128 DORRANCE STREET, SUITE 220
PROVIDENCE, RI 02903
401.831.7171 (t)
401.831.7175 (f)
www.riaclu.org

COMMENTS ON 10-H 7425,
AN ACT RELATING TO CRIMES AGAINST PUBLIC TRUST
April 14, 2010

This legislation, based on a federal law, would make it a felony for a public employee to "engage in any conduct that deprives the public of the intangible right of his or her honest services." The term "honest services" is not defined, leaving it open to wide-ranging interpretations and subjecting every public employee and public official to serious criminal penalties for a variety of relatively innocuous conduct. This language is so broad, vague and open-ended that it allows for great prosecutorial mischief. Indeed, the sweep of this language is such that a public employee who leaves work fifteen minutes early has committed a felony subjecting him to ten years in prison. For these reasons, the ACLU strongly opposes the legislation.

We are not aware of any other states that have adopted this federal language on their own, perhaps in partial recognition of the fact that federal courts have acknowledged the extreme difficulty of grappling with what the statute actually means. (The bill is actually slightly broader than the federal law, which ties the deprivation of honest services to use of the mails.) Two federal courts have found the statute to be so vague as to be unconstitutional, though the majority of courts (including the First Circuit) have not gone that far. In fact, the United States Supreme Court is this very term considering the constitutionality of the federal statute on which this bill is based, and that in itself should be reason to take no action on the bill.

There are, of course, other anti-corruption laws already on the books that prosecutors can and should use for true acts of corruption. If the Attorney General believes they are insufficient, then he should propose *specific* language designed to address those corruption issues, not use an open-ended statute whose meaning is opaque to all. One of the most fundamental tenets of due process is that a person should know – in advance – what conduct is prohibited by the criminal laws so that he or she can act accordingly. People should not have to guess, or wait for a federal appeals court to determine that the conduct for which they have been indicted, tried and convicted is not, in fact, a crime at all. But that is precisely what is happening at the federal level as a result of this law.

This federal law was one of the charges in the recent Urcioli/Celona case that the First Circuit Court of Appeals partially reversed. It is worth quoting from the First Circuit's ruling addressing the statute:

"The federal mail fraud statute is built upon a single, archaic 204-word sentence which, reduced to its essence, makes it unlawful to use the mails in relation to 'any scheme or artifice to defraud.' The statute has undergone 'repeated periods of rapid expansion and contraction.' Its application to political misconduct and corruption, as opposed to ordinary private fraud (e.g., bank fraud, commercial scams), has been especially fraught. Other federal statutes criminalize various corrupt practices--like the federal bribery and gratuity statutes--but these are limited in ways that section 1341 is not.

Notably, after the Supreme Court held the statute inapplicable to cases of political corruption that involve no loss of money or tangible property, Congress overturned this construction by enacting section 1346; the new provision, passed with scant legislative history, defined the term "scheme or artifice to defraud" to include 'a scheme or artifice to deprive another of the intangible right of honest services.' 18 U.S.C. § 1346. Prosecutors have sought to sweep much abusive political conduct within this proscription; in a number of cases courts have been more guarded.

The central problem is that the concept of 'honest services' is vague and undefined by the statute. So, as one moves beyond core misconduct covered by the statute (e.g., taking a bribe for a legislative vote), difficult questions arise in giving coherent content to the phrase through judicial glosses. Closely related concerns are assuring fair notice to those governed by the statute, and cabining the statute--a serious crime with severe penalties--lest it embrace every kind of legal or ethical abuse remotely connected to the holding of a governmental position." (emphasis added) (citations omitted)

As this excerpt candidly acknowledges, the problems with the statute are enormous. Unlike the First Circuit, however, we do not believe it is fair to subject a public employee or public official to a criminal trial based on a vague law and hope that ultimately an unfair conviction will be overturned, after the person's career may have been ruined.

As a cautionary tale, we refer the committee to *U.S. v. Thompson*, 484 F.3d 877 (2007), one of the prime exhibits in the U.S. Attorney politicization scandal that was in the news a couple years ago. Ms. Thompson was a close aide to the Governor of Wisconsin who was in a very tight and contested re-election campaign. Shortly before the election, Ms. Thompson was charged by the U.S. Attorney with violating the federal honest services statute – by awarding a state contract bid to the lowest bidder, though one with alleged political connections to the Governor. She was convicted and sentenced to prison. The Seventh Circuit was so appalled at the abuse of the statute in her case that, the day after oral argument in her appeal, it summarily reversed her conviction and ordered her immediate release from prison. In raising this example, we don't mean to suggest that our current Attorney General would misuse the statute for such blatant political purposes. However, no statute that makes such abuse so easy should ever be adopted.

For all these reasons, we urge the Committee's opposition to this bill.