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Justice **In**action:

The Department of Justice's Unprecedented
Failure to Prosecute Big Finance



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“Justice is the end of government. It is the end of civil society.”

- Federalist No. 51



Table *of* Contents

Executive Summary	4
Historical Narrative	5
Investigative Findings	7
Holder and Covington	7
Corzine and Conflicts of Interest.....	10
Fundraising and Favoritism	13
Charges and Cronies	14
Misconduct and Federal Enforcement.....	19
Conclusion	22
Appendix.....	25
Eric Holder and the Legalization of Online Lotteries	25



Executive Summary

President Obama channeled the rhetoric of the Occupy Movements, blaming the worldwide financial collapse on “the reckless speculations of the bankers.”¹ Large financial institutions, banks, investment houses, and hedge funds are alleged to have knowingly committed fraud. Attorney General Eric Holder explained the challenge facing the newly minted Financial Fraud Task Force in 2009.

We face unprecedented challenges in responding to the financial crisis that has gripped our economy for the past year. Mortgage, securities, and corporate fraud schemes have eroded the public’s confidence in the nation’s financial markets and have led to a growing sentiment that Wall Street does not play by the same rules as Main Street. Unscrupulous executives, Ponzi scheme operators, and common criminals alike have targeted the pocket books and retirement accounts of middle class Americans, and in many cases, devastated entire families’ futures. We will not allow these actions to go unpunished...This task Force’s mission is not just to hold accountable those who helped bring about the last financial meltdown, but to prevent another meltdown from happening. ²

Despite Attorney General Eric Holder’s heated rhetoric promising to hold Wall Street accountable, an investigation into the Department of Justice’s handling of the 2008 financial crisis found that:

- The Department of Justice has not filed a *single* criminal charge against any top executive of an elite financial institution.

¹ Barack Obama, Remarks at a Town Hall in Strasbourg 4/3/09, “Europe, Revisited: A New Image, A New Role,” The <http://www.whitehouse.gov/blog/09/04/09/Europe-Revisited-A-New-Image-a-New-Role/>.

² Eric Holder, Speech at the Financial Fraud Enforcement Task Force Press Conference. Delivered November 17, 2009. <http://www.justice.gov/ag/speeches/2009/ag-speech-091117.html>.



- Attorney General Holder, Associate Attorney General Thomas Perrelli, Associate Attorney General Tony West, and Deputy Associate Attorney General Karol Mason all came to the DOJ from prestigious white-collar defense firms, where they represented the very financial institutions the DOJ is supposed to investigate.
- Top DOJ officials played prominent roles in his 2008 campaign. Holder co-chaired the campaign with Tony West, the DOJ's third highest official.
- No other modern administration has staffed the DOJ with big money fundraisers. Holder bundled \$50,000 for Obama's 2008 campaign, while Perrelli, West, and Mason all bundled \$500,000 for the campaign. West also helped raise an estimated \$65 million in California.
- Washington's "Revolving Door" is at work in the DOJ. Top Justice officials came from and returned to law practices where they defend the financial institutions the DOJ is tasked with prosecuting.

Historical Narrative

The Obama Administration's relationship with Big Finance is not just Washington as usual. In 2008, Obama's largest private source of campaign funding came from Goldman Sachs executives. Candidate Obama outraised McCain on Wall Street - around \$16 million to \$9 million. Although Obama told Wall Street executives, "My administration is the only thing between you and the pitchforks," it appears as though the President may be shielding Big Finance from anything like a severe accounting.³

While the Justice Department is at present dominated from the top with corporate attorneys, whose links to the very financial institutions they are charged with investigating create conflicts of interest, Presidents George H.W. Bush, Bill Clinton, and George W. Bush

³ Peter J. Boyer and Peter Schweizer, "Justice for Sale?" *Newsweek*, May 6, 2012.
<http://www.thedailybeast.com/newsweek/2012/05/06/why-can-t-obama-bring-wall-street-to-justice.html>.



hired experienced prosecutors and attorneys to prosecute the financial titans who caused the Savings & Loan, Enron, and WorldCom crises.⁴

Financial fraud prosecutions are down 39 percent since the Enron and WorldCom disasters in 2003, and they are just one third of what they were during the Clinton years. Clinton's DOJ prosecuted over 1,800 S&L executives, senior officials, and directors, and over 1,000 of them were sent to jail.⁵ The number three in George W. Bush's DOJ formerly served as an attorney at the IRS, and a U.S. Attorney from the Southern District of Manhattan directed Bush's Task Force. That Task Force did not exempt Jeffrey Skilling and Ken Lay from jail time, although Lay died before he was sentenced. Between 2002 and 2008, this task force obtained over 1,300 corporate fraud convictions, including those of over 130 corporate vice presidents and over 200 CEO and corporate presidents.⁶

In 2009, the Justice Department promised more of the same. Holder aimed to make the Financial Fraud Enforcement Task Force the "cornerstone" of his efforts to restore confidence in the markets, threatening "To those who see the victimization of others as an avenue to wealth take notice: if you fabricate a financial statement, if you propagate an investment scheme, if you are complicit in an act of financial fraud, you are writing your ticket to jail." He warned those who had committed financial crimes: "we will investigate you, we will prosecute you, and we will incarcerate you."⁷

Under Holder's watch, federal prosecutions have doubled, according to the Transactional Records Access Clearinghouse, a data-gathering organization at Syracuse University.⁸ Health-care fraud prosecutions reached a historic high in 2011 - a 68.9 percent jump from 2010. While prosecutions have similarly skyrocketed in civil rights abuses, the federal government has yet to file a single CRIMINAL prosecution against any top executive of an

⁴ *Ibid.*, Boyer and Schweizer, *Newsweek*.

⁵ Transactional Records Access Clearinghouse, Syracuse University, "Criminal Prosecutions for Financial Institution Fraud Continue to Fall," November 15, 2011.

⁶ *Ibid.*, Transactional Records Access Clearinghouse.
trac.syr.edu, including <http://trac.syr.edu/tracreports/crim/267/>.

⁷ Eric Holder, Speech at the Forum Club of the Palm Beaches, Delivered January 8, 2010.
<http://www.justice.gov/ag/speeches/2010/ag-speech-100108.html>.

⁸ *Ibid.*, Transactional Records Access Clearinghouse.



elite financial institution. Financial fraud prosecutions by the Department of Justice are in fact at a 20-year low, although the DOJ explains that the number would be higher if new categories of crime were taken into account.

The Attorney General described the budget allocated to the 2009 Task Force as “the largest-ever, single-year enhancement to support and expand the Justice Department’s financial fraud programs” and boasted that it would “allow for additional FBI agents, prosecutors and support staff to aggressively pursue mortgage fraud, corporate fraud, and other economic crimes.”⁹ If such a budget would allow the DOJ to more effectively and aggressively combat financial crime, how has Big Finance largely avoided prosecution? Phil Angelides, a Democratic former California treasurer and chair of the bipartisan Financial Crisis Inquiry Commission, described the lack of financial-fraud prosecutions as “perplexing at best” and “deeply troubling at worst.”¹⁰

Investigative Findings

Understanding the Justice Department’s relationship with Big Finance may shed some light on the situation. Attorney General Holder and other top Justice officials came to the DOJ from prestigious white-collar defense firms, where they represented the very financial institutions the DOJ is supposed to investigate. Many Justice officials also played prominent roles in the president’s 2008 campaign.

Holder and Covington

After a career in the Clinton Justice Department, Attorney General Eric Holder returned to the DOJ in 2009 after spending nearly a decade at Covington & Burling (hereafter referred to as “Covington”), a top-tier Washington law firm. As a Covington partner, Holder earned

⁹ *Ibid.*, Holder, Speech at the Forum Club of the Palm Beaches.

¹⁰ *Ibid.*, Boyer and Schweizer, *Newsweek*.



\$2.1 million in 2008 and \$2.5 million (including deferred compensation) in 2009, when he returned to the DOJ.¹¹

UBS, which has faced a series of criminal investigations, including assisting Americans who wanted to create illegal offshore tax havens, hired Holder for legal services in 2008.¹² After becoming Attorney General, Holder recused himself from the case, and the DOJ launched a criminal investigation of UBS for tax evasion.¹³ One of Obama's closest advisers in the private sector is Richard Wolf, head of UBS America.¹⁴

White-collar criminal defense is one of, if not the, most profitable legal specialties. Professor Charles D. Weisselberg of the University of California at Berkeley explains in the *Arizona Law Review* that while white-collar criminal defense work has not historically been "considered a legal specialty," these practices are enormously profitable, because "this area of practice is not susceptible to the same types of cost controls" that apply to other legal work.¹⁵ Publicly traded companies in the U.S. purchase directors' and officers' liability insurance, rendering the corporation not solely responsible for covering the cost of litigation. A statistical analysis of the top firms in the field shows that firms with white-collar criminal defense practices perform substantially better in gross revenue as a result.

Selecting a white-collar defense attorney from Covington as Attorney General over a more fiery prosecutor, such as Patrick Fitzgerald (whose investigations led to the arrest of

¹¹ Daphne Eviatar, "Eric Holder: the \$2 Million Nominee," *The Washington Independent*, December 23, 2008. <http://washingtonindependent.com/22858/eric-holder-the-2-million-plus-ag-nominee>.

¹² US Attorney Southern District of New York, "Manhattan U.S. Attorney Charges Seven UBS Clients with Hiding Over \$100 Million in Secret Swiss Bank Accounts to Defraud the IRS," Filed April 15, 2010. <http://www.justice.gov/usao/nys/pressreleases/April10/ubsoffshoretaxpr.pdf>.

¹³ US SEC Division of Enforcement, Robert Khuzami, "Testimony Concerning Mortgage Fraud, Securities Fraud, and the Financial Meltdown: Prosecuting Those Responsible." <http://www.stopfraud.gov/news/news-12092009-02.html>.

See also: Mary Jacoby, "Holder Meets Swiss Justice Minister After UBS Recusal," *Main Justice*, March 3, 2009. <http://www.mainjustice.com/2009/03/03/holder-meets-swiss-justice-minister-after-ubs-recusal/>.

¹⁴ Michael J. de la Merced and Ben Protess, "Wolf to Leave UBS to Form New Firm," *New York Times Deal Book*, July 19, 2012. <http://dealbook.nytimes.com/2012/07/19/wolf-to-leave-ubs-to-form-new-firm/>.

¹⁵ Charles D. Weisselberg and Su Li, "Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms," *Arizona Law Review*, Vol. 53, Issue 4, p. 1221, 2011. <http://www.arizonalawreview.org/pdf/53-4/53arizrev1221.pdf>.



Illinois governor Rod Blagojevich), may have sent a subtle signal to the financial community. Covington currently represents Wells Fargo and J.P. Morgan Chase, each of which alone represents at least one percent of the firm's total revenue, according to court disclosures.^{16,17} Covington also represents Bank of America, Citibank, Deutsche Bank, Goldman Sachs, ING, Morgan Stanley, UBS, and Wilmington Trust – many of which the DOJ has investigated for potential criminal activity.¹⁸

Covington was also involved in the creation of MERS, the electronic mortgage system that was ultimately behind the robo-signing scandal. MERS was intended to speed up mortgage registration and transfers, but it led thousands of bank employees to sign their names as MERS officials. In 2004, Covington wrote an instrumental opinion letter for MERS that provided the legal justification for its electronic registry.¹⁹

Assistant Attorney General Lanny Breuer co-chaired the white-collar defense and investigations unit at Covington with Holder before taking his role as the director of the Criminal Division at the Justice Department.²⁰ His counselor at Justice was another colleague from Covington, Steve Fagell, who was responsible for coordinating the Criminal Division's work with the Financial Fraud Enforcement Task Force. Fagell returned to Covington in 2010 to rejoin the firm's white-collar defense practice.²¹

¹⁶ MF Global Case Documents.

<http://mfglobalcaseinfo.com/info.php>.

¹⁷ Covington and Burling website.

<http://www.cov.com/home.aspx>.

¹⁸ United States Bankruptcy Court for the Southern District of New York, Notice of Application of the Chapter 11 Trustee for Entry of an Order Authorizing the Trustee to Retain and Employ Covington and Burling LLP as Special Insurance Counsel *Nunc Pro Tunc*, "Appendix 2: Current Client/Affiliate of Current Client," p. 49-50, Filed March 27, 2012.

¹⁹ Scot J. Paltrow, "Top Justice officials connected to mortgage banks," *Reuters*, January 20, 2012.

<http://www.reuters.com/article/2012/01/20/us-usa-holder-mortgage-idUSTRE80JOPH20120120>.

²⁰ Department of Justice, "Meet the AAG."

<http://www.justice.gov/criminal/about/aag.html>.

²¹ Covington and Burling, LLP website.

<http://www.cov.com/sfagell/>.



Jim Garland also came to the DOJ from Covington, where he represented J.P. Morgan Chase in civil litigation as well as in government related investigations arising out of the default of \$2 billion in asset-backed securities issued by National Century Financial Enterprises.²²

James Cole, Holder's principal deputy, came to Justice from Bryan Cave LLP, a white-shoe firm with A-list finance clients. Cole was tapped to serve in the DOJ's second highest position as the Deputy Attorney General. Cole had deep and lucrative ties to the very institutions at the heart of the financial crisis. While at Bryan Cave, Cole was chosen by the insurance and financial giant AIG to serve as an independent monitor of corporate compliance in a civil case the company settled in 2004. Between 2004 and 2008, Cole billed AIG more than \$20 million. AIG was at the heart of the financial crisis largely because of its noncompliance in regulatory and compliance issues.²³

Thomas Perrelli, the Associate Attorney General, came to the DOJ from the White Collar Criminal Defense group at the Washington office of Jenner and Block.²⁴ After Perrelli left the DOJ, Tony West replaced him in the Justice Department. West formerly practiced law at Morrison and Foerster, where he worked in white-collar criminal defense.

Corzine and Conflicts of Interest

Morrison and Foerster is also providing legal representation to MF Global, the disgraced financial services firm, in its bankruptcy case, due in part to the disappearance of some \$1.6 billion in customer funds. Prior to seeking bankruptcy protection, MF Global was also a client of Covington. In fact, MF Global owed Covington \$114,275.55 "for services rendered prior to Oct. 31, 2011," the day MF Global filed for its bankruptcy protection.²⁵ MF Global's chief, Jon Corzine, formerly represented New Jersey in the U.S. Senate and later served as

²² Covington and Burling, LLP website.
www.cov.com/jgarland/.

²³ Peter Lattman, "The U.S.'s Fly on the wall at AIG," *Wall Street Journal*, March 27, 2009.
<http://online.wsj.com/article/SB123812186477454361.html>.

²⁴ Elizabeth Murphy, "Perrelli, No 3 at Justice Department, Departing in March," *Main Justice*, January 12, 2012.
<http://www.mainjustice.com/2012/01/12/tom-perrelli-no-3-at-justice-department-departing-in-march/>.

²⁵ United States Bankruptcy Court for the Southern District of New York, Notice of Application of the Chapter 11 Trustee for Entry of an Order Authorizing the Trustee to Retain and Employ Covington and Burling LLP as Special Insurance Counsel *Nunc Pro Tunc*, p. 26, Filed March 27, 2012.



governor of the state. During his stint at MF Global, Corzine bundled hundreds of thousands of dollars as a top fundraiser for the 2008 Obama campaign and began to play a similar role in the president's re-election effort.²⁶ After the MF Global collapse, the campaign returned his personal donations but kept the other funds he bundled. Citing Corzine's fundraising efforts, some 65 members of Congress have signed a letter calling on Holder to recuse himself and appoint a special prosecutor to investigate MF Global's collapse and the loss of \$1.6 billion in customer money.²⁷ Other concerns stem from a *Bloomberg* report revealing that Corzine was considered for a Cabinet position in the Obama Administration.²⁸

The MF Global case is further complicated by the selection of Reid Weingarten as MF Global treasurer Edith O'Brien's lawyer. Weingarten previously served as Holder's attorney following the controversial pardon of Marc Rich in the Clinton Justice Department.²⁹ According to the website of Steptoe & Johnson, Weingarten's firm, Holder and Johnston co-founded a non-profit, the See Forever Foundation.³⁰ The Main Justice website claims that Weingarten is "one of Holder's best friends."³¹ Moreover, the most recent report issued by the Justice Department's inspector general found widespread nepotism within the DOJ's hiring practices. As *The Hill* notes, "the report is the third investigation in less than a decade

²⁶ Alexis Simendinger, "Corzine, Amid Scandal, Is Among Obama's Top Bundlers," *Real Clear Politics*, April 21, 2012. http://www.realclearpolitics.com/articles/2012/04/21/corzine_amid_scandal_is_among_obamas_top_bundlers.html.

²⁷ Letter to Attorney General Eric Holder.

<http://media.futuresmag.com/futuresmag/article/2012/05/14/Signed%20Grimm%20letter.pdf>.

²⁸ Michael McKee, "Rubin Removes Himself From Consideration for Treasury (Update 1)," *Bloomberg*, November 6, 2008.

<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aNqmwWOTRzJA&refer=economy>.

See also, JoAnne Sills, "Corzine said to be on short list for Treasury secretary," *New Jersey Real-Time News*, November 9, 2008.

http://www.nj.com/news/ledger/topstories/index.ssf/2008/11/corzine_said_to_be_on_short_li.html.

²⁹ Eric Lichtblau and David Johnston, "Pardon Is Back in Focus for the Justice Nominee," *The New York Times*, December 1, 2008.

<http://www.nytimes.com/2008/12/02/us/politics/02holder.html?pagewanted=all>.

³⁰ Steptoe & Johnson LLP, "Reid H. Weingarten-Partner."

<http://www.steptoelaw.com/professionals-416.html>.

³¹ Stout, "Massachusetts U.S. Attorney Carmen Oritz is Bostonian of the Year," January 3, 2012.

<http://www.mainjustice.com/2012/01/03/massachusetts-u-s-attorney-carmen-ortiz-is-bostonian-of-the-year/>.



that has found numerous examples of illegal hiring practices, amounting to nepotism, within the DOJ.”³²

Not only was MF Global a client of Covington & Burling, the former firm of both Eric Holder and Assistant Attorney General Lanny Breuer, but MF Global also selected a trustee from Morrison & Foerster, Associate Attorney General Tony West’s former firm, as its Chapter 11 bankruptcy trustee counsel. The trustee, former FBI director Louis Freeh, retained Holder to represent MBNA bank when Freeh served as the bank’s general counsel.³³ “As general counsel,” Freeh said, “I could have engaged any lawyer in America to represent our bank. I chose Eric.”³⁴

The late Lloyd Cutler, former White House Counsel to Presidents Jimmy Carter and Bill Clinton, stated, “Integrity is not enough.” He explained how Conflicts often arise “when a private lawyer enters government service and a matter comes before him affecting his former law firm or its clients.” Cutler maintained that lawyers at firms like Covington & Burling or Morrison & Foerster should “operate at somewhat more distance, their friendships and loyalties — not to mention their financial interests — tie them closely to the corporate officers. The appearance of conflict is as dangerous to public confidence in the administration of justice as true conflict itself. Justice must not only be done; justice must also be seen to be done.”³⁵ The Justice Department’s legitimacy not only depends on how accurately it enforces justice, but also on how well the public *perceives* that it does so. Appointing a special prosecutor is indeed necessary to minimize conflicts of interest, as well as the mere “appearance of conflict,” in the Justice Department.³⁶

³² Jordy Yager, “Nepotism Prevalent at Justice Department, says IG report,” *The Hill*, July 26, 2012.

<http://thehill.com/homenews/administration/240533-ig-report-finds-nepotism-at-justice-department>.

³³ “United States Senate Committee on the Judiciary, Questionnaire for Eric Holder, Jr., Attorney General Nominee.”

<http://www.judiciary.senate.gov/resources/documents/upload/111th-Holder-Questionnaire-Public.pdf>.

³⁴ Louis J. Freeh, Testimony, United States Senate Committee on the Judiciary, January 16, 2009.

http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da142aa4b&wit_id=e655f9e2809e5476862f735da142aa4b-1-1.

³⁵ Lloyd Cutler, “Robert Tyre Jones Memorial Lecture on Legal Ethics,” *Emory Law Journal* 30, Fall (1981): 1015.

³⁶ *Ibid.*, Lloyd Cutler.



Fundraising and Favoritism

Senior Justice Department officials are unusual in another respect: many of them worked, like Corzine, in vital fundraising roles in Obama's 2008 campaign. The top five current Justice officials served as campaign bundlers. Prior to 2009, no modern president had ever placed political fundraisers or campaign bundlers in positions as the top law enforcement officials in the country.

Holder himself co-chaired Obama's 2008 campaign and bundled \$50,000 in funds.³⁷ Perrelli served as a member of Obama's National Campaign Finance Committee and bundled \$500,000 in campaign contributions.³⁸ West, who bundled \$500,000 for the 2008 campaign, also served as co-chairman of Obama's campaign and, according to the San Francisco Chronicle, "was instrumental in helping the candidate raise an estimated \$65 million in California."³⁹ West formerly served as the head of the DOJ's Civil Rights Division and is now the number three at the DOJ.

Karol Mason, the chair of Alston & Bird's public finance group, also bundled \$500,000 for the Obama campaign.⁴⁰ While at the DOJ, Holder awarded her a "Distinguished Service Award" for her work. After almost three years at the Department of Justice, she returned to Alston & Bird to work in the firm's real estate finance and capital markets groups.⁴¹

Political connections play an important role in sidestepping federal regulators, as a detailed academic study in the *Journal of Financial and Quantitative Analysis* illustrates.⁴² The study found that corporations whose executives are politically active (measured through campaign contributions and lobbying efforts) were less likely to be investigated by the SEC. Firms that engaged in fraud, but were heavily involved in lobbying and campaign

³⁷ Open Secrets, "Bundlers."

<http://www.opensecrets.org/pres08/bundlers.php?id=N00009638>.

³⁸ *Ibid.*, "Bundlers."

³⁹ Carla Marinucci, "Oakland attorney Tony West tapped by Obama," *SFGate*, January 22, 2009.

<http://blog.sfgate.com/nov05election/2009/01/22/oakland-attorney-tony-west-tapped-by-obama/>.

⁴⁰ *Ibid.*, "Bundlers."

⁴¹ Alston and Bird, LLP Website.

<http://www.alston.com/karol-v-mason1/>.

⁴² Frank Yu and Xiaoyun Yu, "Corporate Lobbying and Fraud Detection," *Journal of Financial and Quantitative Analysis*, Vol. 46, No. 6, December 2011.



contributions were 38 percent less likely to be detected by SEC regulators than those who did not. Those who were caught evaded detection for 117 days longer than average.

William Black, an associate professor of economics and law at the University of Missouri, Kansas City, and former financial regulator who tackled the S&L crisis in the 1980s, noticed a difference in priorities between the federal government's responses to the two crises. Black, a Democrat, notes the difference in priorities between the current administration and that of President H.W. Bush. He explains, "The first President Bush's orders were to get the most prominent, nastiest frauds, and put their heads on pikes as a demonstration that there's a new sheriff in town." Black and other federal regulators handled the S&L crisis by securing a 90 percent conviction rate on over a thousand prosecutions. Black bemoans the lack of "serious investigation of any of the large financial entities by the Justice Department, which includes the FBI."⁴³

Because prosecuting financial crime demands expert specialization, the DOJ claims that such expertise is found at firms like Covington, so the DOJ naturally recruits from the white-collar defense bar. However, the potential for conflicts of interests naturally arise when the DOJ's top officials come from lucrative law practices representing the very financial institutions that the DOJ is supposed to investigate. Moreover, two of Holder's subordinates have already returned to Covington. "Everybody knows there's a problem with that," asserts Black.⁴⁴

Charges and Cronies

The Obama Administration's Task Force has been too busy to prosecute big finance. It has instead pursued small operators, sometimes absurdly small ones. None are connected to the large financial institutions where government reports have alleged so much fraud has taken place.

Some examples from the Task Force's own website:

⁴³ *Ibid.*, Boyer and Schweizer, *Newsweek*.

⁴⁴ *Ibid.*, Boyer and Schweizer, *Newsweek*.



- *Three older Connecticut women were arrested on federal criminal charges related to “gifting tables” they were running in suburban Connecticut.*
- *In March 2012, The Task Force sent a property appraiser in Washington, D.C. to jail for 65 months for fraudulently inflated prices in a scheme to “flip” properties. They netted around \$1 million in the scheme.*
- *Two health care software company executives got 13 and 15 years for fraud, including their raid of Custodial Health Care Expense Accounts.*
- *A resident in Florida was charged and sentenced to 14 months in federal prison for obstructing an SEC investigation by falsifying documents.*
- *Five people in California were charged in December with bid rigging over Foreclosure Auctions. They are being charged with violating the Sherman Act and face up to 10 years in jail.*
- *Federal officials went after ten people in Las Vegas for attempting to “fraudulently gain control of condominium homeowners’ associations in the Las Vegas area so that the HAOs would direct business to a certain law firm and construction company.”*
- *The owner of a Miami company got 46 months in prison for a scheme to defraud the U.S. Export-Import Bank. He created fraudulent loan applications.*
- *Four people in Tacoma, Washington were indicted for conspiracy that resulted in the failure of a small bank. They made “false statements on loan applications, false statements to the U.S. Department of Housing and Urban Development.”⁴⁵*

These offenses should sound familiar. They are the same allegations that have been made in government reports, in SEC filings, and against individual firms in civil courts. No doubt such behavior constitutes financial crime, but the Justice Department’s move to prosecute small operators over Big Finance is troubling, especially in light of top Justice officials’

⁴⁵ The Department of Justice’s Financial Fraud Enforcement Task Force.
<http://www.stopfraud.gov/news-index.html>



relationships with elite financial institutions. As David Einhorn, a hedge fund manager, explains, the government is “not willing to take on significant misbehavior by sizable firms.”⁴⁶ During the financial crisis, we became accustomed to the phrase “too big to fail.” Is it possible that some financial executives are “too big for jail?”

The DOJ commands a wide array of criminal laws it can muster to prosecute financial crimes beyond bank fraud and embezzlement. It is illegal to create false statements, conceal material facts, make false entries in bank records, commit mail or wire fraud, and organize a continuing financial crime enterprise. Although past DOJ's have leveraged these laws to prosecute financial crimes, the current one has not.

In a February 2012 speech at Columbia University, Holder explained that while “we found that much of the conduct that led to the financial crisis was unethical and irresponsible...we have also discovered that some of this behavior—while morally reprehensible—may not necessarily have been criminal.”⁴⁷ Justice Department spokeswoman Alisa Finelli similarly maintained, “When we find credible evidence of intentional criminal conduct - by Wall Street executives or others - we will not hesitate to change it. However, we can and will only bring charges when the facts and the law convince us that we can prove a crime beyond a reasonable doubt.”⁴⁸

The lack of transparency demonstrated by the Department of Justice's dealings with Big Finance is deeply troubling and raises serious questions about conflicts of interest that exist between DOJ officials and the financial industry. The DOJ's inaction is not for lack of questionable activity.

Congressional investigative subcommittees and the SEC declared with detailed evidence from emails and corporate documents that banks knowingly and fraudulently wrote bad

⁴⁶ Andrew Ross Sorkin, “Pulling Back the Curtain on Fraud Inquiries,” *New York Times: Dealbook Column*, December 6, 2010.

<http://dealbook.nytimes.com/2010/12/06/pulling-back-the-curtain-on-fraud-inquiries/>.

⁴⁷ Eric Holder, Speech at Columbia University Law School on Preventing and Combating Financial Fraud, Delivered February 23, 2012.

<http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120223.html>.

⁴⁸ *Ibid.*, Boyer and Schweizer, *Newsweek*.



mortgages and intentionally passed them on to investors and government-backed entities, such as Fannie Mae. Investment houses likewise passed along bad or junk mortgages and loans while intentionally concealing them from investors and government entities.

Goldman Sachs created an investment in 2007 that seemed designed to fail, and then allowed a client who was betting against the mortgage market to help shape the investment instrument, known as Abacus 2007-AC1.⁴⁹ Both Goldman and the client bet against the investment without informing other clients whose investments wagered on its success. Uninformed clients lost more than \$1 billion in the investment. The Senate's Permanent Subcommittee on Investigations, chaired by Democrat Carl Levin, proposed that the DOJ criminally investigate Goldman Sachs for its handling of the Abacus 2007-AC1 transaction.⁵⁰

In 2010, the SEC charged Goldman Sachs with securities fraud "for making materially misleading statements and omissions" in marketing the investment.⁵¹ Because the SEC only conducts civil litigation, it referred the case to the DOJ for criminal investigation. A year later in April 2011, the Senate's Permanent Subcommittee on Investigations issued a 635-page report detailing several transactions (including the Abacus deal) that Levin and his staff asked the DOJ to investigate as possible crimes.⁵²

Forbes captured the tone of the report with the bold headline: "Criminal Charges Loom for Goldman Sachs After Scathing Report."⁵³ The subcommittee made a formal referral to the Justice Department, as did the Federal Financial Crisis Inquiry Commission, chaired by Phil

⁴⁹ *Ibid.*, Boyer and Schweizer, *Newsweek*.

⁵⁰ "Goldman Sachs Chief Blankfein Could Face Criminal Prosecution For Role In Financial Crisis," *Huffington Post: Business*, April 14, 2011.

http://www.huffingtonpost.com/2011/04/14/goldman-financial-crisis-prosecution_n_848994.html.

⁵¹ SEC Plaintiff, v. Goldman Sachs and Co. and Fabrice Tourre, Defendants, 2010 WL 1508202 (S.D.N.Y.), <http://www.sec.gov/litigation/complaints/2010/comp-pr2010-59.pdf>.

⁵² US Senate Permanent Subcommittee on Investigations, "Wall Street and the Financial Crisis," April 13, 2011. http://www.levin.senate.gov/imo/media/doc/supporting/2011/PSI_WallStreetCrisis_041311.pdf.

⁵³ Halah Touryalai, "Criminal Charges Loom For Goldman Sachs After Scathing Senate Report," *Forbes*, April 14, 2011.

<http://www.forbes.com/sites/halahtouryalai/2011/04/14/criminal-charges-loom-for-goldman-sachs-after-scathing-senate-report/>.



Angelides. Levin publicly stated that a criminal inquiry was warranted, and Goldman CEO Lloyd Blankfein, among other Goldman Sachs executives hired white-collar defense attorneys.

Obama continued to ask Wall Street for campaign contributions in 2011, an off year for federal elections. By the fall of 2011, Obama had collected more donations from Wall Street than any of the Republican candidates, and employees at Bain Capital had donated more than twice as much to Obama than they did to Romney, the firm's own founder. In the weeks before and after the Senate report on Goldman Sachs, several Goldman executives and their families made contributions to Obama's Victory Fund and related entities, and some contributors maxed out at the largest individual donation allowed, \$35,800.⁵⁴ Five senior Goldman Sachs executives wrote more than \$130,000 in checks to the Obama Victory Fund. Two of these executives had never donated to Obama before and had previously only given small donations to individual candidates.⁵⁵

Goldman Sachs settled with the SEC over the Abacus transaction In July 2010. Goldman paid \$550 million, but admitted to no wrongdoing.⁵⁶ The fine constitutes a mere four percent of the \$12.1 billion Goldman paid its execs in bonuses the year of the Abacus transaction.⁵⁷

In 2011, CNBC reported: "A new study by the Center for Responsive Politics out shows that Obama is relying more on Wall Street to fund his re-election this year than he did in 2008... the Center found that one-third of the money Obama's elite fund-raising corps has raised on behalf of his re-election has come from the financial sector... Obama and the DNC

⁵⁴ Federal Election Commission, Obama Victory Fund 2012, Reports Image Index for Committee ID: C00494740.
<http://query.nictusa.com/cgi-bin/fecimg/?C00494740>.

⁵⁵ *Ibid.*, Obama Victory Fund 2012.

See also Open Secrets Database.

<http://www.opensecrets.org/indivs/search.php?sort=A&capcode=yh9d3&name=&state=&zip=&employ=Goldman%2BSachs&cand=&all=n&old=n&Soft=&c2012=Y&c2010=n&c2008=n>.

⁵⁶ SEC, "Goldman Sachs to Pay Record \$550 Million to Settle SEC Charges Related to Subprime Mortgage CDO," July 15, 2010.

<http://www.sec.gov/news/press/2010/2010-123.htm>.

⁵⁷ Christine Harper, "Goldman's Bonus Pool Jumps 23% to Record \$12 Billion (Update 1)," *Bloomberg*, December 18, 2007.

<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aUHCJ33.KB.Q&refer=us>.



combined are on pace to blow away the amounts Obama raised from Wall Street donors in 2008.”⁵⁸

At the core of Obama’s re-election fundraising efforts are 357 vital bundlers – fundraisers who use their influence to gather together the donations of many individuals. The majority of these bundlers work in the legal industry, but the securities and investment industry takes the second spot. Obama’s bundlers include executives from Goldman Sachs, Morgan Stanley, Barclays, and Citigroup.⁵⁹

It would be a reach to conclude that the Department of Justice dropped its criminal investigation of Goldman Sachs solely in response to large campaign contributions from Goldman Sachs executives, but the situation comprises what one Justice official openly acknowledges as a “bad set of facts.”⁶⁰ Angelides continues to call for a rigorous criminal investigation of Wall Street, because he believes “it’s fundamental that people in this country need to feel that the justice system is for everyone - that there’s not one system for those people of enormous wealth and power, and one for everyone else.”⁶¹

Misconduct and Federal Enforcement

Ray Brescia, a law professor at the University of Albany, fears that the lack of federal enforcement following the financial crisis may only incentivize cronyism. He explains, “law enforcement’s most recent attempt at uncovering and prosecuting bank misconduct in the lead up to and fallout from the financial crisis has gotten moving in only fits and starts. These forces - public disenchantment with the banks, coupled with weak law enforcement - are a toxic mix. They will fail to prevent future misconduct; what’s worse, they may, in fact, encourage it.”⁶²

⁵⁸ Eamon Javers, “For Funding, Obama Relies Even More on Wall Street,” *CNBC*, July 22, 2011. http://www.cnbc.com/id/43854224/For_Fundraising_Obama_Relies_Even_More_on_Wall_Street.

⁵⁹ Michael Beckel, “Meet the Bundlers Behind the Money,” *Open Secrets*, January 25, 2012. <http://www.opensecrets.org/news/2012/01/meet-the-bundlers-behind-the-money.html>.

⁶⁰ *Ibid.*, Boyer and Schweizer, *Newsweek*.

⁶¹ *Ibid.*, Boyer and Schweizer, *Newsweek*.

⁶² Ray Brescia, “Fomenting Fraud: How Weak Enforcement of Bank Misbehavior Threatens to Bring About the Next Financial Crisis,” *Huffington Post: The Blog*, July 2, 2012.



The largest firms alleged by federal officials to have engaged in financial fraud are nonetheless negotiating settlements that effectively get them off the hook. In February 2012, a \$25 billion settlement was announced with major banks over alleged widespread intentional fraud, according to a civil complaint. In a complaint against more than a dozen banks, including Bank of America, Countrywide, Citibank, J.P. Morgan Chase, GMAC, and Wells Fargo, federal officials alleged that these institutions violated the False Claims Act. The complaint asserted that the banks “knowingly presented or caused to be presented to the United States false or fraudulent claims for payment or approval” and “acted in deliberate ignorance of the truth or falsity” when it came to these dealings.⁶³

Major financial institutions were charged with intentional fraud, not just sloppy management. The complaint included allegations of violations of the “False Claims Act” and that there were “false affidavits” filed and “false and fictitious claims to the Departments of the United States” government were made. The complaint reads that the banks “conspired with one or more persons to present or cause to be presented to the United States false or fraudulent claims for payment or approval.”⁶⁴

These accusations are similar to the charges levied against the smaller operators. A settlement of just \$25 billion was an enormous victory for these large banks - stock prices rose when the news was announced. Much of the \$25 billion is not being paid directly by the banks but will instead be derived from a reduction in projected profits the banks would have received in the future.⁶⁵

President Obama’s 2012 State of the Union speech announced plans “to create a special unit of federal prosecutors and leading states attorneys general to expand our investigations into the abusive lending and packaging of risky mortgages that lead to the

http://www.huffingtonpost.com/ray-brescia/bank-reform-misconduct_b_1639718.html.

⁶³ Complaint, National Mortgage Settlement, Filed March 14, 2012.

https://d9klfgibkcquc.cloudfront.net/Complaint_Corrected_2012-03-14.pdf

⁶⁴ *Ibid.*, Complaint.

⁶⁵ National Mortgage Settlement, “Fact Sheet: Mortgage Servicing Settlement.”

https://d9klfgibkcquc.cloudfront.net/Mortgage_Servicing_Settlement_Fact_Sheet.pdf.



housing crisis” and promised “to hold accountable those who broke the law.”⁶⁶ The new unit, the Residential Mortgage-Backed Securities Working Group, resembled the Financial Fraud Enforcement Task Force. It was similarly charged with investigating securities and mortgage fraud that contributed to the financial meltdown. However, both the 2009 and 2012 units were supplied with a fraction of the attorneys and staff assigned to earlier task forces that investigated financial crises during earlier administrations.⁶⁷

The day before the President delivered the announcement in his State of the Union address, state Attorneys General from around the nation met in Chicago with DOJ officials to discuss the proposed national settlement with five major banks over questionable foreclosure practices. Those who held out on the settlement were supported by a group of activists, who claimed that banks would not make meaningful concessions, such as the reduction of principal on underwater mortgages, unless they faced investigation.

Mike Gecan of the Industrial Areas Foundation feared that formerly tough-minded New York Attorney General Eric Schneiderman had caved to the administration’s Chicago way. “I think what happened is what usually happens: the administration rope-a-doped. There’s no office, there’s no director, there’s no staff, there’s no space, there’s no phone,” he explained.⁶⁸ These concerns seemed justified two weeks later, when it was announced that the settlement had been reached. Gecan called for Schneiderman to quit the working group in protest in an April op-ed for the New York *Daily News*.⁶⁹

Even if Wall Street conducted business negligently and did not intentionally break laws, would a more aggressive DOJ have attempted to prosecute these institutions? Black, the former regulator, explains how Wall Street feasibly violated federal regulations, including

⁶⁶ Barack Obama, State of the Union Address, January 24, 2012.

<http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address>.

⁶⁷ Richard Eskow, “As Evidence Mounts, DC Insiders Worry About Holder’s Inaction on Wall Street Crime,” *Huffington Post*, July 10, 2012.

http://www.huffingtonpost.com/rj-eskow/as-evidence-mounts-dc-ins_b_1660865.html.

⁶⁸ *Ibid.*, Boyer and Schweizer, *Newsweek*.

⁶⁹ Mike Gecan and Arnie Graf, “Obama’s mortgage unit is AWOL: Schneiderman should quit this fraud,” *Daily News*, April, 18, 2012.

<http://www.nydailynews.com/opinion/obama-mortgage-unit-awol-article-1.1063094?pgno=1>.



“securities fraud for false disclosures, wire and mail fraud for making false representations about the quality of the loans and derivatives they were selling, bank fraud for false representations to the regulators.”⁷⁰

As Richard Eskow of the progressive *Huffington Post* recently wrote:

More and more Washington insiders are asking a question that was considered off-limits in the nation's capital just a few months ago: Who, exactly, is Attorney General Eric Holder representing? As scandal after scandal erupts on Wall Street, involving everything from global lending manipulation to cocaine and prostitution, more and more people are worrying about Holder's seeming inaction -- or worse -- in the face of mounting evidence.⁷¹

Conclusion

A remarkable revolving door exists among attorneys who work in government service, move to white-collar criminal defense practices, and then continue to switch back and forth. Relationships and connections are vital for executives facing legal action. When Goldman Sachs faced civil charges from the SEC early in 2010, they selected Greg Craig as their attorney.⁷² Craig had been President Obama's counsel at the White House and had served as a close ally of Holder's on administration battles on a variety of issues. When the CEO of IndyMac faced a civil suit, he hired an attorney from Covington, Eric Holder's former firm.

⁷⁰ *Ibid.*, Boyer and Schweizer, *Newsweek*.

⁷¹ *Ibid.*, Richard Eskow, *Huffington Post*.

⁷² Eamon Javers and Mike Allen, “Goldman Sachs taps ex-W.H. Counsel,” *Politico*, April 19, 2010. <http://www.politico.com/news/stories/0410/36056.html>.



Potential conflicts of interest in such matters are left for DOJ officials to settle at their own discretion. Why would a government attorney interested in returning to a lucrative field throw his potential future clients in jail? Weisselberg warns, “there is also the question of whether the behavior of prosecutors is influenced by the possibility of a quite profitable Big Law partnership at the conclusion of government service.”⁷³

As James Madison and Alexander Hamilton explain in *Federalist No. 51*, “Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.” Madison and Hamilton continue,

But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government...⁷⁴

The Department of Justice is tasked with equitably enforcing the rule of law, but conflicts of interest may explain the DOJ’s reticence to hold Wall Street accountable. The absence of financial prosecutions, coupled with the fact that enforcement comes from the very firms that defended those institutions, indicates that our bureaucracy failed both “to control the governed” and “to control itself.”⁷⁵

The Founders realized that their experiment in self-governance would ultimately rest in its “dependence on the people.”⁷⁶ The American people compromise their commitment to

⁷³ *Ibid.* Weisselberg. *Arizona Law Review*.

⁷⁴ Alexander Hamilton or James Madison, *Federalist No. 51*, Yale Law School’s Avalon Project. http://avalon.law.yale.edu/18th_century/fed51.asp.

⁷⁵ *Ibid.*, *Federalist No. 51*.

⁷⁶ *Ibid.*, *Federalist No. 51*.



liberty and justice when they tolerate cronyism within the highest echelons of the Department of Justice.



Appendix

Eric Holder and the Legalization of Online Lotteries

Another serious conflict of interest involves Attorney General Eric Holder's decision to reinterpret the Interstate Wire Act of 1961 in such a way as to legalize online lotteries and gaming by proxy.

In 1961, the Wire Act banned betting or wagering via telecommunications involving a wire:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two.⁷⁷

The Wire Act received additional reinforcement in 2006 when Congress passed the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA).⁷⁸ The law "prohibits gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law."⁷⁹

But all that changed when these laws, passed with the consent of the duly elected legislative branch, were circumnavigated by the Department of Justice's reinterpretation of the Wire Act.

⁷⁷ 18 USCA §1084(a)

⁷⁸ 31 USCA §§5361-5366

⁷⁹ *Ibid.*



On Friday, December 23, 2011, as lawmakers were leaving Washington for the Christmas holiday, the Department of Justice released a memorandum by Assistant Attorney General for the Criminal Division Virginia A. Seitz.⁸⁰ The National Law Review described the memo, “In a 180-degree reversal, the DOJ memo takes the position that the Wire Act does not apply to non-sports betting. This change in position has wide-ranging implications for the Internet gaming landscape in the U.S.”⁸¹

Pro-gambling interest groups, such as the million-member Poker Players Alliance, hailed the DOJ ruling a major victory.⁸² Overnight, online gaming and Internet lotteries had become legal through the actions, not of elected legislators, but by officials within the Department of Justice. Indeed, just months after the DOJ decision, the state of Illinois became the first state to sell lottery tickets online.⁸³

Why did this happen? And why did the Attorney General Holder’s DOJ try to minimize media attention by releasing the news just two days before Christmas?

Internet lottery and gaming giants like Scientific Games and Lottomatica S.p.A. were among the biggest winners; with the Wire Act out of the way, these billion dollar global gaming companies could penetrate and dominate the U.S. online gaming and lottery markets. Lottomatica S.p.A. is publicly traded on the Italian Stock Exchange and has 7,700 employees in approximately 60 countries. It operates under Gruppo Lottomatica, owned mostly by De Agostini, a “century-old publishing, media, and financial services group.”⁸⁴

In 2006, Lottomatica S.p.A. acquired GTECH Holdings Corporation in a \$4.8 billion acquisition deal. Attorney Jack Bodner represented Lottomatica. Mr. Bodner’s law

⁸⁰ Virginia A. Seitz, “Memorandum Opinion for the Assistant Attorney General, Criminal Division,” *Opinions of the Office of Legal Counsel*, Vol. 35 (2011).

⁸¹ J. Daniel Walsh, “DOJ’s Reversal on the Wire Act – What It Means for Internet Gaming.” <http://www.natlawreview.com/article/doj-s-reversal-wire-act-what-it-means-internet-gaming>.

⁸² “PPA Applauds DOJ Ruling: Online Poker Does Not Violate the Wire Act,” Scribd. <http://www.scribd.com/doc/76396794/Press-Release-PPA-Applauds-DoJ-Ruling-Online-Poker-Does-Not-Violate-the-Wire-Act-Calls-on-Congress-to-Act-Quickly-to-Pass-Federal-Legislation-12-2>.

⁸³ Judy Keen, “Illinois to become first state to allow online lottery sales,” *USA TODAY*, March 22, 2012.

⁸⁴ “Corporate Structure.” http://www.lottomaticagroup.com/it/about_us/au_01struttura_societaria.html.



firm is Covington & Burling—the same law firm Eric Holder belonged to before becoming Attorney General.⁸⁵ The Chairman of GTECH, which kept its name after the acquisition, is Donald Sweitzer. From 1992 to 1996, Mr. Sweitzer was the Political Director and Finance Director for the Democratic National Committee.⁸⁶

Scientific Games was another big winner. The company has approximately 4,200 employees 4,200 and customers in over 50 countries on six continents.⁸⁷ One of the company's directors is Francis Townsend, a former senior official at the Department of Justice who, according to the *Chicago Tribune*, "worked closely with [Eric] Holder in the Clinton administration Justice Department."⁸⁸ In fact, Townsend was so fond of Holder that she agreed to testify on his behalf during his Senate confirmation. "As a career prosecutor there, I had the privilege of working with Mr. Holder during his tenure as a U.S. Attorney and as Deputy Attorney General," said Ms. Townsend during her testimony at Mr. Holder's confirmation hearing. "I was a direct report of Mr. Holder's."⁸⁹

Prior to the DOJ ruling legalizing online gaming, Lottomatica was trading at 10.97 (euro) a share. After the ruling the stock shot up to 13.73 (euro).⁹⁰ Scientific Games enjoyed even greater gains. One week before the ruling, it's stock was \$7.69 a share. After the DOJ ruling, it skyrocketed to \$13.03 a share.⁹¹

⁸⁵ "Jack S. Bodner."

<http://www.cov.com/jbodner/>.

⁸⁶ Open Secrets, Influence and Lobbying, "Sweitzer, Donald R."

http://www.opensecrets.org/revolving/rev_summary.php?id=71216.

⁸⁷ "Inside Scientific Games."

<http://www.scigames.com/sections/inside-scientific-games/>.

⁸⁸ Meyer, Josh. "Clinton vet eyed for AG job." *Chicago Tribune*, November 19, 2008.

http://articles.chicagotribune.com/2008-11-19/news/0811180739_1_obama-campaign-supporter-covington-burling-llp-holder.

⁸⁹ "Testimony of Frances F. Townsend," Senate Judiciary Committee.

http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da142aa4b&wit_id=e655f9e2809e5476862f735da142aa4b-1-4.

⁹⁰ "Lottomatica Group SpA: BIT:LTO quotes & news - Google Finance." *Google*.

<http://www.google.com/finance?q=BIT%3ALTO>.

⁹¹ "Scientific Games Corp: NASDAQ:SGMS quotes & news - Google Finance." *Google*.

<http://www.google.com/finance?q=NASDAQ%3ASGMS>.

