

# A CONGRESSIONAL “MEAT AXE”?

## NEW LEGISLATION WOULD BROADEN THE POTENTIAL FOR PROSECUTIONS UNDER THE FEDERAL ILLEGAL GRATUITY STATUTE

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High-ranking officials within the Obama administration have made it clear that investigating and prosecuting public corruption is a top enforcement priority.<sup>1</sup> Proponents of strengthened enforcement argue that “[r]espect for our nation’s laws is critically diminished when public officials are found to have accepted bribes or to have participated in criminal behavior that violates the sacred trust our nation’s people have placed in them.”<sup>2</sup> Prosecutions of public corruption are already on the rise under the Obama administration,<sup>3</sup> and recent legislation introduced in Congress would significantly bolster those efforts in relation to illegal gratuities.

The Public Corruption Prosecution Improvements Act of 2009 (“PCPIA”) is designed to improve federal anti-corruption statutes by, among other things, making it easier to prosecute individuals under the illegal gratuity statute, codified at 18 U.S.C. § 201(c). The bill’s sponsor, Senator Patrick Leahy (D-VT), asserts that changes within the PCPIA will “strengthen and clarify key aspects of federal criminal law and provide new tools to help investigators and prosecutors attack public corruption nationwide.”<sup>4</sup> The legislation is said to address narrow court interpretations, which, in the minds of some, have hindered efforts by the government to investigate and prosecute public corruption crimes.<sup>5</sup>

The sentiment to narrowly interpret the illegal gratuity statute may be nothing more than a pragmatic approach to imprecise drafting by Congress. In *United States v. Sun-Diamond Growers of California*, Justice Antonin Scalia, delivering the unanimous opinion of the Court, noted that illegal gratuities are addressed in an area of law where statutes are written to be precise or, alternatively, to be broad and accompanied by numerous exceptions.<sup>6</sup> Justice

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1. See, e.g., David W. Ogden, Deputy Att’y Gen., Remarks as Prepared for Delivery at His Installation Ceremony (May 8, 2009) (transcript available at <http://www.justice.gov/dag/speeches/2009/dag-speech-090508.html>) (referring to public corruption as an “urgent priorit[y] within [the DOJ’s] traditional missions”); Robert S. Mueller III, Dir., FBI, Remarks at the American Bar Association Litigation Section Annual Conference (Apr. 17, 2008) (transcript available at <http://www.fbi.gov/pressrel/speeches/mueller041708.htm>) (calling public corruption the Bureau’s “top criminal priority”).

2. Letter from Richard Delonis, President, Nat’l Ass’n of Assistant U.S. Attorneys to Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary (Mar. 2, 2009) [hereinafter Letter from Delonis to Sen. Leahy].

3. Mueller, *supra* note 1 (“[The FBI has] more than 2,500 pending public corruption investigations—an increase of more than [fifty] percent since 2003. In the past five years, the number of agents working public corruption cases also has increased by more than [fifty] percent.”).

4. 155 CONG. REC. S56 (daily ed. Jan. 6, 2009) (statement of Sen. Leahy).

5. See, e.g., Letter from Delonis to Sen. Leahy, *supra* note 2; see also Letter from J. Gerald Hebert, Executive Dir. & Dir. of Litig., Campaign Legal Ctr., to Sen. Patrick Leahy (Mar. 2, 2009), available at <http://www.campaignlegalcenter.org/press-3550.html> [hereinafter Letter from Hebert to Sen. Leahy].

6. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999).

Scalia posited that if the illegal gratuity statute could be interpreted as either "a meat axe or a scalpel," it should reasonably be taken to be a scalpel in this context.<sup>7</sup> In contrast, the PCPIA not only broadens the potential for prosecutions under the illegal gratuity statute, it also appropriates a remarkable \$100 million for the federal prosecution of public corruption.<sup>8</sup> As a consequence, the PCPIA is more akin to the meat axe than the scalpel, and the extent of its potential impact on prosecutions of illegal gratuities is worth a closer look prior to the enactment of such legislation.

## I. HISTORIC OVERVIEW

Proponents of the PCPIA believe new legislation is needed, at least in part, to restore teeth to the illegal gratuity statute, the efficaciousness of which has been limited by federal court interpretations.<sup>9</sup> A brief overview of the illegal gratuity statute and subsequent interpretations by the federal judiciary is useful to understanding why proponents support the enactment of the PCPIA and may support similar efforts in the future.

### A. *The Illegal Gratuity Statute, Unamended*

The modern statutory offense for giving or accepting a bribe or illegal gratuity was enacted by Congress in 1962 and codified at 18 U.S.C. § 201 as part of a broader package of legislation aimed at combating public corruption.<sup>10</sup> The illegal gratuity statute states, in pertinent part:

Whoever—

...

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of

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7. *Id.*

8. S. 49, 111th Cong. § 16 (2009).

9. *Public Corruption Prosecution Improvements Act of 2009: Executive Business Meeting on S. 49 Before the S. Comm. on the Judiciary*, 111th Cong. (Mar. 12, 2009) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3708&wit\\_id=2629](http://judiciary.senate.gov/hearings/testimony.cfm?id=3708&wit_id=2629) [hereinafter *Executive Business Meeting on S. 49*].

10. 18 U.S.C. § 201(b)–(c) (2006) (criminalizing bribery involving a public official and illegal gratuities involving a public official, respectively). See generally Notice of Memorandum Regarding Conflict of Interest Provisions of Public Law 87-849, 28 Fed. Reg. 985–89 (Feb. 1, 1963).

any official act performed or to be performed by such official or person;

...

shall be fined under this title or imprisoned for not more than two years, or both.<sup>11</sup>

To obtain a conviction under the unamended illegal gratuity statute, prosecutors must prove as to the giver (or receiver) that: (1) a thing of value was given, offered, or promised (or that a thing of value was demanded, sought, received, accepted, or received by agreement); (2) to (or by) a former, current, or newly selected public official; (3) for or because of any "official act" performed or to be performed in the future by such official or person.<sup>12</sup> For the purposes of the statute, an "official act" is defined as "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."<sup>13</sup>

### B. Interpretation by Courts

With a few notable exceptions, federal courts have narrowly interpreted the illegal gratuity statute. In particular, two high-profile cases are seen as having limited prosecutions under the illegal gratuity statute by requiring that prosecutors allege and prove a link between the gratuity and the "official act" involved and by narrowing the types of acts that may constitute an "official act" for the purpose of violating the statute.<sup>14</sup>

#### 1. *United States v. Sun-Diamond Growers*

In early 1999, the U.S. Supreme Court heard the case of *United States v. Sun-Diamond Growers of California*.<sup>15</sup> The controversy focused on gifts made to former Secretary of Agriculture Michael Espy from an industry trade association called Sun-Diamond Growers of California.<sup>16</sup> The indictment alleged that Espy took roughly \$5,900 in illegal gratuities, including items like tickets to the U.S. Open, luggage, meals, and a crystal bowl.<sup>17</sup> The indictment also "alluded to" matters that were pending before Espy at the time and in which Sun-Diamond Growers had an interest in favorable treatment.<sup>18</sup> What the indictment did not allege, however, was whether there was any specific connection or link between those gratuities and the pending matters.<sup>19</sup> The

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11. 18 U.S.C. § 201(c)(1).

12. A similar summary by the U.S. Supreme Court is found in *United States v. Sun-Diamond Growers of California*. See *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404 (1999).

13. 18 U.S.C. § 201(a)(3).

14. See, e.g., Letter from Delonis to Sen. Leahy, *supra* note 2.

15. 526 U.S. at 398.

16. *Id.* at 400-01.

17. *Id.* at 401.

18. *Id.*

19. *Id.* at 402.

issue before the Court was whether a conviction under the illegal gratuity statute requires that prosecutors prove anything "beyond the fact that a gratuity was received because of the recipient's official position."<sup>20</sup>

The district court embraced a broad reading of the illegal gratuity statute at trial and instructed the jury, among other things, that "[i]t is sufficient if Sun-Diamond provided Espy with unauthorized compensation simply because he held public office."<sup>21</sup> Espy was subsequently convicted at trial.<sup>22</sup> The court of appeals reversed, holding that the jury instructions had improperly permitted a conviction based solely upon the Espy's official position and without regard to any specific "official act" as contemplated by the illegal gratuity statute.<sup>23</sup>

On appeal, the U.S. Supreme Court held that in order to establish a violation of the illegal gratuity statute, a "link" must be proven between the gratuity and "a specific 'official act' for or because of which [the gratuity] was given."<sup>24</sup> The unanimous opinion, delivered by Justice Scalia, focused on the phrase "for or because of any official act."<sup>25</sup> That language within the statute, it was reasoned, "seems pregnant with the requirement that some particular official act be identified and proved."<sup>26</sup> The district court's jury instructions, on the other hand, mistakenly "placed an expansive gloss on the statutory language" by stating, among other things, that "[t]he government need not prove that the alleged gratuity was linked to a specific or identifiable official act or any act at all."<sup>27</sup>

In support of the Court's narrow interpretation, Scalia pointed out that a broad reading would lead to peculiar results and simply does not fit with the approach taken by Congress in similar contexts. Scalia was concerned, for example, that a broad reading would criminalize mere "token gifts to the President based upon his official position and not linked to any identifiable act."<sup>28</sup> Furthermore, "when Congress has wanted to adopt such a broadly prophylactic criminal prohibition upon gift giving, it has done so in a more precise and more administrable fashion."<sup>29</sup> Section 201(c)(1) is also "merely one strand of an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials."<sup>30</sup> Scalia noted that many related statutes and regulations also contain "exceptions for various kinds of gratuities," and "those exceptions would be snares for the unwary" in the absence of exceptions within a broadly-interpreted illegal gratuity statute.<sup>31</sup> In light of its holding that a link must be

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20. *Id.* at 400.

21. *Id.* at 403 (quoting App. to Pet. for Cert. 85a).

22. *Id.*

23. *Id.* at 403-04.

24. *Id.* at 414.

25. *Id.* at 406.

26. *Id.*

27. *Id.* at 403 (quoting App. to Pet. for Cert. 87a).

28. *Id.* at 406.

29. *Id.* at 408.

30. *Id.* at 409; see Steven M. Levin, Note, *Illegal Gratuities in American Politics: Learning Lessons from the Sun-Diamond Case*, 33 LOY. L.A. L. REV. 1813, 1826 & n.76 (2000).

31. *Sun-Diamond Growers*, 526 U.S. at 411.

proven between the gratuity and specific official act, the U.S. Supreme Court affirmed the judgment of the court of appeals.<sup>32</sup>

## 2. *Valdes v. United States*

Several years after *Sun-Diamond Growers*, the illegal gratuity statute was the focus of another high-profile case. In early 2007, the Court of Appeals for the District of Columbia decided the case of *Valdes v. United States*.<sup>33</sup> In *Valdes*, the court of appeals was forced to interpret the definition of “official act” in order to determine whether a conviction for certain actions was supported by sufficient evidence.<sup>34</sup> The controversy arose from the prosecution of Nelson Valdes, a Washington, D.C. police detective.<sup>35</sup> At the request of an undercover FBI informant posing as a judge, Valdes accessed police databases and supplied publicly available information about various individuals.<sup>36</sup> Valdes received various sums of money from the informant in the process.<sup>37</sup> A jury convicted Valdes on several counts, including three counts of receiving an illegal gratuity in violation of § 201(c)(1)(B).<sup>38</sup>

As mentioned above,<sup>39</sup> an “official act” is defined as “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.”<sup>40</sup> The court of appeals rejected a broad interpretation of “official act,” which would include “any action which implicates the duties and powers of a public official.”<sup>41</sup> The court reasoned that “§ 201 is not about officials’ moonlighting, or their misuse of government resources, or the two in combination.”<sup>42</sup> In fact, those activities are prohibited by other regulations and statutes.<sup>43</sup> Instead, the proper focus for identifying “official acts” for the purposes of § 201 is placed on those “questions, matters, causes, suits, proceedings, and controversies that are decided by the government.”<sup>44</sup> The court held that “information disclosure is not in itself a ‘decision or action on [a] question, matter, cause, suit, proceeding or controversy’ that ‘may by law be brought’ before a public official.”<sup>45</sup> To prove that an “official act” is involved requires a showing of something more than a mere information disclosure, and because the prosecution of Valdes failed to meet that burden, the court of

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32. *Id.* at 414.

33. 475 F.3d 1319 (D.C. Cir. 2007) (en banc).

34. *Id.* at 1320–21.

35. *Id.* at 1320.

36. *Id.* at 1321–22.

37. *Id.*

38. *Id.* at 1322.

39. See discussion *supra* Part II.A.

40. 18 U.S.C. § 201(a)(3) (2006).

41. *Valdes*, 574 F.3d at 1322.

42. *Id.* at 1324.

43. *Id.* at 1324–25.

44. *Id.* at 1325.

45. *Id.* at 1329–30 (quoting 18 U.S.C. § 201(a)(3)).

appeals reversed his conviction.<sup>46</sup>

### C. Criticism of *Sun-Diamond Growers* and *Valdes*

A common thread among criticisms of *Sun-Diamond Growers* and *Valdes* is the concern that prosecutions under the illegal gratuity statute have become too difficult. Regarding *Sun-Diamond Growers*, the concern is rooted in the belief that, even in cases of clear corruption, it is often difficult to demonstrate a direct link between a gift and a specific official act.<sup>47</sup> In addition, even those willing to acknowledge that *Sun-Diamond Growers* prevents the unnecessary criminalization of innocent gift-giving, there is concern that its narrow interpretation nonetheless "underestimates just how influential money is in the legislative process."<sup>48</sup> With respect to *Valdes*, critics claim the decision has either muddied the understanding of what constitutes an "official act" for purposes of the illegal gratuity statute<sup>49</sup> or so limited the definition of an "official act" that many types of actions are no longer covered.<sup>50</sup>

## II. THE PUBLIC CORRUPTION PROSECUTION IMPROVEMENTS ACT OF 2009

The PCPIA would update several federal anti-corruption statutes and make significant changes to the current version of the illegal gratuity statute in response to *Sun-Diamond Growers* and *Valdes*.

### A. S. 49

By way of background, a nearly identical predecessor to the PCPIA was introduced during the last session of Congress and was defeated by Republicans.<sup>51</sup> The latest version, Senate Bill 49, was introduced in the Senate on January 6, 2009 by Senators Patrick Leahy, John Cornyn, and Ted Kaufman.<sup>52</sup> The bill has been considered by the Senate Judiciary Committee and was reported out on March 12, 2009.<sup>53</sup> The PCPIA is now slated to be considered by the Senate as a whole, and it is currently on the Legislative Calendar under General Orders.<sup>54</sup>

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46. *Id.* at 1330.

47. *See, e.g., Executive Business Meeting on S. 49, supra* note 9.

48. Levin, *supra* note 30, at 1840. While the outcome of *Sun-Diamond Growers* prevents peculiar results "stemming from innocent gift-giving, it also shelters not-so-innocent gift-giving that is likely to influence a public official." *Id.*

49. *See, e.g., Letter from Delonis to Sen. Leahy, supra* note 2. The National Association of Assistant United States Attorneys endorses the PCPIA because "it will give federal prosecutors and law enforcement officials the legal tools and resources to better detect and prosecute public corruption." *Id.*

50. *See, e.g., Letter from Hebert to Sen. Leahy (Mar. 2, 2009), supra* note 5.

51. *See, e.g.,* 155 CONG. REC. S56 (daily ed. Jan. 6, 2009) (statement of Sen. Leahy).

52. S. 49, 111th Cong. (2009).

53. *Id.*

54. U.S. Senate Calendar of Business, 111th Cong., Gen. Order No. 32 (Mar. 2, 2010), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=senate\\_calendar&docid=sc001.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=senate_calendar&docid=sc001.pdf).

## 1. Section-by-Section Snapshot

Section One: Identifies the Act as the “Public Corruption Prosecution Improvements Act.”<sup>55</sup>

Section Two: Extends the statute of limitations from five to six years for public corruption offenses involving certain types of theft, bribery and illegal gratuities (§§ 201, 666), mail and wire fraud (§§ 1341, 1343, 1346), extortion (§ 1951), and racketeering (§ 1962).<sup>56</sup>

Section Three: Broadens the application of mail and wire fraud statutes (§§ 1341, 1343) from just money and property to any other thing of value, such as licenses and intangible rights.<sup>57</sup>

Section Four: Modifies the venue rules for criminal prosecutions. Prosecution will be permitted in “any district in which an act in furtherance of an offense is committed.”<sup>58</sup>

Section Five: Reduces the threshold amount for theft or bribery involving federally-assisted programs from \$5,000 to \$1,000 and increases the maximum prison term for these offenses from ten to fifteen years (§ 666).<sup>59</sup>

Section Six: Increases from ten to fifteen years the maximum prison term for offenses involving theft and embezzlement of federal money, property, or records (§ 641).<sup>60</sup>

Section Seven: Increases from fifteen to twenty years the maximum prison term for bribery offenses under § 201(b).<sup>61</sup>

Section Eight: Increases to ten years the maximum prison term for: (1) the solicitation of political contributions by federal officers and employees (§ 602(a)); (2) the promise of employment for political activity by way of an act of Congress (§ 600); (3) the deprivation of employment for political activity (§ 601(a)); (4) intimidation to secure political contributions (§ 606); (5) the solicitation and acceptance of contributions in federal offices (§ 607(a)(2)); and (6) coercion of political activity by federal employees (§ 610).<sup>62</sup>

Section Nine: Broadens the application of prohibitions on embezzlement or theft of federal money or property under § 641 to government officials and employees of the District of Columbia.<sup>63</sup>

Section Ten: Includes embezzlement or theft of public money, property, or records (§ 641) and theft or bribery concerning programs receiving federal funds (§ 666) as predicates for racketeering prosecutions under § 1961(1).<sup>64</sup>

Section Eleven: Includes embezzlement or theft of public money, property, or records (§ 641) and theft or bribery concerning programs receiving federal

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55. S. 49, § 1.

56. *Id.* § 2.

57. *Id.* § 3.

58. *Id.* § 4.

59. *Id.* § 5.

60. *Id.* § 6.

61. *Id.* § 7.

62. *Id.* § 8.

63. *Id.* § 9.

64. *Id.* § 10.



funds (§ 666) as predicates for federal wiretaps under § 2516(1)(c).<sup>65</sup>

Section Twelve: Clarifies the crime of illegal gratuities by adding an exception to § 201(c)(1) for acts provided "by rule or regulation" and expands the language of § 201(c)(1)(A) and (B) to apply to gratuities given or accepted because of an "official's or person's official position." It also defines the term "rule or regulation" to mean either "a federal regulation or rule of the House of Representatives and the Senate, including rules governing the acceptance of campaign contributions."<sup>66</sup>

Section Thirteen: Broadens the definition of "official act" under § 201(a)(3). The term now means "any action within the range of official duty, and 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 public official's official capacity or in such official's place of trust or profit. An official act can be a single act, more than one act, or a course of conduct."<sup>67</sup>

Section Fourteen: Expands § 201 of the bribery and illegal gratuity statute from "anything of value" to "any thing or things of value" to account for a course of conduct.<sup>68</sup>

Section Fifteen: Expands venue for perjury and obstruction of justice proceedings.<sup>69</sup>

Section Sixteen: Provides appropriations for additional investigations and prosecutions in the combined amount of \$100 million for 2010 to 2013.<sup>70</sup>

Section Seventeen: Directs the U.S. Sentencing Commission to review and amend its guidelines and policy statements relating to public corruption offenses under §§ 201, 641, and 666 to reflect the intent of Congress that penalties for such offenses be increased in comparison to those currently in effect.<sup>71</sup>

## B. H.R. 2822

A companion bill to S. 49 was introduced in the House of Representatives on June 11, 2009 as H.R. 2822.<sup>72</sup> On July 23, 2009, it was referred to the Subcommittee on Crime, Terrorism, and Homeland Security.<sup>73</sup> The bill is designed to "help [f]ederal prosecutors and investigators combat public corruption by strengthening and clarifying the law."<sup>74</sup> The language of H.R. 2822 closely tracks that of its counterpart in the Senate. Nonetheless, a handful

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65. *Id.* § 11.

66. *Id.* § 12.

67. *Id.* § 13.

68. *Id.* § 14.

69. *Id.* § 15.

70. *Id.* § 16.

71. *Id.* § 17.

72. H.R. 2822, 111th Cong. (2009).

73. See GovTrack.us, H.R. 2822: Public Corruption Prosecution Improvements Act, <http://www.govtrack.us/congress/bill.xpd?bill=h111-2822> (last accessed Mar. 4, 2010).

74. H.R. 2822, 111th Cong. (2009).

of provisions contained in S. 49 are missing from H.R. 2822.

H.R. 2822 diverges from S. 49 in two significant respects. Unlike section three of S. 49, H.R. 2822 does not broaden the application of mail and wire fraud offenses (§§ 1341, 1343) to items other than money and property (e.g., any other thing of value, such as licenses and intangible rights).<sup>75</sup> In addition, H.R. 2822 does not add flexibility to or expand the choice of venue as contemplated in section four of S. 49.<sup>76</sup> Perhaps most significantly, H.R. 2822 does not increase the maximum prison terms contemplated in sections six through eight of S. 49.<sup>77</sup>

### III. ANALYSIS OF THE PUBLIC CORRUPTION PROSECUTION IMPROVEMENTS ACT OF 2009

While many lawmakers, prosecutors, and some academics have sought congressional action in the wake of *Sun-Diamond Growers*,<sup>78</sup> there remains, at present, no shortage of those who question the need for and breadth of the PCPIA.<sup>79</sup> This section explores the need for the PCPIA, how the PCPIA would aid prosecutions of illegal gratuities, what the PCPIA attempts to accomplish, and where the PCPIA falls short. The conclusion to be drawn is that, at a minimum, the PCPIA should be retooled and not enacted as presently drafted.

#### A. *Why the PCPIA May Be Needed*

Generally speaking, it seems uncontroversial to suggest that investigating and prosecuting public corruption is sound public policy. In the words of the PCPIA's backers, "public corruption can erode the trust the American people have in those who are given the privilege of public service."<sup>80</sup> In spite of several recent and high-profile public corruption cases, such as former Congressman William Jefferson, the prosecution of public corruption fell an estimated fourteen percent during the Bush administration.<sup>81</sup> While that decline is in part attributable to the shifting of federal resources from white collar crime to counterterrorism in the wake of September 11th,<sup>82</sup> the PCPIA is a measure that would make public corruption prosecutions a higher priority through several key amendments and the appropriation of \$100 million in additional funding.<sup>83</sup>

Beyond normative policy arguments, proponents of the PCPIA assert that new legislation is needed to correct precedents set by the holdings in *Sun-*

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75. *Id.*

76. *Id.*

77. *Id.*

78. *See, e.g.*, Letter from Delonis to Sen. Leahy, *supra* note 2.

79. *See, e.g.*, Peter R. Zeidenberg, Comment, *Major Defect in Public Corruption Prosecution Improvements Act*, THE HILL, Apr. 28, 2009, at 33.

80. 155 CONG. REC. S56 (daily ed. Jan. 6, 2009) (statement of Sen. Leahy).

81. Op-Ed, *Suspicion in the Capitol*, N.Y. TIMES, Mar. 2, 2009, at A22.

82. 155 CONG. REC. S56 (daily ed. Jan. 6, 2009) (statement of Sen. Leahy).

83. S. 49, 111th Cong. § 16 (2009).

*Diamond Growers* and *Valdes*.<sup>84</sup> To illustrate the need, some commentators point to the prosecutions of lobbyist Jack Abramoff and former Ohio Congressman Bob Ney, who were each charged with honest services fraud and not for bribery or illegal gratuities due to the purported difficulties in prosecuting for bribery or illegal gratuities following *Sun-Diamond Growers* and *Valdes*.<sup>85</sup> In the words of Senator Patrick Leahy during a Senate Judiciary Committee Executive Business Meeting, the PCPIA is needed to restore:

the law to where it was prior to the Supreme Court's decision in the 1999 *Sun-Diamond Growers* case. Justice Scalia read into the statute a requirement of essentially the same kind of proof linking a gift to a specific official act for a gratuities violation that would be needed for a bribery violation—even though gratuities is a two-year offense, while bribery is a [fifteen-year] offense. As a result of this judicially imposed change, the gratuities statute has all but been rendered obsolete.<sup>86</sup>

#### B. *How the PCPIA Would Aid Prosecutions of Illegal Gratuities*

In addition to providing \$100 million in new appropriations,<sup>87</sup> the PCPIA would ease the evidentiary burden faced by prosecutors seeking to use the illegal gratuity statute in public corruption prosecutions. The PCPIA would amend § 201(c)(1) such that violations would be possible for gratuities given or received solely because of an individual's "official position," unless those gratuities are permitted as "provided by law for the proper discharge of official duty, or by rule or regulation."<sup>88</sup> When an "official act" is involved, violations would arise with respect to "any action within the range of official duty."<sup>89</sup> In short, the amendments would broaden the potential for prosecution under the illegal gratuity statute. Moreover, prosecutors would also have more flexibility in terms of timing. The PCPIA would extend the statute of limitations from five to six years, which is an important addition since public corruption cases are notoriously time-consuming and difficult to prosecute.<sup>90</sup>

#### C. *What the PCPIA Attempts to Accomplish*

The PCPIA's amendments would effectively reverse the precedents set by *Sun-Diamond Growers* and *Valdes*. For violations of the illegal gratuity statute, prosecutors would no longer be required to prove a link between the gratuity and a specific official act, and what constitutes an official act now includes any

84. See, e.g., *Executive Business Meeting on S. 49*, *supra* note 9; Letter from Hebert to Sen. Leahy, *supra* note 5.

85. Lucy Morgan, *Fighting Corruption with the 'Honest Services' Doctrine*, ST. PETERSBURG TIMES, Jan. 25, 2009, at 1P.

86. *Executive Business Meeting on S. 49*, *supra* note 9.

87. S. 49, § 16.

88. *Id.* § 12(b)(1).

89. *Id.* § 13.

90. See Levin, *supra* note 30, at 1825.

action within the range of official duty. In addition, the PCPIA seems to make a good-faith attempt to address concerns raised by Justice Scalia and others that the illegal gratuity statute may criminalize innocent gift-giving.<sup>91</sup> The mechanism is found within the catch-all exception for gratuities that are permissible “as provided by law for the proper discharge of official duty, or by rule or regulation.”<sup>92</sup> The definition of “rule or regulation” would include “a federal regulation or a rule of the House of Representatives and the Senate, including those rules and regulations governing the acceptance of campaign contributions.”<sup>93</sup>

#### D. Where the PCPIA Falls Short in Amending the Illegal Gratuity Statute

The PCPIA has been the subject of rather potent criticism.<sup>94</sup> In *Sun-Diamond Growers*, Justice Scalia observed that “this is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions.”<sup>95</sup> *Sun-Diamond Growers* resolved a textual ambiguity in a manner that makes the illegal gratuity statute a more narrow and precisely-targeted prohibition. The PCPIA seeks to broaden the illegal gratuity statute, but it does so without taking the time to provide a thoughtful group of exceptions. This gap in the PCPIA has been called a “major defect,” and one that fails in practice because House and Senate gift rules not only “differ,” they are also “Byzantine,” and often “open to interpretation.”<sup>96</sup> Additionally, the exception has the effect of making what was previously just a gift rule violation into “a federal indictment and prison sentence” under the illegal gratuities statute.<sup>97</sup>

With respect to the PCPIA’s broadening of the illegal gratuity statute’s definition of “official act” in response to *Valdes*, it is not clear that such a response is needed. *Valdes* has not been adopted by other circuits, and the Eleventh Circuit has even explicitly rejected the holding in favor of a more expansive definition.<sup>98</sup> Commentators also point out that *Valdes* involved facts “so peculiar that its holding carries little risk of endangering future prosecutions.”<sup>99</sup> That viewpoint is supported by the recent prosecution of former Congressman William Jefferson, who was made famous several years ago for having kept in a freezer \$90,000 in bribes related to his promotion of

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91. See *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 406–07 (1999); Zeidenberg, *supra* note 79.

92. S. 49, § 12(b)(1).

93. *Id.* § 12(a)(4).

94. See, e.g., Zeidenberg, *supra* note 79.

95. *Sun-Diamond Growers*, 526 U.S. at 412.

96. See, e.g., Zeidenberg, *supra* note 79.

97. *Id.*

98. Peter R. Zeidenberg & Jamie Hoag, *\$90,000 in the Freezer: Bribe or Non-official Business?*, BLOOMBERG LAW REPORTS, Sept. 1, 2009, available at [http://www.dlapiper.com/files/Publication/d9cbee4c-10d8-4fa7-b212-79564db31c71/Presentation/PublicationAttachment/c0384a49-5567-46c1-a399-7d87288e5303/Zeidenberg\\_Article\\_2009.pdf](http://www.dlapiper.com/files/Publication/d9cbee4c-10d8-4fa7-b212-79564db31c71/Presentation/PublicationAttachment/c0384a49-5567-46c1-a399-7d87288e5303/Zeidenberg_Article_2009.pdf).

99. *Id.*

certain business interests in Africa.<sup>100</sup> Jefferson's defense attempted to argue that a conviction for bribery or receiving an illegal gratuity was impossible because prosecutors alleged only that Jefferson met with foreign officials to promote business interests in Africa, which, they argued, does not constitute an "official act."<sup>101</sup> The strategy was unsuccessful, and Jefferson was convicted in spite of the narrow interpretation in the *Valdes* decision.<sup>102</sup> In addition, if the PCPIA would allow prosecutions merely because of an individual's official position, it seems prosecutors would rarely, if ever, need to show that an official act was involved, however broadly or narrowly defined.

The PCPIA is also giving rise to other concerns. The PCPIA is seen by some as inappropriately expanding the illegal gratuity statute in a manner that gives federal prosecutors "vast and unneeded discretion."<sup>103</sup> This raises the risk of prosecutions inappropriately brought for political reasons.<sup>104</sup> Additionally, some have noted that due process requires the law to provide ample notice to would-be violators and to require the government to prove both the defendant's *actus reus* (wrongful act) and *mens rea* (the requisite level of intent) in order to meet constitutional requirements.<sup>105</sup> The PCPIA's more expansive iteration of the illegal gratuity statute arguably includes no *mens rea* component, because a conviction can be predicated merely upon a gift made because of a public official's position or title.<sup>106</sup> Prosecutors could be tempted to abuse this newly-found authority.<sup>107</sup>

#### IV. CONCLUSION

Public corruption has a corrosive effect on the democratic process and our institutions of governance. As a response to concerns that the illegal gratuity statute needs to be clarified and strengthened, the PCPIA has gained support from the Department of Justice, the Campaign Legal Center, Common Cause, the League of Women Voters, Democracy 21, U.S. PIRG, Public Citizen, and the National Association of Assistant United States Attorneys.<sup>108</sup> Yet, in spite of that support and the sentiment that combating public corruption is good public policy, there are enough issues to recommend that proponents and legislators should stop and give pause.

Proponents that desire a broader and more sweeping criminal prohibition against illegal gratuities should draft legislation that includes a more deliberate attempt to carve out equally desirable exceptions that are truly workable in practice. Illegal gratuities come in many flavors. Some gratuities are innocent;

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100. *Id.*

101. *Id.*

102. *Id.*

103. *See, e.g.,* Zeidenberg, *supra* note 79.

104. *See, e.g.,* Brian W. Walsh, *Public Corruption Prosecution Improvements Act: Revising Federal Gratuities Law to Criminalize Innocent Conduct*, THE HERITAGE FOUNDATION, Mar. 12, 2009, [www.heritage.org/Research/Legallssues/wm2340.cfm](http://www.heritage.org/Research/Legallssues/wm2340.cfm).

105. *See id.*

106. S. 49, 111th Cong. § 12(b)(2) (2009).

107. Walsh, *supra* note 104.

108. *Executive Business Meeting on S. 49, supra* note 9.

some are less innocent but nonetheless benign, and some are entirely appropriate to punish criminally. The PCPIA lacks the sophistication that is needed to intelligently handle those nuances. Even if everyone agrees that illegal gratuities are inadequately addressed by the present version of § 201(c), this legislation, and any similarly drafted bills in the future, will need thoughtful retooling prior to enactment.