104TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
104–680

GOVERNMENT ACCOUNTABILITY ACT OF 1996

JULY 16, 1996.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MCCOLLUM, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 3166]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3166) to amend title 18, United States Code, with respect to the crime of false statement in a Government matter, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Government Accountability Act of 1996".

SEC. 2. RESTORATION OF FALSE STATEMENT PENALTIES.

Section 1001 of title 18, United States Code, is amended to read as follows:

"§ 1001. Statements or entries generally

"(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

"(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

"(2) makes any materially false, fictitious, or fraudulent statement or representation; or

"(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

"(b) Subsection (a) does not apply—

"(1) to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge in that proceeding; or

"(2) to—

"(A) any non-administrative matter; or

"(B) any investigative matter, other than with respect to a person furnishing information pursuant to a duly authorized investigation;

within the jurisdiction of an entity within the legislative branch.".

PURPOSE AND SUMMARY

Section 1001 of title 18 United States Code makes it a crime to knowingly and willfully falsify, conceal or cover up by any trick, scheme, or device, a material fact, or make any false statement in any matter within the jurisdiction of any department or agency of the United States. Prior to the Supreme Court's decision in *Hubbard* v. *United States,* 115 S.Ct. 1754 (1995), Section 1001 applied to all three branches of the Federal Government. In *Hubbard,* the Court held that Section 1001 did not apply to the judicial branch, and by implication, to the legislative branch of the Federal Government. The purpose of H.R. 3166 is to ensure that section 1001 applies to the judicial and legislative branches as well as the executive branch, thereby ensuring the integrity of legislative and judicial functions and proceedings. H.R. 3166 accomplishes this purpose by applying section 1001 to persons who knowingly and willfully make misrepresentations to all three branches of the Federal Government.

The bill includes two sections. Section 1 provides that the short title is the "Government Accountability Act of 1996." Section 2 provides for the restoration of false statement penalties by applying the criminal penalties of section 1001 to all three branches of the Federal Government. It does so while ensuring that the scope of section 1001 is limited, as it was prior to *Hubbard.* Consequently, section 2 establishes both judicial and legislative function exceptions, limiting the application of section 1001 so as to ensure that the judicial and legislative functions of the Federal judiciary and Congress are not undermined. To that end, the judicial function exception exempts from section 1001's application those representations made by a party or party's counsel to a judge during a judicial proceeding, so as to avoid any chilling effect upon the adversarial process. Similarly, the legislative function exception exempts from section 1001's application those communications made to or before Congress and which do not constitute administrative filings and which are not furnished pursuant a duly authorized investigation.

BACKGROUND AND NEED FOR THE LEGISLATION

Section 1001 of title 18 of the United States Code states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations or makes any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

Congress passed section 1001 of title 18 of the United States Code in 1934. It was interpreted expansively in 1955 so as to include statements made to Congress and the courts, when the courts were functioning in their administrative, not adjudicatory, capacity.[1] Over the last four decades, section 1001 has been used to prosecute Members of Congress who lie on their financial disclosure forms, initiate ghost employee schemes, knowingly submit false vouchers, and purchase personal goods and services with taxpayer dollars.[2] Courts consistently held that section 1001 covered reports filed pursuant to the Ethics in Government Act.[3]

In *Hubbard* v. *United States,* 115 S.Ct. 1754 (1995), the Supreme Court held that a Federal court is not a "department" or "agency" within the meaning of section 1001, and that the statute, therefore, does not apply to false statements made in a judicial proceeding. The court argued that a common sense, ordinary reading of the text of section 1001 does not define "agency" to include courts.[4] While the Court did not directly address the question of whether section 1001 still applies to Congress, in holding that section 1001 does not apply to the courts, *Hubbard* is widely interpreted as leaving section 1001 covering only the executive branch, leaving Congress outside its scope. Lower courts have already taken this view. After *Hubbard,* Ethics in Government Act reports filed by officials within the Courts and Congress are no longer covered by section 1001.

In May, 1995, Congressman Martini introduced H.R. 1678, which applied section 1001 to all three branches of the Federal Government, without exception. At a Crime Subcommittee hearing on June 30, 1995, witnesses expressed concern that the broad application of section 1001 to all three branches would chill advocacy in judicial proceedings and also undermine the fact-gathering process that is indispensable to the legislative process. In response to these concerns, Representative Martini introduced H.R. 3166 on March 27, 1996, which included a judicial function exception, exempting from the scope of section 1001 those representations made by a party or party's counsel to a judge during a judicial proceeding. At

---

[1] *U.S.* v. *Bramblett,* 348 U.S. 503 (1955); See also *Morgan* v. *United States,* 309 F.2d 234 (D.C. Cir. 1962), cert. denied, 373 U.S. 917 (1963).

[2] See *United States* v. *Levine,* 860 F.Supp. 880 (D.D.C. 1994), *United States* v. *Diggs,* 613 F.2d 988 (D.C. Cir. 1979) and *United States* v. *Marvoules,* 819 F.Supp. 1109 (D. Mass 1993).

[3] 5 U.S.C. § 101. See *United States* v. *Hansen,* 772 F.2d 940 (D.C. Cir. 1985).

[4] "There is nothing in the text of the statute, or in any related legislation, that even suggests—let alone shows—that the normal definition of 'department' was not intended." *Hubbard,* 115 S.Ct. at 1758.

the Judiciary Committee mark-up of H.R. 3166, Representative McCollum, Chairman of the Subcommittee on Crime, offered an amendment, which passed on voice vote without opposition, to provide a legislative function exception to section 1001.

H.R. 3166 applies section 1001 to all three branches of the U.S. Government, with two exceptions. First, the bill does not apply section 1001 "to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge in that proceeding." Such an exception is intended to codify the judicial function exception which has long been recognized by many Federal courts as necessary to safeguard from the threat of prosecution statements made in the course of adversarial litigation.[5] Allowing the criminal penalties of section 1001 to apply to statements made in the course of adversarial litigation would chill vigorous advocacy, thereby undermining the adversarial process. The exception is consistent with the Court's reasoning in *Bramblett* and *Morgan,* and subsequent case law, which consistently distinguished the adjudicative from the administrative functions of the court, exempting from section 1001 only those communications made to the court when it is acting in its adjudicative or judicial capacity, and leaving subject to section 1001 those representations made to the court when it is functioning in its administrative capacity. Thus, false statements uttered during the course of court proceedings or contained in court pleadings would not be covered by section 1001. The language of the exception recognizes that a wide range of filings are an integral part of the adversarial process, and therefore goes beyond merely exempting "statements," exempting as well "representations, writings or documents" submitted to the judge. Importantly, such filings made in judicial proceedings are already covered by other statutes, further limiting any supposed necessity of covering these filings with section 1001.[6]

The second exception exempts from section 1001's scope certain representations that are made involving the legislative branch. The purpose of the exception is to avoid creating an atmosphere which might so discourage the submission of information to Congress that it undermines the fact-gathering process which is indispensable to the legislative process. Consequently, the exception provides that certain information provided to Congress—information which is neither furnished as part of an administrative filing, nor furnished pursuant to a duly authorized Congressional investigation—is not subject to the criminal penalties of section 1001.

Without such an exception, the criminal penalties of section 1001 would apply to all forms of communication made to Congress. This would include, for example, opinions expressed through constituent correspondence and all forms of unsworn testimony. Prior to *Hubbard,* the ambiguities regarding the exact scope of section 1001 resulted in the statute not being applied to such forms of communica-

---

[5] In his concurring opinion in *Hubbard,* Justice Scalia recognized the merits of the judicial function exception, noting that without the exception there "remains * * * a serious concern that the threat of criminal prosecution under the capacious provisions of § 1001 will deter vigorous representation of opposing interests in adversarial litigation, particularly representation of criminal defendants, whose adversaries control the machinery of § 1001 prosecution." *Hubbard,* at 1765.

[6] For example, perjury (18 U.S.C. § 1621) and obstruction of justice (18 U.S.C. § 1505).

tions.[7] Moreover, applying section 1001's criminal penalties to such statements would almost certainly have contributed to an intimidating atmosphere, not only undermining the fact-gathering function of Congress, but perhaps also discouraging the exercise of Constitutional rights such as the First Amendment rights of free speech and the right to petition the Government for redress of grievances. The Committee believes that the scope of a criminal law should be sufficiently clear so as to in no way discourage the exercise of constitutional rights, and that the failure to clarify how section 1001 applies to all forms of communications and representations made to Congress invites such an outcome. H.R. 3166 avoids this result by explicitly limiting the application of section 1001 in a congressional setting to administrative and duly authorized investigative matters. As such, section 1001 would continue to apply—as it has in the past—to members of Congress who knowingly and willfully lie on their financial disclosure forms, initiate ghost employee schemes, knowingly submit false vouchers, and purchase personal goods and services with taxpayer dollars. It would also apply to those who knowingly and willfully mislead a duly authorized Congressional investigation. As in the past, statutes such as perjury (18 U.S.C. § 1621), obstruction of justice (18 U.S.C. § 1505) and contempt of Congress (2 U.S.C. § 192) continue to provide possible means of punishing those who would willfully mislead Congress in various forms of communication to Congress.

It has been argued that section 1001 should apply to all forms of communication made to Congress, including all forms of testimony and correspondence, and that prosecutors should be trusted to use such a broad statute with restraint. The Committee does not find this view persuasive. A criminal statute should not be broadly formulated and then defended by asserting that prosecutors will not apply it in selected circumstances. Certainty about the scope of a criminal statute must not be based on the hope of future prosecutorial restraint. Rather, certainty must be based on a specifically-tailored statute that criminalizes only what is intended to be a crime. As the Supreme Court stated in *Hubbard:* "[W]e have often emphasized the need for clarity in the definition of criminal statutes, to provide fair warning, in language that the common world will understand, of what the law intends to do if a certain law is passed." *Hubbard,* at 1758.

It has also been argued that section 1001 applied to all forms of communications made to Congress for at least 40 years prior to *Hubbard,* without any indication that it adversely affected the legislative process. While the Committee is cognizant that section 1001 has not been used to prosecute statements such as unsworn Congressional testimony or constituent mail directed to Congress, the fact remains that section 1001 could have been applied to these types of communications. The Subcommittee on Crime received testimony asserting that the ambiguities regarding the exact scope of § 1001 served to check its use in such settings; it is precisely that ambiguity which will be eliminated after Congress amends section 1001. Leaving section 1001 explicitly applying to all forms of com-

[7] The Committee is unaware of any cases involving the use of section 1001 to prosecute opinions offered to Congress in the form of unsworn testimony or representations made that were not obtained pursuant to a subpoena.

munications made to Congress would clearly signal the breadth of its application, thereby inviting more extensive use of the statute than occurred prior to *Hubbard*.

HEARINGS

The Judiciary Committee's Subcommittee on Crime held 1 day of hearings on June 30, 1995. Testimony was received from three witnesses. They were Representative William J. Martini, Representative from the Eighth Congressional District of New Jersey, Timothy F. Flanigan, counsel, Jones, Day, Reavis & Pogue, and Gerald H. Goldstein, President, National Association of Criminal Defense Lawyers.

COMMITTEE CONSIDERATION

The bill was reported favorably on a voice vote, without amendment, by the Subcommittee on Crime on March 29, 1996.

On June 11, 1996, the Committee met in open session and ordered the bill favorably reported, by voice vote, with a single amendment in the nature of a substitute, a quorum being present.

VOTE OF THE COMMITTEE

The Committee considered the following amendment:

Mr. McCollum offered an amendment to limit the application of Section 1001 in a legislative context by exempting from its scope those communications that are neither administrative matters nor duly authorized matters. The McCollum amendment was adopted by voice vote, without opposition.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2259, the following estimate and comparison prepared

by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 18, 1996.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 3166, the Government Accountability Act of 1996, as ordered by the House Committee on the Judiciary on June 11, 1996. CBO estimates that enacting the bill could lead to increases in both direct spending and receipts, but the amounts involved would be less than $500,000 a year. Because H.R. 3166 could affect direct spending and receipts, pay-as-you-go procedures would apply. The bill contains no intergovernmental or private-sector mandates as defined in Public Law 104–4, and would impose no direct costs on state, local, or tribal governments.

H.R. 3166 would provide that persons who make false statements to the Congress or the federal Judiciary could be prosecuted to the same extent as persons making false statements to the Executive Branch. Violators of the bill's provisions would be more likely to face criminal fines and imprisonment than they are under current law. The imposition of additional fines could cause governmental receipts to increase through greater penalty collections, but we estimate that any such increase would be less than $500,000 annually. Criminal fines would be deposited in the Crime Victims Fund and would be spent in the following year. Thus, direct spending from the fund would match the increase in revenues with a one-year lag.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Grabowicz and Stephanie Weiner.

Sincerely,

JUNE E. O'NEILL, *Director.*

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 2259 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS

SECTION 1.—SHORT TITLE

This section states the short title as the "Government Accountability Act of 1996."

SECTION 2.—RESTORATION OF FALSE STATEMENT PENALTIES

This section amends section 1001 of title 18, United States Code, by providing that the criminal penalties of section 1001 apply to all three branches of the Federal Government. It does so while ensuring that the scope of section 1001 is limited, as was the case prior

to *Hubbard.* Consequently, section 2 establishes both judicial and legislative function exceptions. To that end, the judicial function exception exempts from section 1001's application those statements made by a party or party's counsel to a judge during a judicial proceeding, so as to avoid any chilling effect upon the adversarial process. Similarly, the legislative function exception exempts from section 1001's application those unsworn statements made to or before Congress and which are not furnished pursuant a duly authorized investigation.

Subsection (a) provides that section 1001 applies to the executive, legislative and judicial branches of the United States. As such, it returns the scope of section 1001 to its pre-*Hubbard* status, by explicitly providing that section 1001 covers all three Federal branches.

Subsection (a) further provides that section 1001 applies only to knowing and willful conduct within any of the three branches. Consequently, misrepresentations that are made without knowledge or that are unintentional would not be subject to punishment under section 1001.

Paragraphs (1), (2) and (3) of subsection (a) then delineate the three separate but related offenses that section 1001 criminalizes. The paragraphs state that section 1001 applies to anyone who, in any matter within the jurisdiction of any one of the branches of the Federal Government, knowingly and willfully: (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry. Importantly, the offense in each of the three paragraphs has "materiality" as an element. This express requirement that all three offenses have materiality as an element resolves a conflict among circuits as to whether materiality is an element of all three offenses or merely the offense of falsifying as delineated in paragraph (3).[8] Other than establishing materiality as an element of all three offenses, the Committee does not view the offenses defined in paragraphs (1), (2) and (3) as changing already existing case law as it relates to the elements of the offenses.

Finally, subsection (a) provides that anyone convicted of an offense under section 1001 shall be fined or imprisoned not more than 5 years, or both. These penalties are identical to those that were in effect prior to *Hubbard*.

Subsection (b) establishes the two exceptions to the general application of section 1001 as delineated in subsection (a). First, subsection (b) provides that section 1001 does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge in that proceeding. As such, section 1001 does not apply to representations made to a court that is acting in its judicial, or adjudicatory capacity; Rather, it applies only to representations made to a court acting in its administrative capacity. The language of the exception recognizes that a wide range of fil-

[8] See *United States* v. *Corsino,* 812 F.2d 26 (1st Cir. 1987) and *United States* v. *Elkin,* 731 F.2d 1005 (2d Cir. 1984).

ings are an integral part of the advocacy process, and therefore goes beyond merely exempting "statements," exempting as well "representations, writings or documents" submitted to the judge. This judicial or adjudicatory function exception is consistent with the Court's reasoning in *United States* v. *Bramblett,* 348 U.S. 503 (1955) and *Morgan* v. *United States,* 309 F.2d 234 (D.C. Cir. 1962), cert. denied, 373 U.S. 917 (1963), and subsequent case law, which distinguished between the adjudicative and administrative functions of the court. The judicial function exception provided in subsection (b) is intended to codify the judicial function exception as articulated in *Bramblett.* Consequently, consistent with *Bramblett,* only those representations made to a court when it is acting in its administrative or "housekeeping" capacity are within the scope of section 1001. Such representations would include any filings not related to a proceeding before the court, such as submissions related to bar membership, and would also include the submission of information to another entity within the judicial branch, such as the probation service.

The second exception established in subsection (b) is the legislative function exception. The exception is defined in subsection (b) by identifying the two matters that section 1001 does not apply to. The first such matter is "any non-administrative matter." The second such matter is "any investigative matter, other than with respect to a person furnishing information pursuant to a duly authorized investigation." Consequently, stated in the affirmative, subsection (b) provides that, with respect to Congress, section 1001 applies only to administrative matters and to duly authorized investigative matters.

The administrative matters covered by subsection (b) includes, but is not limited to, all financial disclosure filings, including those required pursuant to the Ethics in Government Act, and all claims submitted to the House Finance Office. It is the Committee's view that congressional support entities—including the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of the Inspector General of the House, and the Capitol Police—are part of the legislative branch, and are therefore covered by section 1001 in the same manner that the rest of Congress is covered.

Subsection (b) further limits the application of section 1001 to duly authorized investigative matters. In so doing, the subsection differentiates between those congressional investigations that are "duly authorized" and those that are not, and applies section 1001 only to the former. The Committee is cognizant of the current array of circumstances and authorities that give rise to congressional investigations. It is, however, the view of the Committee that the means by which a congressional investigation can be duly authorized is limited to those investigations that are initiated through a formal action of a House or Senate committee, or the whole House or Senate. Consequently, an inquiry conducted by a Member of Congress or the staff of such Member which is relevant to such person's official duties is not a "duly authorized investigation" for purposes of section 1001. For example, an employee in a Member's office who contacts an executive branch employee to acquire information about a particular matter of interest to the Member is not en-

gaged in a "duly authorized investigation." Neither is the inquiry which is made by a House or Senate committee employee at the direction of the Chairman of the Committee, even when the inquiry pertains to a matter within such committee's jurisdiction, a "duly authorized investigation" for purposes of section 1001.

The Committee anticipates that some consideration may be given in the future to the possibility of amending the rules of the House or Senate or particular committees to provide further clarification to the meaning of "duly authorized investigation" for purposes of section 1001. Such amendments may expand the ways in which investigations can be "duly authorized," and would, as such, supersede the standard as provided in this report.

AGENCY VIEWS

The Committee has received a letter in support of H.R. 3166 from the Office of Management and Budget of the Executive Office of the President. That letter is as follows:

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, DC, July 16, 1996.

STATEMENT OF ADMINISTRATION POLICY

H.R. 3166—GOVERNMENT ACCOUNTABILITY ACT (MARTINI (R) NEW JERSEY AND THREE COSPONSORS)

The Administration strongly supports House passage of H.R. 3166, which is very similar to a proposal the Administration transmitted to the Congress on December 28, 1995.

* * * * * * *

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 1001 OF TITLE 18, UNITED STATES CODE

[§ 1001. Statements or entries generally

[Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.]

§ 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Subsection (a) does not apply—

(1) to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge in that proceeding; or

(2) to—

(A) any non-administrative matter; or

(B) any investigative matter, other than with respect to a person furnishing information pursuant to a duly authorized investigation;

within the jurisdiction of an entity within the legislative branch.

○