



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 9, 2010

The Honorable Patrick Leahy
Chairman
Committee on Judiciary
United States Senate
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Lanny Breuer, Assistant Attorney General of the Criminal Division, before the Committee on September 28, 2010, at a hearing entitled "Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's Skilling Decision."

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this, or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Weich".

Ronald Weich
Assistant Attorney General

Enclosures

cc: The Honorable Jeff Sessions
Ranking Member

**Written Question for Assistant Attorney General Lanny Breuer
Senator Patrick Leahy, Chairman, Senate Judiciary Committee,
Hearing on “Restoring Key Tools to Combat Fraud and Corruption
After the Supreme Court’s Skilling Decision”
September 28, 2010**

In your hearing testimony, you focused primarily on the impact of the Skilling decision on prosecutions of state and local public officials. You asserted that a legislative fix, particularly one that addresses the issue of undisclosed self-dealing, is necessary and that, absent such a fix, federal prosecutors might be unable to prosecute significant corrupt conduct by state and local officials.

A. Have there also been cases in which federal officials have been charged with honest services fraud for undisclosed self-dealing?

As an initial matter, the Department of Justice believes that any effort to fill the gap created by the Supreme Court’s decision in Skilling v. United States, 130 S.Ct. 2896 (2010), should apply to public officials at all levels of government – state, local, and federal. The public has a right to know that government officials are acting in the public’s best interests, rather than attempting to further their own undisclosed financial interests. That right applies with regard to officials from the three branches of the federal government, as well as to officials from state and local governments.

The Department has charged federal officials with honest services fraud not only for cases involving bribery, but also those related to undisclosed self-dealing. Indeed, the honest services fraud statute, 18 U.S.C. § 1346, has been used against federal officials, as well as state and local officials, for many years. For example, Congressman William Jefferson was convicted of honest services fraud, and former Congressman Richard Renzi has been indicted on multiple charges of honest services fraud, and both cases involve undisclosed self-dealing in addition to bribery.

B. Is the Department of Justice concerned that, without a legislative fix clarifying that honest services fraud includes undisclosed self-dealing, there will be cases involving significant corrupt conduct by federal officials, as well as state and local officials, that will be more difficult or impossible to prosecute?

Yes, the Department is concerned that, without a legislative fix, it will be more difficult and, in some instances, impossible to prosecute federal officials, as well as state and local officials, for significant corrupt conduct. Corrupt public officials are creative and consistently devise new kinds of schemes to benefit themselves at the expense of the citizens who trust them. Before the Skilling decision, the honest services fraud statute provided an important and flexible tool to address the wide variety of criminal schemes devised by corrupt officials.

When a federal public official engages in undisclosed self-dealing, it is likely that the conduct will fall outside the reach of currently existing statutes. If the federal official is within the executive branch, we may be able to use the conflict of interest statute, 18 U.S.C. § 208, to address the conduct if all of the elements of that statute have been met. Section 208, however, has limitations. For example, § 208 does not apply to the judicial or legislative branches, and thus undisclosed self-dealing by employees in Congress or the federal courts is not covered. Moreover, § 208 is not a predicate offense for Title III wiretaps or for racketeering charges under the RICO statute, while the mail and wire fraud statutes are predicates for both.

In sum, the Department believes that a legislative fix that fills the gap created by the Skilling decision should apply to undisclosed self dealing in the federal government, as well as state and local governments.