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Public Corruption Prosecution Improvements Act: Revising Federal Gratuities Law to Criminalize Innocent Conduct

Brian W. Walsh

The Senate Judiciary Committee is considering a bill that would greatly expand the reach of a key "public corruption" offense, an offense that is already far too broad. In fact, the current statute is already so ill-defined that public officials are likely to violate it by engaging in conduct that no one should deem criminal or define as "public corruption."

Nevertheless, supporters of expanding the federal gratuities statute via the Senate's Public Corruption Prosecution Improvements Act (PCPIA) are overtly rejecting the U.S. Supreme Court's analysis in a unanimous opinion warning of the dangerous, unfounded prosecutions that are likely to arise if policies like those in this bill are permitted to authorize federal prosecutions.

The bill has several problems,[1] but its proposed changes to the federal gratuities statute are among the most pernicious.[2] Rather than weakening the gratuity statute's protections against unjust prosecution and conviction, the Senate should be strengthening the statute's criminal-intent requirement. For a criminal offense to be relatively free from the possibility of abuse, it must include precise, clear, and meaningful language requiring the government to prove beyond a reasonable doubt that a person acted with criminal intent.[3] Because this provision fails that test, it would invite even more accusations of politically motivated prosecutions.

Disregarding Dangers Highlighted in a Unanimous Supreme Court Decision. In general terms, a gratuity is merely a gift, but in law it often carries the additional meaning of a gift "given in return for a favor or especially a service."[4] Specifically in the context of federal public corruption law, "gratuity" generally implies something given or offered, received or solicited in contemplation of a public official using his office on behalf of the giver—i.e., it is akin to a bribe.[5]

In the *Sun-Diamond* case, the lower federal courts had extended the language of the gratuities statute to include a gift given to a public official merely "on account of" or "because of" that official's position.[6] Under this interpretation, it was not necessary that the gift have been given in express or implied consideration of the public official's taking (or foregoing) any specific official act on behalf of the giver. A unanimous Supreme Court rejected this broad reading of the statute, pointing out that whenever a championship sports team visits the White House and awards the President an honorary team jersey, the lower federal courts' interpretation of the gratuities statute would have made criminals out of both the President and whoever gave him the jersey.[7]

PCPIA would change the public gratuities statute in a manner that, as the U.S. Supreme Court

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warned, would subject to criminal prosecution and punishment public officials and average Americans who did nothing that should be considered wrongful. Rather than accept the Supreme Court's modest reading from *Sun-Diamond*, the PCPIA seeks to reverse it by altering the statutory language to include the expansive scope of activity embraced by the lower courts.

The result of such a change is not just to make criminals of citizens giving actual gifts rather than bribes to public officials but to criminalize acts of collegiality as well. For example, any Member of Congress who uses a personal auto—or, heaven forbid, a personal plane—to give another person a ride because the latter, too, is a Member of Congress would be a criminal.

In addition to the negative practical effects, by functionally delegating legislative authority to the executive branch—in this case, to prosecutors—to define the actual contours of the offense, overbroad criminal statutes raise serious constitutional questions regarding the separation of powers. This is particularly problematic in the context of the criminal law, where due process requires that the law provide sufficient notice to potential violators[8] and that the government prove that the defendant both committed the wrongful conduct and had the requisite guilty state of mind at the time. Exceedingly broad criminal statutes that encompass and fail to distinguish between wrongful, criminal conduct and totally innocent conduct constitute unconstitutional traps for the unwary.

Political Prosecutions. If the PCPIA's proposed revision of the federal gratuities statute were enacted, the gratuities statute would lack criminal-intent protections, and the primary "safeguard" on which federal officials would have to rely to protect them against unjust prosecution would be federal prosecutors' good graces, their exercises of professional judgment, and their desire not to engage in politically motivated prosecutions.

While prosecutorial discretion serves a useful purpose, it should not be unbounded. A narrowly defined criminal offense that targets specific wrongful conduct and requires the government to prove a meaningful level of criminal intent is the best protection against prosecutions that could be politically motivated or otherwise unjust.

The former head of the Justice Department's Criminal Division in 2008 lamented the bum rap DOJ's Public Integrity Section receives no matter what it does.[9] If the number of cases that the Public Integrity Section prosecutes is not large enough for some of its critics, it is accused of being soft on fraud

1. *See* Letter from The Heritage Foundation and the National Association of Criminal Defense Lawyers to U.S. Senate Judiciary Committee Chairman Patrick Leahy and Ranking Member Arlen Specter, Feb. 26, 2009, *available at* http://www.heritage.org/research/legalissues/upload/HeritageNACDLPublicCorruptionProvisions.pdf (analyzing weaknesses in the Public Corruption Prosecution Improvements Act of 2009).
2. 18 U.S.C. § 201(c)(1).
3. Except in a limited number of instances, which are increasingly disfavored in law, criminal intent is a necessary element of every crime and thus must be proven beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358, 364 (1970) (holding that constitutional due process requires the government to prove beyond a reasonable doubt "every fact necessary to constitute the crime").
4. *E.g.*, Black's Law Dictionary 701 (6th ed. 1990).
5. *See id.*
6. *See* United States v. Sun-Diamond Growers of California, 526 U.S. 398, 402–04 (1999). In denying Sun-Diamond's motion to dismiss on the grounds that the indictment failed to allege a specific connection between the gratuities conferred and any specific act by the public official, the federal district had stated, "It is sufficient for the indictment to allege that Sun Diamond provided things of value to [the public official] because of his position." *Id.* at 402-03.
7. *Sun-Diamond*, 526 U.S. at 406–07.
8. United States v. Bass, 404 U.S. 336, 347–48 (1971) (addressing concerns of adequate notice and non-delegation).
9. *See* Alice Fisher, Former Assistant Attorney General, Criminal Division, U.S. Department of Justice, Comments during Panel Discussion at the Federalist Society's 2008 Nat'l Lawyers Convention: The Prosecution of Public Corruption (Nov. 20, 2008), *available at* http://www.fed-soc.org/publications/pubid.1203/pub_detail.asp (audio and video recordings).

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and corruption by public officials. On the other hand, the prosecutions it does bring are often criticized as being politically motivated. Some Members of Congress have leveled similar accusations regarding politically motivated prosecutions.

What they apparently fail to recognize is that narrowly defined criminal laws are also a defense against false accusations that a prosecution is politically motivated. Broad, vaguely defined offenses that encompass a wide range of conduct—both wrongful and innocent—and that do not require the government to prove that a public official acted with criminal intent invite—indeed, beg—criticism that charges brought under them are politically motivated.

A Trap for the Unwary. A unanimous Supreme Court was not mistaken when it warned of the dangers and injustices likely to arise if the federal gratuities statute can be interpreted and applied in the manner that the Senate proposes under the PCPIA. The broadened definition of the already broad gratuities offense would criminalize innocent conduct in which Members of Congress and other public officials currently engage without doing anything that is truly wrongful or corrupting to government.

The revised gratuities statute would thus invite politically motivated and otherwise abusive prosecutions. Further, even many prosecutions under the revised statutes that are not politically motivated would be vulnerable to false accusations that they are in fact politically motivated.

If Congress makes any changes at all to the existing federal gratuities statute, the criminal-intent terms should be strengthened so that only those persons who knew their conduct was unlawful or otherwise wrongful can be convicted and subjected to criminal punishment. This change would go far to help prevent the gratuities statute from acting as the trap for the unwary that concerned the Supreme Court. It would thus help ensure that public officials and those who give them gifts are not made into criminals unless they actually contemplated and intended the type of gratuities-based alteration of their officials acts that can actually corrupt good government.

—Brian W. Walsh is Senior Legal Research Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation.