Written Statement of
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on behalf of the
National Association of Criminal Defense Lawyers

Before the
Senate Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

Re: "Restoring Key Tools To Combat Fraud and Corruption After the Supreme Court's Skilling Decision"

September 28, 2010

TIMOTHY P. O'TOOLE, ESQ. defends individuals and companies in white collar criminal prosecutions, conducts internal investigations, and handles complex litigation arising under the Employee Retirement Income Security Act (ERISA) as a partner at Miller & Chevalier in Washington, D.C. In the fall of 2009, Mr. O'Toole served as co-counsel in the only trial to date of a lobbyist arising out of the Abramoff scandal, litigating a number of cutting-edge issues related to the honest services fraud and gratuities laws. In addition, Mr. O'Toole has a wealth of experience handling criminal and civil appeals, having presented more than 25 appellate arguments in the state and federal courts, and represented multiple parties and amici curiae before the United States Supreme Court. Mr. O'Toole has published and lectured nationwide on a variety of topics. Prior to joining Miller & Chevalier, Mr. O'Toole served as the Chief of the Special Litigation Division of the Public Defender Service for the District of Columbia, where he supervised and handled complex cases in the local and federal courts. He is also a former Assistant Federal Public Defender in Las Vegas, Nevada, where he represented people under sentence of death in federal proceedings.

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The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's more than 10,000 direct members — and 80 state and local affiliate organizations with another 28,000 members — include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

My name is Timothy P. O'Toole, and I am writing on behalf of the National Association of Criminal Defense Lawyers (NACDL), an organization of over 10,000 members. NACDL is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. I am a practicing criminal defense attorney in Washington, DC, specializing in white collar crime. I sit on NACDL's Board of Directors and am a member of NACDL's White Collar Crime Committee.

Since its adoption in 1988, the honest services fraud statute (18 U.S.C. § 1346) has been widely criticized as vague and overbroad. The statute's failure to define the phrase "intangible right of honest services" allowed it to be stretched to cover conduct that no reasonable legislator would have deemed criminal. This vagueness, in turn, permitted the government to treat the "honest services fraud" law as the ultimate in flexible prosecutorial weapons—a statute whose application, especially in high-profile cases, seemed limited only by the prosecutor's imagination.

The Supreme Court's recent decision in *Skilling v. United States*[1] validated these criticisms, with all nine members of the Court expressing concern about the expansive nature in which this facially vague statute had been applied. While three members of the Court would have addressed these concerns by striking the statute in its entirety on vagueness grounds,[2] the Court's majority chose instead to construe the statute as criminalizing "*only* the bribe-and-kickback core of the pre-*McNally* case law."[3] A narrowed version of the offense thus survives, but Congress should not lose sight of the fact that the statute's vagueness was uniformly condemned by a unanimous Supreme Court, representing views across the ideological spectrum.

The Supreme Court did not simply narrow the current statute, however. It also expressly warned Congress about the difficulty in amending the statute to revive the sorts of amorphous "undisclosed conflict of interest" theories that were pursued prior to *Skilling*. As the Court held, the very flexibility of the honest-services statute—touted by some as its primary virtue—was in fact its fatal flaw. In particular, the Supreme Court expressly recognized in footnote 45 of its decision that attempts to revive a federal criminal prohibition on "undisclosed conflicts of interest" would face a host of practical and constitutional problems. Given the Supreme Court's teachings on this subject, Congress should be extremely cautious of any legislative "fix" and *especially* wary of any *quick* legislative "fix" that attempts to retain the "flexibility" that prosecutors enjoyed when they had an unlimited honest services statute in their toolbox.

The difficulty of the endeavor is one sound reason for treading lightly in this area; the lack of any exigency is another. Simply put, there are already many overlapping federal criminal laws that reach "corrupt" conduct by public officials and no one has identified any legitimate gap in this area. Indeed, even without mentioning the honest services fraud law, the Supreme Court

[1] *Skilling v. United States*, ___ U.S. ___; 2010 U.S. LEXIS 5259; 2010 WL 2518587 (June 24, 2010).
[2] *Id*., 2010 U.S. LEXIS 5259 at *108-128.
[3] *Id. at* *97-98 (emphasis in original).

has already observed that potentially corrupt behavior of public officials is governed by an "intricate web of regulations, both administrative and criminal."[4] These federal criminal laws include not only the anti-bribery statutes, but also the mail fraud and racketeering statutes, the Hobbs Act, the Travel Act, and the Anti-Kickback laws. Congress has also passed laws specifically prohibiting public officials' acceptance of gifts.[5] In addition, Congress passed the Honest Leadership and Open Government Act of 2007 ("HLOGA"), which contains a criminal prohibition expressly prohibiting private citizen lobbyists from making gifts or providing travel to government officials if the person has knowledge that the gift or travel may not be accepted by the official under the Rules of the House of Representatives or the Standing Rules of the Senate.[6] Any new honest services statute would be duplicative of these already-existing prohibitions, which already carry extensive penalties.

A new honest services statute is likewise unnecessary in the state and local context. Many have argued that the primary purpose of the honest services law is to allow federal prosecutors to prosecute corruption that would otherwise be ignored by conflicted and politically weak state and local officials.[7] But there is simply no merit to this idea. First, state and local jurisdictions often have their own extensive anti-corruption laws.[8] Second, using the federal honest services law to essentially displace this extensive state and local regulatory framework creates potential federalism concerns, as courts have noted, since it essentially allows the federal government to override the laws that state and local governments adopted to address the misconduct of their own officials.[9]

Third, and most importantly, even if one were to accept the need for federal officials to police state and local corruption, federal prosecutors have plenty of other tools at their disposal. For example, *Skilling* makes clear that the honest services fraud statute may still be applied to state and local officials who participate in fraudulent schemes that were clearly illegal prior to the adoption of the statute and meet the elements of the federal bribery and kickback statutes.[10] Likewise, many other federal criminal laws—most importantly, the Hobbs Act and the Travel Act—apply to corruption offenses involving state and local officials. And Congress passed at

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[4] *United States v. Sun-Diamond Growers*, 526 U.S. 398, 409 (1999).
[5] 5 U.S.C. § 7353, discussed *infra*.
[6] 2 U.S.C. § 1613 (2009). That provision expressly prohibits private citizen lobbyists from "mak[ing] a gift or provid[ing] travel to a covered legislative branch official if the person has knowledge that the gift or travel may not by accepted by that covered legislative branch official under the Rules of the House of Representatives or the Standing Rules of the Senate (as the case may be)." *Id.* The HLOGA also added a provision requiring lobbyists to certify on a semi-annual basis that they are familiar with the House and Senate Rules on gifts and travel, and have not provided or offered such gifts or travel in violation of those rules. HLOGA, § 203(a), 2 U.S.C. § 1604(d)(1)(G) (2009).
[7] *See, e.g.*, Brief for Respondent at 50-51, *Weyhrauch v. United States*, No. 08-1196 (U.S. Oct. 2009); Joshua A. Kobrin, *Betraying Honest Services: Theories of Trust and Betrayal Applied to the Mail Fraud Statute and § 1346*, 61 N.Y.U. ANN. SURV. AM. L. 779, 809-811 (2006).
[8] *See, e.g.*, N.Y. Penal Law (McKinney) § 200 et seq. (1999); Title 13A: Alabama Criminal Code § 13A-10-60 et seq.; CAL. PENAL CODE § 67 et seq. (2009); § 85 et seq. (2009); 720 ILL. COMP. STAT. 5/33-1 et seq. (2010); TEX. PENAL CODE § 36.01 et seq. (2010).
[9] *See, e.g., Brumley v. United States*, 116 F.3d 728, 735 (5th Cir. 1997) (en banc).
[10] *Skilling*, __ U.S. at __, 2010 U.S. 5259 at *104 n.46.

least one other law governing state and local corruption—18 U.S.C. § 666—that prohibits bribery involving state and local officials employed by agencies receiving more than $10,000 in federal program grants. That law has also been broadly applied by the Supreme Court.[11]

As this non-exhaustive list shows, a host of criminal statutes already address the conduct the honest services law attempted to prohibit.

List of Relevant Charging Statutes and Maximum Sentences

- **Title 18, Chapter 11 - Bribery Offenses**
  - 18 U.S.C. § 201 - Bribery of public officials and witnesses (15 years)
  - 18 U.S.C. § 201(c) - Anti-gratuities statute (2 years)
  - 18 U.S.C. § 205 - Activities of officers and employees in claims against and other matters affecting the Government (1 year or 5 years for willful violation)
  - 18 U.S.C. § 207 - Restrictions on former officers, employees, and elected officials of the executive and legislative branches (1 year or 5 years for willful violation)
  - 18 U.S.C. § 208 - Acts affecting a personal financial interest (1 year or 5 years for willful violation)
  - 18 U.S.C. § 209 - Salary of Government officials and employees payable only by United States (1 year or 5 years for willful violation)
  - 18 U.S.C. § 217 - Acceptance of consideration for adjustment of farm indebtedness (1 year)

- **Title 18, Chapter 31 - Embezzlement and Theft Offenses**
  - 18 U.S.C § 666 - Theft or bribery concerning programs receiving Federal funds (10 years)

- **Title 18, Chapter 63 - Mail Fraud Offenses**
  - 18 U.S.C. § 1341 - Mail Fraud (20 years)
  - 18 U.S.C. § 1343 - Wire Fraud (20 years)
  - 18 U.S.C. § 1347 - Health Care Fraud (20 years)
  - 18 U.S.C. § 1348 - Securities Fraud (25 years)
  - 18 U.S.C. § 1351 - Fraud in foreign labor contracting (5 years)

- **Title 18, Chapter 95 - Racketeering Offenses**
  - 18 U.S.C § 1951 - Interference with commerce by threats or violence ("The Hobbs Act") (20 years)
  - 18 U.S.C § 1952 - Interstate and foreign travel or transportation in aid of racketeering enterprises ("The Travel Act") (5 years, 20 years or life, depending on applicable subsection)

[11] *Sabri v. United States*, 541 U.S. 600, 606 (2004).

- **Title 41 - "The Anti-Kickback Act of 1986"**
  - 41 U.S.C. § 53
  - 41 U.S.C. § 54 (10 years)

- **Title 26, Chapter 75 - Crimes, Other Offenses and Forfeitures (Internal Revenue Code)**
  - 26 U.S.C. § 7214(a)(9) - Offenses by officers and employees of the United States (5 years)

- **Title 2, Chapter 26 - Disclosure of Lobbying Activities**
  - 2 U.S.C. § 1606(b) - Penalties (5 years)
  - 2 U.S.C. § 1613 - Prohibition on provision of gifts or travel by registered lobbyists to Members of Congress and to congressional employees

- **Title 15, Chapter 2B - Securities Exchanges**
  - 15 U.S.C. §§ 78dd-1, *et seq.* - "The Foreign Corrupt Practices Act"

- **Relevant Administrative Provisions**
  - **Title 5, Chapter 73 - Suitability, Security and Conduct**
    - 5 U.S.C. § 7353 - Gifts to federal employees (prohibiting federal employees from soliciting anything of value from individuals whose interests may be substantially affected by the performance or non-performance of the individual's official duties)
  - **Rule XXXV** of the Standing Rules of the Senate[12]
  - **Rule XXVI** of the Rules of the House of Representatives[13]

As this list illustrates, there are currently more than enough federal statutes on the books to deal with corruption by federal and state officials. The Supreme Court's limitation on one of these tools—the honest services fraud law—cannot justify fashioning a replacement statute, particularly without a methodical attempt to both address all of the concerns identified by the Supreme Court in *Skilling*, as well as a reasoned effort to see if any replacement statute is needed in the first place. Attempting to revive any aspect of the invalidated portion of the statute is complicated and a hasty attempt to "fix" a perceived gap will almost certainly revive the vagueness concerns that caused the Supreme Court to invalidate the statute. It is difficult to believe that existing federal, state and local criminal laws do not already reach all conduct that is properly criminal. If conduct is still beyond reach, that is likely because the conduct itself is properly beyond the reach of the criminal laws.

[12] This Rule prohibits senators or their employees—except under defined circumstances—from knowingly accepting a gift from a registered lobbyist or a private entity that retains or employs a registered lobbyist.
[13] This Rule covers financial disclosure requirements for Members of Congress.

Thank you for this opportunity to express NACDL's views. We urge the Committee to thoughtfully consider the wide array of existing federal and state criminal and civil laws that already proscribe misconduct in this arena before it acts further.

Respectfully,

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