

WHY CAN'T DOJ INVESTIGATE AS WELL AS THE HAPLESS SENATE?

There's a lot to loathe about the current incarnation of the Senate, that elite club of millionaires where legislation goes to either get rewritten to serve corporate interests or killed.

What does that say about DOJ, then, that the Senate is doing such a better job at investigating crimes? In just one month's time the Senate has produced two investigations that have left DOJ—and the SEC and FEC—looking toothless by comparison.

First there was Carl Levin's investigation of the banksters, released last month. Matt Taibbi does us the favor of outlining the case Levin's investigators made.

Here is where the supporters of Goldman and other big banks will stand up and start wanding the air full of confusing terms like “scienter” and “loss causation” – legalese mumbo jumbo that attempts to convince the ignorantly enraged onlooker that, according to American law, these grotesque tales of grand theft and fraud you've just heard are actually more innocent than you think. Yes, they will say, it may very well be a prosecutable crime for a corner-store Arab to take \$2 from a customer selling tap water as Perrier. But that does not mean it's a crime for Goldman Sachs to take \$100 million from a foreign hedge fund doing the same thing! No, sir, not at all! Then you'll be told that the Supreme Court has been limiting corporate liability for fraud for decades, that in order to gain a

conviction one must prove a conscious *intent* to deceive, that the 1976 ruling in *Ernst and Ernst* clearly states....Leave all that aside for a moment. Though many legal experts agree there is a powerful argument that the Levin report supports a criminal charge of fraud, this stuff can keep the lawyers tied up for years. So let's move on to something much simpler. In the spring of 2010, about a year into his investigation, Sen. Levin hauled all of the principals from these rotten Goldman deals to Washington, made them put their hands on the Bible and take oaths just like normal people, and demanded that they explain themselves. The legal definition of financial fraud may be murky and complex, but everybody knows you can't lie to Congress.

"Article 18 of the United States Code, Section 1001," says Loyola University law professor Michael Kaufman. "There are statutes that prohibit perjury and obstruction of justice, but this is the federal statute that explicitly prohibits lying to Congress."

The law is simple: You're guilty if you "knowingly and willfully" make a "materially false, fictitious or fraudulent statement or representation." The punishment is up to five years in federal prison.

When Roger Clemens went to Washington and denied taking a shot of steroids in his ass, the feds indicted him – relying not on a year's worth of graphically self-incriminating e-mails, but chiefly on the testimony of a single individual who had been given a deal by the government. Yet the Justice Department has shown no such prosecutorial zeal since April 27th of last year, when the Goldman executives who oversaw the Timberwolf, Hudson and Abacus deals

arrived on the Hill and one by one – each seemingly wearing the same mask of faint boredom and irritated condescension – sat before Levin’s committee and dodged volleys of questions.

[snip]

Lloyd Blankfein went to Washington and testified under oath that Goldman Sachs didn’t make a massive short bet and didn’t bet against its clients. The Levin report *proves* that Goldman spent the whole summer of 2007 riding a “big short” and took a multibillion-dollar bet against its clients, a bet that incidentally made them enormous profits. Are we all missing something? Is there some different and higher standard of triple- and quadruple-lying that applies to bank CEOs but not to baseball players?

Then there’s the investigation of John Ensign. Scott Horton lambastes DOJ’s decision to indict Ensign’s cuckold but not Ensign himself.

Alarmingly, the Justice Department not only failed to act against Ensign, it actually indicted Doug Hampton, Ensign’s former senior staffer, who was clearly a victim of Ensign’s predatory conduct and who had blown the whistle on him. The new report does suggest that Hampton may have engaged in improper lobbying activities, with Ensign’s connivance. But it also makes clear that Hampton’s statements about what happened were truthful and complete, whereas Ensign’s were often cleverly misleading, and sometimes rank falsehoods. In this context, the Justice Department’s decision—to prosecute the victim who spoke with candor and against his own interests, and let the malefactor who lied about his conduct go free—is

perverse. It is also completely in line with recent Justice Department public integrity prosecutions, which have displayed an unseemly appetite for political intrigue and an irrepressible desire to accommodate the powerful.

And the NYT writes a more sheepish article featuring both an FEC official who apparently wouldn't go on the record with his shock-shock! that ~~there was gambling going on in the casino~~ someone lied to the FEC.

An election commission official, who asked not to be identified while the case was pending, acknowledged that the commission took the senator at his word, whereas the Senate dug deeper. This official expressed anger to learn the true circumstances behind the \$96,000 payment.

"I hate it when people lie to us," the official said, adding: "If somebody submits a sworn affidavit, we usually do not go back and question it, unless we have something else to go on. Maybe we should not be so trusting."

The NYT also cites several legal experts attributing DOJ's impotence to embarrassment over the Ted Stevens trial (without, at the same time, wondering why William Welch is still at DOJ acting just as recklessly, only this time against whistleblowers and other leakers).

Several of these reviews of DOJ's failure to act wonder why the understaffed Senate Ethics Committee or Levin's Permanent Committee on Investigations—again, this is the hapless Senate!—managed to find so much dirt that the better staffed DOJ and regulatory bodies did not.

But Taibbi really gets at the underlying issue.

If the Justice Department fails to give

the American people a chance to judge this case – if Goldman skates without so much as a trial – it will confirm once and for all the embarrassing truth: that the law in America is subjective, and crime is defined not by what you did, but by who you are.

These two Senate committees did an excellent job mapping out the crimes of the powerful. But unless we see action from DOJ, the committees will also have, by comparison, mapped out the stark truth that DOJ refuses to apply the same laws we peons abide by to those powerful people.