cir. 2001); (prosecutor’s expungement of convictions constituted a thing of value); *United States v. Zwick*, 199 F.3d 672, 690 (3d Cir. 1999) (township commissioner’s vote to approve permits was a thing of value)”).

²⁶ E.g., 18 U.S.C. 208 (acts affecting personal financial interests); 28 U.S.C. 455 (judicial recusal); 5 U.S.C. App. 4 (Ethics in Government Act)

Branch.”²⁷ Perhaps more to the point, the proposed undisclosed self-dealing section only applies to those financial interests which the law obligates the public official to disclose. The qualifying reporting statute or regulation would ordinarily make clear the financial interests whose disclosures it requires.

In the Justice Department’s endorsement of the proposal the same witness testified that, “[U]nder 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.”²⁸

A representative of the criminal defense bar, however, criticized the proposal as constitutionally suspect, contrary to federalism principles, duplicative, and overly simplistic. He argued that the section fails to heed *Skilling* Court’s plea for clarity.²⁹ He envisioned First Amendment implications in the proposal’s application to campaign contributions to elected officials.³⁰ He also

²⁷ H.R. 2572, *The “Clean Up Government Act of 2011”*: Hearing Before the House Judiciary Subcomm. on Crime, Terrorism, and Homeland Security, 112th Cong., 1st sess. (2011)(House hearing)(statement of Dep. Ass’t Att’y Gen. Mary Partice Brown)(Brown testimony).

²⁸ *Id.* (emphasis in the original).

²⁹ House hearing (statement of Timothy P. O’Toole on behalf of the National Association of Criminal Defense Lawyers)(O’Toole testimony)(“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.’ 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 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?’). 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”).

³⁰ *Id.* (“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 (continued...)”)



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characterized the proposal as a “classic example of overcriminalization” that would replicate existing law and intrude upon state prerogatives.³¹ Finally, the witness contended that the proposal is at odds with the realities of part-time legislators and other state and local officials.³²

Even after *Skilling*, the honest services mail and wire fraud statutes reach bribery and kickbacks. The proposal adds unreported self-dealing in public corruption cases. It leaves unchanged the law governing self-dealing in private cases.

The Cleveland Fix

Honest services aside, the mail and wire fraud statutes also outlaw schemes to obtain money or property or to deprive another of “money or property.”³³ The “property” protected includes both tangible and intangible property.³⁴ The Supreme Court in *Cleveland*, however, concluded that the

(...continued)

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”).

³¹ *Id.* (“[T]he 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.’ ... 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 agrees should not be criminal at all (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”).

³² *Id.* (“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”).

³³ 18 U.S.C. 1341, 1343. *McNally v. United States*, 483 U.S. 350, 358 (1987) (“After 1909, therefore, the mail fraud statute criminalized schemes or artifices ‘to defraud’ or ‘for obtaining money or property by means of false or fraudulent pretenses, representation, or promises....’ Because the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently and that the money-or-property requirement of the latter phrase does not limit schemes to defraud to those aimed at causing deprivation of money or property.... As the Court long ago stated, however, the words ‘to defraud’ commonly refer to wronging one in his property rights by dishonest methods or schemes”).

³⁴ *Carpenter v. United States*, 484 U.S. 19, (1987) (“*McNally* did not limit the scope of §1341 to tangible as (continued...)”).

mail fraud statute “does not reach fraud in obtaining a state or municipal license of the kind here involved, for such a license is not ‘property’ in the [defrauded] government regulator’s hands.”³⁵

The House and Senate bills would amend the mail and wire fraud statutes to cover schemes to obtain “money, property or any other thing of value,” under a section captioned, “application of mail and wire fraud statutes to licenses and other intangible rights.”³⁶ The earlier Committee report’s description of identical language seems to confirm an intent to reverse *Cleveland*:

Finally, the bill broadens coverage of the mail and wire fraud statutes, which may be used in tandem with other statutes to prosecute public corruption. The term ‘money or property’ has been interpreted by courts to broadly include a variety of benefits, including intangible rights; but the Supreme Court in *United States v. Cleveland*, 531 U.S. 12 (2000), held that state licenses to operate video poker machines were not ‘property’ within the meaning of the mail fraud statute. The bill would reverse the Supreme Court’s holding in *Cleveland*. As many circuit courts held before *Cleveland* was decided, licenses, permits and other intangible rights have value to the issuing authority, and, assuming a mailing or a wire, fraudulent deprivation of these rights should be chargeable as federal crimes.³⁷

The difficulty is that *Cleveland* did not deny that a license constitutes an interest in property; it held that the state had no property interest in an unissued license. That is, it held that a property wire fraud conviction requires that the “object of the fraud ... be property *in the victim’s hands*.”³⁸ Thus on its face, the language of the proposed amendment does not fix the *Cleveland* problem. It may dispel any doubt that a license may be a thing of value. It does not speak to the *Cleveland* holding that in the hands of the state an unissued license is valueless.

Nevertheless, the inclusion of “things of value” in the money or property mail and wire fraud proscription would enlarge their coverage to reach things of value that are neither money nor property. The term has been construed generously in other related contexts.³⁹

The pre-*Skilling* election cases, however, may provide an example of where the courts might begin to limit the otherwise sweeping language. Two circuits, in cases decided shortly before *Skilling*, relied upon *Cleveland* to deny mail and wire fraud application to state and local campaign dishonesty. Rejecting the argument that an official elected by dishonest means had acquired his salary by a scheme to defraud, the Sixth Circuit said in *Turner*, “In the context of election fraud, the government and citizens have not been deprived of any money or property because the relevant salary would be paid to someone regardless of the fraud....The citizens have

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distinguished from intangible property rights”); see also, *Pasquantino v. United States*, 544 U.S. 349, 356 (2005)

(“Canada’s right to uncollected excise taxes ... is ‘property’ in its hands. This right is an entitlement to collect money.... Valuable entitlements like these are ‘property’ as that term ordinarily is employed”).

³⁵ *Cleveland v. United States*, 531 U.S. 12, 20 (2000). *Cleveland* was allegedly involved in filing deceptive applications for video poker licenses issued by the state. *id.* at 16-7.

³⁶ H.R. 2572, §2. S. 401, §3.

³⁷ S.Rept. 110-239, at 8-9 (2007).

³⁸ *Pasquantino v. United States*, 544 U.S. 349, 355 (2005)(emphasis added), quoting, *Cleveland v. United States*, 531 U.S. 12, 26 (2000).

³⁹ See note 25, *supra*, for examples.

a right to cast their vote in a fair and honest election. However, this is an intangible right. Thus, an elected official's salary does not constitute property in the hands of the victim."⁴⁰

The Fifth Circuit expressed similar views in *Ratcliff*, "Although the parish government is obligated to pay whichever candidate the voters elect, it has no discretion in the matter; its role is purely administrative, implicating the government's role as sovereign, not as property holder. There is thus no basis to view the electorate as an agent of the government such that false statements influencing the voters could be viewed as a fraud on the parish."⁴¹ Neither would apparently deny that fair and honest elections are a thing of value.

Both circuits noted in passing a concern that may be a harbinger of things to come:

Our analysis in this appeal also takes into account federalism concerns, and on this front we are informed by the Supreme Court's decision in *Cleveland*.... In construing the meaning of the terms of the mail fraud statute, we are similarly guided by the principle that unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes.... And like the Court in *Cleveland*, "[w]e resist the Government's reading of §1341 ... because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." 531 U.S. at 24. Finding a scheme to defraud a governmental entity of the salary of elected office based on misrepresentations made during a campaign would "subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities." *Id.* In practice, the Government's theory in this case would extend far beyond the context of campaign finance disclosures to any misrepresentations that seek to influence the voters in order to gain office, bringing state election fraud fully within the province of the federal fraud statutes. The mail fraud statute does not evince any clear statement conveying such a purpose, and the terms of the statute, as interpreted by Supreme Court precedent, simply do not proscribe the conduct for which *Ratcliff* was indicted.⁴²

Bribery Changes

Section 201

The bills also seek to overcome *Sun Diamond* and *Valdes*, two judicial interpretations of the basic federal bribery and illegal gratuities statute, 18 U.S.C. 201. Subsection 201(b) outlaws soliciting or offering anything of value in exchange for an official act. Subsection 201(c) outlaws soliciting or offering anything of value in gratitude ("for or because of") for the performance of an official act. The distinction between the two is the corrupt bargain, the illicit quid pro quo, that marks bribery.⁴³

⁴⁰ *United States v. Turner*, 465 F.3d 667, 680, 682 (6th Cir. 2006).

⁴¹ *United States v. Ratcliff*, 488 F.3d 639, 647-48 (5th Cir. 2007).

⁴² *Id.* at 648-49, citing, *United States v. Turner*, 488 F.3d at 683 ("We stress that our interpretation of §§1341 and 1346 is guided by the requirement that Congress speak clearly when enacting criminal statutes and, to an even greater degree, when altering the federal-state balance in the prosecutions of crimes.... Moreover, the requirement that Congress speak in clear and definite terms is amplified where, as here, the federal law in question applies to conduct traditionally regulated by state law. Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes").

⁴³ *United States v. Sun Diamond Growers of California*, 526 U.S. 398, 404-405 (1999)(emphasis of the Court)("The (continued...)

The issue in *Sun Diamond* was whether an illegal gratuities conviction might be based solely on gifts given a public official because of his office, without reference to any particular official act, or whether the conviction could only stand if gifts were sought or provided with a specific official act in mind.⁴⁴ The Court unanimously concluded that “in order to establish a violation of 18 U.S.C. §201(c)(1)(A), 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.”⁴⁵ Justice Scalia, writing for the Court, asserted this construction, along with the definition of a qualifying “official act,” preclude unintended application of the gratuities subsection:

Besides thinking that this is the more natural meaning of §201(c)(1)(A), we are inclined to believe it correct because of the peculiar results that the Government’s alternative reading would produce. It would criminalize, for example, token gifts to the President based on his official position and not linked to any identifiable act—such as the replica jerseys given by championship sports teams each year during ceremonial White House visits. Similarly, it would criminalize a high school principal’s gift of a school baseball cap to the Secretary of Education, by reason of his office, on the occasion of the latter’s visit to the school. That these examples are not fanciful is demonstrated by the fact that counsel for the United States maintained at oral argument that a group of farmers would violate §201(c)(1)(A) by providing a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to the farmers concerning various matters of USDA policy—so long as the Secretary had before him, or had in prospect, matters affecting the farmers. Of course the Secretary of Agriculture *always* has before him or in prospect matters that affect farmers, just as the President always has before him or in prospect matters that affect college and professional sports, and the Secretary of Education matters that affect high schools.⁴⁶

The official act requirement plays no less significant a role in avoiding unintended coverage, for as the Court observed

It might be said in reply to this that the more narrow interpretation of the statute can also produce some peculiar results. In fact, in the above-given examples, the gifts could easily be regarded as having been conferred, not only because of the official’s position as President or Secretary, but also (and perhaps principally) “for or because of” the official acts of receiving the sports teams at the White House, visiting the high school, and speaking to the farmers about USDA policy, respectively. The answer to this objection is that those actions—while they are assuredly “official acts” in some sense—are not “official acts” within the meaning of the statute, which, as we have noted, defines “official act” to mean “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.” 18 U.S.C. §201(a)(3). Thus, when the violation is linked to a particular “official act,” it is possible to eliminate the absurdities *through the definition of that term*. When, however, no particular “official act” need be identified, and the giving of gifts by reason of the recipient’s mere tenure in office

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distinguishing feature of each crime is its intent element. Bribery requires an intent ‘influence’ an official act, while illegal gratuity requires only that the gratuity be given or accepted ‘for or because’ of an official act. In other words, for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act”).

⁴⁴ *Id.* at 400.

⁴⁵ *Id.* at 414.

⁴⁶ *Id.* at 406-407.

constitutes a violation, nothing but the Government's discretion prevents the foregoing examples from being prosecuted.⁴⁷

The bills would enlarge both the illegal gratuities prohibition and the definition of "official acts." They would also devise an alternative means of avoiding the type of unintended results mentioned in *Sun Diamond*.

First, they would amend the proscriptions of subsection 201(c) to prohibit offering or soliciting a gift for or because of "the official's or person's official position" in order to supplement the existing prohibition against gifts for or because of an "official act."⁴⁸ The amendment would bring within the scope of the illegal gratuities subsection "status" and "good will" gifts and contributions, without requiring prosecutors to show that they were sought or provided with an eye to any specific official act. As the Committee report explained, "This [would] allow the statute to reach its intended range of corrupt conduct, including benefits flowing to public officials designed to curry favor for non-specified future acts or to build a reservoir of good will."⁴⁹

Second, they would amend the gratuities offense to create a safe harbor for gifts and campaign contributions permitted by rule or regulation.⁵⁰ The Committee report noted that in any event most campaign contributions would not be implicated by the gratuities prohibition. The prohibition is confined to things given to the official personally, and campaign contributions ordinarily are not.⁵¹ The report also confirmed that the exception would help avoid the "horribles" found in Justice Scalia's *Sun Diamond* opinion.⁵² Yet the report may have introduced a hint of ambiguity in the exception when it suggested that rules or regulations would rest beyond the pale if they left the particulars of an exception to individual Member or agency discretion.⁵³

⁴⁷ *Id.* at 407-408 (emphasis of the Court).

⁴⁸ H.R. 2572, §8. S. 401, §12(b), (c).

⁴⁹ S.Rept. 110-239, at 6 (2007).

⁵⁰ "Whoever—(1) otherwise than as provided by law for the proper discharge of official duty, *or by rule or regulation*—(A) ... offers ... anything of value to any public official ... for or because of *the official's or person's official position or any official act*.... (B) being a public official ... demands ... anything of value ... for or because of *the official's or person's official position or any official act* ..."

"(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 gifts and campaign contributions,*" 18 U.S.C. 201(c)(1), (a)(4)(language H.R. 2572, §§6, 8 and S. 401, §12 would add in italics).

⁵¹ S.Rept. 110-239, at 7 n.7 (2007).

⁵² *Id.* at 7 ("To foreclose unrestrained prosecutorial discretion in this sensitive area in the law, however, the bill also provides an additional protection that was not included in the original gratuities statute, and that responds to concerns that contributed to the Sun-Diamond Court's decision to restrict the reach of the statute. Specifically, the bill creates a safe harbor for Government officials who accept things of value pursuant to applicable rule or regulation. This carve-out responds to the examples Justice Scalia set out in Sun-Diamond of de minimis gifts that, as the law stood in 1999, could have triggered the gratuities statute, by exempting from prosecution for gratuities all benefits accepted by public officials that are permitted by rules or regulations. This new provision squarely addresses Justice Scalia's parade of horrors in Sun-Diamond by constraining prosecutorial discretion in cases where federal prosecution would clearly be inappropriate").

⁵³ *Id.* at 7 n.6 (emphasis added)("This safe harbor is intended to include only duly enacted federal regulations and duly enacted Rules of the House of Representatives and the United States Senate, see, e.g., Standing Rules of the Senate, S. Doc. No. 110-9 (2007), and *is not intended to include other operating procedures and policies established by individual offices, departments, or agencies of the Government*").

Third, the bills would amend the definition of official act, applicable to both the bribery and gratuities offenses, as follow.

(3) the term “official act” [Strike out ->] means [~~-Strike out~~—(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 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.*⁵⁴

The change is designed to repudiate the construction of the term “official act” announced by the D.C. Court of Appeals in *Valdes*. *Valdes*, a police officer, had received cash in connection with license plate identification and outstanding warrant information he had provided an informant he believed to be a judge.⁵⁵ Indicted for bribery, *Valdes* was convicted of the lesser included offense of receiving an illegal gratuity.⁵⁶ The Court of Appeals reversed, declaring, “§201 is not about officials’ moonlighting, or their misuse of government resources, or the two in combination.”⁵⁷ Instead, the term “any question, matter, cause, suit, proceeding or controversy” in the definition of official act “refers to a class of questions or matters whose answer or disposition is determined by the government,” the court held.⁵⁸ Not every subsequent federal appellate court has concurred.⁵⁹

The phrase “any act within the range of official duty,” is designed to overcome the *Valdes* interpretation of “official act,” and “to ensure that the bribery statute applies to all conduct of a public official within the range of the official’s duties.”⁶⁰

The bills would add the term “course of conduct” to the definition of official act to avoid requiring prosecutors to “establish a one-to-one link between a specific payment and a specific official act.”⁶¹ The change would apply to both bribery and illegal gratuity offenses.⁶² The bills’ illegal gratuity subsection would feature a safety valve for campaign contributions. The bribery

⁵⁴ 18 U.S.C. 201(a)(3) as H.R. 2572, §9 would amend it (language to be added in italics; language to be struck noted). S. 401, §13 is the same except that (1) it would not divide the paragraph into subparagraphs (A), (B), and (C); (2) it would not change the word “means” to “includes” nor include the word “recommendation;” and (3) it would not add language comparable to that proposed by H.R. 2572 for subparagraph (C).

⁵⁵ *Valdes v. United States*, 475 F.3d 1319, 1320 (D.C. Cir. 2007).

⁵⁶ *Id.* at 1322.

⁵⁷ *Id.* at 1324.

⁵⁸ *Id.*

⁵⁹ *United States v. Moore*, 525 F.3d 1033, (11th Cir. 2008), quoting *United States v. Birdsall*, 233 U.S. 223, 230 (1909)(“Every action that is within the range of official duty comes within the purview of these sections”).

⁶⁰ House hearings, Brown testimony; see also, S.Rept. 110-239, at 7-8 (2007).

⁶¹ “The bill also closes a potential loophole by clarifying bribery law in cases where there is an on-going stream of financial benefits flowing from a private source to a public official. In such cases, it may be impossible to establish a one-to-one link between a specific payment and a specific official act. No circuit presently requires such a one-to-one showing, but to avoid confusion and unnecessary litigation, the bill clarifies that a corrupt payment can be made to influence more than one official act, and, to the same end, that a series of such payments may be made to influence a public official in performing a series of official acts.... Congress should leave no doubt that a bribery charge cannot be defeated merely because the government cannot match up each specific payment in a series with specific official acts,” S.Rept. 111-239, at 8 (2007).

⁶² The term “official act” appears in both the bribery and illegal gratuities subsections of 18 U.S.C. 201.

subsection would not. Yet, bribery would be prosecutable only in the presence of a corrupt proposal to influence official conduct in exchange of something of value.⁶³

The House bill would change the word “means” to the word “includes.” The Senate bill would not. Under the Senate bill the definition limits; under the House bill it exemplifies.

Section 666

Section 666 outlaws bribery, embezzlement, and other forms of theft, involving more than \$5,000, in relation to federal programs. The bills propose several changes in the language of section 666. They would lower the threshold for federal prosecution from \$5,000 to \$1,000.⁶⁴ The new threshold corresponds to that found in the statute that outlaws embezzlement or other theft of federal property.⁶⁵ The defense bar contends, however, that the modification would undo a limitation imposed in the interest of federalism and to avoid federal over criminalization.⁶⁶

The bills would increase the maximum term of imprisonment associated with the offense from, 10 to 20 years.⁶⁷ The new maximum would match those under the mail and wire fraud statutes⁶⁸ as well as the 20-year maximum that the bills would establish for the bribery of federal officials under section 201.⁶⁹

Section 666’s bribery components now outlaw corruptly offering or soliciting “anything of value.” The term would become “any things of value.”⁷⁰ The adjustment is apparently offered to confirm that the prohibitions apply to cases involving a series of payments.⁷¹ The bills would

⁶³ 18 U.S.C. 201(b)(“Whoever (1) ... corruptly ... offers ... anything of value to any public official ... with intent - (A) to influence any official act ... [or] (2) being a public official ... corruptly demands ... anything of value ... in return for: (A) being influenced in the performance of any official act ... shall be fined under this title....”).

⁶⁴ H.R. 2572, §4(2). S. 401, §5(1)(A)(ii), (B).

⁶⁵ 18 U.S.C. 641.

⁶⁶ House hearing, O’Toole testimony (“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”).

⁶⁷ H.R. 2572, §4(1). S. 401, §5(1)(C).

⁶⁸ 18 U.S.C. 1341, 1343.

⁶⁹ H.R. 2572, §6(2). S. 401, §7(1).

⁷⁰ H.R. 2572, §4(3), (4). S. 401, §5(1)(A)(i), (B).

⁷¹ S.Rept. 110-239, at 8 (2007)(footnote 10 of the report in brackets)(“No circuit presently requires such a one-to-one showing, but to avoid confusion and unnecessary litigation, the bill clarifies that a corrupt payment can be made to (continued...)”).

emphasis the point with a change in the language that removes salaries and other forms of legitimate compensation and reimbursement from the list of tainted payments:

[Strike out->] This section does not apply to [<-Strike out] The term “any thing or things of value” that is corruptly solicited, demanded, accepted, or agreed to be accepted in subsection (a)(1)(B) or corruptly given, offered, or agreed to be given in subsection (a)(2) shall not include bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.⁷²

Embezzlement and Other Theft of District of Columbia Property

Section 641 outlaws the embezzlement or other theft of money or anything else of value belonging to the United States or one of its agencies or departments.⁷³ The District of Columbia Code outlaws embezzlement or other forms of theft, regardless of the victim.⁷⁴ Violations of the D.C. provision carry a maximum 10-year term of imprisonment, if the value of the property exceeds \$1,000 and a maximum of 180 days in other cases.⁷⁵

The bills would increase the maximum term of imprisonment for a violation of section 641 from 10 to 20 years, and would fold the property of the D.C. Government and its agencies and departments into the coverage of section 641.⁷⁶ The earlier Committee report explained that

The bill also contains a series of long-needed technical fixes to select statutes, as well as targeted increases in statutory maximum penalties for statutes used in public corruption cases. For example, the bill amends the federal theft statute—18 U.S.C. Sec. 641—to bring within its purview the District of Columbia government and its agencies. This change is long overdue in view of the District’s unique status, and it comports with the overarching statutory scheme because the District is already included in the federal bribery statute (18 U.S.C. 201) and the statute governing theft and bribery from programs receiving federal funds (18 U.S.C. 666). The need for this fix is acute: under current law, massive thefts of District of Columbia funds—such as the recent D.C. Tax and Revenue allegations of a \$44 million fraud—cannot be prosecuted on a federal theft theory.⁷⁷

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influence more than one official act, and, to the same end, that a series of such payments may be made to influence a public official in performing a series of official acts. [The bill makes this same clarification to the statute governing federal prosecution of state and local bribery, 18 U.S.C. Sec. 666, and it lowers the transactional threshold for section 666 bribery prosecutions from \$5,000 to \$1,000.]”).

⁷² 18 U.S.C. 666(c)(as H.R. 2572, §18 and S. 401, §5(2) would amend it).

⁷³ 18 U.S.C. 641.

⁷⁴ D.C. Code §22-3211.

⁷⁵ D.C. Code §22-3212.

⁷⁶ H.R. 2572, §§5, 7. S. 401, §§6, 9.

⁷⁷ S.Rept. 110-239, at 9 (2007).

Penalty Increases

When penalty increases were proposed for various federal public corruption offenses during the 110th Congress, the Committee report noted that the increases would reflect “the Committee’s view of the serious and corrosive nature of these crimes, and ... harmonize the punishment of these public corruption-related offenses with similar statutes.”⁷⁸ Moreover, the Committee was of the opinion that “[i]ncreasing penalties in appropriate cases sends a message to would-be criminals and to the public that there are severe consequences for breaching the public trust.”

Reacting to the same proposals replicated in the House and Senate bills, a representative of the defense bar contended that the proposals would “dramatically expand already lengthy prison sentences ... without any evidence of whether such an expansion is necessary or what the costs of such an expansion would be.”⁷⁹

Specifically, the House and Senate bills would increase the maximum term of imprisonment for the following existing federal public corruption offenses:⁸⁰

Offenses	Maximum Term: Now	Maximum Term: Proposed
Bribery/theft in re fed. program, 18 U.S.C. 666(a)	10 years	20 years
Theft of U.S. property, 18 U.S.C. 641	10 years	20 years
Bribery: U.S. officials, 18 U.S.C. 201(b)	15 years	20 years
Illegal gratuities: U.S. officials, 18 U.S.C. 201(c)	2 years	5 years
Promise of U.S. job for political activity, 18 U.S.C. 600	1 year	10 years
Denial of U.S. benefit for want of political contribution, 18 U.S.C. 601	1 year	10 years
Solicitation of political contributions from fellow U.S. employee, 18 U.S.C. 602(a)(4)	3 years	10 years
Intimidation to secure political contribution, 18 U.S.C. 606	3 years	10 years
Solicitation of political contributions in U.S. buildings, 18 U.S.C. 607(a)	3 years	10 years
Coercion of U.S. employees for political activities, 18 U.S.C. 610	3 years	10 years

⁷⁸ *Id.*

⁷⁹ House hearing, O’Toole testimony.

⁸⁰ H.R. 2572, §4(1)(18 U.S.C. 666(a)); §5(18 U.S.C. 641); §6(18 U.S.C. 201(b), (c)); §12 (18 U.S.C. 600, 601, 602, 606, 607, 610). S. 401, §5(1)(C)(18 U.S.C. 666(a)); §6(18 U.S.C. 641); §7(18 U.S.C. 201(b), (c)); §8(18 U.S.C. 600, 601, 602, 606, 607, 610).

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Sentencing Guidelines

Sentencing defendants convicted of federal crimes begins with the Sentencing Guidelines.⁸¹ The court must calculate the sentence recommended by the Guidelines and then weigh the other statutory sentencing factors mentioned in 18 U.S.C. 3553(a).⁸² The sentence imposed will survive appellate scrutiny, if it is procedurally and substantively reasonable.⁸³ A sentence is procedurally reasonable if it is free of procedural error, such as a sentencing beyond the statutory maximum or below any statutory minimum,⁸⁴ an incorrect Guideline calculation, failure to consider the factors in subsection 3553(a), or a failure to explain the sentence imposed.⁸⁵ A sentence is substantively reasonable if it is appropriate given all the circumstances of the case, including the extent to which the sentence imposed varies from the sentence recommended by the Guidelines.⁸⁶

⁸¹ *Kimbrough v. United States*, 552 U.S. 38, 49 (2007); *Gall v. United States*, 552 U.S. 38, 49 (2007); *United States v. Ellis*, 641 F.3d 411, 415 (9th Cir. 2011). See CRS Report R41696, *How the Federal Sentencing Guidelines Work: An Overview*, by Charles Doyle.

⁸² *Gall v. United States*, 552 U.S. at 49-50; *United States v. Bradley*, 644 F.3d 1213, 1283 (11th Cir. 2011); *United States v. Johnson*, 640 F.3d 195, 202-203 (6th Cir. 2011); 18 U.S.C. 3553(a) (“Factors To Be Considered in Imposing a Sentence. - The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider - (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); (5) any pertinent policy statement - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced[;] (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense”).

⁸³ *Gall v. United States*, 552 U.S. at 46; *United States v. Courtland*, 642 F.3d 545, 550 (7th Cir. 2011); *United States v. Rhine*, 637 F.3d 525, 527 (5th Cir. 2011).

⁸⁴ *Edwards v. United States*, 523 U.S. 511, 515 (1998) (“[A] maximum sentence set by statute trumps a higher sentence set forth in the Guidelines”); *United States v. Vallar*, 635 F.3d 271, 289 (7th Cir. 2011); *United States v. Sutton*, 625 F.3d 526, 528-29 (8th Cir. 2010); *United States v. Tepper*, 616 F.3d 583, 587 n.1 (D.C. Cir. 2010). The Guidelines themselves preclude a Guideline recommended sentence of greater than an applicable statutory maximum or less than an applicable statutory mandatory minimum, U.S.S.G. §5G1.1.

⁸⁵ *Gall v. United States*, 552 U.S. at 51; *United States v. Apodaca*, 641 F.3d 1077, 1081(7th Cir. 2011); *United States v. Rhine*, 637 F.3d 525, 527 (5th Cir. 2011).

⁸⁶ *Gall v. United States*, 552 U.S. at 51; *United States v. Bradley*, 644 F.3d at 1274 (“All that is required is that the sentence be substantively reasonable, meaning that, in part, it is proportional to such broad notions as the nature and circumstances of the offense and history and characteristics of the defendant, 18 U.S.C. 3553(a)(1)”; *United States v. Apodaca*, 641 F.3d at 1082; *United States v. Johnson*, 640 F.3d at 209.

The bills would direct the United States Sentencing Commission to examine the Guidelines applicable in the case of a conviction under 18 U.S.C. 201 (bribery of federal officials), 641 (theft of federal property) and 666 (theft or bribery in relation to federal programs).⁸⁷ The Commission would be instructed to amend the Guidelines “to reflect the intent of the Congress that such penalties be increased in comparison to those currently provided.”

Related Provisions

Statute of Limitations

Capital offenses and certain child abduction and sex offenses have no statute of limitations and can be tried at any time.⁸⁸ Elsewhere statute of limitations have been established to encourage prompt law enforcement and to avoid the need to defend against stale charges.⁸⁹ Most other federal crimes must be prosecuted within five years.⁹⁰ The statute of limitations for certain securities fraud cases, for instance, is six years.⁹¹

The earlier Committee report explained that “public corruption cases are among the most difficult and time-consuming cases to investigate and prosecute,” and pointed out that there have been other exceptions to the general five-year rule.⁹² Consequently, both bills would establish a six-year statute of limitations for the following public corruption offenses or conspiracies or attempts to commit them.

- 18 U.S.C. 201 (bribery and illegal gratuities involving federal officials or employees)
- 18 U.S.C. 666 (bribery or theft involving federal programs)
- 18 U.S.C. 1341 (mail fraud)(honest services fraud involving public officials only)
- 18 U.S.C. 1343 (wire fraud)(honest services fraud involving public officials only)
- 18 U.S.C. 1951 (Hobbs Act)(extortion under color of official right only)
- 18 U.S.C. 1952 (Travel Act)(bribery cases only)

⁸⁷ H.R. 2572, §10. S. 401, §16.

⁸⁸ 18 U.S.C. 3281, 3299.

⁸⁹ *Toussie v. United States*, 397 U.S. 112, 114-15 (1970)(“The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity”).

⁹⁰ 18 U.S.C. 3282(a)(“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed”).

⁹¹ 18 U.S.C. 3301.

⁹² S.Rept. 110-239, at 4, 5 (2007).

- 18 U.S.C. 1962 (RICO)(only when the predicate offenses include bribery under state law, or violations of one of the offenses listed above other than the Travel Act).⁹³

The proposal has certain drafting eccentricities. It would establish a six-year statute of limitations for a series of bribery offenses, but only one embezzlement offense (18 U.S.C. 666). It would apply to honest services mail and wire fraud, but not the proposed self-dealing mail and wire fraud. It would apply to the more narrow money laundering statute (18 U.S.C. 1952), but not the more general (18 U.S.C. 1956).

Finally, the bills would create a six-year statute of limitations for attempt to commit any of the listed crimes. Yet it is not a crime to attempt to commit some of them. It is a crime to attempt to violate the mail or wire fraud statutes, the Hobbs Act, or the Travel Act;⁹⁴ but it is not a separate crime to attempt to violate the bribery provisions of 18 U.S.C. 201 or 666 or the RICO provisions. Nevertheless, the proposal purports to set a six-year statute of limitations for crime and noncrime alike.

Venue

Place of Acts in Furtherance

The Constitution insists that federal crimes be tried in the states and districts in which they are committed.⁹⁵ Congress may provide by statute for the trial of any crime committed outside any state.⁹⁶ In the case of continuous crimes or crimes otherwise committed in more than one place, the Supreme Court in *Rodriguez-Moreno* held that the offense may be tried wherever a conduct element of the offense occurs.⁹⁷ Thus, conspiracy may be tried in any district in which an overt act in furtherance of the scheme is committed.⁹⁸ Congress has provided that as a general rule:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and ... may be inquired of and prosecuted in any district from, through, or into which such

⁹³ H.R. 2572, §11 (proposed 18 U.S.C. 3302); S. 401, §2 (proposed 18 U.S.C. 3299A).

⁹⁴ 18 U.S.C. 1349, 1951(a), 1952(a).

⁹⁵ U.S. Const. Art. III, §2, cl.3 (“The trial of all Crimes ... shall be held in the State where the said Crimes shall have been committed ...”); Amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ...”). For a general discussion see CRS Report RL33223, *Venue: A Legal Analysis of Where a Federal Crime May Be Tried*, by Charles Doyle.

⁹⁶ U.S. Const. Art. III, §2, cl.3

⁹⁷ *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999); see also, *United States v. Magassouba*, 619 F.3d 202, 206-207 (2d Cir. 2010); *United States v. Rodriguez*, 581 F.3d 775, 784 (8th Cir. 2009).

⁹⁸ *Whitfield v. United States*, 543 U.S. 209, 218 (2005); *United States v. Tzolov*, 642 F.3d 314, 319-20 (2d Cir. 2011); *United States v. Foy*, 641 F.3d 455, 466 (10th Cir. 2011).

commerce, mail matter, or imported object or person moves, *or in any district in which an act in furtherance of the offense is committed.*⁹⁹

The bills would amend the venue statute to add language italicized above that would permit trial of an offense, involving use of the mail or interstate commerce or entry of individual or goods into the United States, “in any district in which an act in furtherance of the offense is committed.”¹⁰⁰ The earlier Committee report explained that

The [proposal] broadens the part of the general venue statute –18 U.S.C. §3237(a)—that governs venue in mail fraud cases, among other so-called ‘continuing’ offenses that may be carried out in more than one district. The bill would permit venue to lie in any district in which an act in furtherance of the offense is committed. It is designed to address situations where the bulk of the criminal conduct takes place in one district, but the required mailing to facilitate that scheme happens to occur in another. For example, if a fraud scheme is hatched and carried out by a public official from his Washington, D.C. office, but the mailing in furtherance of that scheme happens to be dropped in a mailbox near the public official’s home in Bethesda, Maryland, venue should be able to lie in the District of Columbia, because the principle acts in furtherance of the scheme took place in the District. Under current law, the case could only be brought in Maryland. The intent of this provision is to expand venue to include districts where any part of the offense occurred as well as the district where the actual mailing took place.¹⁰¹

Expanded venue options would apply not to just federal public corruption offenses but to any other federal offenses where federal jurisdiction is predicated on interstate commerce or use of the mail. The representative of the defense bar objected that the proposal would impose an unfair hardship upon the accused under some circumstances and might lead to forum shopping for that purpose.¹⁰²

The Constitution, however, may limit the proposal’s scope to acts in furtherance that constitute conduct elements of the offense. In this context, a recent Second Circuit case may be instructive. In *Tzolov*, the court rejected the argument that venue was necessarily proper where the defendants committed an act in furtherance of the crime charged. In doing so, it distinguished an earlier case in which the act in furtherance case had been a conduct element of the offense:

Count Two charged Butler with securities fraud under 15 U.S.C. §§78j(b) and 78ff, which has its own specific venue provision: “Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred.” 15 U.S.C. §§78aa. The government’s sole basis for venue in the Eastern District on this substantive count was that Butler and Tzolov traveled through JFK airport on their way to meet with the investors. According to the government, these flights are sufficient to establish venue because, under

⁹⁹ 18 U.S.C. 3237(a)(with language the House and Senate bills would add in italics).

¹⁰⁰ H.R. 2572, §3; S. 401, §4.

¹⁰¹ S.Rept. 110-239, at 5 (2007).

¹⁰² House hearing, O’Toole testimony (“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”).

United States v. Svoboda, 347 F.3d 471 (2d Cir. 2003), the flights were “an important part of furthering the [fraudulent] scheme.”

We disagree. We have little difficulty concluding that the government failed to offer competent proof that any “act or transaction *constituting* the [securities fraud] violation occurred” in the Eastern District. *See* 15 U.S.C. §78aa (emphasis added). Butler did not transmit any false or misleading information into or out of the Eastern District. All the fraudulent statements that were part of the government’s proof, whether made by Butler or Tzolov, were made in telephone calls or emails from Credit Suisse’s Madison Avenue offices located in the Southern District or in meetings with investors. None of this activity occurred in the Eastern District.

Nor did Butler commit securities fraud by boarding a plane in the Eastern District. At most, catching flights from the Eastern District to meetings where Butler made fraudulent statements were preparatory acts. They were not acts “constituting” the violation. We have cautioned that venue is not proper in a district in which the only acts performed by the defendant were preparatory to the offense and not part of the offense. That is all we have here. In other words, going to Kennedy airport and boarding flights to meetings with investors were not a constitutive part of the substantive securities fraud offense with which Butler was charged....

The government’s reliance on *Svoboda* is misplaced. In *Svoboda*, we stated that “venue is proper in a district where (1) the defendant intentionally or knowingly causes an act in furtherance of the charged offense to occur in the district of venue or (2) it is foreseeable that such an act would occur in the district of venue [and it does].” 347 F.3d at 483. However, *Svoboda* does not control here. In *Svoboda* we were not faced with the question of whether preparatory acts alone could establish venue. Indeed, *Svoboda* did not involve preparatory acts at all. The act that established venue and that occurred “in furtherance” of the crime charged—the execution of a trade—constituted an essential element of the crime. *See id.* at 485.¹⁰³

Place of Obstructed Activities

The House and Senate bills contain other venue proposals, relating to perjury and the obstruction of justice, that would apply in federal public corruption cases and elsewhere.¹⁰⁴ The Supreme Court in *Rodriguez-Moreno* expressly declined to rule on whether venue may lie in the district impacted by the crime charged.¹⁰⁵ The witness tampering statute now has a subsection under which witness tampering and the obstruction of judicial proceedings may be prosecuted “in the

¹⁰³ *United States v. Tzolov*, 642 F.3d 314, 318-19 (2d Cir. 2011)(some internal quotation marks and citations omitted). *See also, United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 n.4 (1999)(distinguishing a conduct element from a circumstance element, i.e., conduct in furtherance (“By way of comparison, last Term in *United States v. Cabrales*, 524 U.S. 1 (1998), we considered whether venue for money laundering, in violation of 18 U.S.C. §§1956(a)(1)(B)(ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundering transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe ‘the anterior criminal conduct that yielded the funds allegedly laundered.’ *Cabrales*, 524 U.S. at 7. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct—defendant’s money laundering activity—occurred ‘after the fact of an offense begun and completed by others.’ *Ibid.* Here, by contrast, given the “during and in relation to” language, the underlying crime of violence is a critical part of the §924(c)(1) offense”); *United States v. Strain*, 396 F.3d 689, 696-97 (5th Cir. 2005)(venue may not be predicated solely on acts of preparation to commit the offense charged).

¹⁰⁴ H.R. 2572, §15; S. 401, §15.

¹⁰⁵ *United States v. Rodriguez-Moreno*, 526 U.S. at 279 n.2 (1999).

district in which the official proceeding ... was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.”¹⁰⁶

The bills would amend the subsection to permit similar treatment for the prosecution of obstructions in violation of 18 U.S.C. 1504 (writing to influence a federal juror), 1505 (obstructing Congressional or federal administrative proceedings), 1508 (eavesdropping on federal jury deliberations), 1509 (obstructing the execution of federal court orders), 1510 (obstructing federal criminal investigations).¹⁰⁷

At the same time, they would create a new section that would afford prosecutors in federal perjury and subornation cases the same options:

A prosecution under section 1621(1)[perjury generally], 1622 [subornation of perjury](regard to subornation of perjury under 1621(1)), or 1623 [false declarations before the grand jury] 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.¹⁰⁸

The federal appellate cases announced after *Rodriguez-Moreno* suggest that the proposal’s obstruction and perjury amendments may be limited to cases in which a conduct element occurs.¹⁰⁹

Racketeering

Federal racketeering laws—the Racketeer Influenced and Corrupt Organization (RICO) laws—proscribe using a pattern of predicate offenses to conduct the affairs of an enterprise, formal or informal, whose activities impact interstate commerce.¹¹⁰ Bribery of federal officials, mail fraud, and wire fraud are already RICO predicate offenses.¹¹¹ RICO violations are punishable both by imprisonment and by the criminal forfeiture of a defendant’s RICO tainted property.¹¹² RICO predicate offenses are by virtue of that status also money laundering predicate offenses, even in the absence of a completed RICO offense.¹¹³ By the same token, money laundering predicate offenses are by virtue of that status civil forfeiture predicates.¹¹⁴

¹⁰⁶ 18 U.S.C. 1512(i).

¹⁰⁷ H.R. 2572, §15(a). S. 401, §15(a).

¹⁰⁸ H.R. 2572, §15(b)(proposed 18 U.S.C. 1624); S. 401, §15(b)(proposed 18 U.S.C. 1624).

¹⁰⁹ *United States v. Bowers*, 224 F.3d 302, 308-11 (4th Cir. 2000)(noting that of the four elements of the harboring offense—a warrant had been issued for the fugitive’s arrest, the defendant knew of the warrant, the defendant harbored the fugitive; and he did so in order to prevent the fugitive’s arrest—only the act of harboring constitutes a conduct element. Thus, a defendant could not be tried in the district which issued the warrant, but in which defendant had committed no act of harboring); see also, *United States v. Strain*, 396 F.3d 689, 693-97 (5th Cir. 2005).

¹¹⁰ 18 U.S.C. 1961-1963. See CRS Report 96-950, *RICO: A Brief Sketch*, by Charles Doyle.

¹¹¹ 18 U.S.C. 1961(1)(B), 201, 1341, 1343.

¹¹² 18 U.S.C. 1963.

¹¹³ 18 U.S.C. 1956(c)(7)(A).

¹¹⁴ 18 U.S.C. 981(a)(1)(C). Criminal forfeiture occurs as a consequence of the property owner’s conviction and only the defendant’s interest in the property is subject to confiscation. Civil forfeiture may occur without the conviction of anyone and all interests are confiscated unless the interest is held by one who can establish an innocent owner defense.

Both bills would add offenses under section 641 (theft of federal property), 666 (theft or bribery involving federal programs), and 1031 (major fraud against the United States) to the list of RICO predicate offenses.¹¹⁵ The money laundering and forfeiture consequences of RICO status would be less dramatic than might be expected, because of existing coverage. Sections 641 and 666 are already money laundering predicate offenses,¹¹⁶ and sections 666 and 1031 are already civil forfeiture predicates.¹¹⁷ Thus, the only real money laundering and forfeiture consequences that follow from RICO status would be that section 1031 offenses (major fraud) become money laundering predicates and section 641 (theft of federal property) offenses become civil forfeiture predicates.

Apparently to avoid duplication, the bills would rely for money laundering coverage on their grant of RICO predicate status for sections 641 and 666, and would drop the pre-existing explicit reference to those sections in the money laundering list.¹¹⁸

Wiretap Authority

Existing law authorizes federal courts to issue orders approving law enforcement installation and use of devices to intercept wire, oral, and electronic communications.¹¹⁹ The orders are available upon a showing that interception is likely to result in evidence of one of a list specific predicate offenses.¹²⁰ Bribery of federal officials, mail fraud, and wire fraud are already predicate offenses.¹²¹

The bills would add offenses under sections 641 (theft of federal property), 666 (theft or bribery involving federal programs), and 1031 (major fraud against the United States).¹²² The Justice Department has testified that “[p]rosecutors often have lamented their inability to use these tools in such cases.”¹²³

Judicial Disciplinary Investigations

Materials relating to a federal judicial council’s investigation of a complaint filed against a federal judge are confidential.¹²⁴ The bills would allow the materials to be disclosed to federal or state grand juries and to federal, state, or local law enforcement officials.¹²⁵

¹¹⁵ H.R. 2572, §13(a). S. 401, §10(a).

¹¹⁶ 18 U.S.C. 1956(c)(7)(D).

¹¹⁷ 18 U.S.C. 981(a)(1)(D).

¹¹⁸ H.R. 2572, §13(b). S. 401, §10(b).

¹¹⁹ 18 U.S.C. 2518. See CRS Report R41734, *Privacy: An Abridged Overview of the Electronic Communications Privacy Act*, by Charles Doyle.

¹²⁰ 18 U.S.C. 2516.

¹²¹ 18 U.S.C. 2516(c) (“The Attorney General ... may authorize an application ... for ... an order ... approving the interception of wire or oral communications ... when such interception may provide ... evidence of ... (c) any offense which is punishable under the following sections of this title: ... section 201 ... section 1341... section 1343 ...”).

¹²² H.R. 2572, §14. S. 401, §11. Note that S. 401 appears to have inadvertently placed section 1030 in the predicate offense list “before ‘section 1032.’” There is no section 1032 in the 18 U.S.C. 2516 predicate offense list.

¹²³ House hearing, Brown testimony.

¹²⁴ 28 U.S.C. 360.

¹²⁵ H.R. 2572, §17. S. 401 §17.

Appeals

The United States Attorney must certify that any appeals by the Government are not taken for purposes of delay and that in the case of an appeal relating to the exclusion of evidence must certify that the evidence is substantial proof of a material fact in the pending case.¹²⁶ The bills would permit certification as well by the Attorney General, the Deputy Attorney General, or an Assistant Attorney General.¹²⁷ The proposal was not a feature of the bill reported out of the Senate Judiciary in the 110th Congress and no mention of it appears in the hearings held in this Congress. It appears to be the result of a situation that arose in *Weyhrauch*. In *Weyhrauch*, the government appealed the trial court's exclusion of evidence based on an interpretation of the honest services statute.¹²⁸ The Supreme Court ultimately granted certiorari¹²⁹ and thereafter returned the case to the Ninth Circuit for further consideration in light of *Skilling*.¹³⁰

Prior to the case's arrival before the Supreme Court, however, the Ninth Circuit had ordered the government to show cause why its appeal should not be dismissed for failure to comply with the certification requirements of section 3731.¹³¹ The Executive Office for United States Attorneys had stated that the United States Attorney's Office for the District of Alaska was to recuse itself from participating in the *Weyhrauch* case.¹³² Attorneys from the Justice Department's Public Integrity Section had prosecuted the case and the Chief of the Section had certified the appeal.¹³³

The court found the certification insufficient, since the Chief had not been delegated authority to certify the appeal.¹³⁴ It later accepted the certification of the Attorney General, but suggested that alternative means of certification should be developed for instances when prosecutions were conducted by Justice Department attorneys other than those of a United States Attorney's office.¹³⁵

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¹²⁶ 18 U.S.C. 3731.

¹²⁷ H.R. 2572, §19. S. 401, §19.

¹²⁸ *United States v. Weyhrauch*, 548 F.3d 1237 (9th Cir. 2008).

¹²⁹ *Weyhrauch v. United States*, 129 S.Ct. 2863 (2009).

¹³⁰ *Weyhrauch v. United States*, 130 S.Ct. 2971 (2010).

¹³¹ *United States v. Weyhrauch*, 544 F.3d 969, 970 (9th Cir. 2008).

¹³² *United States v. Weyhrauch*, 548 F.3d at 1241.

¹³³ *Id.* at 1240-241.

¹³⁴ *United States v. Weyhrauch*, 544 F.3d at 972-75.

¹³⁵ *United States v. Weyhrauch*, 548 F.3d at 1241-242.

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