U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 4, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is to advise that the Department of Justice (Department) supports S. 49, the "Public Corruption Prosecution Improvements Act" and would like to work with the Committee on improvements that would further enhance our law enforcement efforts relating to public corruption. The legislation would close significant gaps that exist under current law and provide additional tools and needed resources to public corruption prosecutors and investigators. We believe that the revisions recommended below, if adopted, would make the legislation more effective in assisting our investigations and prosecutions of public corruption.

Combating public corruption is one of the Department's top priorities and this bill would enhance our ability to do so in several ways. First, section 2 extends the statute of limitations for certain offenses. While this provision would be helpful to prosecutors, an eight year extension should be permitted for public corruption cases.[1] We note that financial crimes enjoy a 10 year statute of limitations to accommodate the additional time that often passes before discovery of the offense and the additional time that document-intensive investigations entail. Similarly, public corruption cases can involve long-term systemic and insidious conduct that involve similarly extended time periods.

Sections 3 and 4 of the legislation address specific problems that have been at issue in prosecutions under the mail and wire fraud statutes. The legislation would remedy these problems by expanding the scope of 18 U.S.C. §§ 1341 and 1343 to cover schemes involving money, property, or any other thing of value. S. 49 also would expand the appropriate venue in such cases to include not only the district in which a mailing took place, but also any district in which the defendants otherwise devised and carried out their scheme to defraud. These are vitally needed and narrowly tailored provisions that would greatly assist us in a variety of public corruption cases.

[1] We note that the Office of Government Ethics holds records for the statutorily required six years. To fully recognize the benefits of the eight-year statute of limitations, revisions to that requirement may be necessary.

Section 5 would amend 18 U.S.C. § 666, the federal program bribery and fraud statute, by lowering the dollar threshold for application of the statute to public corruption offenses from $5,000 to $1,000. Experience has shown that significant abuses of the public trust can occur in circumstances in which the dollar amount involved is relatively low, but the threat to the integrity of a government function is relatively high. This amendment would permit us to reach a greater number of corruption cases that involve less money.

Sections 10 and 11 of the legislation would provide us with two important tools in the investigation and prosecution of Federal program bribery (18 U.S.C. § 666) and theft or embezzlement of government property (18 U.S.C. § 641). Specifically, the legislation would make these offenses predicates for the use of court-ordered wiretaps to gather evidence, and predicates for charging violations of the Racketeering Influenced and Corrupt Organizations Act. Prosecutors often have lamented their inability to use these tools in such cases. The legislation would enhance our ability to investigate and prosecute these offenses.

Sections 12 and 13 would remedy problems that have arisen from judicial interpretations of the federal bribery statute in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999) and *United States v. Valdes*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc). S. 49 would clarify that a public official violates 18 U.S.C. § 201(c) when he or she accepts a thing of value that is given for or because of the defendant's official position. This was a well-established interpretation of subsection 201(c) prior to *Sun-Diamond*, and the amendment would simply return the law to its earlier status. *Sun-Diamond*'s requirement that the government establish a direct link between a specific official act and the payment of a thing of value is a substantial obstacle to the use of subsection 201(c). The amendment of section 12 would enhance our ability to prosecute violations of this statute successfully. Section 13 would amend the definition of the term "official act" in 18 U.S.C. § 201(a)(3) to ensure that the bribery statute applied to all conduct within the range of a public official's duties. This amendment would reverse the damaging interpretation of section 201(a)(3) in *Valdes*, which held that a law enforcement officer did not violate section 201 when he accepted cash payments in exchange for obtaining information from a sensitive law enforcement database. *Valdes* is a serious impediment to public corruption enforcement efforts and the amendment in S. 49 would eliminate its adverse effects.

Section 14 would amend subsections 18 U.S.C. § 201(b) and (c) to bolster our ability to address "course of conduct" bribery. In many public corruption cases, there is an ongoing stream of financial benefits flowing to a public official and it may be difficult to establish a one-for-one link between a particular gift and a particular official act. While the Department and several courts have interpreted the current law to cover such schemes, the proposed amendment would shore up our ability to reach this conduct under section 201.

Section 15 of the bill would enhance the Department's ability to prosecute obstruction of justice and perjury by expanding the number of districts in which such prosecutions may be brought. This expansion of the available venues in obstruction of justice and perjury cases would give us greater flexibility in charging these offenses, which are closely related to public corruption. Although in most cases, this expansion of venue would not exceed the limits on

venue for criminal trials prescribed by Article III, section 2, clause 3 of the Constitution and the Sixth Amendment to the Constitution, we have concerns that as applied in certain cases, the expanded venue provisions in subsections (a) and (b) of section 15 would allow venue to be located in a district not permitted by the Constitution, *i.e.*, in a district other than one in which criminal conduct occurred. *See Travis v. United States*, 364 U.S. 631, 634 (1961). For instance, in a prosecution of a perjury offense where some connection to an official proceeding is *not* an element of the offense (such as under 18 U.S.C. § 1621(2)), venue may not be located in a district merely because the perjured statement was introduced in a court proceeding in that district, as the current version of section 15(b) of the bill would allow. Similarly, with respect to subsection 15(a) of the bill, not all prosecutions under "this chapter"—chapter 73—necessarily involve or relate to an "official proceeding." *See, e.g.*, 18 U.S.C. § 1520. Revising the venue provision in 18 U.S.C. § 1512(i) to cover all the offenses in chapter 73 therefore could result in an unconstitutional expansion of venue in certain cases.

In order to avoid any concerns about unconstitutional applications of section 15 and minimize litigation about permissible locations of venue, we recommend that section 15 be revised to state:

> (a) IN GENERAL.—Section 1512(i) of title 18, United States Code, is amended to provide: "A prosecution under this chapter may be brought in the district in which the conduct constituting the alleged offense occurred or in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected in cases where an effect on such a proceeding, or an intent to affect such a proceeding, is an element of the relevant offense.
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> (b) PERJURY—(1) . . . . "§ 1624. Venue. A prosecution under this chapter 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 in cases where a connection to such a proceeding is an element of the relevant offense."

In addition to the expanded venue provisions in section 15, we would like to propose an expansion of venue for 18 U.S.C. § 1001, which is a very commonly used tool in public corruption and white collar cases. We recommend an amendment to expand venue under 1001 to mirror 18 U.S.C. § 1512 by inserting after 18 U.S.C. § 1001(c) the following:

> (d) A prosecution under this section may be brought in the district in which the executive, legislative, or judicial branch matter was intended to be affected, or in the district in which the conduct constituting the alleged offense occurred.

Section 16 of the legislation provides for funding for personnel to investigate and prosecute public corruption offenses. Section 17 of the bill would also increase the statutory maximum penalties for many public corruption offenses and direct the United States Sentencing

Commission to review the sentencing guidelines for such offenses. Public corruption is a serious matter and presents a substantial threat to the integrity of government functions. The Department believes that public corruption warrants stiff punishment and we support increased penalties for these offenses.

In sum, we support S. 49 and we stand ready to work with the Committee on the improvements we have identified relating to the legislation. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

M. Faith Burton

M. Faith Burton
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member