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ORAL STATEMENT before the United States Senate
Committee on the Judiciary
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"Restoring Key Tools to Combat Fraud and Corruption
After the Supreme Court's *Skilling* Decision"

Mr. Chairman and Distinguished Members of the Committee:

Thank you for providing me with the opportunity to testify here today. I am going to limit my remarks to issues surrounding the impact of *Skilling v. United States*[1] on the prosecution of public-sector honest services fraud.

Few experts would take issue with the Supreme Court's conclusion in *Skilling* that the concept of honest services found in 18 U.S.C. § 1346 was unconstitutionally vague. As the Court held, the term was so general that (1) it did not provide citizens with fair notice of potential criminal conduct; (2) it allowed for abuse of prosecutorial discretion, both through vindictive prosecution and the waste of precious law enforcement resources on trivial cases; and (3) it risked intrusion on the right of States to regulate their own political affairs.

However, the solution that the Court devised -- limiting the application of the statute to cases involving bribery and kickbacks -- is far from ideal. In fact, the newly-narrowed statute suffers from the very same ills as before. One example will suffice to prove this point. Even after *Skilling*, federal prosecutors could charge a State Department of Motor Vehicles employee with honest services fraud for taking a $20 bribe to allow a driver's license applicant to cut in line. I think we'd all agree that making a federal case out of such minor conduct would be an improvident use of DOJ resources in an area in which state officials are surely equipped to handle the infraction themselves.

At the same time, the *Skilling* limitation has made the scope of honest services fraud considerably too narrow, causing serious malfeasance meriting the attention of federal law enforcement to be beyond its reach. The case's most glaring flaw is its failure to define bribery and kickbacks. Lacking direct guidance, lower courts are likely to import the definition of these terms from the federal bribery statute, 18 U.S.C. § 201. According to the Supreme Court's

[1] 130 S. Ct. 2896 (2010).

decision in *Sun Diamond Growers*,[2] conviction under § 201 for an illegal bribe or gratuity (which is included within the definition of a kickback pursuant to 41 U.S.C. § 52(2)) requires proof of a *quid pro quo* -- in other words, proof that the bribe or gratuity was paid in connection with a specific official act.[3] Sometimes, despite obviously corrupt behavior, this element is impossible to prove beyond a reasonable doubt. For example, a state legislator might secretly be on the payroll of a corporation that has an interest in a wide variety of matters that are the constant subject of legislation. The employer and employee use all kinds of deception to conceal the illicit income, which adds up to more than a half million dollars over the course of several years. Although the legislator is a routine champion of causes that benefit the company, there is no evidence of a direct link between any particular official act and his undisclosed conflict of interest. Under the post-*Skilling* status quo, this arrangement, so obviously antithetical to a healthy political environment, lacks a federal criminal remedy.

Unless Congress acts, two other categories of public sector honest services fraud will likewise go unaddressed. The first is composed of cases involving a public employee or official who receives a non-monetary benefit as a result of an undisclosed conflict of interest. Cases falling into this category would include a prosecutor whose purposeful failure to reveal his ties to the victim in a murder investigation led to an overturned conviction requiring retrial at taxpayer's expense; or a legislator who secretly directed an appropriation to his alma mater by disguising the recipient's identity through deceptive language buried deep within the legislation; or a judge who failed to disclose that he was negotiating for a future job (that perhaps never came to fruition) with a party to a major case before the court. Unfortunately, these scenarios are derived from real life.

The last type of undesirable conduct that is now beyond the reach of the mail and wire fraud statutes is a public employee's use of outright deception to obtain something other than money or property. Consider, for example, a disturbed employee of the Department of Homeland Security who exaggerates a threat for the sheer evil pleasure of causing a public panic. Or a civil servant who has repeatedly falsified test scores to secure the promotion of one racial or ethnic group over another. Perhaps these actions violate other federal laws, but honest services fraud -- properly construed -- would be a useful and straightforward means of punishing and deterring such antisocial conduct.

Congress should address these shortcomings of the holding in the *Skilling* case. In should rewrite the honest services statute to make clear that, at the very least, cases relying on illegal gratuities do not require proof of a *quid pro quo*, and situations involving undisclosed conflicts of interest or outright deception by public officials that result in a non-monetary benefit are within its scope.

At the same time, to avoid future vagueness problems and respect the sovereignty of the States, Congress should use this opportunity to limit honest services fraud to carefully

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[2] United States v. Sun Diamond Growers of Cal., 526 U.S. 398 (1999).

[3] 18 U.S.C. § 201 and 41 U.S.C. § 52 were both used by the Court in Skilling as points of reference. 130 S. Ct. at 2933-34.

circumscribed and well-defined conduct that is of true federal significance. The new legislation should (1) define each of its terms with precision; (2) require that, to be cognizable, the conduct of the public official must violate a state or federal law, rule, or regulation; (3) impose a minimum, though flexibly measured, level of intended or caused benefit or harm; and (4) spell out in clear terms high levels of specific intent -- for example, intent to defraud and knowing conduct -- that the prosecution must prove before the statute is breached.

Properly redrafted, the mail and wire fraud statutes can continue to serve a very important role in the constant battle against serious and corrosive public corruption.

Thank you.