

Testimony of the
**American Civil Liberties Union
of the Nation's Capital**

by
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Legal Director

before the Committee on Government Operations
of the
Council of the District of Columbia

on the
Draft Committee Print
dated November 30, 2011
of the

“Board of Ethics and Government Accountability Establishment
and Comprehensive Ethics Reform Amendment Act of 2011”

November 30, 2011

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The ACLU of the Nation's Capital appreciates the opportunity to testify at this roundtable on the Chairwoman's Draft Committee Print of this wide-ranging ethics reform bill.

First, we wish to compliment Chairwoman Bowser for taking the very unusual and very commendable step of releasing a draft committee print and holding a public roundtable to receive comments after having held a lengthy public hearing on the many bills that were introduced on this general subject. This procedure was well justified here, and ought to be considered on other occasions as well.

Second, the American Civil Liberties Union exists to protect and expand civil liberties and civil rights, and given our location in Washington, D.C., the ACLU of the Nation's Capital has long been concerned with the due process, free speech and privacy rights of government employees. However, we are not a general “good government” organization. We will therefore limit our testimony to topics that relate to civil liberties and civil rights, although there are many other points that could be made about the draft bill. Our failure to comment on other topics (for example, whether a new agency should be created or how the members of such an agency should be appointed) should not be construed as approval.

Our testimony will be organized under three general headings: due process concerns, free speech concerns, and privacy concerns.

Due Process Concerns

A.

Section 208(b)(1) of the draft bill provides:

Except as provided in subsection (a)(1) of this section, any person who violates the Code of Conduct which violation substantially threatens the public trust shall be fined not more than \$25,000, or shall be imprisoned for not longer than 12 months, but not both.

Violations of the Code of Conduct would range from accepting a bribe to filing a report late or omitting a small stock holding from a report. A jury being asked to convict a person of a felony charge should not be asked to decide, without any statutory guidance, whether a violation “substantially threatens the public trust.” We have no idea what that phrase is supposed to mean, and jurors are likely to have wildly differing conceptions about it, which may have no relation to what members of this Committee, or of the Council, had in mind.

As Justice Oliver Wendell Holmes famously explained long ago, constitutional due process requires a “fair warning . . . of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.” *McBoyle v. United States*, 283 U.S. 25, 27 (1931). This provision fails that test.

There are already strong criminal laws against bribery, extortion, and the like. We see no need for the creation of a new felony, which would enable prosecutors to “pile on” additional charges for conduct that is already criminal, or to charge minor violations of reporting requirements as felonies.¹

¹ The section of the draft bill quoted above begins, “Except as provided in subsection (a)(1) of this section, . . .” Subsection (a)(1) provides that “A civil penalty may be assessed by the Board for a violation of the Code of Conduct . . .” As far as we can see, subsection (a)(1) applies to *all* violations of the Code. It is therefore not at all clear what violations of the Code of Conduct subsection (b)(1) is intended to cover. In order to provide the required “fair warning,” statutes must be comprehensible.

B.

Section 209(c) of the draft bill provides:

a violation of the Code of Conduct committed by a public official, except elected officials, which violate the public trust shall be cause for removal, if applicable.

This provision similarly rests the very serious determination of whether to terminate a civil servant from his or her job on a wholly undefined and amorphous phrase — “violate the public trust” — that will mean tremendously different things to different people. Does it mean something *less* than “substantially threatens the public trust”? Perhaps so, because it doesn’t include the word “substantially.” Or does it mean something *more*, because it requires an actual “violation” of the public trust rather than just a “threat” to the public trust. No one can possibly know what the provision is intended to mean. That violates due process.

Additionally, we cannot tell what the phrase “if applicable” is supposed to mean. We don’t see anything in the draft bill that would indicate when this provision would be applicable and when it would not be applicable.

C.

Section 702(a)(1) of the draft bill also would require every “public official” (as broadly defined to include many mid-level D.C. employees), and section 703(a) would require every “employee” (as even more broadly defined) to certify, when he or she files his or her financial disclosure, that he or she has

...

(C) Diligently engaged in safe-guarding the assets of the taxpayers and the District;

...

(G) Not raised or received funds in violation of Federal or District law; and

(H) Not engaged in any pay-to-play schemes or quid pro quo arrangements.

These requirements are quite vague. If a real estate assessor values a property at less than some critic thinks it was worth, thereby lowering its tax rate, was the assessor failing to safeguard the District’s assets? If a lawyer

representing the District agrees to give an opposing party an extension of time to file a brief, in return for the other party agreeing to give the lawyer an extension of time to file the responsive brief, is that a “quid pro quo arrangement because each side has received a thing of value? If an employee overvalues some charitable contributions of used furniture and clothing, thereby increasing his income tax refund, can he be prosecuted for perjury if he certifies that he has not “received funds in violation of Federal or District law”?

Without clear definitions, it is improper to require people to sign such certifications, since they cannot know what they are certifying. Because a false certification would be grounds for discharge and even felony prosecution, it would violate due process to require such certifications of such ambiguous statements.

D.

Section 702(a)(1) of the draft bill also provides that “[t]he Board may, on a case-by-case basis, exempt a public official from this [financial disclosure] requirement for good cause shown.” While “good cause” may be an adequate standard in some contexts, we think it is an invitation to arbitrary discrimination in the context of this bill. If there are reasons why the Council thinks some categories of employees who are covered by the draft bill should not be covered, then the bill should be amended so as not to cover those categories of employees.

We note that the existing regulations governing D.C. employees contain a carefully crafted set of rules and procedures for determining which employees in the executive branch must file financial disclosure forms. *See* 6 DCMR § 1813. The proposed bill would displace those regulations with vague language and sweep in a vast but quite uncertain swath of low-level executive branch employees — those “who make decisions or participate substantially in areas of contracting, procurement, administration of grants or subsidies, developing policies, inspecting, licensing, regulating, auditing, or acting in areas of responsibility which may create a conflict of interest or appearance thereof” (Section 101(b)) — and then make them subject to the discretionary exemptions criticized above. From a due process point of view, the draft bill would certainly not be an improvement over existing law. Quite the contrary: it would create enormous confusion and dispute over who is covered and who is not — confusion and dispute that would take many years for the proposed Board of Ethics and Accountability, and then the courts, to resolve.

Free Speech Concerns

E.

Referring to the proposed new Board of Ethics and Accountability that the draft bill would create, Section 202(g) of the draft provides:

(g) A board member shall not:

...

(2) Make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or

(3) Solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.

Supporting, opposing, and voicing opinions on political candidates and issues, and making financial contributions to political organizations or candidates, are among the most important and fundamental rights of Americans. A person's right to engage in such activities can be overcome only when the government has a compelling interest in doing so, and even then any restriction must be narrowly tailored to restrict no more of the activity than is necessary to serve the government's compelling interest. *See Buckley v. Valeo*, 424 U.S. 1 (1976); *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003); *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

The restrictions quoted above do not pass this constitutional test. While a person's involvement in local, District of Columbia electoral politics may be incompatible with membership on the proposed Board, involvement in political activity at the national level or in other places, or in non-electoral political activity, has no such incompatibility. Additionally, the term "political organization" is undefined; there are many organizations that might be deemed "political" but that are not involved in activities that would pose any conflict of interest for members of the proposed Board.

These problems could be addressed by inserting "District of Columbia" before the phrase "political organization or candidate" in all three places where it appears and before the phrase "candidate for public office," and by carefully defining "political organization" to include only organizations that are involved in supporting or opposing candidate for District of Columbia public office.

F.

Section 601(a)(3) of the draft bill would prohibit a “lobbyist or registrant” from

provid[ing] legal representation, or other professional services, to an official in the legislative or executive branch, or to a member of his or her staff, at no cost or at a rate that is less than the lobbyist or registrant would routinely bill for the representation or service.

The ACLU has a direct concern with this provision, because paid ACLU staff members who lobby the Council are “registrants,” and the ACLU would therefore be prohibited from providing *pro bono* legal representation to any officials in the legislative or executive branch, which comprises a large group of D.C. employees.² We have provided such representation in the past and we (and other public interest organizations) should remain free to do so, as part of our First Amendment right to help protect civil liberties and civil rights for all.

For example, just this fall we provided *pro bono* legal representation to Councilmembers Mendelson and Cheh when they agreed to become parties to our *amicus* brief in the *Dan Snyder v. City Paper* SLAPP case.³ Long ago, we represented Councilmember Hilda Mason in the *Convention Center Referendum Committee* case.⁴ In between, there have been other occasions on which we

² Under existing law, the term “official in the executive branch” is defined to mean “the Mayor, any officer or employee in the Executive Service, persons employed under the authority of §§ 1-609.01 through 1-609.03 (except § 1-609.03(a)(3)) paid at a rate of GS-13 or above in the General Schedule or equivalent compensation under the provisions of subchapter XI of Chapter 6 of this title or designated in § 1-609.08 (except paragraphs (9) and (10) of that section) or members of boards and commissions designated in § 1-1106.02(a).” D.C. Code § 1-1105.01(9).

Under existing law, the term “official in the legislative branch” is defined to mean “any candidate for Chairman or member of the Council in a primary, special, or general election, the Chairman or Chairman-elect or any member or member-elect of the Council, officers and employees of the Council appointed under the authority of §§ 1-609.01 through 1-609.03 or designated in § 1-609.08.” D.C. Code § 1-1105.01(10).

³ Officially, the case was captioned *Snyder v. Creative Loafing, Inc.*, No. 2011 CA 003168B (D.C. Superior Court).

have represented Councilmembers without charge on matters of public interest. And even though such representation is *not* “at a rate that is less than the lobbyist or registrant would routinely bill for the representation” — because we never bill a client for our legal services — it would still be prohibited by the draft bill, because it is free.

Even more important, the draft bill would prevent the ACLU from providing *pro bono* legal representation to a wide range of D.C. employees who may have meritorious civil liberties or civil rights claims, either against the District government or against a third party. For example, an executive branch employee who is “paid at a rate of GS-13 or above” may have been a victim of housing discrimination by a private landlord, or may have suffered a false arrest at the hands of the U.S. Capitol Police. In both cases, the ACLU — or the NAACP, or the Lawyers Committee for Civil Rights and Urban Affairs, or any other organization that lobbies the Council — would be barred from providing *pro bono* representation to such a person.

Because *pro bono* representation is what such groups normally provide, and because such groups select their cases based on the issues they present, such representation is not likely to be corrupt, or to be perceived as corrupt, the way free representation provided by a for-profit law firm or lawyer may be. And the draft bill may prevent D.C. employees from obtaining legal counsel for meritorious cases if they cannot afford private counsel — legal fees of tens of thousands of dollars are a substantial burden even on a GS-13 salary — and are prohibited from accepting *pro bono* representation.

Accordingly, we suggest that if this provision is retained at all, it be amended to exempt representation provided by organizations that routinely provide *pro bono* services. For example, language might be added along the following lines: “. . . provided, however, that a non-profit organization that routinely provides *pro bono* services to clients without charge may provide such services to such officials when doing so serves the purposes for which such *pro bono* services are routinely provided.”

Privacy Concerns

Although privacy is the final category of our testimony, the broad invasions of privacy that the draft bill would mandate may be our most serious objection.

⁴ *Convention Center Referendum Committee v. D.C. Board of Elections and Ethics*, 441 A.2d 889 (D.C. 1981) (*en banc*).

G.

Existing law requires the filing of *non-public* financial disclosure reports by a relatively limited number of officials and employees listed in D.C. Code § 1-1106.02(a). The privacy of such reports is protected by law:

No person shall unlawfully disclose or use for any purpose other than in accordance with the terms of this subchapter any information contained in financial statements required by this subchapter.

D.C. Code § 1-1106.02(j). The Board of Elections and Ethics may examine such a report only on a case-by-case basis, upon a vote of the full Board, and “after giving to the individual concerned due notice and opportunity for hearing in a closed session.” D.C. Code § 1-1106.02(c).

The draft bill would radically change this system in three ways. First, it would greatly expand the category of D.C. employees required to file financial disclosure reports. Second, it would greatly expand the scope of the information required to be disclosed. And third, it would make these reports public.

First, section 701(a)(2) of the draft bill greatly expands the category of D.C. employees required to file financial disclosure reports, to include *all* employees in the Excepted Service and all employees “who make decisions or participate substantially in areas of contracting, procurement, administration of grants or subsidies, developing policies, inspecting, licensing, regulating, auditing, or acting in areas of responsibility which may create a conflict of interest or appearance thereof as the Board may determine.” Virtually all of the employees in some agencies participate substantially in one or more of these activities, which describe much of the business of government.

Second, section 702(a)(1) of the draft bill greatly expands the scope of the information required to be disclosed. For example, where current law requires the disclosure of business entities in which an employee (or spouse, if the property is jointly titled) has an interest exceeding \$1,000, or \$5,000 if the entity is publicly traded, the draft bill would require the disclosure of business entities (including publicly traded entities) in which an employee (or spouse, domestic partner, or dependent children, regardless whether the property is jointly titled) has an interest exceeding \$1,000 or that produced income of \$200. Similarly, where current law requires the disclosure of any interest in excess of \$5,000 in real property in D.C., the draft bill would

require disclosure of any interest in excess of \$1,000, or that produced income of \$200 (a personal residence is excluded in both cases).

Third, section 702(a)(1) of the draft bill would make such financial disclosures “public report[s],” which

shall be maintained by the Board as public records which, under such reasonable regulations as it shall prescribe, shall be available for inspection by members of the public.

D.C. Code § 1-1106.02(f). This is where the invasion of privacy occurs. It would be one thing to require public disclosure of major financial interests by high level officials who make major decisions for the District, but it’s a very different thing to require public disclosure of even quite minor financial interests by possibly thousands of employees at levels down to those who merely “participate substantially” in most areas of government regulation. A person’s entire financial life — and that of his or her spouse — does not become the public’s business simply because the person has a job that involves, for example, inspecting fire hydrants or issuing vending licenses. Balancing the public’s legitimate interest in government transparency against the employees’ legitimate interest in financial privacy, and taking into account the small size of the financial interests required to be disclosed, we believe that the draft bill clearly errs unacceptably on the side of invading privacy.⁵

H.

Section 702(a)(1) of the draft bill would require every “public official” (as broadly defined), to include in his or her public report the name of each non-profit organization — whether or not that organization transacts any business with the District of Columbia government — in which the official, or

⁵ In addition to the reporting requirements discussed in the text, section 703(a) of the draft bill would also require all D.C. employees who even “advise” in areas of contracting, procurement, administration of grants or subsidies, developing policies, inspecting, licensing, regulating, auditing, etc., to file complete financial disclosure reports. These reports, however, will remain non-public.

Sections 702(c) and 703(a) of the draft bill would require the proposed Board of Ethics and Accountability to “provide for the annual auditing of the reports filed” under both of these provisions (*i.e.*, both the public and non-public reports). Unless the Board requires employees to provide copies of their tax returns and bank and brokerage statements (and those of their spouses), it is difficult to imagine what kind of useful “auditing” could be accomplished. It is also difficult to imagine what the cost of auditing thousands of financial disclosure reports might be.

his or her spouse, domestic partner, or dependent children, “serves as an officer, director . . . consultant . . . [or] volunteer or in any other formal capacity or affiliation.”⁶

It is not the public’s business — or the District of Columbia’s business as an employer — to know all of an employee’s connections to any and every non-profit organization, much less the connections of the employee’s spouse, domestic partner, or dependent children. If an employee is a deacon at a gay church, or a volunteer with a pro-choice or right-to-life organization, or if an employee’s spouse is a consultant to the National Rifle Association or Emily’s List, or if a dependant child volunteers with a “Ron Paul for President” organization, there is no justification for forcing such affiliations into public view, at least not absent a business connection to the District of Columbia government that would involve the employee’s job. The Supreme Court has repeatedly rejected government attempts to pry into such affiliations. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958) (Alabama cannot compel disclosure of NAACP membership list); *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960) (public school teachers cannot be compelled to list all organizations to which they belong; “to compel a teacher to disclose his every associational tie is to impair that teacher’s right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.”).⁷

I.

Section 702(a)(1) of the draft bill also would require every “public official” (as broadly defined), and section 703(a) would require every “employee” (as even more broadly defined) to certify, when he or she files his or her financial disclosure, that he or she has “[f]iled and paid his or her income and property taxes.”

This may seem like a simple requirement, but it is not. For example, people sometimes disagree with the tax authorities about what they owe in taxes. If a person has paid what he believes he owes, but the IRS says he owes more, can he certify that he has paid his taxes? How about a person who has agreed to a time-payment plan with the IRS? Can she certify that she has paid her taxes? A person’s dealings with the IRS are confidential under federal

⁶ Section 703(a) of the draft bill would require every “employee” to disclose this same information to the government in a non-public report.

⁷ As the cited cases make clear, this provision of the draft bill infringes on the First Amendment rights of employees, as well as their right to privacy.

law. We don't think all D.C. employees "who make decisions or participate substantially in areas of contracting, procurement, administration of grants or subsidies, developing policies, inspecting, licensing, regulating, auditing," etc. ought to be required to release *public* statements of their situations vis-à-vis the IRS.

J.

Section 702(a)(3) of the draft bill would delete from the existing definition of "gift," in D.C. Code § 1-1106.02(h)(7), the phrase, "for the purpose of influencing the actions of a public official in making or influencing the making of an administrative decision or legislative action." The result would be that *any* gift to a covered employee from *any* business entity, no matter how small, and even if the business entity did no business with the District of Columbia, would have to be reported on the employee's *public* financial disclosure form (unless the gift was "a political contribution otherwise reported as required by law, a commercially reasonable loan made in the ordinary course of business, or a gift received from a member of the person's immediate family, or unless the aggregate value of all such gifts in a year was less than \$100).

We do not see a valid purpose in requiring employees to report *publicly* gifts received from business entities that do no business with the District of Columbia. Nor do we see any reasonable justification for requiring employees to report *publicly* modest gifts (individually or in the aggregate) that have nothing to do with their jobs. If an employee gets a 15th cup of coffee free from Starbucks every month or a 10th sandwich free from Cosi, and the total value exceeds \$100 in a year, do we really need the employee to keep careful track of the value of those corporate gifts and report them, and does the public's interest in fighting corruption really outweigh the employees' interest in keeping his food and beverage preferences to himself? Requiring haystacks of trivialities to be reported only makes it harder to find the occasional needle.

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There are certainly parts of this bill to which we would not object, particularly those dealing with Councilmembers' constituent service funds, transition committees, inaugural committees, and legal defense committees. But we would have to oppose the bill if it moved forward in its current form, and it would require major surgery before we could change that position.

Thank you for your consideration of our comments.