Written Testimony of
Lisa Kern Griffin
Professor, Duke University School of Law

Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Crime, Terrorism and Homeland Security

Hearing on: H.R. 2572, "The Clean Up Government Act of 2011"

July 26, 2011

Chairman Sensenbrenner, Ranking Member Scott, Members of the Subcommittee, and Subcommittee staff:

Thank you for the opportunity to testify today about pending legislative responses to recent Supreme Court decisions that affect public corruption prosecutions. I am a professor of law at Duke University, where my research and teaching focus on federal criminal justice policy, as well as evidence and constitutional criminal procedure. Before teaching law, I served as an Assistant United States Attorney in Chicago for five years, including two years in the Public Corruption Division. I submit this statement and appear before the Subcommittee on behalf of no organization, and the views expressed are entirely my own.

My testimony will focus on the specific provisions of H.R. 2572 that seek to clarify the federal prohibition on self-dealing in the public sector. A core question about the proposed legislation is this: Why should the federal criminal law, and in particular a revised definition of fraud, be used to enforce disinterested decisionmaking by public officials? I will suggest first that the loss caused by undisclosed conflicts of interest justifies fraud sanctions and second that a carefully constructed new offense could actually rein in overreaching and reduce the inconsistencies in public corruption prosecutions.

It is unusual to identify an enforcement gap in the federal criminal law, but recent decisions by the Supreme Court cut off prosecutions of at least one category of public officials who abuse their positions to achieve personal gain. The result is serious wrongdoing, affecting substantial federal interests, that is beyond the reach of any statute.

I believe the inquiry into whether and how to close that gap should begin with an assessment of the harm that flows from self-dealing. The victim is constructed, and the social costs are broadly distributed; the damage is to the political process itself. The cases about public corruption often express aspirations like fidelity and integrity and describe the loss in terms of these abstract concepts. But even though difficult to measure, the harm is nonetheless significant. Self-interest distorts the decisions of public officials. It puts private gain before public good. It degrades our ideals about government and detracts from its legitimacy.

Just as the harm can only be described in dynamic terms, the wrongful conduct takes on varying forms. Existing laws clearly cover the case where a vote is promised in exchange for a briefcase full of cash. But it is exceptional to see such a case. Instead, corruption often lies hidden in layers of transactions. And both the benefits conferred on public officials and the actions taken in exchange may be deferred or disguised.

Sophisticated actors and intricate wrongdoing characterize modern fraud as well. And the central purpose of the mail and wire fraud statutes is to prevent various forms of harmful deception. Fraud is also a sufficiently adaptable concept to capture concealed self-interest and keep pace with the normative harms I have described. It thus makes sense that prohibitions on

fraud have long been the principal vehicle for corruption enforcement. This has been true even though the social costs to corruption typically transcend material economic losses.

Until the Supreme Court's recent decision in *Skilling v. United States*, federal prosecutors relied on honest services fraud, as defined in 18 U.S.C. § 1346, to address both undisclosed self-dealing and cases of bribes and kickbacks. Today's hearing forms part of an inter-branch conversation that has been going on for half a century. The idea that there is a species of fraudulent conduct that imperils intangible but valuable rights emerged through common law rulemaking and then expanded and contracted through judicial interpretation, legislative clarification, and prosecutorial initiative. When the Supreme Court's 1987 decision in *McNally v. United States* limited fraud prosecutions to offenses involving the deprivation of property, Congress responded with the current version of section 1346. The statute expanded the definition of mail and wire fraud to include not only deprivations of money and property but also schemes to "deprive another of the intangible right to honest services." In the decades of honest services adjudication that followed, those terms acquired layers of meaning and were subject to some conflicting interpretations. The *Skilling* Court seemed poised last year to offer needed clarifications, but instead excluded concealed conflicts of interest from the reach of the fraud statute altogether.

That decision created a rare federal criminal shortfall. Consider a public official who accepts a substantial and unreported sum of money, with no particular strings attached, who is later moved to take action favorable to the benefactor. Or an individual who takes advantage of public office to steer contracts to a company in which he has a concealed financial interest. Or a politician seeking private-sector employment who fails to disclose that connection yet votes favorably on legislation that affects her prospective employer. These are all examples of acts that would no longer fit within the statutory scheme. Yet in each case there is leverage over the public officials and self-interested deception.

The *Skilling* Court confirmed that such conduct is harmful regardless of economic injury. The Court acknowledged, for example, that accepting a bribe in exchange for the award of a public contract is corruption even when the provider offers the lowest price or most advantageous terms. The Court shifted focus, however, from the nature of the harm to the formal contours of the wrongdoing. Now, only where there is a direct exchange of benefits for official action—or a *quid pro quo*—has the public been deprived of honest services. That definition of fraud excludes many varieties of dishonest conduct by public officials. But even when no immediate economic harm ensues, *and* there is no direct link to a bribe or kickback, withheld information can be a fraudulent taking. Indeed, divided loyalties and secret interests may cause substantially more harm than small kickbacks.

How, though, can we define an offense that captures this particular wrongdoing? Again, a focus on harm helps. The case law and commentary concerning corruption has a through line. It converges on the theme of transparency. When the *Skilling* Court recognized that a personal pecuniary interest in official action causes harm even if the decision itself is sound, it

underscored the real social cost of corruption: the loss of information about an official's potential motivations.

Of course, it can be tricky to isolate and evaluate motivations. As you well know, official decisionmaking is complicated, and it involves intertwined personal, practical, and political factors. Sometimes those influences are evident, and other times they are more opaque. In some cases it is hard to distinguish private gain from the public good. Which end is served by an official's actions taken to ensure reelection? There, private and public motivations might align. At least one incentive, however, should be fully disclosed, and that is personal financial gain. Pocketing money is presumptively unrelated to the public interest. And when officials deviate from a baseline position of neutrality because of money, the public is entitled to know. No law could compel officials to act in the public interest at all times, but the proposed legislation at least ensures that the public is informed about the most corrosive conflicting motivations.

One section of the proposed statute would overturn restrictive interpretations of bribes and gratuities. Prosecutors turned to honest services charges in corruption cases in part because the Supreme Court rejected a retainer theory of illegal gratuities in *United States v. Sun Diamond Growers*. Expanding 18 U.S.C. § 201 to proscribe gratuities given because of an official position, as well as those given in exchange for or to reward official acts, would significantly enlarge liability. Section 201 would then cover the official who accepts a gift with no specific strings attached but later takes action to aid the giver. Between *Sun Diamond* and *Skilling*, that retainer theory of corruption surfaced only in honest services prosecutions, including, for example, some of the cases arising from lawmakers' relationships with lobbyist Jack Abramoff.

That change does not, however, address the public official who conceals a personal financial interest in vendors who receive state contracts, or the conflict that arises when a public official takes actions that benefit a prospective employer. The advantage of focusing clearly on the problem of undisclosed self-dealing is that it would capture these situations and the secret retainer scenario—the stream of favors that later produces a stream of benefits—as well. Targeting undisclosed self-dealing also responds to the core harm of lost information in its various forms. This could be accomplished by a freestanding disclosure statute similar in structure to 18 U.S.C. § 208, which criminalizes undisclosed conflicts of interest by federal employees of the Executive Branch. The proposed addition of section 1346A, which responds to the *Skilling* decision and reinstates the undisclosed self-dealing theory of fraud also fulfills that objective.

An important point about harm is that it provides not only the justification for self-dealing prosecutions but also a limitation on them. Any expansion of the prosecutorial mandate must be sensitive to the problem of "overcriminalization." Opponents of a new—or renewed—self-dealing crime will question the need to add any further offenses to the approximately 4500 federal criminal statutes already scattered throughout the federal code, many of them vaguely drafted, poorly constructed, or plainly duplicative. Honest services fraud has often been labeled

a leading example of this phenomenon, and sometimes the label fits. Without question, there have been honest services cases in which prosecutors brought rash charges or engaged in harsh plea bargaining.

The proposed self-dealing provision would not actually create a new crime, however. Rather, it would reinstate a theory of prosecution that has been in use for decades. And while it is true that several other statutes address aspects of public corruption, they do not reach concealed self-enrichment as they are currently construed. Although many state and local jurisdictions have parallel schemes, local enforcement institutions may also labor under resource issues, political vulnerabilities, or conflicts of interest.

Identifying the purpose of the statute and targeting the specific harm sought to be avoided also has the beneficial effect of clarifying the scope of honest services fraud. A measure of disquiet about any statute that allows prosecutors to be entrepreneurial is appropriate. Pre-*Skilling*, there were occasional cases in which prosecutors applied the honest services provision to factual scenarios where the harm was not just intangible but nonexistent. Legislative action that defines undisclosed self-dealing also refines the distinction between frivolous and meritorious cases.

In other words, the proposed legislation would mean less vagueness about the liability of public officials and less potential for overreaching. The *Sun Diamond* decision restricting the use of the illegal gratuities provision led to fewer prosecutions for that offense, but an increase in honest services prosecutions for the same conduct. In the aftermath of *Skilling*, prosecutors are seeking alternative routes, for example by recasting information as property that fits within traditional mail and wire fraud theories, or by expanding the definition of bribery to include implicit exchanges. The advantage of a new self-dealing provision is that it actually reduces prosecutorial opportunism.

Congress can maximize this sorting effect by ensuring that the legislation is clear and specific, as the Court in *Skilling* admonished that any effort to restore the honest services theory must be. It is possible, however, for legislation to be too specific. Very narrow drafting can put wrongdoers on notice not only of the boundaries of criminality but also of the safe spaces for continued self-dealing. It can also over-deter prosecutors and preclude the exercise of discretion or the application of the provision to novel schemes.

Tying the offense to a preexisting disclosure requirement under state, federal, or local law addresses one of the major inconsistencies in the application of the honest services provision pre-*Skilling*. And that requirement, combined with the element of knowing concealment, protects against liability for unwitting deception. A defendant who knowingly conceals material financial information, is aware that disclosure is mandated, and acts with the requisite specific intent to defraud, can hardly claim a failure of notice.

A further refinement the Members may wish to consider is some threshold amount of gain that would signal a potential distortion. If a public official is acting to benefit or further her own

financial interests, then there is presumptively a breach of the public's trust. But the criminal sanction should extend only to nontrivial harms and therefore cover only those gains that could actually give rise to hidden incentives. It might be prudent to take benefits like restaurant reservations and team jerseys off the table to preempt that obvious criticism and ensure that the statute does not extend to de minimis interests in disclosure. Some of the ethics codes and disclosure obligations already folded into the proposed legislation would include such thresholds, but the legislation might also establish a general federal standard that only benefits valued in excess of some amount like $5,000 presumptively imperil impartiality. Although any numeric threshold will necessarily be both over- and under-inclusive, setting one mitigates the danger of overcriminalization.

Public corruption is complex, sometimes subtle, but always harmful. And a particularly harmful form of corruption now lies beyond the reach of federal law. Enlarging the terms of the current statutory scheme in response to recent Supreme Court decisions will also clarify its scope and thus decrease vagueness and overbreadth.

The questions are challenging because the statute protects dynamic values, and the offense conduct has normative contours, but few initiatives are more significant. Corruption degrades representative government at every level. Fair and effective enforcement ultimately makes your work easier, because it increases public confidence in elected officials and enhances the legitimacy of the government as a whole.

Thank you again for the invitation to appear today and to discuss these important issues. I am happy to respond to any questions the members of the Subcommittee may have.

Mr. SENSENBRENNER. The gentlewoman's time has expired. I grant you that the yellow light hasn't gone on. We have a mechanical aberration up here.

Ms. GRIFFIN. Thank you, Chairman Sensenbrenner.

Mr. SENSENBRENNER. Thank you.

Mr. O'Toole?