FINANCIAL BRIBERY AND FRAUD

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

H.R. 5405

FINANCIAL BRIBERY AND FRAUD AMENDMENTS ACT OF 1984 AND PARTS E, F, AND G OF TITLE XI OF S. 1762, COMPREHENSIVE CRIME CONTROL ACT OF 1984

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THURSDAY, APRIL 26, 1984

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met at 9:30 a.m. in room 2226 of the Rayburn House Office Building, Hon. John Conyers, Jr. (chairman of the subcommittee), presiding.

Present: Representatives Conyers, Edwards, and Gekas.

Staff present: Michael Ward, assistant counsel; Raymond V. Smietanka, associate counsel.

Mr. CONYERS. The subcommittee will come to order. Our hearing today concerns H.R. 5405, the Financial Bribery and Fraud Amendments Act of 1984, and parts E, F, and G of title XI of S. 1762. These proposals both amend provisions of Federal law prohibiting bribery of bank officials, frauds against banks, and receiving of stolen bank property.

There is no question that the banks and financial institutions of this country are critical to the flow of interstate and foreign commerce. It is therefore no surprise that the regulation of banks and financial institutions has long been a matter of Federal concern, and properly so. It has been brought to my attention, however, that there are serious gaps in the Federal criminal laws which protect the integrity of banks and banking operations, and that some of the laws that do exist are obsolete and ineffective. I have therefore recently introduced H.R. 5405, the Financial Bribery and Fraud Amendments Act of 1984, to correct some of these problems. The bill would amend current law with regard to bribery and create a new crime of financial fraud.

Section 215 of title 18, one of the current sections prohibiting bribery regarding banking operations, is amended to proscribe all payments intended to influence an officer or employee of a financial institution in making a discretionary decision, or to induce such a person to violate a duty. Thus, it does not prohibit the receipt of a gift given to encourage an officer or employee to fulfill legal or fiduciary duties.

18 U.S.C. 216 is amended to prohibit payments made to an officer or employee of a financial institution as a reward for violating a duty or taking discretionary action in a particular manner. In order to avoid criminalizing such conduct as treating a loan officer to dinner following a successful negotiation, the section requires

that the payment be in money or its equivalent, or else have a value greater than $100. It is insufficient to rely on prosecutorial discretion not to prosecute such cases for two reasons: First, there is nothing to prevent abuse of such discretion, such as the use of such statutes for vindictive prosecution; second, declaring activity criminal that is not really considered criminal breeds disrespect for the criminal law.

The financial institutions covered by both sections include all such institutions in which the Federal Government has a significant interest.

H.R. 5405 also enacts a new 18 U.S.C. 1344. The new section would prohibit devising a plan to obtain the property of a financial institution, or to cause economic loss to that institution, by means of fraud. Fraud is defined by a list of types of deceptive conduct. The section does not use the language of the current mail fraud and wire fraud statute "scheme to defraud" because there is a history of expansive interpretations of that language by the courts. Its current coverage is clearly greater than intended by Congress. Although the additional activity brought under the purview of the language is reprehensible, and probably should be criminal, due process and notice argue for prohibiting such conduct explicitly, rather than relying on expansive court interpretations.

It is our purpose today to explore the deficiencies of current law and to examine the proposed solutions. Our witness is Victoria Toensing, a Deputy Assistant Attorney General in the Criminal Division of the Department of Justice. Ms. Toensing, welcome to the subcommittee. We have your prepared statement which will be included in the record. Please proceed as you see fit.

TESTIMONY OF VICTORIA TOENSING, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

Ms. TOENSING. Thank you, Mr. Chairman and Mr. Edwards. I want to thank you for asking me to represent the Department's views on H.R. 5405 and parts of title XI of the Senate bill, S. 1762. Both bills are concerned with bribery and fraud in Federal financial institutions. A prepared statement, as you said, Mr. Chairman, has been submitted for the record. What I'd like to do is condense those remarks for you.

In general, the Department supports the goal of the legislation that you have introduced. But we do have certain modifications to enable the prosecutors to pursue all the persons who violate the trust that the public must place in these financial institutions. I think that the subcommittee and the Department have the same objective, and that is to prohibit the white collar crime and bribery against Federal financial institutions.

So, I want to share with you some of the suggestions strongly urged by those in the Department who have prosecuted those cases or attempted to prosecute those cases, and found the law to be sorely lacking. There are three major areas, Mr. Chairman, that I would like to address: No. 1, the bribery statutes. Sections 215 and 216, passed almost 40 years ago, are long overdue for revision because they do not cover all persons involved in a bribery situation.

Nor do they cover all the federally insured financial institutions, and the penalty is merely a slap on the hand. It's a misdemeanor.

No. 2, there is no generally applicable bank fraud statute. We need one that covers essentially the same acts as our present wire and mail fraud statutes.

No. 3, the criminal statute which prohibits receiving stolen bank funds prevents prosecuting some persons who are guilty.

Let me discuss these three areas more thoroughly. The first one is the bribery statutes. When a bank bribe is being investigated by a Federal prosecutor, the prosecutor looks principally to two statutes, 215 and 216. But under the present law, the prosecutor may not be able to pursue what we would consider, as a matter of policy, to be criminal activity.

For example, 215 allows prosecution only of the receiver of the bribe, and not of the offeror. So, Mr. Chairman, if you were a bank official and I came to you and offered you a bribe, and you went to the Federal investigators to report me so that you could see to it that I did not carry out my crime, I would not have committed a crime. I would go free because merely offering the bribe is not a crime.

Section 215 only criminalizes payments made to influence future conduct, and it does not punish the person giving a gift or a gratuity for services that have been carried out. Additionally, the list of Federal financial institutions is clearly outdated. It omits even federally insured savings and loans associations or credit unions.

Turning to section 216, it does not necessarily help the prosecutor, because although the briber there can be prosecuted, the list of Federal financial institutions is limited, incredibly, to Federal land institutions and small business investment companies. So, we agree, a change is needed. And we would perhaps differ only slightly in how we should go about it.

The Department has a major concern with one approach taken by the House. And that is making two separate offenses, Mr. Chairman: the bribery and the graft offenses. Also, in accordance with the House making bribery and graft two separate offenses, grafts for under $100 are not criminalized.

I look at bribery as sort of a "please do" situation. It's to cover when you're asking somebody to give you a favor in the future. Even though the payment isn't made at that time, it's a "please do this for me and you're going to get something in return." And graft is a "thank you" for having done something, even though you may not have asked them to do it.

The Department thinks that both kinds of conduct should be criminalized, particularly when you have a factual situation, Mr. Chairman, where I might have asked a person in a meeting to please do something for me in the future, but I didn't get the payoff till later, so the only evidence that the prosecutor has is the payment that's made later.

So, if you treat graft as a lesser offense, you may be treating the same kind of criminal conduct as a lesser offense.

The Senate bill lumps together the briber and bribee into one provision, and it treats bribery and graft as the same kind of criminal conduct, providing a 5-year sentence. The only distinguishing part that the Senate bill has is that if the thing of value is under

$100, then it is a misdemeanor. As I said, the House bill creates two different crimes, and the "thank you" for past activities is only criminal if that value is over $100.

We realize there's a precedent for this approach in 18 U.S.C. 201, dealing with corruption of public officials, but we feel that the banking area raises additional policy considerations. Should a rich person be allowed to provide the bank officer the $50 bottle of vintage wine as a "thank you" for getting a loan, clearly providing the message th favorable treatment is expected and would perhaps be rewarde the future? There is no OGE form for the bank officer as there for all of us in Government.

The stabil of the banking industry and protection of Federal insurance pr ms against losses because of loan defaults is an important poli consideration. A so-called gratuity or thank you of $100,000 to a bank officer who approved a $10 million loan certainly should be a greater threat to the Federal Insurance Program than the payment of $150 to an officer to persuade him or her to approve a $5,000 loan.

The Department prefers to be able to prosecute "please do-ers" or bribers and "thank you-ers" alike, and to punish all of those people who are saying thank you or providing gratuities who would intend to influence financial conduct. We hope that you will seriously consider this change in the bribery statutes.

Now I'd like to turn to the bank fraud statutes, which is a very important area of concern, and that is because there is no generally applicable Federal statute making fraud on a bank a Federal crime. This has been a problem for Federal prosecutors for decades. The Supreme Court in 1974, *United States* v. *Maze,* exacerbated the problem by restricting the use of the mail fraud statute. Perhaps you're familiar with that case. It was there that the court held that merely proving the mails were used in a fraudulent scheme was insufficient for conviction under the mail fraud statute.

Additionally, today, the banks are more and more using the private courier service. So, that's even further restricting our ability to use the mails when there is a fraud on a bank.

Another just as important problem that we have with there being no Federal fraud statute, is that check kiting is almost impossible to prosecute today. The Federal prosecutors attempted to use the false statement statute, 1014. And they did so by charging that making out a check for an amount that you didn't have in the bank was essentially a false statement. And the Supreme Court, 2 years ago in *Williams* v. *United States,* said writing a check did not constitute a statement within 1014.

The result of that interpretation is that the Department frequently encounters major interstate check-kiting schemes, and we cannot prosecute. At the time of the *Williams* decision in 1982, we canvassed the FBI offices to see what effect *Williams* would have on our prosecutions; 208 cases had to be declined for Federal prosecution at that time. What is needed, Mr. Chairman, is a separate Federal statute similar to the mail and wire fraud statutes.

The wording of H.R. 5405 needs to have some broader coverage. It limits prosecution only to situations where the object of the fraud is to obtain money or inflict an economic loss. A scheme to defraud should also involve a situation where a person is trying to

deprive the institution of an intangible right or interest. For example, take the situation where a private industry employee fails to disclose that he received kickbacks from a third party. That doesn't necessarily take away, or make an economic loss for the Federal financial institution.

The language under our present mail and wire fraud statutes, a scheme or artifice to defraud, has been interpreted many times by the courts, and it was interpreted to cover just such a situation where a person was getting money from a third party. The proposed words, new words—courts don't like new words, Mr. Chairman—fraudulent means, have not been interpreted yet by the courts, and we all know what the courts do. They say, "Oh, Congress had those old words and they must have meant something different, because they wouldn't have used the new term in this new statute."

I think, studying the history of what occurred here, that when the House—and perhaps the Senate—but at least when the House was proposing an entirely new criminal code, fraudulent means was being introduced as the new term to be used for all the fraud statutes. And that made sense there, because everything was being changed. But now, when we have our old language that had been interpreted by the courts and we're only changing in one area for bank fraud, I fear that the courts are going to say: "Congress didn't want us to use those old and proven terms."

So, we ask that you consider giving us the old and worn language.

Part 3, Mr. Chairman, receiving stolen bank property. That's an issue that's not addressed in H.R. 5405. We ask that it be addressed. There's a major problem under the present law making it a crime to receive stolen bank property. And this problem results in people who are obviously guilty not being able to be prosecuted.

The Government must prove beyond a reasonable doubt that the person in possession of the stolen property knew that it was stolen from a bank. And it has to be proven that he or she knew it was from a bank.

We think that it should be a crime if it is proven the person knew beyond a reasonable doubt that the property was stolen, and that the fact that the property came from a bank is jurisdictional, as is the fact that the bank is federally insured.

So, we ask that the statute be amended to reflect this kind of situation, where the Government only has to prove that the defendant knew it came from a bank. And I have proposed language for that, Mr. Chairman, in my statement for the record.

In summary, I think it is clear that we have good agreement here on this legislation, and we appreciate your asking the Department's views. I hope you will seriously consider our concerns. It's necessary that we have a range of prosecutorial tools to use for white collar fraud and crime, just the same as we pursue vigorously the street crime. I thank you.

Mr. CONYERS. We appreciate the spirit in which you've come and given support for the legislation, and respect the differences that you've pointed out. Your testimony is very persuasive. We appreciate your coming here.

I still have an inclination, though, to keep the "before" and "after" transactions separate, even though sometimes they do present problems of similarity. I also like the idea of defining the offenses so that we're really not making crimes out of things that we really don't plan to prosecute, such as taking a loan officer to lunch or giving a plaque to the bank president after the fact for funding some new campground.

I really like to keep these activities separate, because I think that the U.S. attorney is going to come at the prospective defendant with a long range of charges anyway. I still shudder from the horror stories of prosecutors writing out how many different violations can occur from one act. The number is legendary, depending on what particular statute one wants to use.

Your points are well taken, though, and I just hope that the Department will understand why we continue to try to separate out the before and after the fact kinds of circumstances.

Do you have any final comment about that?

Ms. TOENSING. Mr. Chairman, I appreciate your concerns. As a Federal prosecutor in Detroit for 5 years, I was in the charging business also.

Mr. CONYERS. I'm glad I didn't say that I was referring to the local prosecutors, because that's what I had in mind. I had the Wayne County prosecutor's office in mind, and I'm glad I didn't say that.

Ms. TOENSING. I just thought I'd help you out. I realize that. There's a dilemma in certain situations and you can't ever write a statute to cover all crimes.

I would hope that the statute would reflect that the lunch to a bank officer would certainly not be prosecuted, because the prosecutor would have to show an intent to influence the bank business. But I appreciate what your concern is, too.

Mr. CONYERS. Thank you. Mr. Edwards of California.

Mr. EDWARDS. Thank you very much, Mr. Chairman. I, too, appreciate the testimony of Ms. Toensing. It's going to be very helpful in drafting the final version of this bill.

Out in Los Angeles, there's a bank robbery every 7 minutes, I think—every 3 or 7 minutes, something like that. They just happen all the time. And I always worry about involving the Federal Government in these essentially local crimes. I guess I would worry to some extent here, also.

The FBI's budget is now over $1 billion a year, with 20,000 employees. And one thing that we're all agreed upon, in Congress and the Directors of the FBI, and as most Americans would agree, we really don't want a national police force, and we don't want the Federal police to be investigating every crime that comes down the pike, just because there happens to be a Federal connection, like with an insured savings and loan or an insured bank, FDIC or something like that.

Now, when you say that you automatically lost 208 cases, why wouldn't those cases be more appropriately handled under State law?

Ms. TOENSING. Mr. Edwards, as I asked the question—and I will have the Deputy of the Fraud Section speak to you more specifically—some of those cases could be prosecuted on the State level. But

there is a strong Federal interest in at least protecting those institutions which are insured by the Federal Government. And so, I know we do have a responsibility to insure that we're prosecuting people who violate that.

I think there is a strong Federal interest.

Mr. EDWARDS. You mean for $200 frauds or something like that, or $500, you're going to take the Federal resources and FBI and handle the case federally? I don't quite understand that. I don't see the Federal interest to that effect.

Ms. TOENSING. Mr. Edwards, this is Jim Graham.

Mr. EDWARDS. What are your instructions to your U.S. attorney? Are you supposed to grab every case that comes along?

Mr. GRAHAM. Mr. Edwards, first with respect to the technical aspects of the statute, we're principally talking about a crime referred to as check kiting. That often will cross State boundaries, and in cases that we would undertake or the FBI would undertake, it would involve a number of banking institutions and a whole series of financial transactions.

Mr. EDWARDS. That's a real serious Federal crime. I understand that.

Mr. GRAHAM. It would be a complex case that would warrant the use of FBI resources. And the Department has sort of approached this State/Federal decisionmaking process, in this administration, that they're law enforcement committees, attempting to make intelligent, balanced judgments based on the needs of particular jurisdictions. They've made those kinds of decisions with respect to bank robberies, as well as the white collar sort of crimes.

I think that would be the way to sort of make that distinction. It's pretty hard to do in mere statutory language.

Mr. EDWARDS. Well, what is your general policy? As I said, do you encourage U.S. attorneys to move ahead with indictments and with charges whenever there is a Federal violation, however miniscule?

Mr. GRAHAM. No. The Department's published "The Principles of Federal Prosecution," which talk to that process. One of the things that prosecutors are supposed to look at is, is the case more in the nature of warranting local prosecutive investigative attention? If those resources are there or the nature of the case suggests that's how it should be treated, that's the way the discretion is exercised in that instance.

It's pretty hard to legislate out the Federal Government in some areas, because there is sort of a natural duplication of interests.

Mr. EDWARDS. Well, thank you. All three of us here are members of Mr. Conyers' subcommittee, and are also members of the subcommittee that I chair, having jurisdiction over the FBI. For many years, we have encouraged the FBI—and the FBI agrees with this policy—that wherever possible, the criminal matters should be handled State and locally.

Especially with these bank robberies or whatever they might be, such as an elderly woman passing a piece of paper in a branch in San Bernardino, CA, and she only lives 2 blocks away, it's really ridiculous for the FBI to spend Federal resources and involve itself in it. It's very clearly a local crime. I would hope the same philosophy applies to some of the things we're talking about with regard

to financial bribery and fraud, that there's good judgment used in not moving ahead with the Federal involvement where it's unnecessary.

Mr. GRAHAM. We don't have any choice, Mr. Edwards. Both our investigative and prosecutive resources are limited. That dictates that, as well as natural policy issues.

Mr. EDWARDS. Thank you very much.

Mr. CONYERS. Just before I recognize Mr. Gekas, though, let me ask Ms. Toensing, what was the policy in Detroit where you have a case that, as Mr. Edwards points out, could have either Federal or local jurisdiction? How did it operate in your Wayne County prosecutor days?

Ms. TOENSING. I wasn't Wayne County prosecutor, Mr. Chairman. I was a Federal prosecutor in the U.S. attorney's office.

Mr. CONYERS. I see. Did you handle the small, individual cases? Were they prosecuted regularly? This is sort of tangential to our consideration, but in the committee over years, this has become a very large question, because our colleagues are continually encouraging us to expand Federal criminal jurisdiction into kidnaping, domestic relations cases, pornography. There are any number of areas.

So whenever we find something that is small, but a Federal offense, it would seem to us that the more clearly the U.S. attorney's policy is to encourage local prosecution, the better off all of us are at the Federal level.

On that point I think we're all very supportive of Mr. Edwards in the question that he put to you.

Ms. TOENSING. Mr. Chairman, if you would like for me to address that, let me put it in a context, in that I did narcotics conspiracy cases. I was not directly involved in the policy on that, but I served under Ralph Guy and Jim Robinson. So, I was familiar with the policy that was evolving in our office. It was really an evolving policy, because when I started there were 17 assistants, and today there are 50. And they had to sort of switch gears over that 6- or 7-year period, between 1976 and 1983.

What they did was they began to set a monetary limit for certain crimes that the Federal Government would be involved in. I think at some point it was $500, and there was also a consideration of upping that so that there were less and less small, local things that should have been prosecuted by our office.

Today, as Mr. Graham just stated, there is now a coordinating council in most of the U.S. judicial districts, where the U.S. attorneys are mandated by the Department of Justice to meet with the local prosecutors and to work out where they can give the locals their proper cases, so that we can set our priorities on a more national level.

Mr. CONYERS. That's encouraging. We hope that you report this discussion back to the Department, so that we could be increasing that kind of cooperation in filing out the lightweight cases, that Federal criminal jurisdiction should still hopefully be reserved for the more complex and challenging matters. I'm sure we're in agreement there.

Mr. CONYERS. Mr. Gekas.

Mr. GEKAS. Thank you, Mr. Chairman. I think Mr. Graham properly answered the question posed by Mr. Edwards when Mr. Edwards was concerned about what is the policy. When Mr. Graham answered that there is the established committee, with which I am familiar, the coordinating committee of the Federal and local authorities, the policy is that that should be a screening process, is this not correct, where the locals and the Federal decide generally what kind of cases will fall where they may, and even on individual cases, is it not so, that they can make a decision together as a case evolves? Or do they just enunciate general propositions?

Mr. GRAHAM. Its principal purpose was to see if they could work out some advanced agreements. But the other intent was to set up communication guidelines so you can do that case-by-case decisionmaking. I think this is happening in many districts.

Mr. GEKAS. The only thing that happens that I've noticed in my own jurisdiction back in Pennsylvania, is that the decision is sometimes made by circumstances. That is, if something happens in a bank and the local county detective is the first on the scene, that's where it may stay, with the Federal Government deciding: "He started it, he knows about it, we're going to keep hands off"; and thus the Federal Government, reserving its right to intervene, many time does not. Does that occur quite often? When a State or local government official begins a case, that the Federal Government allows him to finish it?

Ms. TOENSING. Yes, that can happen, certainly.

Mr. GEKAS. I have no further questions.

Mr. CONYERS. Thank you.

[The prepared statement of Ms. Toensing follows:]

STATEMENT OF VICTORIA TOENSING, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear before you today to present the views of the Department of Justice on parts E through G of title XI of S. 1762 and on H.R. 5405, bills which deal primarily with bribery and frauds concerning banks and other financial institutions. The Department firmly supports the objectives of these proposals, but will suggest certain modifications to enable federal prosecutors to pursue all persons who violate the trust the public must place in these institutions.

In general, Mr. Chairman, I stress that the present federal bank bribery and fraud statutes are outdated, ineffective deterrents to crime. Moreover, because of the complexity of cases involving frauds perpetrated on banks, it is important that the available statutes be sufficiently broad and flexible to deal with such crimes. The investigations of fraud offenses are very difficult, since they frequently entail highly complex financial transactions designed and carried out by sophisticated perpetrators. Unraveling the transactions in a bank fraud case requires laborious tracing of money from account to account, proving overvaluation or nonexistence of collateral, and determining the person or persons responsible for each phase of the transaction. Because of the volume of documents involved and the number of witnesses to be debriefed, a major bank fraud case can take years to investigate and a bank fraud trial is an arduous process. In some ways, these problems are common to white-collar crimes in general. However, bank fraud prosecutions have also been hampered by Supreme Court decisions which have rendered inapplicable existing statutes that were formerly used to combat common bank fraud schemes.

To respond to these problems, the administration proposed legislation, parts F and G of title XI of S. 1762, which passed the Senate 91–1 on February 2, 1984. This legislation updates and strengthens the bank bribery statutes and provides for a new offense of bank fraud. I am delighted that you, too, Mr. Chairman, have recognized the problems with the existing statutes and have addressed them in H.R. 5405. I wish to discuss specifically three major areas.

I. BRIBERY AND GRAFT

Turning first to section two of H.R. 5405 which deals with bank bribery and graft, I note that it undertakes a long overdue revision of the almost 40 year old sections, 18 U.S.C. 215 and 216. The present law inadequately proscribes the bribery of certain bank officers and employees and of other persons. Under 18 U.S.C. 215, the officers, directors, employees, agents, and attorneys of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, and of two other types of financial institutions [1] are prohibited from stipulating for, receiving, or agreeing to receive anything of value from any person, firm, or corporation "for procuring or endeavoring to procure," for the giver or for anyone else, "any loan or extension or renewal of loan, or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange" by any such bank or financial institution.

This statute is deficient in at least four respects. First, unlike most bribery statutes, it reaches only the recipient of the bribe, not the offeror. Thus, if A offers a bribe to B and B rejects the offer and reports it to law enforcement authorities, A cannot be prosecuted under 18 U.S.C. 215. Second, the statute covers only payments intended to influence future conduct such as the granting of a loan; it does not proscribe payments made as a reward for past favors. Third, the statute's list of financial institutions omits several major components of the banking system. For example, bribery of employees of savings and loan associations or of credit unions are not criminal offenses even though the Government also insures the deposits in federally chartered savings and loan associations and credit unions much as it insures the deposits in banks through the FDIC. Finally, the penalty for a violation of the section—1 year's imprisonment and a $5,000 fine—is woefully inadequate.

18 U.S.C. 216 prohibits employees and officials of Federal land banks, a Federal land bank association, joint stock land banks, and small business investment companies [2] from receiving "directly or indirectly, any fee, commission, gift, or other consideration for or in connection with any transaction or business of such association or bank" other than the usual salary or fee. It is somewhat broader in scope than section 215 by virtue of the "for or in connection with" phraseology and in that it also reaches the person who "causes or procures" the payment of the bribe to one of the enumerated officials. But this statute, too, is obsolete because it does not clearly cover officers and employees of other agricultural credit organizations.[3] Additionally, it lists "joint stock land banks," institutions no longer in existence. Moreover, the penalty for both the offeror and the receiver of the illegal payment under this section is, like that in section 215, set at the inadequate misdemeanor level of 1 year's imprisonment and a $5,000 fine.

H.R. 5405 would combine and completely revise both sections 215 and 216. The new section 215 would cover the giving, offering, or agreeing to give, anything of value to any person with intent to influence official action to be taken by or to induce the violation of a legal or fiduciary duty by an officer, employee, agent, or attorney of a "national credit institution." It would also cover the soliciting, accepting, or agreeing to accept anything of value in such circumstances by the officer, employee, agent, or attorney. The punishment would extend to imprisonment for 5 years and a fine of up to $250,000 for individuals; if other than an individual there is a fine for $1,000,000. In essence, then, the proposed section 215 is a prohibition against bribery because it proscribes giving or taking anything of value (other than a bona fide salary or fee) as a payment for specific future action to be taken by the bank employee or officer.

The new section 216 in H.R. 5405 is titled "graft in financial operations" and would proscribe the offering, giving, or agreeing to give "anything of pecuniary value" to any person to reward an officer, employee, agent, or attorney of a national credit institution for past official actions he has taken or for a legal or fiduciary duty he has violated. It also would punish the soliciting, accepting, or agreeing to accept "anything of pecuniary value" by such an officer or employee because of a

[1] The other two institutions are "a Federal intermediate credit bank," and a "National Agricultural Credit Corporation."

[2] Small business investment companies are organizations created under Public Law 85-699 (15 U.S.C. 661 et. seq.) to provide venture capital in the form of equity financing, long term loans, and management services to small businesses.

[3] For example, it does not cover banks for cooperatives. These organizations are established in each of the 12 farm credit districts to lend money to farm cooperative associations and cooperative processing organizations. See 12 U.S.C. 2121, et. seq. An employee of such a bank who took a bribe might, however, be considered an employee of a "National Agricultural Credit Corporation" and thus covered under 18 U.S.C. 215.

past official action he has taken or because of a past legal or fiduciary duty violated. Apparently because the payment is for past actions, not future conduct, and can have been made even if the past actions were in fact legal, the punishment is slightly less for a violation of proposed section 216 than for section 215. It would extend to 3 years' imprisonment and a $250,000 fine for individuals and to a $1,000,000 fine for organizations. Moreover, the term "anything of pecuniary value" is defined to include money or economic advantage in any amount but other things—for example, meals, liquor, or a country club membership—are included only if they are valued in excess of $100.

The lesser penalty for the "graft" offense under section 216 than for the bribery offense under section 215, and the provision that the graft offense is not committed at all if the conduct involves a payment in goods or services valued at less than $100 are the principal differences between section two of H.R. 5405 and part F of title XI of S. 1762. Part F combines the bribery and graft offenses into one section since the phrase "for or in connection with any transaction or business of such financial institutional" employed in that part would cover the taking or giving of something of value for past actions as well as for a specific agreement to perform some future action.

There is some precedent for the approach in H.R. 5405 of creating a separate graft offense with a lesser punishment than that for a bribery offense since 18 U.S.C. 201, dealing with corruption of public officials, makes a similar distinction. Subsections (b) and (c) of that section extend only to the giving or receiving of a corrupt payment to affect specific future actions and provide for a more severe punishment than do subsections (f) and (g) which involve payments for past acts as well as payments made in the apparent hope of exerting a sort of general influence over official actions.

While such a distinction in the area of bank bribery and graft is thus not wholly illogical, it should be kept in mind that the reasons for Federal legislation in this area are to protect the stability of the banking industry and to protect the Federal insurance programs against losses caused by defaults on loans obtained through improper influence. Rewards for past services may not seem as harmful to these interests as would a bribe for specific future action, but on closer examination it would appear that the amount of the reward or bribe may well represent a truer measure of the conduct's harm. For example, a "gratuity" of $100,000 to bank officer who approved a $10,000,000 loan may well be more of a threat to the Federal insurance system than a payment of $200 to an officer to persuade him or her to approve a $5,000 loan. On balance, therefore, we would prefer that the bank bribery and graft statutes be combined and punished equally.

We also question the wisdom, if a separate graft offense is retained, of exempting from the graft provision payments in goods and services of less than $100. The understandable intent is evidently to exempt such actions as buying a bank officer a meal or sending a bottle of vintage wine at the conclusion of negotiations concerning a loan where there is no evidence that the loan was made improperly. I should point out that such singular acts would be rejected routinely as inappropriate for prosecution, thus rendering the $100 exemption unnecessary. However, the repetitive giving of small gratuities to bank employees could, over time, act as a corrupting influence if the customers who give the best gifts get preferential treatment in the future. At any rate, the practice should not be encouraged by a statutory exemption. Moreover, we cannot discount the corrupting influence of providing gifts and entertainment to a loan officer of a small credit union.

Finally, the bank bribery and graft provisions in H.R. 5405 are both felonies. While the Department agrees that the present misdemeanor penalty for bank bribery is inadequate, it does not think it wise to eliminate entirely the possibility of a misdemeanor prosecution for payment involving $100 or less where the likelihood of serious harm is reduced.

II. BANK FRAUD

I turn next to section three of the bill. As I stated earlier, serious gaps now exist in asserting Federal jurisdiction over frauds against banks and other federally insured credit institutions or those which are organized under Federal law. Congress has recognized the need for Federal criminal jurisdiction over such institutions by passing broad statutes punishing bank robbery, burglary, larceny, misapplication and embezzlement, as well as false statements to banks. However, there is presently no Federal statute of similarly general application making bank fraud a crime.

For several decades the absence of a general Federal bank fraud statute has been a problem for Federal prosecutors. The existing misapplication, embezzlement, false

statement and false entry statutes are often cumbersome or impossible to apply to complex bank frauds. Our reliance on the mail and fraud statutes to prosecute bank fraud has also been undermined by the Supreme Court's 1974 decision in *United States* v. *Maze,* 414 U.S. 395. In *Maze,* the Court held that proof that use of the mails occured in or was caused by a fraudulent scheme was insufficient for conviction under 18 U.S.C. 1341. The *Maze* decision has proven to be a particular problem in prosecuting check kite schemes. In addition to the problems of proof posed by the *Maze* decision, banks' increasing use of private courier services for collection purposes in lieu of the mails has further limited the instances in which the mail fraud statute may be used to prosecute bank fraud.

Even after *Maze,* the Justice Department attempted to address one of the most common bank fraud schemes, check kiting, under an interpretation of 18 U.S.C. 1014 by which we asserted that the presentation of known insufficient fund checks to a federally insured bank was a false statement. However, two years ago, the Supreme Court rejected our interpretation of this section in *Williams* v. *United States,* 458 U.S. 279 (1982), holding that writing a check did not constitute a "statement" within the meaning of the section. As a result, we frequently encounter major check kiting schemes where there is no way to apply any federal criminal statute. The magnitude of the continuing problem is in part reflected by an informal FBI survey of its field offices, conducted at our request, shortly after *Williams* was decided. The survey (in August 1982) showed that there were 208 pending check-kiting investigations in which prosecution either had been or would be declined because of *Williams.* While presumably some cases could be pursued by State or local prosecutors, in many instances the complexity and/or interstate character of the check-kiting scheme, or difficulties with local statutes, prevent a successful investigation at the State or local level.

What is needed, Mr. Chairman, is a separate Federal statute, similar to the mail and wire fraud statutes, making it an offense to defraud a federally chartered or insured financial institution. Section three of H.R. 5405 creates a new statute but does so in a way that creates unnecessary problems. First, it creates a new section 1344 of title 18 which would punish whoever knowingly "devises a plan to obtain the property of a national credit institution, or to cause economic loss to such an institution by fraudulent means" and who engages in any conduct in furtherance of such a plan.

The section thus is limited to situations in which the object of the offense is to obtain money or inflict an economic loss. But the present mail and wire fraud statutes have not been so narrowly construed. Under these sections a scheme to defraud may involve the deprivation of an intangible right or interest. For example, the statutes have been held to reach cases in private industry in which an employee fails to disclose his receipt of kickbacks from outside sellers with resulting breach of fiduciary duties, thus depriving his employer of his right to the employee's honest and faithful services. See, *e.g., United States* v. *Bryza,* 522 F.2d 414 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); *United States* v. *Reece,* 614 F.2d 1259 (10th Cir. 1980).

We see no reason to preclude the use of the new section in similar cases involving banks. Moreover, we see no reason to abandon the terminology of the present mail and wire fraud statutes which employ the phrase "a scheme or artifice to defraud"—a phrase which has been the subject of countless courtless court decisions establishing its meaning—in favor of the new term "fraudulent means" which is defined in the new section.[4] The tendency of courts to construe statutes narrowly, as for example in *Maze* and *Williams,* suggests that settled language such as "scheme to defraud" should be incorporated in a general bank fraud statute. In particular we are concerned that the novel language of H.R. 5405 may well lead to technical problems in prosecuting complex check kites or other sophisticated banking related frauds. In short, we strongly urge the Subcommittee to revise the proposed new subsection 1344 to follow the format in part G of title XI of S. 1762 which is modeled on the present mail and wire fraud statutes deliberately to incorporate all existing case law concerning the scope of the offense.

[4] The definition of "fraudulent means" in H.R. 5405 is taken from the Criminal Code Reform bill considered by the House Judiciary Committee in the 96th Congress. That bill would have supplanted the mail and wire fraud statutes with new provisions which substituted the defined term "fraud" for the current phrase "scheme to defraud." Whatever the merits of that proposal, there seems considerably less justification for using the new (and narrower) "fraud" definition in the context of this bill, where no comprehensive reform is to be accomplished and the result would be the creation of a bank fraud offense which is at variance with the existing mail and wire fraud statutes.

III. RECEIPT OF STOLEN BANK PROPERTY

Finally, we would urge that the subcommittee add another section to the bill to eliminate a problem with the current 18 U.S.C. 2113(c). That statute punishes whoever receives, possesses, conceals, sells or disposes of any property "knowing the same to have been taken from a bank, credit union, or any savings and loan association" in violation of the preceding subsection which proscribes theft from such institutions. The section is unduly generous to wrongdoers because it has been interpreted to require that the government prove not only that the defendant knew that the property was stolen, but that he knew it was stolen from a bank.[5] Just as the Government need not show knowledge by the defendant that the bank he or she robbed was federally insured, it should not be necessary for the Government to prove scienter as to the jurisdictional fact that the property was stolen from a bank so long as the government proves that the defendant knew that the property he received was stolen. Hence, we would recommend that the subcommittee amend subsection (c) of section 2213, as in part E of title XI of S. 1762, to read as follows:

"Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has ben stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker."

In sum, Mr. Chairman, we again appreciate your time and interest in the important subject of crimes against banks. As stated, we thoroughly support the goals of your bill, H.R. 5405. Nevertheless, for the reasons previously discussed, we urge the Subcommittee to redraft the bank fraud provision to follow the mail and wire fraud statutes as closely as possible. The changes we have suggested to the bank bribery and graft provisions would also, in our estimation, substantially strengthen the bill.

Mr. Chairman, that concludes my prepared remarks and I would be happy to answer any questions the members of the subcommittee may have.

Mr. CONYERS. If there are no further questions, we want to thank you both. We appreciate your testimony and we will consider some of the recommendations.

There being no further witnesses on this matter, this subcommittee stands adjourned.

[Whereupon, at 10 a.m., the hearing was adjourned.]

[5] See, e.g., *United States* v. *Kaplan,* 586 F.2d 980 (2d Cir. 1978); *United States* v. *Tavoularis,* 515 F.2d 1070 (2d Cir. 1975).

98TH CONGRESS
2D SESSION

H. R. 5405

To amend title 18 of the United States Code with respect to certain bribery and related offenses.

IN THE HOUSE OF REPRESENTATIVES

APRIL 10, 1984

Mr. CONYERS introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 18 of the United States Code with respect to certain bribery and related offenses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Financial Bribery and Fraud Amendments Act of 1984".

SEC. 2. (a) Chapter 11 of title 18 of the United States Code is amended by striking out section 215 and all that follows through section 216 and inserting in lieu thereof the following:

"§215. Bribery regarding financial operations

"(a) Whoever knowingly—

"(1) offers, gives, or agrees to give anything of value to any person with intent—

"(A) to influence any official action to be taken by; or

"(B) to induce the violation of a legal or fiduciary duty by;

such person as an officer, employee, agent, or attorney of a national credit institution; or

"(2) solicits, accepts, or agrees to accept anything of value from another—

"(A) because of any action to be taken by, or any violation of a legal or fiduciary duty to be committed by, such person as an officer, employee, agent, or attorney of a national credit institution; or

"(B) that is given with the specific intent described in paragraph (1) of this subsection;

shall be fined not more than $250,000 or imprisoned for not more than five years, or both, if such person is an individual, and shall be fined not more than $1,000,000 if such person is other than an individual.

"(b) As used in this section—

"(1) the term 'national credit institution' means—

"(A) a bank with deposits insured by the Federal Deposit Insurance Corporation;

"(B) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;

"(C) a credit union with accounts insured by the Administrator of the National Credit Union Administration;

"(D) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system;

"(E) a Federal land bank, Federal intermediate credit bank, bank for cooperatives, production credit association, and Federal land bank association;

"(F) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662); and

"(G) any individual, corporation, partnership, business trust, association or similar organization that is a bank holding company or a savings and loan holding company under the Bank Holding Company Act Amendments of 1956 (12 U.S.C.

1841) or the Savings and Loan Holding Company Amendments of 1967;

"(2) the term 'official action' means a decision, opinion, recommendation, judgment, vote, or other conduct involving an exercise of discretion in the course of administration, employment, agency or representation; and

"(3) the term 'anything of value' means any direct or indirect gain or advantage, or anything that might reasonably be regarded by the beneficiary as a direct or indirect gain or advantage, including a direct or indirect gain or advantage to another person, but such term does not include bona fide salary, wages, fees or other compensation paid in the usual course of business.

"(c) There is extraterritorial jurisdiction over an offense under this section.

"§216. Graft in financial operations

"(a) Whoever knowingly—

"(1) offers, gives or agrees to give anything of pecuniary value to any person with intent to reward such person for an official action taken by, or any legal or fiduciary duty violated by, such person as an officer, employee, agent or attorney of a national credit institution; or

"(2) solicits, accepts, or agrees to accept anything of pecuniary value from another—

"(A) because of any action taken by, or any legal or fiduciary duty violated by, such person as an officer, employee, agent or attorney of a national credit institution; or

"(B) that is given with the specific intent described in paragraph (1) of this subsection;

shall be fined not more than $250,000 or imprisoned for not more than three years, or both, if such person is an individual, and shall be fined not more than $1,000,000 if such person is other than an individual.

"(b) As used in this section—

"(1) the terms 'national credit institution' and 'official action' have, respectively, the meanings given those terms in section 215 of this title; and

"(2) the term 'anything of pecuniary value' means anything of value, as defined in section 215 of this title—

"(A) in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage; or

"(B) that has a value in excess of $100.

"(c) There is extraterritorial jurisdiction over an offense under this section.".

(b) The table of sections at the beginning of chapter 11 of title 18 of the United States Code is amended by striking out the item relating to section 215 and all that follows through the item relating to section 216 and inserting in lieu thereof the following:

"215. Bribery regarding financial operations.
"216. Graft in financial operations.".

SEC. 2. (a) Chapter 63 of title 18 of the United States Code is amended by adding at the end the following new section:

"§1344. Financial fraud

"(a) Whoever knowingly—

"(1) devises a plan to obtain the property of a national credit institution, or to cause economic loss to such an institution by fraudulent means; and

"(2) engages in any conduct in furtherance of such plan;

shall be fined not more than $250,000 or imprisoned for not more than five years, or both, if such person is an individual, and shall be fined not more than $1,000,000 if such person is other than an individual.

"(b) As used in this section—

"(1) the term 'national credit institution' has the meaning given that term in section 215 of this title;

"(2) the term 'fraudulent means' means—

"(A) making a false statement;

"(B) omitting information from a statement, thereby causing a portion of that statement to be misleading;

"(C) submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

"(D) submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

"(E) using a trick, scheme or device;

with intent to mislead another.

"(c) There is extraterritorial jurisdiction over an offense under this section.".

(b) The table of sections at the beginning of chapter 63 of title 18 of the United States Code is amended by adding at the end the following new item:

"1344. Financial fraud.".

(c)(1) The heading of chapter 63 of title 18 of the United States Code is amended to read as follows:

"CHAPTER 63—MAIL AND OTHER FRAUD".

(2) The table of chapters for part I of title 18 of the United States Code is amended so that the item relating to chapter 63 reads as follows:

"63. Mail and other fraud ..... 1341".

○

END