

Statement of
The Honorable Russ Feingold

United States Senator
Wisconsin
September 28, 2010

Senate Judiciary Committee
Hearing on "Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's Skilling Decision"
Tuesday, September 28, 2010

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Tackling corruption by public officials and large corporations remains one of Congress's most important and most difficult tasks. Bribery, embezzlement, and kickbacks are all illegal and relatively easy to identify, but there are many other types of corruption that we all know are wrong that are more elusive. I am talking about deals where it is clear that government officials are using their power and influence to benefit themselves, or a spouse or a business partner, but there is no money that changes hands. This type of undisclosed self-dealing, particularly when it is done by public officials, undermines people's faith in their government and destroys the integrity of our democracy. When corporate executives engage in this sort of deceptive behavior, it can have a destabilizing effect on the market, which can ultimately lead to financial ruin for the employees and shareholders who are dependent on companies like Enron, Tyco, or Worldcom for their livelihoods and their retirement funds.

Congress has been struggling to get this area of the law right for decades, and in 1988 it created a new category of fraud called honest services fraud. This past June, the Supreme Court struck a devastating blow to this area of the law when it handed down a decision that involved the former CEO of Enron, Jeffrey Skilling. Skilling was accused of participating in a scheme to deceive investors about Enron's financial position, but the Court said the law was not specific enough for Skilling to have notice that this was criminal conduct. The Court said that honest services fraud can only apply to bribes and kickbacks, not self-dealing.

As a result of this case, it is now no longer enough to show that a mayor accepted lavish gifts, tickets to sporting events, and expensive meals from someone bidding on a development contract with the city. A prosecutor now must show a direct quid pro quo relationship between these meals and gifts and a decision to award a contract to that individual in order to prove bribery. This is often a very difficult element to prove, and as expected, this decision has had a chilling effect on the number of corruption prosecutions that have been filed in the last year. Over the last several months, we have also seen a wave of challenges to existing convictions and requests for reconsideration of sentences. We need to act quickly to close the large loophole that the Court

created. This type of fraudulent behavior should not go unpunished merely because it is more devious, more sophisticated, or more complex than a simple bribe or kickback.

I have been working closely with Chairman Leahy and other members of the Committee on this issue, and I am pleased that we seem to be getting closer to reaching an agreement on an appropriate fix that addresses the concerns raised by the Court. I look forward to continuing this collaboration in the coming months so that we can restore the Department of Justice's ability to prosecute this type of fraudulent conduct.