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Prioritizing Justice: Combating Corporate Crime from Task Force to Top Priority

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Prioritizing Justice: Combating Corporate Crime
from Task Force to Top Priority
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**Abstract:** Inadequate law enforcement against corporate criminals appears to have created perverse incentives leading to an economic crisis – this time in the context of the subprime mortgage crisis. *Prioritizing Justice* proposes institutional reform at the Department of Justice in pursuing corporate crime. Presently, corporate crime is pursued nationally primarily through the DOJ Corporate Fraud Task Force and other task forces, the DOJ Criminal Division Fraud Section, and the individual U.S. Attorney’s Offices. Rather than a collection of ad hoc task forces that seek to coordinate policy among a vast array of offices and agencies, the relentless waves of corporate criminality support the need to create a Corporate Crimes Division as a permanent base in the Department of Justice. The Corporate Crimes Division would more efficiently investigate and prosecute crimes of national and multi-national corporations spanning multiple districts, and pursue a coordinated national policy that affirms the commitment of the DOJ to fight large-scale corporate crime which costs taxpayers billions, frustrates financial markets, increases the cost of capital to honest businesses, and undermines citizens’ confidence in the rule of law. Given the cost of corporate crime, creating the Division promotes superior institutional design that should yield substantial benefit.

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“If they aren’t out there looking for fraud, there’s a good bet they won’t find it.”

I. Introduction

Once again, inadequate law enforcement against corporate criminals appears to have created perverse incentives leading to an economic crisis – this time in the context of the subprime mortgage crisis. The Securities and Exchange Commission recently announced that it plans to enhance its civil enforcement capabilities. There have also been scattered criminal actions addressing isolated wrongdoing by lesser known individuals. In the summer of 2009, the SEC leveled civil charges against Angelo Mozilo, the CEO of Countrywide Financial Corporation. Yet, as of the fall of 2009, no criminal charges had been filed against any major firm or any high profile CEO. Moreover, all of the limited law enforcement activity mentioned above occurred only after the crisis. Enforcement laxity had distorted incentives facing putative white collar criminals long before.

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4 See Michael A. Fletcher, Former Fund Managers Face Fraud Charges in Credit Crisis, WASH. POST, June 20, 2008, at A1.

5 Stempel, supra note 3; Kara Scannell & John R. Emshwiller, Countrywide Chiefs Charged with Fraud, WALL ST. J. C1, June 5, 2009 (reporting that civil securities charges were filed by the SEC against former Country executives CEO Angelo Mozilo, COO David Sambol, and CFO Eric Sieracki; a federal criminal investigation is ongoing).

6 Martha Graybow & Randal Mikkelsen, Subprime Criminal Probes Yet to Catch Big Fish, REUTERS, June 9, 2008, http://www.reuters.com/articlePrint?articleID=USN0945592020080609. The lack of high profile cases may be attributed in part to the difficulty in investigating white collar crime, the complexity of the cases, and the high burden of proof in criminal cases. See id.
Presently the United States prosecutes corporate crime through several different avenues: the Criminal Division of the United States Department of Justice polices national policy throughout the DOJ divisions, agencies, and US Attorney’s Offices.\textsuperscript{7} The Criminal Division also takes on significant litigation that includes prosecution of white collar crime through its Fraud Section. That section addresses a variety of criminal practices including those related to consumer fraud, identity theft, and the Foreign Corrupt Practices Act.\textsuperscript{8} The DOJ has several task forces dedicated to or substantially related to corporate crime: the Corporate Fraud Task Force, the Enron Task Force, and the National Procurement Fraud Task Force.\textsuperscript{9} The task forces coordinate efforts among the Attorney General, relevant Assistant Attorney Generals (such as the AAG’s for the Criminal Division and the Tax Division for the Corporate Task Force), relevant agencies (such as the FBI for the Corporate Task Force), and United States Attorneys from various districts throughout the country.

Rather than a collection of ad hoc task forces that seek to coordinate policy among a vast array of offices and agencies, the relentless waves of corporate criminality support the need to create a Corporate Crimes Division as a permanent base in the Department of Justice from which to pursue national policy and to more efficiently investigate and prosecute such crimes. The mission of the Corporate Crimes Division would be to specialize in investigating and prosecuting corporate crime by developing expertise that includes legal and related professional expertise as well as considering and recommending national policy regarding that mission. The time taken to


\textsuperscript{9} See infra text accompanying notes 66-85.
investigate major corporate criminal acts is costly to the typical U.S. Attorney’s Office tasked with pursuing a wide variety of both criminal and civil cases, as well as defending the United States, its agents, and its officers in wide-ranging civil suits. Consequently, such corporate criminal cases can only be pursued in local U.S. Attorney’s Offices at the expense of other cases, many of which are easier to investigate and less costly to prosecute. For the numbers-driven manager focused on reporting high conviction numbers to support office funding, the long-run potential for convictions in corporate crime cases may seem slight compared to the short-run costs. Moreover, pursuing powerful corporations in one’s district has the added disadvantage of creating potential political difficulties for the U.S. Attorney, and possibly limiting employment prospects for those who leave government service and hope to gain employment with the private sector.\(^{12}\)

A Corporate Crimes Division would offer a superior institutional design.\(^{13}\) It would sharpen the expertise of the lawyers, economists, accountants, financial analysts and related professionals within the narrow focus of its mission. That expertise could then be efficiently employed to pursue appropriate cases of corporate criminality. An increase in experience and an

\footnotesize
\(^{10}\) See DAVID O. FRIEDRICHS, TRUSTED CRIMINALS 278 (3rd ed. 2007).


\(^{12}\) FRIEDRICHS, supra note 10, at 327-28 (referencing both campaign contributions and the “revolving door syndrome” in which governmental employees with considerable power move into and out of private sector positions as sources of white collar crime corruption).

\(^{13}\) Among the recent articles on institutional design, several authors have applied design theory to matters of criminal law and procedure. See, e.g., Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 STAN. L. REV. 869, 895-907 (2009) (applying the lessons of institutional design in administrative law to propose means of curbing abuses of prosecutorial discretion and enhancing supervision); Darryl K. Brown, Rationing Criminal Defense Entitlements: An Argument from Institutional Design, 104 COLUM. L. REV. 801 (2004) (proposing default rules that rationalize apportionment of resources to better protect constitutional criminal procedural rights); Michael C. Dorf, Legal Indeterminacy and Institutional Design, 78 N.Y.U. L. REV. 875, 935-37 (2003) (proposing means by which experimentalist courts can address the indeterminacy of problem-solving courts). A common theme in institutional design is that the structure of an institution will directly impact its productive capacity in achieving positive results. See, e.g., Dorf, supra, at 886.
undivided mission to pursue such crimes would eliminate the cost-benefit analysis that arises in the local U.S. Attorney’s Offices in selecting which cases to pursue. Finally, since the decision to prosecute is made at a national level, the corporate wrongdoer would be less likely to be able to improperly influence the decision to investigate and prosecute.

The estimated direct cost of economic crime outweighs street crime by measures ranging from 10 to 1, to 50 to 1.\textsuperscript{14} Segregating corporate crime from other types of economic crimes is appropriate because of the complex structure of business organizations, the often multidistrict effect of the criminality, and the complexity of the laws that govern corporate conduct such as securities and banking laws. It is also appropriate because the current institutional structure of the Department of Justice with respect to corporate criminality is egregiously inadequate.

The current approach of using task forces such as the corporate fraud task force places a band-aid on a gaping wound. With continuous narrowing of civil avenues to address corporate misconduct, prosecution of corporate crime becomes critical to meaningfully protect our national financial structure. Corporate crime and the resulting financial failures undermine confidence in our markets, reduce national and foreign investment in our businesses, increase the cost of doing business for all businesses (including the honest businesses), and impose long-term consequences on every person in the country through government bailouts that increase national

\textsuperscript{14} See Friedrichs, supra note 10, at 46 (identifying a variety of sources for cost estimates, including one comparison of $250 billion for white collar crime to $4 billion for street crime, and observing that “economic losses have been estimated as high as $1 trillion annually.”): Francis T. Cullen, et al., Corporate Crime Under Attack 17-23 (2006) (reviewing various estimates of the cost of corporate crime, and observing that “[t]he tremendous economic impact of corporate lawlessness results in part from the extensive involvement of business in unlawful activities, but it is also due to the reality that the costs of even a single corporate offense are often immense.”). Highlighting just a few of the many corporate frauds, the authors cited the 1973 conviction of Equity Funding Corporation of America, a company that in 1960 began issuing phony insurance policies, resulting in a reported $2 billion dollar loss; the 1985 guilty plea by E.F. Hutton for a check kiting scheme involving nearly $10 billion; the 1980s crash of the savings and loan industry produced estimated losses of $200 billion; the 1980’s insider trading scandal; the exposure of widespread corporate accounting fraud beginning in 2001 with Enron’s collapse into bankruptcy that resulted in a loss of $60 billion in market value for Enron, exposed $11 billion in fraud at WorldCom, and fueled hundreds of criminal investigations yielding even more convictions and discovery of costly crimes.) Id.
debt, impose greater tax burdens on its citizens and taxpayers, and reduce other government
sponsored, broadly applied social services to pay for the wrongdoing of a few.\textsuperscript{15}

Part II of this article provides a historical view of the rise of the (multinational) corporation, and the associated crime that has followed its trajectory. Part III reviews the current national approach to corporate crime. Part IV proposes a corporate crime division as a means of pursuing national policy and developing expertise in corporate crime fighting, and highlights the benefits of such a Division. Any change in institutional design poses challenges and those are raised and considered here. Means to address risks associated with developing a Corporate Crimes Division and tempering such risks to effectuate the goals of the new division are suggested. This article concludes that the benefits gained from a cohesive national pursuit of corporate criminality well outweigh the risks associated with such a pursuit. Most significantly, every lawful citizen and business stands to gain when costs associated with corporate crime decrease, and confidence in our economy and its underlying corporate structures booms.\textsuperscript{16}

II. The Rise of the Multinational Corporation and the Associated Crime-Wave

A. Corporate Growth and Dominance

\textsuperscript{15} See Steven A. Ramirez, Arbitration and Reform in Private Securities Litigation: Dealing with the Meritorious as Well as the Frivolous, 40 WM. & MARY L. REV. 1055, 1056-57 (1999) [hereinafter Ramirez, Arbitration and Reform] (discussing the need for public confidence in the integrity of our business markets).

\textsuperscript{16} Socialization of risk is a key element to corporate success. FRIEDRICH, supra note 10, at 59. (observing that corporations enjoying the benefits of success during good times, lobbying for deregulation so that they are free to exploit the maximum profits from corporate activity; however, corporate liability from exposure to risk is limited, and in instances when corporate criminality leads to harm, the government is often asked to bailout the corporation or to clean up afterword). See, e.g., Stiglitz, supra note 2 (criticizing President Barack Obama’s bailout of the banks as providing perverse incentives to corporate managers that reward corporate risk-taking with oversized profits while socializing losses to be borne by American taxpayers).
Corporations have grown exponentially. Although “the legal idea of the corporation can be traced back to Roman times, . . . the modern corporation, with specific corporate powers can be recognized in the East India Company, founded in 1612.” In 1988, the top twenty percent of “the Fortune 500 corporations held a greater share of all manufacturing profits than all the other 370,000 manufacturing firms combined, . . . employed over two-thirds of all workers engaged in manufacturing, . . . and earned about four-fifths of all industrial profits.” Indeed, “[t]hree to four corporations generally dominate most industries.”

The growth of the modern corporation has continued through mergers and acquisitions leading to increasingly complex organizational structures. These conglomerates “cross-

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17 FRIEDRICH, supra note 10, at 55-59 (3d ed. 2007) (tracing the historical development of the corporation and corporate crime).

18 FRIEDRICH, supra note 10, at 55. See RICHARD D. HARTLEY, CORPORATE CRIME 6 (2008) (but placing the founding of the East India Company in 1602).


20 Id. at 3.

21 HARTLEY, supra note 18, at 13-14; CHARLES DERBER, CORPORATION NATION 11-12, 74-80 (1998) (observing that “[t]he years from 1994 to 1998 set successive records as the biggest merger years in American history.”).

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The General Electric Company, e.g., is a company that has grown through extensive mergers and acquisitions. Founded by Thomas Edison in 1876 with a single laboratory in New Jersey, GE today is one of the world’s largest companies based on market capitalization. FT USA 500 2008, FINANCIAL TIMES, Mar. 31, 2008, http://media.ft.com/cms/186442b8-41db-11dd-a5e8-0000779fd2ac.pdf. The General Electric Company was actually formed by the merger of Edison General Electric and Thomson-Houston Company in 1892. GE today is a multinational and multi-business organization, comprised of several business units that include infrastructure, industrial, finance, media, healthcare, and consumer finance. See GE Company Organizational Chart, http://www.ge.com/pdf/company/ge_organization_chart.pdf (last visited June 4, 2008); see also GE, Our Company, http://www.ge.com/company/index.html (last visited June 4, 2008).

subsidize, meaning they can sustain one business with the profits from another.”22 Today, many corporations have become conglomerates forming holding companies and subsidiaries with a variety of product lines and wielding “political as well as economic [power] that extends well beyond that of the traditional large corporation operating in a single product line.”23 Multinational corporations have ridden the wave of globalization, moving manufacturing jobs outside the U.S. border, and supporting NAFTA and other free-trade agreements that permit the

http://www.tyco.com/wps/wcm/connect/tyco+who+we+are/Who+We+Are/History/ (last visited June 4, 2008). In 2009, Tyco International Ltd. moved its company’s domicile from Bermuda to Switzerland. It presently operates in all 50 states and in 60 countries worldwide.

http://www.tyco.com/wps/wcm/connect/tyco+who+we+are/Who+We+Are/Tyco+Worldwide/ (last visited June 4, 2008).


22 HARTLEY, supra note 18, at 14.

23 CLINARD, supra note 19, at 4-5. See HARTLEY, supra note 18, at 14. Clinard traced the growth of America’s Fortune 500 and the contraction of competition in major industries through mergers and consolidations, and considers the expansion into international markets. CLINARD, supra note 19, at 2-6. He further connected the contributions of corporations and industry political action committees (PACs) to the democratic process. Id. at 6-7. McCain-Feingold is bipartisan legislation designed to address the concern over the political influence wielded by these large conglomerates through political campaign contributions. Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 207-155, 116 Stat. 81 (2002). One of the most important provisions of McCain-Feingold is the prohibition of unregulated political donations or “soft money” to parties or campaigns (“hard money” is regulated contributions to political parties or campaigns). 2 U.S.C. § 441i(a)(1) (2003). McCain-Feingold was intended to close the loophole that would allow corporations to give unlimited and unregulated amounts of “soft money” for so-called party building activities, recognizing that large corporations and wealthy individuals could exert considerably more influence during campaigns simply by virtue of their ability to give more money. Albert R. Hunt, McCain-Feingold Did Its Job, WALL ST. J., Nov. 18, 2004, at A19 (“the declared purpose of McCain-Feingold . . . was to curb the corrupting nexus of big money and federal candidates”).
free flow of goods and services, while allowing these entities to take advantage of favorable legal conditions.

B. A Brief History of Corporate Crime

Several U.S. Supreme Court decisions are critical to understanding the legal authority and rights of modern corporations. In 1818, the Court denied states’ rights to amend corporate charters. In 1886, the Court used the Fourteenth Amendment to grant personhood to corporations, affording the corporation the right to own property and to enter binding contracts. It further expanded those rights in 1830, finding corporate rights “to be similar to those of natural persons.” Key among these rights is the right of free speech which underlies the corporation’s


27 “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

28 Santa Clara County v. Southern Pac. R. Co, 118 U.S. 394, 396 (1886) (refusing to hear argument on the issue because the court had already concluded that the Fourteenth Amendment—which was a human rights measure adopted to address slavery—applied to corporations); see Hartley, supra note 18, at 8.

29 Hartley, supra note 18, at 10; Society for the Propagation of the Gospel in Foreign Parts v. Town of Pawlet, 29 U.S. 480 (1830).
ability to support political initiatives.³⁰ Responsibilities came along with the rights. Corporations could be required to pay taxes,³¹ and in 1909, the U.S. Supreme Court concluded that corporations could be held criminally liable for the acts of its agents.³²

It is true that there are some crimes which, in their nature, cannot be committed by corporations. But there is a large class of offenses . . . wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them.³³

Actions done by employees during their course of employment may place the corporation at risk of criminal liability even in circumstances where the employee acted contrary to corporate policy or direction.³⁴ The only time an organization is generally not subject to corporate liability for the criminal acts of employees is when the corporation is “the object of the wrongdoing—instead of a mere vehicle for its perpetration.”³⁵


³¹ See Santa Clara County v. S. Pac. Ry. Co, 118 U.S. 394, 396 (1886); HARTLEY, supra note 18, at 8.


³³ Id.


Crime has tagged along with the corporation and examples can be found throughout the history of the corporation.\textsuperscript{36} Indeed, investment bubbles have been identified going back hundreds of years to the South Sea Bubble.\textsuperscript{37} The Industrial Revolution in the late eighteenth to nineteenth centuries “gave rise to the powerful and wealthy capitalist corporations.”\textsuperscript{38} Corporate empires of the robber barons,\textsuperscript{39} who dominated their industries and amassed huge fortunes during the second half of nineteenth century, were involved in every manner of bribery, stock manipulation, predation against competitors, price gouging, exploitation of labor, and maintenance of unsafe working conditions; corporations became largely invulnerable to legal controls.\textsuperscript{40} In the late nineteenth century, trusts\textsuperscript{41} engaged in monopolistic practices, which were addressed by the passage and enforcement of the Sherman Act prohibiting agreements in restraint of trade.\textsuperscript{42} During the early part of the twentieth century, corporations grew into national entities.\textsuperscript{43} In the post World-War II era, “mergers, formation of conglomerates, 

\textsuperscript{36} See CULLEN, supra note 14, at 13-17, 19-23 (recounting well-know criminology studies into the breadth of corporate crime in the United States, and major corporate crime scandals of the past half century); HARTLEY, supra note 18, at 6-12.

\textsuperscript{37} FRIEDRICH, supra note 10, at 55-56 (“The South Sea Company was chartered in London in 1711 to engage in slave trade and commerce. . . . Investors lost fortunes because the enterprise was fraudulent, driven by bribery, false financial statements, and stock manipulation.”).

\textsuperscript{38} Id.; see also HARTLEY, supra note 18, at 7.

\textsuperscript{39} FRIEDRICH, supra note 10, at 55-56 (e.g., John D. Rockefeller, Cornelius Vanderbilt, Jay Gould, Andrew Carnegie, and Henry Clay Frick).

\textsuperscript{40} Id.

\textsuperscript{41} Id. (holding companies for a chain of corporations).

\textsuperscript{42} Id. 15 U.S.C. §1 (2004).

\textsuperscript{43} Id.
corporate takeovers, and growth of transnational or multinational corporations have been characteristic of corporate development.  

Corporate structure makes it difficult to effectively punish corporations because of the socialization of risk, and political influence. The size of current multinational corporations upon which jobs depend, create political and economic resistance to criminal conviction.  

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44 See FRIEDRICH, supra note 10, at 56; HARTLEY, supra note 18, at 13-14; DERBER, supra note 21, at 72-75, 79, 81-90.

45 FRIEDRICH, supra note 10, at 59. Risk and reward, all things being equal, are in proportion. The more risk undertaken, the greater the possibility for reward and the greater the possibility for loss. When risk is socialized or guaranteed by the taxpayer, however, the potential outcomes are disproportional at least with respect to the corporations: corporations are encouraged to engage in even greater risks for even greater rewards, recognizing that they will not fully bear the greater risk. When corporations understand that the U.S. taxpayer will bail-out, guarantee, and socialize their risks, a moral hazard is created because corporations lose the incentive to properly identify and mitigate risk. Cf. Tim Geithner, My Plan for Bad Bank Assets, WALL ST. J., Mar. 23, 2009, at A15, available at http://online.wsj.com/article/SB123776536222709061.html. United States Treasury Secretary Geithner discusses "too big to fail" themes in explaining the U.S. government’s plan to bail out major banks and other corporate institutions, remarking that "our nation deserves better choices than . . . being forced to pour billions of taxpayer dollars into an institution like AIG to protect the economy against the scale of damage." Id.

The U.S. Department of Justice considers the collateral consequences in pursuing a corporate conviction on others, including "tak[ing] into account the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it.” See U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, § 9-28.1000 (1997, section revised Aug. 2008) [hereinafter U.S. ATTORNEYS’ MANUAL], available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/ (last visited Aug. 18, 2009).


Both Republicans and Democrats receive nearly equal political funding from major corporations and industries. See Opensecrets.org. In 2008, pharmaceutical companies provided 50% political funding to Democrats and 50% to Republicans, http://www.opensecrets.org/industries/indus.php?ind=H04 (last visited June 4, 2009); while the defense industry and the finance industry provided campaign funding of 51% to Democrats and 49% to
III. Current National Approach to Corporate Crime Fighting

Presently, the United States pursues corporate crime through several avenues, and federal criminal prosecutions are pursued exclusively through the United States Department of Justice (DOJ). The DOJ is led by the U.S. Attorney General (AG), who is appointed by the President.48 The AG sits at the top of the DOJ organizational chart, and is served by a Deputy AG, and below that, are a sprawling series of offices and divisions that execute the responsibilities of the DOJ; included are litigating divisions of the DOJ that are designated to particular missions.49 Each division is headed by an Assistant Attorney General to oversee that division and report either to the Deputy Attorney General or the Associate Attorney General.50 The United States Attorney’s Office is a litigating arm of the DOJ that maintains offices in ninety-four federal judicial districts located throughout the United States, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands.51 The DOJ includes an Executive Office for United States Attorneys (EOUSA) with a Director, which coordinates policy among the ninety-three offices.52

48 28 U.S.C. § 503 (“The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States.”).


50 U.S. Dep’t of Justice, Organization Chart, available at http://www.usdoj.gov/dojorg.htm (last visited Aug. 18, 2009). The Criminal Division, Justice Management Division, and National Security Division report to the Deputy Attorney General, and the Antitrust Division, Civil Division, Civil Rights Division, Environment and Natural Resources Division, and Tax Division report to the Associate Attorney General). Id.

A. Structural Responsibility for Corporate Crime Fighting

One of the three statutory responsibilities of the United States Attorney’s Offices is the prosecution of criminal cases on behalf of the federal government. The U.S. Attorneys are appointed by and serve at the discretion of the President of the United States, with the advice and consent of the U.S. Senate. Although caseloads vary among the offices of the U.S. Attorneys, all offices are responsible for prosecuting criminal cases and the U.S. Attorney for the judicial district is considered the chief prosecuting attorney for the United States within that judicial district. Despite the resource-taxing complexity of the investigations and prosecutions, the U.S. Attorney’s Offices have played a significant role in fighting corporate crime.


53 28 U.S.C. § 547. The offices are also responsible for representing the interests of the United States in civil cases, and for collecting its debts. Id.

54 28 U.S.C. § 547; U.S. CONST. art. 2, § 2: “[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . other public Ministers and Consuls, . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”


Aside from the
Criminal Division, each of these divisions’ prosecutorial responsibilities address limited areas of law, so that the Antitrust Division enforces “various criminal statutes related to Sherman Act violations, or “that affect the integrity of the [related] investigatory process.” The National Security Division, the most recently added division to the DOJ, investigates and prosecutes “international and domestic terrorism cases.” The Criminal Division, however, exercises general supervision over the enforcement of “all federal criminal laws, except those specifically assigned to other divisions.”

The Criminal Division is responsible for formulating and implementing criminal enforcement policy. Additionally, the division is responsible for “advis[ing] the Attorney General, Congress, the Office of Management and Budget and the White House on matters of criminal law.” The Division provides leadership and also coordinates international, federal, state, and local law enforcement matters. Although the Criminal Division’s homepage lists


60 Criminal Division Homepage, U.S. Dep’t of Justice, available at http://www.usdoj.gov/criminal/ (last visited Aug. 16, 2009). Certain divisions, such as the Antitrust, Civil Rights, Environment and Natural Resources, and Tax Divisions have authority to apply and enforce specific statutes assigned to those divisions.

61 Id.

62 Id.

63 Id.
sixteen separate sections, one key responsibility is particularly related to the proposed Corporate Crimes Division. The responsibilities of the Fraud Section include the following: investigating and prosecuting sophisticated and multi-district white-collar crimes such as corporate, securities, and investment fraud, government program and procurement fraud, and international criminal violations; developing Department policy; and training, advising and mentoring its attorneys and other professionals. These responsibilities would aptly fit the focus of the proposed Corporate Crimes Division.

Presently, the Department of Justice has several task forces dedicated to or substantially related to corporate crime. The task forces coordinate efforts among the Attorney General, relevant Assistant Attorney Generals (e.g., Criminal Division, Tax Division), relevant agencies (e.g., FBI), and U.S. Attorneys. One such task force is the Corporate Fraud Task Force, given the stated purpose of strengthening the investigation and prosecution of significant financial crimes, recovering the proceeds, and ensuring just punishment of the perpetrators. In addition to other DOJ officials that the Attorney General may designate, the members of the task force are designated by Executive Order to include the Deputy Attorney General, the Assistant Attorneys

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64 The Criminal Division’s major responsibilities are wide-ranging: counterterrorism, public integrity, domestic security, fraud, child exploitation, computer crime and intellectual property crime, narcotics and dangerous drugs, organized crime drug enforcement task forces program, organized crime, sensitive investigative techniques, special investigations, international affairs, assistance to foreign law enforcement institutions, policy and legislation, and appellate work. See id.


General for the Criminal Division and the Tax Division, the Director of the Federal Bureau of Investigation, and the United States Attorneys for the Southern District of New York, the Eastern District of New York, the Northern District of Illinois, the Eastern District of Pennsylvania, the Central District of California, the Northern District of California, and the Southern District of Texas.\textsuperscript{67} Led by the Deputy Attorney General for the Criminal Division,\textsuperscript{68} the responsibilities of the Corporate Fraud Task Force include “provid[ing] direction for the investigation and prosecution of [significant] cases of securities fraud, accounting fraud, mail and wire fraud, money laundering, tax fraud based on such predicate offenses, and other related financial crimes committed by commercial entities and directors, officers, professional advisers, and employees thereof (hereinafter ‘financial crimes’).”\textsuperscript{69} Additional responsibilities include recommending to the Attorney General the allocation of resources, and recommending to the Attorney General and Congress “changes in rules, regulations or policy to improve the effective investigation and prosecution of significant financial crimes.”\textsuperscript{70} These responsibilities would be at the core of a Corporate Crimes Division, except with the added charge to conduct the investigation and prosecution of significant corporate financial crimes cases.

Other task forces in place created to address corporate crime include the Enron Task Force, the Options Backdating Task Force, the National Procurement Fraud Task Force, and the

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\begin{itemize}
\item \textsuperscript{67}Exec. Order No. 13,271, 67 C.F.R. 46, 091 (2002) at Sec. 2. Other officers of the executive branch are members of the task force for “specified functions” and include the Secretary of the Treasury, and chairpersons of the following agencies: Securities and Exchange Commission; Commodities Futures Trading Commission; Federal Energy Regulatory Commission; and Federal Communications Commission. \textit{Id.} at Sec. 4
\item \textsuperscript{68}See U.S. Dep’t of Justice, What We Do, \url{http://www.usdoj.gov/whatwedo/whatwedo_tf.html} (last visited Aug. 18, 2009).
\item \textsuperscript{69}Exec. Order No. 13,271, 67 C.F.R. 46, 091 (2002) at Sec. 3.a. The Deputy Attorney General is tasked with designating the crimes as “significant.” \textit{Id.}
\item \textsuperscript{70}\textit{Id.} at Sec. 3.a & b.
\end{itemize}
\end{footnotesize}
Health Care Fraud Prevention and Enforcement Action Team. The Enron Task Force is part of the Corporate Fraud Task Force and was formed to investigate and prosecute allegations of fraud and corruption in connection with the collapse of Enron, a multinational energy corporation based in Houston, Texas, that filed for bankruptcy in 2001, at the time the most extensive and expensive bankruptcy ever filed. In July 2006, the FBI formed part of an Options Backdating Task Force, in conjunction with federal prosecutors.

The National Procurement Fraud Task Force was formed in October 2006 “to promote the prevention, early detection and prosecution of procurement fraud.” Chaired by the Assistant Attorney General for the Criminal Division, this task force includes representatives of the Civil, Criminal, Antitrust, and Tax Divisions of the DOJ, in addition to federal prosecutors from the U.S. Attorneys Offices in various districts, the Inspector General, and other inspectors.


general involved in defensive investigations.\textsuperscript{76} The task force is “designed to leverage the resources of the federal law enforcement community by partnering with the I[nspector] G[eneral]s and other law enforcement agencies.”\textsuperscript{77} In its first two years of existence, the task force promoted legislation to strengthen procurement fraud investigations,\textsuperscript{78} and developed training initiatives to educate and share expertise in procurement fraud detection, investigation, and prosecution with auditors, investigators, prosecutors, and procurement specialists throughout the country.\textsuperscript{79}

The DOJ is also a member of the International Contract Corruption Task Force that “deploys criminal investigative and intelligence assets worldwide to detect and investigate corruption and contract fraud related” to the Global War on Terrorism.\textsuperscript{80} Established in October 2006, this task force is not under the direction of the DOJ but rather is a joint agency task force “led by a Board of Governors composed of senior agency representatives” involved in defending the interests of the United States overseas.\textsuperscript{81} These complex, resource-intensive cases involve foreign, extra-territorial and domestic coordination, as well as military and civilian cooperation, at times in active combat zones.\textsuperscript{82}

\textsuperscript{76} See NATIONAL PROCUREMENT FRAUD TASK FORCE PROGRESS REPORT 2008, supra note 56.

\textsuperscript{77} Id. at 1.

\textsuperscript{78} Id. at 22-23.

\textsuperscript{79} Id. at 21, 32.

\textsuperscript{80} Id. at 13-14.

\textsuperscript{81} Id. at 13.

\textsuperscript{82} Id. at 13.
The Health Care Fraud Prevention and Enforcement Action Team is another task force expanded by the Obama administration to “help detect and prevent healthcare fraud.”\(^{83}\) In 2007, the DOJ and Health and Human Services (HHS) launched the Medicare Fraud Strike Force.\(^{84}\) The DOJ’s Fraud Section of the Criminal Division and U.S. Attorney’s Offices lead the strike force teams to combat fraudulent Medicare Billing.\(^{85}\)

In addition to task forces, the Criminal Division Fraud Section leads or partners with U.S. Attorney’s Offices, the FBI, and other interested agencies in national and regional working groups related to financial crimes including a Securities and Commodities Fraud Working Group, a Bank Fraud Enforcement Working Group, and Mortgage Fraud Working Groups.\(^{86}\)

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\(^{83}\) See Carrie Johnson, *Health-Care Fraud to be Targeted*, WASH. POST, May 21, 2009 (announcing expansion of the strike force teams to Detroit and Houston). *Id.* The task force is composed of senior-level officials at the DOJ and Health and Human Services. *Id.* The Department of Justice coordinates with the Department of Health and Human Services to combat health care fraud since 1997, through the National Health Care Fraud and Abuse Control program, which uses federal, state, and local resources pursuant the Health Insurance Portability and Accountability Act (HIPAA). See Fact Sheet: Department of Justice Efforts to Combat Health Care Fraud and Abuse (May 28, 2008) [http://hcca-info.org/Content/NavigationMenu/ComplianceResources/ComplianceNews/DoJ_EffortsCombatHealthCareFraudAbuse.pdf](http://hcca-info.org/Content/NavigationMenu/ComplianceResources/ComplianceNews/DoJ_EffortsCombatHealthCareFraudAbuse.pdf). There were different phases of this strike force. *Id.* The IRS also investigates health care fraud tax schemes. See Internal Revenue Service, U.S. Dep’t of Treasury, Examples of Healthcare Fraud Investigations FY 2008, [http://www.irs.gov/compliance/enforcement/article/0,,id=174637,00.html](http://www.irs.gov/compliance/enforcement/article/0,,id=174637,00.html).


\(^{85}\) *Id.* The task force reported significant activity in enforcement:

In FY 2007, U.S. Attorneys’ Offices opened 878 new criminal health care fraud investigations involving 1,548 potential defendants. Federal prosecutors had 1,612 health care fraud criminal investigations pending, involving 2,603 potential defendants, and filed criminal charges in 434 cases involving 786 defendants. A total of 560 defendants were convicted for health care fraud-related crimes during the year. Also in FY 2007, the Department of Justice (DOJ) opened 776 new civil health care fraud investigations, and had 743 civil health care fraud investigations pending at the end of the fiscal year. The Department opened 218 new civil health care fraud cases during the year.

*Id.* at 1.

Such working groups may even include international efforts to coordinate and prosecute financial crimes.\(^87\)

The Financial Crimes Section (FCS) of the Federal Bureau of Investigation (FBI) is the primary unit in the DOJ tasked with investigating financial crimes such as “corporate fraud, securities and commodities fraud, health care fraud, financial institution fraud, mortgage fraud, insurance fraud, mass marketing fraud, and money laundering.”\(^88\) Beginning with fiscal year 2003 and through fiscal year 2007, the FBI has participated in corporate criminal cases resulting in 183 indictments and 173 convictions.\(^89\) In 2008, the FBI reported having more than 18,000 pending white-collar cases, of which corporate crimes cases are only one piece.\(^90\) The FBI’s White-Collar Crime program has set a five-year strategic goal for fiscal years 2007-2012, to “dismantle a cumulative total of 745 criminal enterprises engaging in white-collar crime.”\(^91\)

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90 Press room, FBI, Corporate Fraud: Options Cases Aim for Level Field, http://www.fbi.gov/page2/feb07/options021407.htm (last visited Aug. 18, 2009). The FBI defines white-collar crime as “those illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence. Individuals and organizations commit these acts to obtain money, property, or services; to avoid the payment or loss of money or services; or to secure personal or business advantage.” CYNTHIA BARNETT, U.S. DEP’T OF JUSTICE, FBI CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME REPORTING (UCR) DATA 1 (NIBRS Publications Series, undated).

91 U.S. DEP’T OF JUSTICE, FY2008 PERFORMANCE AND ACCOUNTABILITY REPORT, II-19 available at http://www.usdoj.gov/ag/annualreports/pr2008/TableofContents.htm (last visited June 4, 2009). “Dismantlement means destroying the organization’s leadership, financial base, and supply network such that the organization is incapable of operating and/or reconstituting itself.” Id. at II-20.
The membership of the various tasks forces highlight the breadth of involvement in corporate crime fighting from many agencies within the government and from many branches and divisions within the DOJ. Although the coordination of the agencies is certainly a benefit, the heavy lifting of any criminal case ultimately rests with the litigators who will either press the case through trial or negotiate a plea or other settlement short of trial.

B. Success in National Corporate Crime Fighting

Tracking the success in federal corporate crime fighting is not an easy task because no single accounting is made available. The DOJ collects statistics from the U.S. Attorney’s Offices and does not maintain a centralized record of corporate fraud cases. Nevertheless, the DOJ reported in 2008 that since July 2002, when the Corporate Fraud Task Force (CFTF) was established, the DOJ had “obtained nearly 1,300 corporate fraud convictions . . . includ[ing] convictions of more than 200 chief executive officers and corporate presidents, more than 120 corporate vice presidents, and more than 50 chief financial officers.” Although created to address the massive accounting frauds discovered with the advent of the Enron bankruptcy filing,

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92 Zachary Bookman, *Convergences and Omissions in Reporting Corporate and White Collar Crime*, 6 DePaul Bus. & Com. L.J. 347, 348 (2008) (observing that even when statistics are kept, the data made available to the public does not include critical information about the precise type of crime (e.g., embezzlement versus broad-based accounting fraud) nor the size of the crime or its economic impact); Leonard Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 Amer. Crim. L. Rev. 501-20 (1980, reprinted in *Corporate and White Collar Crime: An Anthology* 127, 131 (Leonard Orland, ed. 1985)).

93 Daphne Eviatar, *Case Closed?*, AM. LAW. 19 (Fall 2007) (“according to Joan Meyer, senior counsel to the deputy attorney general, [the DOJ] cannot provide a complete list of the cases that were the basis of the victories [Attorney General] Gonzales cited at the July 17 [2007] anniversary celebration” of the DOJ’s Corporate Fraud Task Force).

the numbers do not reveal the size of the corporations or the extent of the fraudulent conduct. In 2008, the U.S. Sentencing Commission reported that of the ninety-five organizations sentenced under the federal sentencing guidelines, forty-four involved organizations with ten or fewer employees, and only seven involved organizations with over one thousand employees.

Unable to acquire from the DOJ an accounting of the reported 1300 convictions, The American Lawyer’s 2007 independent investigation of the DOJ’s corporate crime fighting compiled a Corporate Fraud Database that includes 440 indicted defendants arising out of 124 corporate fraud investigations. Despite being borne of a crisis in confidence in our corporations brought

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95 See Darryl K. Brown, The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement, 1 OHIO ST. J. CRIM. L. 521, 528 (2004). Professor Brown observes that large, publicly held firms can afford legal assistance that matches or surpasses the government's, and they can devise policies to take full advantage of privacy protections-to make as much information as hard to discover as possible. Smaller firms, as a group, have fewer resources with which to optimize privacy, litigate, and otherwise raise the government's costs of enforcement. This may partly explain why most firms sentenced under the federal sentencing guidelines are small, closely held firms.

Id.

96 See U.S. SENTENCING COMM’N, SOURCEBOOK FOR FEDERAL SENTENCING STATISTICS 2008, tbl. 54 (Involvement in or Tolerance of Criminal Activity by Authority - §8C2.5(b)), available at http://www.ussc.gov/ANNRPT/2008/Table 54.pdf.

97 See The American Lawyer, Corporate Fraud Database, http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1193821435603 (Nov. 2007) (last visited Feb. 20, 2009) (on file with author) [hereinafter Corporate Fraud Database] (compiled and relied upon by The American Lawyer articles by Barker, supra note 1, at 39, and Eviatar, supra note 93, at 20. The DOJ refused to provide American Lawyer with a complete list of corporate fraud cases since 2002, so the publication created its own database “including cases cited on the [CFTF] Web site and in two published task force reports, as well as corporate fraud prosecutions mentioned in speeches or public comments by DOJ officials,” and consulted “publicly available case records and performance statistics, as well as interviews with dozens of current and former prosecutors, task force members, and white-collar criminal defense lawyers.” Eviatar, supra note 93, at 20. Professor Kathleen Brickey has also been tracking major corporate fraud prosecutions, and has examined her findings in several articles. Kathleen Brickey, In Enron’s Wake: Corporate Executives on Trial, 96 J. CRIM. & CRIMINOLOGY 397, 401, 420-33 (2006) [hereinafter In Enron’s Wake] (examining corporate fraud prosecutions related to seventeen major companies and firms, and reporting that forty-six defendants at those companies had gone to trial, covering twenty-three prosecutions between March 2002 and the end of January 2006; see Appendix 1); Kathleen Brickey, Enron’s Legacy, 8 BUFF. CRIM. L. REV. 221, 246 (2004) (tracking nineteen major companies involving, sixty-nine prosecutions and over 125 defendants between March 2002 and July 2004 ); Kathleen Brickey, From Enron To WorldCom and Beyond: Life and Crime After Sarbanes-Oxley, 81 WASH. U. L.Q. 357, 358, 382 (2003) (Appendix A, Major Corporate Fraud Prosecutions, March 2002-Aug. 2003; over ninety defendants criminally charged).
on by the collapse of Enron, WorldCom and other previously well-respected corporations, the
task force “had no prosecutorial staff or budget of its own,” and “U.S. Attorney’s offices were
not given additional staff to prosecute corporate fraud cases.”98 Once formed, however, the
CFTF appears to have spurred local U.S. Attorney’s Offices to pursue corporate crime, at least
initially.99

The success of the corporate crime fighting efforts has been scrutinized to evaluate the
government’s commitment to pursuing corporate criminals and to assess its tactics. Of the 440
cases tracked by The American Lawyer, fifty-seven percent of those defendants pled guilty, and
twenty-one percent of the cases that went to trial ended in acquittals.100 Moreover, over fifty
convictions resulted in sentences of imprisonment of greater than five years.101 In Professor
Kathleen Brickey’s 2004 study of nineteen companies involving 125 defendants, seventy-three
out of eighty-nine convictions (about eighty-two percent) were by guilty plea.102 But by 2006,

98 Eviatar, supra note 93, at 24, 30. The American Lawyer reports that the U.S. Attorney’s office for the Southern
District of New York in Manhattan “actually lost about $5 million in personnel and other assistance from the SEC”
during the 2002-2007 time period, although the DOJ would not confirm this information. Id. at 24. One of the lead
prosecutors in the trial of Enron’s Chairman Ken Lay and CEO Jeffrey Skilling acknowledged a “lack of resources,
both technical and in terms of personnel,” including the lack of resources to even create a searchable electronic
database of documents until shortly before trial.” Id. But see Christine Hurt, The Undercivilization of Corporate
Criminal Enforcement, in THE PRACTITIONER’S GUIDE TO THE SARBANES-OXLEY ACT, at VII-1-2 (John J. Huber et
al. eds., 2006) (“With the Task Force came a $24.5 million increase in the DOJ’s budget for corporate fraud
investigations and a 73% budget increase for the SEC.”).

99 See Eviatar, supra note 93, at 20.

100 See Barker, supra note 1, at 37.

101 See Eviatar, supra note 93, at 20.

102 See Brickey, In Enron’s Wake, supra note 97, at 403 (table 2) (reporting on results from earlier study and
addressed in Brickey, Enron’s Legacy, supra note 97, at 246, tracking nineteen major companies involving, sixty-
nine prosecutions and over 125 defendants between March 2002 and July 2004).
less than half the defendants in the study pled guilty.\textsuperscript{103} Moreover, throughout the Brickey study, results from criminal trials of defendants have been mixed with eighteen convicted, eleven acquitted, and fifteen deadlocked.\textsuperscript{104} The \textit{American Lawyer} Corporate Fraud Database yielded twenty-seven defendants acquitted at trial, twenty-eight cases were dismissed, twenty-two cases were declared mistrials, and nine convictions were reversed on appeal.\textsuperscript{105} Both Professor Brickey and \textit{The American Lawyer} nod toward the idea of poor lawyering by the DOJ as potentially contributing to the non-convictions,\textsuperscript{106} however, in evaluating the “losses,” Brickey does not dismiss the “issues of complexity, witness credibility, juror sophistication, and myriad unquantifiable factors” that play into the results.\textsuperscript{107} Certainly, proving accounting fraud through numerous witnesses, financial experts, and hundreds of documents, is substantially more complicated than proving the average drug deal on the street.\textsuperscript{108}

The CFTF has been criticized as an instrument created to calm market fears in the summer of 2002, rather than a true force of change in prosecutorial approach to corporate

\textsuperscript{103} Brickey, \textit{In Enron’s Wake}, supra note 97, at 404 (of thirty defendants, thirteen pled guilty, seven received guilty verdicts after trial, three received not guilty verdicts, and seven cases resulted in mistrials).

\textsuperscript{104} Id. at 407.

\textsuperscript{105} See Eviatar, supra note 93, at 20; Barker, supra note 1, at 37 (for those cases that went to trial, 62% resulted in guilty verdicts, 21% resulted in acquittals, and 17 in mistrials; moreover, 12% of the guilty verdicts were overturned on appeal); Corporate Fraud Database, supra note 97.

\textsuperscript{106} See Brickey, \textit{In Enron’s Wake}, supra note 97, at 407 (“at first blush, the government’s trial record does not reflect overwhelming success and appears to validate—or at least provide support for—the criticism that prosecutors have overreached by trying to find crimes where none really exist”); Eviatar, supra note 93, at 20 (“Among the cases highlighted on the task force Web site, we found several high-profile acquittals, hung juries, and appellate reversals—and some of those prosecution failures were due specifically to questionable tactics by the Justice Department”).

\textsuperscript{107} Brickey, \textit{In Enron’s Wake}, supra note 97, at 410.

\textsuperscript{108} FRIEDRICH, supra note 10, at 278 (“Corporate and finance crime cases in particular require large expenditures of time and special investigative skill, involve greater difficulties in establishing criminal intent, and pose problems in obtaining appropriate witness or victim cooperation. The cases may require sifting through masses of dull and difficult-to-understand records, and the evidentiary issues are especially complex.”).
crime. The Corporate Fraud Database identified 357 indictments in major corporate fraud cases between formation of the task force in 2002 and 2005; the number of indictments dropped substantially after that time period with only fourteen cases identified by the DOJ as significant cases in 2006, and only twelve major case indictments in the first nine months of 2007. With the spotlight shifted away from corporate wrongdoing, the government shifted resources aimed at corporate fraud away from investigation and enforcement. Most of the cases listed in the American Lawyer database and in the DOJ’s 2008 report were brought solely by U.S. Attorneys Offices. Indeed, a handful of local U.S. Attorneys Offices with locations in major metropolitan areas prosecuted a majority of the cases. Contrary to DOJ claims that the decline

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109 Eviatar, supra note 93, at 30 (“The Corporate Fraud Task Force was just one star in a larger constellation of government efforts to calm investors in an escalating financial crisis.”). “The mandate has always been not to strangle corporate America, but to put investor confidence back into the market, which I think we have.” Id. (quoting Debra Wong Yang, former U.S. Attorney in Los Angeles and an original member of the CFTF).

110 Id. at 21. See also Corporate Fraud Database, supra note 97. See CORPORATE FRAUD TASK FORCE 2008 REPORT, supra note 56, at 1.3-1.22. The CFTF reported that between July 2002 and May 31, 2004, prosecutors had “obtained over 500 corporate fraud convictions or guilty pleas [and] charged over 900 defendants and over 60 corporate CEOs and presidents with some type of corporate fraud crime in connection with over 400 filed cases.” CORPORATE FRAUD TASK FORCE, SECOND YEAR REPORT TO THE PRESIDENT 2.3 (2004).

111 See Hurt, supra note 98, at 380 (warning that a shift away from criminal enforcement of corporate wrongdoing should not occur without strengthening private enforcement laws that were left “untouched by post-Enron reforms”); Carrie Johnson, SEC Enforcement Cases Decline 9%, WASH. POST, Nov. 3, 2006, at D3 (reporting on recent budget cuts and hiring freezes at the SEC); Eric Lichtblau et al., F.B.I. Struggles to Handle Financial Fraud Cases, N.Y. TIMES, Oct. 18, 2008, A1 (reporting on a loss of 625 agents (36% of its 2001 levels) for white collar crime investigations as the administration shifted its focus to antiterrorism). “Executives in the private sector say they have had difficulty attracting the bureau’s attention in cases involving possible frauds of millions of dollars.” Lichtblau, supra.

112 See Corporate Fraud Database, supra note 97. The database lists the prosecutors from each case and the location of the prosecutor at that time. Id. In addition to cases brought by Enron Task Force; some were filed by attorneys from the Criminal Division or Tax Division of the DOJ, either alone or in conjunction with the local U.S. Attorney’s Office. See id. The 2008 CFTF Report to the President identified six major cases brought by the Criminal Division (which includes the Enron Task Force), four major cases brought by the Tax Division, and fifty-one major cases brought by U.S. Attorney’s Offices, and one joint Criminal Division/USAO prosecution. See CORPORATE FRAUD TASK FORCE 2008 REPORT, supra note 56, at 1.3-1.19.

113 Although the bulk of the cases were brought by the U.S. Attorney’s Offices in New York (Southern District of New York), Chicago (Northern District of Illinois), and San Francisco (Northern District of California), cases were filed in another twenty-five districts, including the Southern District of Texas (in which the Enron cases were filed –
in investigations and prosecutions marks the success of the corporate fraud initiative,\textsuperscript{114} continued reports of corporate fraud and wrongdoing in the news and the meltdown in the financial markets suggests that more needs to be done.\textsuperscript{115}

Criminal prosecutions occur after a crime has already been committed. Thus, while some would argue prosecutions can deter future crimes by assuring punishment, it is generally performed after the fact. Yet, with corporate crime, the criminal acts are often ongoing and persistent so that early discovery and prosecution can prevent greater losses.\textsuperscript{116} In 2006, Professor Erik Lie conducted a study of options discovering that backdating of options awarded to corporate executives as incentives was rampant.\textsuperscript{117} After The Wall Street Journal persisted in

\textsuperscript{114} Barker, supra note 1, at 39.

\textsuperscript{115} See Evan Perez & Kara Scannell, FBI Launches Subprime Probe, WALL ST. J. A3, Jan.30, 2008 (reporting that the FBI “is working with the SEC, which has opened more than three dozen investigations in the subprime-mortgage business, including the role of mortgage brokers, investment banks and due-diligence companies involved in the underwriting and securitization of loans”); M.P. Narayanan et al., The Economic Impact of Backdating Executive Stock Options, 105 MICH. L. REV. 1597, 1601 (2007) (backdating options cost shareholders an average of $400 million in market capitalization, compared to an average gain of about $500,000 in additional executive compensation). See also Barker, supra note 1, at 39 (plotting on multiple graphs the decline in investigations and indictments (peaked in 2003), guilty pleas (peaked in 2003, and trial outcomes (peaked in 2004) since the CFTC became operational). Notably, the number of investigations, indictments, and guilty pleas for the years 1994 through 1999 were negligible. Id. The fallout from the subprime mortgage crisis goes beyond the criminal investigations, and has worldwide effects, including the U.S. government bailout of banks and insurance companies, tightening of credit, record job losses, and spiraling national debt. See Steven A. Ramirez, Lessons from the Subprime Debacle: Stress Testing CEO Autonomy, 54 ST. LOUIS U. L.J. ___, 5-7 (2010) [hereinafter Stress Testing] (describing the economic effects and implications from the mortgage crisis). The staggering losses from the mortgage crisis have spurred states attorneys general to action indicting loan processors, mortgage brokers, and bank officers. See David Segal, Financial Fraud is Focus of Attack by Prosecutors, N.Y. TIMES, Mar.12, 2009, at A1, available at http://www.nytimes.com/2009/03/12/business/12crime.html (reporting that the Obama administration’s budget proposal “includ[ed] money for more FBI agents to investigate mortgage fraud and white-collar crime, and a 13 percent raise for the Securities and Exchange Commission”).

\textsuperscript{116} In cases where the defendants are convicted, large restitution orders offer little chance that victims will be compensated since the offenders have usually spent the money (first on luxuries, then on defense lawyers), lost their jobs, or hidden the assets prior to the judgment, and thus, have no real prospects of paying the money back. Ross Todd, Three Cents on the Dollar, LITIGATION 68, 69, 72 (Fall 2007).

\textsuperscript{117} See Randall A. Herron & Erik Lie, Does Backdating Explain the Stock Price Pattern Around Executive Stock Option Grants?, 83 J. FIN. ECON. 271, 294 (2007) (estimating that between 1996 and 2005, 29.2% of firms engaged
investigating the backdating scandal, the DOJ and FBI formed a task force to investigate and prosecute the crimes.\(^\text{118}\) Thus the DOJ did finally step in to prosecute, but not in advance of an investigation spurred by the private sector. Likewise, as early as 2004, the FBI suspected fraud in the mortgage and subprime mortgage market, but did not pursue the investigation due to a lack of funding and staffing, after overall FBI staffing decreased between 2001 and 2007 and resources were shifted to post-9/11 national security priorities.\(^\text{119}\) Even though the number of agents devoted to mortgage fraud has increased from 15 to 177 agents since 2004, the overall staffing level remains “hundreds of agents below the levels seen in the 1980s during the savings and loan crisis.”\(^\text{120}\) More recently, the securities fraud Ponzi scheme advanced by Bernie Madoff in manipulation of stock option grants to top executives). Backdating options raises critical accounting, disclosure, and tax issues. After the waves of scandals from Tyco to Enron, the SEC began a probe over the pricing and timing of stock option grants in over a hundred companies. See Perfect Payday: Options Scorecard, Wall St. J. Online, http://online.wsj.com/public/resources/documents/info-optionsscore06-full.html (last visited May 24, 2009) (listing companies that have come under scrutiny for stock options practices, through September 2007). The SEC requires specific disclosures involving executive compensation and stock option grants. SEC Reg S-K, 117 C.F.R. § 229.402 (2006) (disclosure of the stock option expiration date is required by the SEC).

The Sarbanes-Oxley Act of 2002 now requires companies to report the granting of stock options within two business days of their issue, whereas previously the SEC allowed companies to report options within two months, which would allow executives to backdate (when stock prices were lower) the grant in order to inflate option pay. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.); Adam Lashinsky, Why Options Backdating is a Big Deal, FORTUNE, July 26, 2006, available at http://money.cnn.com/2006/07/26/magazines/fortune/lashinsky.fortune/index.htm. Stock options backdating can be legal, but proper disclosure is necessary. Id.

\(^{118}\) Press Room, FBI, Corporate Fraud: Options Cases Aim for Level Field (Feb. 14, 2007), http://www.fbi.gov/page2/feb07/options021407.htm (reporting sixty-one pending options backdating cases); Charles Forelle & James Bandler, Matter of Timing: Five More Companies Show Questionable Options Pattern, WALL ST. J., May 22, 2006, at A1; Stephanie Saul, Study Finds Backdating of Options Widespread, N.Y. TIMES, July 17, 2006, at C1 (reporting that backdating stock options scandal includes encompasses more than 2,000 companies); Eviatar, supra note 93, at 21.

\(^{119}\) See Lichtblau et al., supra note 111, at A1 (reporting that nearly one-third of agents were shifted to national security priorities after the 9-11 attacks, while overall staffing at the FBI decreased by 132 agents between 2001 and 2007).

\(^{120}\) See id.
only came to light in December 2008, after Mr. Madoff told his sons of the crime.\textsuperscript{121} The U.S. House of Representatives Financial Services Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises examined the Madoff scheme as a case-study to assess whether the SEC requires reorganization.\textsuperscript{122} Given the failure of the SEC to exercise its civil enforcement authority, having a second avenue available in the criminal investigative and prosecutorial authority of a Corporate Crimes Division would have offered whistleblower Harry Markopolis two avenues of contact and less likelihood that his complaints would be ignored.\textsuperscript{123} Early intervention would have stemmed years of Madoff-created losses.\textsuperscript{124}

By 1903, “the growth of the [U.S.] economy and of corporate enterprise” made it “evident” that the DOJ needed “to have its own corps of specialists in antitrust law to cope with an increasingly complex enforcement situation.”\textsuperscript{125} Indeed, “[c]orporate antitrust cases tend to

\textsuperscript{121} See Amir Efrati, \textit{Top Broker Accused of Fraud}, \textit{Wall St. J.}, Dec. 12, 2008, at A1; U.S. House of Representatives Financial Services Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, Committee Hearing on Regulatory Failures (111\textsuperscript{th} Congress), \textit{testimony of Harry Markopolis}, Feb. 4, 2009, 2009WL 271870 (F.D.C.H.) \url{http://wallstnation.com/MADOFF_testimony.html} (at p.14 of printout, but testimony is unpaginated) [hereinafter \textit{Testimony of Harry Markopolis}] (questioning by Rep. Scott Garrett, “but for the statement by Mr. Madoff to his sons about what he had done, we may very well not be having this hearing today, that it would not have been uncovered, officially, at least. Do you concur with that assessment?”, to which Markopolis responded, “Yes.”).

\textsuperscript{122} See \textit{Testimony of Harry Markopolis}, supra note 21 (Opening statement by Rep. Paul E. Kanjorski, Chairman).

\textsuperscript{123} See \textit{Testimony of Harry Markopolis}, supra note 21 (at 7) (testimony from citizen whistleblower that the case against Madoff was “repeatedly ignored over an eight-and-a-half-year period between May 2000 and December 2008). Markopolis acknowledged in his testimony that he could have gone to the FBI, but believed his concerns would have been discounted by investigators once he informed them that he had already contacted the SEC on numerous occasions. \textit{Id.} at 33.

\textsuperscript{124} See \textit{Testimony of Harry Markopolis}, supra note 21 (at 7-8) (testifying that when he first approached the SEC with “repeated and credible warnings” about the Madoff Ponzi scheme, the losses were likely between $3 billion to $7 billion, and yet the scheme was not stopped until losses had reach an estimated $50 billion). \textit{See also} Efrati, \textit{supra} note 121, at A1 (reporting that “Madoff told his sons he believed the losses from his fraud exceeded $50 billion”).

\textsuperscript{125} U.S. DEP’T OF JUSTICE, JUSTICE MANAGEMENT DIVISION, FUNCTIONS MANUAL: ANTI TRUST DIVISION, \url{http://www.usdoj.gov/jmd/mps/manual/atr.htm} [hereinafter \textit{ANTITRUST DIVISION FUNCTIONS MANUAL}] (last visited Aug. 18, 2009). At the turn of the century, President Theodore Roosevelt was locked in a battle to wrest control of the U.S. economy from the monopolistic practices of the corporate trusts. FRIEDRICHs, \textit{supra} note 10, at 56. In 1903, the president appointed an Assistant to the Attorney General to pursue antitrust crimes. See \textit{ANTITRUST
be large and complicated, stretching across various jurisdictions and lasting an extended period of time." This article posits that the growth of the world economy and the increasing complexity of corporate enterprise present the ripe opportunity to create a new DOJ division to address the persistent corporate criminality pervasive in our society.

IV. Superior Institutional Design: Corporate Crimes Division Proposal

A. Defining Corporate Crime

Edwin Sutherland, credited with coining the phrase “white collar crime,” defined it as a “crime committed by a person of respectability and high social status in the course of his occupation.” Sutherland studied the crimes of the seventy largest industrial and commercial corporations in the United States at that time and included both criminal convictions and civil judgments admitting or finding violations of the law. Sutherland’s definition is but one of many meanings assigned to the phrase.

“Corporate Crime” is a type of white collar crime, and as such, its definition can encompass a good deal of activity. Some noted categories of corporate crime include fraud,

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126 FRIEDRICHS, supra note 10, at 282.
127 See Edwin H. Sutherland, White Collar Criminality, 5 AM. SOC. REV. 1, 1 (Feb. 1940).
129 See HARTLEY, supra note 18, at 2-3 (recounting Sutherland’s study).
131 Corporate fraud is a subset of white collar crime. As an example, in February 2007, the FBI had over 18,000 pending white collar crime cases, as compared to its 492 pending corporate fraud cases. Press Room, FBI,
tax evasion, economic exploitation, antitrust activity, false advertising, theft, unfair labor practices, hazardous working conditions, violent torts, unsafe consumer products, and environmental offenses. John Braithwaite defines corporate crime as the “conduct of a corporation, or of employees acting on behalf of a corporation, which is proscribed and punishable by law.” Marshall Clinard has observed that corporations have been shielded from the stigma of the “criminal” label by ensuring that a range of non-criminal punishments is available to address corporate wrongdoing, including “administrative and civil penalties [such as] warnings, injunctions, consent orders, and non-criminal monetary payments.” In fact, that list has grown in recent years to include non-prosecution agreements and deferred prosecution agreements. Consequently, he asserts that administrative, civil, and criminal sanctions should all be considered in any definition of corporate crime. Recent malfeasance by corporate executives that appears to have benefitted them at the expense of the corporate shareholders but subject to board or executive affirmation suggests a more refined definition as to what is included and what is not included may be in order. Thus, a corporate official or employee

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132 See HARTLEY, supra note 18, at 21-31; CLINARD, supra note 19, at 6-14.


134 See CLINARD, supra note 19, at 15.


136 Id.

137 The Model Penal Code defines corporate crime in section 2.07(1) but the definition is limited in scope:

(1) A corporation may be convicted of the commission of an offense if:
commits a corporate crime if the official or employee violates the law in acting on behalf of the corporation, but if he or she gains personal benefit in the commission of a crime against the corporation and without its knowledge or consent, as in the case of embezzlement of corporate funds, it is occupational crime and not corporate crime.

In creating a Corporate Crimes Division, the scope of the Division would be more narrowly defined, limiting the types of corporate crime it pursues. The DOJ already has Divisions dedicated to addressing violations of Antitrust, Environmental, and Tax laws. The American Law Institute, Model Penal Code § 2.07(1). The MPC includes the following definitions within § 2.07:

(4) As used in this Section:

(a) “Corporation” does not include an entity organized as or by a governmental agency for the execution of a governmental program;

(b) “Agent” means any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association and, in the case of an unincorporated association, a member of such association;

(c) “High managerial agent” means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.

Id. at § 2.07. See Kathleen F. Brickey, Rethinking Corporate Liability Under the Model Penal Code, 19 Rutgers L.J. 593, 629-31 (1988) (reporting that many states that have legislatively articulated corporate criminal liability appear to have patterned statutory language in some degree after the MPC, but most have not resorted to the limited version of corporate criminal liability articulated in MPC §2.07).

138 See U.S. ATTORNEYS’ MANUAL, supra note 45.
unique feature of this Division would be that unlike those divisions defined by a narrow set of
laws they are charged to enforce, this new division would combine purposes, looking to enforce
certain groups of laws, but more significantly, focusing on the type of perpetrator. The Criminal
Division and the Civil Division have broad legal responsibility for enforcing the U.S. laws. The
Corporate Crimes Division would focus on cases of fraud, especially financial crimes and fraud
against the government that would otherwise fall within the scope of these two Divisions or the
U.S. Attorney Offices across the United States. The division would also consider the alleged
perpetrator, pursuing activities by major corporate actors where the potential for harm is
significant. In this format, the division might be better compared to the recent National Security
Division, which pursues violations concerning national security laws, but more significantly
pursues perpetrators who threaten national security.139

Segregating corporate crime from other types of economic crimes is appropriate for many
reasons. The continued growth of corporate conglomerates that operate nationwide or even
multi-nationally means that the effect of criminality is often multidistrict, at least.140 Pursuing
such corporations through the Corporate Crimes Division would eliminate the territorial issues
that arise when more than one federal district, and therefore more than one U.S. Attorney’s
Office, is involved.141 Additionally, the complexity of multidistrict corporate structures requires

139 See Mission Statement, National Security Division, available at

(Global) Agreement Requests), available at

141 See, e.g., U.S. ATTORNEYS’ MANUAL, supra note 45, at § 9-44.160 (Health Care Fraud Investigations in Multiple
Districts). Section 9-44.160 (II) provides guidance on multidistrict litigation:

When a federal or state investigative agency, a United States Attorney’s Office or the Department of Justice
ascertains that a subject is under investigation in multiple jurisdictions (whether by one or multiple
agencies), they should convey that information to the relevant investigative agencies and the Criminal
greater expertise to investigate and analyze. Consequently, a Corporate Crimes Division that includes a variety of professionals has the expertise to sort through the organizational relationships of the mega-corporation at its disposal. Moreover, the complexity of the laws that govern corporate conduct such as securities and banking laws require legal and financial expertise that is often not available in the typical U.S. Attorney’s Office. To the degree that a particular office does encounter a fair share of such litigation, those offices would still be encouraged to pursue such cases, but they would have the added benefit of the Corporate Crimes Division’s experts to aid in investigating and preparing the case for trial.

and/or Civil Divisions of the Department of Justice and the appropriate United States Attorneys’ Offices so that, where appropriate, they can develop together a nationwide strategy to most effectively coordinate the multiple efforts and efficiently use resources. Where the subject operates only in one state or in one metropolitan area, communication to the relevant United States Attorneys is sufficient. In other instances of multiple investigations of the same subject, the U.S. Attorney's Office must notify, as early as possible, the Criminal and/or Civil Divisions and relevant investigative agencies by letter or electronic mail of the multiple investigations and the following information:

A. the identity of the subjects of the investigation;
B. a summary of the factual allegations to be investigated; and
C. a preliminary assessment of the statutes which may have been violated.

Id.

142 See CORPORATE FRAUD TASK FORCE 2008 REPORT, supra note 56, at 1.5-1.14; HARTLEY, supra note 18, at 67.

143 Joan Neff Gurney, Factors Influencing the Decision to Prosecute Economic Crime, 23 CRIMINOLOGY 609, 620 (1985) (“Organizations generate large volumes of paper and their financial records can be difficult to understand for those without adequate training in the fundamentals of accounting. The [prosecutors] lacked such training, and they also lacked the resources to be able to afford the luxury of allowing a staff member to spend a large amount of time on any one case.”).

144 See CORPORATE FRAUD TASK FORCE 2008 REPORT, supra note 56, at 1.5-1.14.


[T]he prosecution of criminal enterprises stretching across many states necessitated the formation of multidistrict prosecution teams. The DOJ began to call conferences of First Assistant U.S. Attorneys and other supervisors in specialized areas (for example, terrorism and white collar fraud). . . . Some AUSAs acquire national reputations for expertise in their area, a development recognized by the DOJ when it draws upon experienced career assistants to make training videos and to teach seminars at the National Advocacy Institute. Assistants participating in training seminars at the National Advocacy Center inevitably become
The cost of corporate crime outweighs that of conventional crime many times over.\(^{146}\)

The restriction in civil remedies in securities cases and other corporate fraud cases has created a void in oversight that is currently filled by resort to criminal prosecution.\(^{147}\) These restrictions limiting civil recourse and remedies have lead directly to higher regulatory burdens for all businesses.\(^{148}\) Alan Greenspan acknowledged the flaw in the deregulatory actions of the last decade was the failure to account for the corporate agent’s willingness to place short term gain over the long-run self-interest of the corporation.\(^{149}\) With corporate managers unable or unwilling to protect the long-range interest of the corporate entity,\(^{150}\) shareholders unable to hold

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Id. Although Eisenstein argues that training at the National Advocacy Institute for Assistant U.S. Attorneys (AUSAs) has lessened the need for centralized authority through Main Justice, his observations about the value of training supports this proposal for a Corporate Crimes Division in that expertise in fighting corporate crime will be furthered with a division devoted to its cause, and those experts can aid in the training of AUSAs that work in districts across the United States.

\(^{146}\) See supra note 4, discussing the costs of corporate crime.

\(^{147}\) See Hurt, supra note 98, at 380-89 (empirical studies of post-PSLRA effects indicates that dismissal rates are much higher now (66.7% compared to 28.7% before the PSLRA, and that fewer meritorious cases are brought because of lower expected damages); Ramirez, Science Fiction, supra note 46, at 966-70 (asserting that stiffer criminals penalties are necessary to compensate for lower rates of civil enforcement due to changes in law than lessen the likelihood of successful civil lawsuits against corporations to address corporate wrongdoing); Vikrameditya S. Khanna, Politics and Corporate Crime Legislation, REGULATION 30, 32 (Spring 2004) (observing that corporations would prefer criminal legislation which imposes a higher burden of proof on the prosecution, over civil legislation which entails greater private enforcement); Ramirez, Arbitration and Reform, supra note 15, at 1089-91 (arguing against relaxing private civil remedies for securities fraud in light of the rampant financial market fraud of the 1980s and 1990s).


\(^{149}\) See U.S. House of Representatives Committee of Government Oversight and Reform on The Role and Responsibility of Federal Regulators in the Wall Street Financial Crisis (110th Cong.), testimony of Dr. Alan Greenspan, Oct. 23, 2008, at 34 (“I made a mistake in presuming that the self-interest of organizations, specifically banks and others, was such that they were best capable of protecting their own shareholders and their equity in their firms.”), available at http://oversight.house.gov/documents/20081023100438.pdf.

\(^{150}\) See Ramirez, Stress Testing, supra note 115, at 8 nn.38-40 (“America’s flawed system of corporate governance operated to allow CEOs to harvest huge compensation payments while off-loading staggering risks upon their companies and the global economy generally”).

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corporate managers to that interest, and professional gatekeepers such as accountants, analysts, and lawyers willing to sacrifice reputational capital for generous consulting fees, affirmative measures to detect, investigate, and prosecute the criminal actions of corporations through its agents can best be accomplished by creating a Division committed to that course.

B. The Proposal

The Corporate Crimes Division would combine the resources and personnel from the Criminal Division Fraud Section that address as part of its responsibilities “[i]nvestigating and prosecuting sophisticated and multi-district white-collar crimes including corporate, securities, and investment fraud, government program and procurement fraud, and international criminal violations including the bribery of foreign government officials in violation of the Foreign Corrupt Practices Act” with the expertise of various professionals, and the investigative strengths of federal agencies responsible for regulating and overseeing corporations. In addition to its focus on corporate crime litigation, it would also advise the Attorney General, Congress, and the White House on matters of corporate crime, develop legislative and policy proposals to enhance corporate crime fighting and to deter corporate criminality, coordinate corporate crime investigations and prosecutions across the Department of Justice, and develop and promote training and expertise in detecting, investigating, and prosecuting corporate crime.

151 See Hurt, supra note 98, at 380-89 (discussing the limits of private litigation avenues available to curb corporate misconduct); see also text accompany supra note 147. Professor Hurt observed that while “corporate crimes may be harder to detect initially than some street crimes, which are more self-revealing, prosecutors have some effective investigatory and charging tools at their disposal to identify and confront individuals suspected of corporate crimes [that can] greatly increase the likelihood of a guilty plea or conviction.” Hurt, supra note 98, at 403-17.

152 See John C. Coffee, Jr., Understanding Enron: “It’s About the Gatekeepers, Stupid,” 57 BUS. LAW. 1403, 1405-08 (2002).

Each of the DOJ litigating divisions are divided into sections based, in part, upon expertise. The Corporate Crimes Division would be constructed to limit its mission to corporate fraud in its many variations, but it might also be divided into litigating sections such as the following: (1) financial fraud section, including securities fraud, banking fraud, investment fraud, and accounting fraud; (2) government procurement fraud section; (3) health care fraud section; and (4) foreign commerce section, addressing cases falling under the Foreign Corrupt Practices Act. In addition to government enforcement through trial litigation, the Corporate Crimes Division would incorporate an appellate section that would draw cases from all the litigating sections much like those sections in the Antitrust Division or the Criminal Division. The Division would benefit also from an Economic and Financial Analysis section

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that would consolidate expertise of financial experts, including forensic accountants, financial analysts, and economists.\textsuperscript{160}

Finally, the Division would include a legislative policy and regulation section to advance the non-litigating elements of its mission.\textsuperscript{161} This section would be responsible for developing division policy and advocating for regulatory policy consistent with law enforcement goals towards the corporate sector. One area that would benefit from this approach is providing consistency in criminal prosecutions and in prosecution deferrals. Critics have attacked the uneven application of the DOJ’s corporate charging policies among the ninety-three U.S. Attorney’s Offices including the use of deferred prosecution agreements (DPA) and non-prosecution agreements (NPA), and related issues such as appointment of monitors, waiver of attorney and work product privileges, and even when such agreements are to be made available to prospective criminal defendants.\textsuperscript{162} Although relatively rare a mere decade ago, these alternatives to full scale criminal prosecution have mushroomed since Arthur Andersen’s indictment,\textsuperscript{163} conviction,\textsuperscript{164} demise,\textsuperscript{165} and success on appeal.\textsuperscript{166} Because the DPA and NPA

\textsuperscript{160} The DOJ Antitrust Division’s Competition Policy, Economic Regulatory, and Economic Litigation sections, for example, have economists on staff working with litigators as well as forming economic policy. See http://www.usdoj.gov/atr/sections.htm#ers (last visited Aug. 18, 2009).


\textsuperscript{162} See, e.g., Finder & McConnell, supra note 47, at 1.

\textsuperscript{163} Arthur Andersen, formerly one of the major auditing firms, was criminally investigated for destroying Enron-related documents. See generally Elizabeth K. Ainslie, Indicted Corporations Revisited: Lessons of the Arthur Andersen Prosecution, 43 AM. CRIM. L. REV. 107, 107 (2006). Arthur Andersen was charged with a single count indictment for obstruction of justice, and a federal jury in Houston, Texas convicted. Id. Although its conviction was affirmed by the Fifth Circuit, a unanimous Supreme Court reversed and remanded Arthur Andersen’s conviction. Arthur Andersen, LLP v. United States, 544 U.S. 696 (2005) (holding that the jury instructions failed to convey properly the elements of "corrupt persuasion" for a conviction under 18 U.S.C. § 1512(b)).

\textsuperscript{164} Arthur Andersen, LLP, 544 U.S. at 698.
approaches benefit both the defendant and the government by lowering the risk to success posed by trial and appeal, being less costly to litigate, and offering some control over the outcome, there is incentive to negotiate against criminal prosecution.\textsuperscript{167} Furthermore, the government avoids the high burden of proof beyond a reasonable doubt, while the corporation avoids the risk of collateral damage such as debarment if convicted,\textsuperscript{168} or exposure to civil lawsuits riding the coattails of the criminal litigation.\textsuperscript{169}

Presently, corporate criminal fraud is one of many areas of concern in the Criminal Division of the DOJ.\textsuperscript{170} The Assistant Attorney General for the Criminal Division also has responsibility over such diverse criminal sections, such as the gang unit, the capital case unit, the child exploitation and obscenity section, the organized crime and racketeering section, the

\textsuperscript{165}It was the criminal indictment and not the conviction that sealed Arthur Andersen’s fate. See Finder & McConnell, \textit{supra} note 47, at 3.

\textsuperscript{166}Arthur Andersen, LLP, 544 U.S. at 708 (unanimous decision); HARTLEY, \textit{supra} note 18, at 60-62; Ainslie, \textit{supra} note 163, at 123.

\textsuperscript{167}See Finder & McConnell, \textit{supra} note 47, at 3; Ramirez, \textit{Science Fiction}, \textit{supra} note 46, at 951-53 (discussing the use and benefits of deferred prosecution agreements).

\textsuperscript{168}See Ramirez, \textit{Science Fiction}, \textit{supra} note 46, at 944 (identifying collateral consequences of corporate convictions may include “debarment from government contracting, treble civil damages, shareholder derivative actions, [and] regulatory fines”), and 949-51 (further describing the impact of debarment on a corporation, especially exclusion provisions known as the “death penalty” in health care fraud cases); Kurt Eichenwald, \textit{HCA to Pay $95 Million in Fraud Case}, N.Y. TIMES, Dec. 15, 2000, at C1 (reporting that “[a]lthough the practices involve widespread criminal actions in HCA’s hospital system, the guilty pleas will be formally entered by two inactive subsidiaries”).

\textsuperscript{169}See Ramirez, \textit{Science Fiction}, \textit{supra} note 46, at 946 (“civil lawsuits based upon the underlying proven criminal conduct can be even more injurious because the standard of proof for establishing civil liability is lower than the “beyond a reasonable doubt” standard mandated in criminal prosecutions”); Khanna, \textit{supra} note 147, at 32 (observing that corporations would prefer criminal legislation to civil suits because the is greater private civil enforcement and higher criminal procedural standards).

\textsuperscript{170}Carrie Johnson, \textit{Justice Department Putting New Focus on Combating Corporate Fraud}, WASH. POST, Feb. 12, 2009, at A06 (“Justice Department and FBI officials [told] lawmakers that they are looking into more than 530 cases of alleged corporate malfeasance” and FBI Deputy Director Pistole said the bureau “is ’doing a complete scrub of all resources’ to ensure that enough agents are assigned to corporate investigations”).
narcotic and dangerous drug section, just to name a few. Given such broad authority and responsibility, it is not surprising that corporate crime is not given full attention until a pattern of criminality erupts into a crisis, such as the savings and loan crisis, the corporate accounting fraud crisis, or the more recent subprime mortgage crisis. Just as the Antitrust Division has had success in addressing anticompetitive practices among corporations and the Environment and Natural Resources Division has pursued environmental crimes, the Corporate Crimes Division would likely enjoy similar success. Led by the policy and regulation section, the Corporate Crimes Division could anticipate risks of corporate criminality and promote legislative stopgaps, or at the very least could recognize patterns of corporate criminality at an early stage and prosecute the criminal trailblazers. Earlier prosecution could deliver a message of deterrence to those who might follow, rather than waiting until wrongdoing reaches a crisis stage and then lobbying Congress and the White House for additional resources. Early intervention and pursuit of criminal conduct would reduce the social harm by protecting the American business


173 See Russell Mokhiber, Top 100 Corporate Criminals of the Decade, Corporate Crime Reporter, http://www.corporatecrimereporter.com/top100.html (last visited Aug. 18, 2009) (listing the top 100 companies by size of criminal fine imposed during the 1990s). Six out of the top ten fines were for antitrust crimes, as were twenty of the top one hundred. Id. Thirty-eight of the top one hundred fines were for environmental crimes. Id. Thus, together pursuit of antitrust and environmental crimes accounted for nearly three-fifths of the top one hundred criminal fines levied against corporations. See id.

174 See, e.g., Lichtblau et al., supra note 111, at Al (describing how warnings of the mortgage fraud crisis by the FBI as early as 2004 went unheeded, and requested for additional resources were ignored).
sector’s reputation and avoid risking vast sums of American taxpayer dollars in another bailout.

Given the complexity of corporate crime, the need to continue to coordinate inter-agency efforts with investigating agencies is critical to successful investigations and prosecutions. The Corporate Crimes Division would retain the task forces described above, replacing the current chairpersons with the Assistant Attorney General of the Corporate Crimes Division, or the appropriate Assistant or Deputy Attorney General of the particular related litigating section. Presently members of the Corporate Fraud Task Force include Criminal Division leaders, including the Assistant Attorney Generals for the Criminal Division and Tax Division, the Director of the FBI, several U.S. Attorneys in larger districts across the country, the Treasury and Labor Secretaries, Chairpersons of the Securities and Exchange Commission, the Commodities Futures Trading Commission, the Federal Energy Regulatory Commission, the Federal Communications Commission, the Director of Federal Housing Enterprise Oversight

175 See Ramirez, Science Fiction, supra note 46, at 994-95. “Foreign investor confidence in U.S. businesses is influenced by the perception of the integrity of U.S. financial markets. Thus, confidence in U.S. businesses can lower the cost of capital by reducing interest rate, which is beneficial to all U.S. investors.” Id. at 1000-01.


177 See Johan A. de Bruijn & Ernst F. ten Heuvelhof, Policy Networks and Governance, in INSTITUTIONAL DESIGN 161, 162, 173-75 (David L. Weimer ed. 1995) (addressing strategic concepts of network management and network restructuring). The authors observe:

Creating stability and points of reference in a network is considered . . . a[n] important aspect of network management. One approach to reducing instability and the uncertainty it produces is for organizations to develop more credible relations by sharing members. These members, as in interlocking directorates, can convey reliable information between organizations to facilitate coordination.

Id. at 174. The task forces can approximate in government the interlocking network management for investigative and prosecutorial offices and divisions within and outside of the DOJ. In maximizing use of task forces, however, the participants must perceive that there is a “net benefit” in information sharing providing a “cooperative surplus” for each agency or office, perhaps in the form of recognition for its contribution to any subsequent convictions. See id. at 175.
Office, and the Chief Postal Inspector. This task force represents “the talents and experience of thousands of investigators, attorneys, accountants, and regulatory experts.” With a Corporate Crimes Division in place, the goal would be to further develop the relationships among these agencies not just at the managerial level, but more deeply in the organizations, potentially even drawing some experts from the agencies into the Corporate Crimes Division litigating sections as permanent members of the Corporate Crimes Division. In addition to permanent employees of the Corporate Crimes Division, cross-designations between agencies, such as the SEC and the DOJ could be implemented so that an SEC attorney or investigator could cross into the Division temporarily to aid in an ongoing case or set of cases.

Some expertise would be permanently associated with a particular litigating section, as distinguished from being assigned to the Economic and Financial Analysis section. Thus, securities investigators would be hired as part of the financial fraud section, for example, and would include financial analysts and economists, whereas engineers or logisticians would be hired as part of the procurement fraud section, and nurses or other medical experts would be hired as part of the health care fraud section. Dedicated professionals and investigators within

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178 See CORPORATE FRAUD TASK FORCE 2008 REPORT, supra note 56, at ii.

179 See id. at iii.

180 See de Bruijn & ten Heuvelhof, supra, note 177, at 175 (“Network management can be viewed as the reworking of relations in such a way that the goals of individual actors and those of the governing actor are sufficiently congruent to offer mutual benefits from cooperation.”).


182 See NATIONAL PROCUREMENT FRAUD TASK FORCE PROGRESS REPORT 2008, supra note 56, at 39 (the task force is creating an expert witness directory to identify “individuals with expertise in subjects relevant to procurement fraud prosecution.”).
the Division could ease the burden on the FBI and provide institutional consistency. Some experts would be available on a broader scale throughout the Corporate Crimes Division, assigned to the Economic and Financial Analysis section,\textsuperscript{183} such as forensic accountants, whose expertise may be as useful in uncovering investment fraud, as it would be in uncovering health care fraud.\textsuperscript{184}

One critical feature of this proposal is retaining local authority to prosecute corporate crime with the U.S. Attorneys Offices throughout the country. As was discussed above, several of the offices, especially those in major metropolitan areas with active financial centers, have been essential to the success in corporate crime fighting thus far.\textsuperscript{185} Those offices may already have separate financial fraud units operating within the larger USAO, and even if no separate section is devoted to corporate crime, many offices retain experienced litigators who are assets to the DOJ and have been highly successful in litigating these types of cases in the past.\textsuperscript{186} If a Corporate Crimes Division were adopted, some of these litigators may wish to transfer into the Division and provide foundational expertise to its operation. Another contribution to the Division’s mission could be gained through their participation in training new lawyers and updated training through the National Advocacy Institute. As described above, one

\textsuperscript{183} See, e.g., supra text accompanying note 160.


\textsuperscript{185} See supra text accompanying note 113. U.S. Attorney Offices may continue to pursue cases, especially larger offices with dedicated sections to securities fraud or corporate crime, such as the N.D. of California (San Francisco), which has the Securities Fraud Section and a White Collar Crime Section as part of its Criminal Division, or the Eastern District of Pennsylvania (Philadelphia), which has a Financial Institution Fraud Section and a Government and Health Care Fraud Section as part of its Criminal Division. See \url{http://www.usdoj.gov/usao/pae/about.html}.

\textsuperscript{186} See, e.g., \textit{id.}
responsibility of the new division would be promoting and developing training in the detection, investigation, and prosecution of corporate crime. Retaining authority within the local offices would also contribute to the improved institutional design because it would allow for both centralized direction and oversight by the division, as well as creativity and localized cultural understanding by the USAO.¹⁸⁷

Moreover, retention of litigating authority with local U.S. Attorney’s Offices would advance the key feature of the Corporate Crimes Division: using the Division to pursue large-scale corporate criminality, either because of the size of the corporation, the scope of the fraud, or the multidistrict extent of the fraudulent activity. Corporate fraud cases are time-consuming to investigate and costly to prosecute relative to other criminal and civil matters.¹⁸⁸ One study of local prosecutors concluded that “[t]he evidence suggests that whenever economic crime units (ECUs) have been established as a device for more effectively prosecuting white collar crime, the units place protecting the property interests of corporations and other organizations ahead of protecting individual citizens from corporate wrongdoing.”¹⁸⁹ Because of the resource demands of corporate fraud prosecutions, U.S. Attorneys offices are most likely to only pursue low

¹⁸⁷ See Eisenstein, supra note 145, at 223-26 (recounting the arguments supporting decentralized organization in the DOJ that promotes local U.S. Attorney’s Office autonomy). Among arguments supporting local autonomy is the recognition that local prosecutors have a more “intimate understanding” of the local community including its leaders, its diversity, and the impact of these on case selection (such as the attitudes of potential jurors to particular crimes), as well as a clearer picture on the full scope of pending litigation in the district. Id.

¹⁸⁸ See Michael L. Benson & Francis T. Cullen, Combating Corporate Crime 66 (1998) (“Because corporate crimes are committed in organizational settings, they can be troublesome to detect, investigate, and prosecute. . . . Prevailing in such complicated cases is difficult even for experienced, well-funded federal prosecutors.”); Brown, supra note 95, at 527-28 (discussing the difficulty in detection, the complexity of financial records, and the comparatively overwhelming resources of corporate conglomerates as compared to government resources to fight corporate crime).

¹⁸⁹ See Friedrichs, supra note 10, at 278; Gurney, Factors Influencing the Decision to Prosecute, supra note 143, at 622-23; Joan Neff Gurney, Implementing a National Crime Control Program—The Case of an Economic Crime Unit, in Implementing Criminal Justice Policies 33, 43-45 (Merry Morash, ed. 1982).
hanging fruit, that is, the cases that are easier to investigate and prosecute. Restructuring the DOJ’s approach to corporate fraud cases would not eliminate authority of the USAOs to pursue such cases, and indeed, some offices would likely continue to vigorously pursue larger cases, especially where local corporations are involved.

On the other hand, prosecuting such cases through the Corporate Crimes Division would offer several advantages depending upon the circumstances. First, in instances where the suspected activity is occurring in a particularly large corporation or spanning multiple judicial districts, the Division could step in with the expertise and resources available to the Division without draining resources away from the local U.S. Attorney’s Office. Second, decisions regarding investigating and prosecuting a corporation made by a regionally based office or the Division headquarters could minimize any political influence that might interfere when district offices pursue local businesses, threatening local jobs or risking political careers. Third, many prosecutors eventually leave government service and go into private practice, and therefore are dependent upon the local businesses as future clients or sources of income. A Corporate Crimes Division would be exempt from local pressures in assessing whether to investigate and prosecute a case against an influential major corporation.

190 See Gurney, Factors Influencing the Decision to Prosecute, supra note 143, at 619 (in her study of a local county economic crimes unit, Gurney observed that “[t]he pressure to produce convictions coupled with limited resources produced a situation conducive to selecting cases for prosecution which could be prepared for trial quickly and easily and which had a strong probability of success.”). In a study of local prosecution of corporate crime, over half of the respondents indicated that “insufficient investigative or prosecutorial personnel ‘definitely’ or ‘probably’ would limit their willingness to prosecute.” BENSON & CULLEN, supra note 188, at 79.

191 See supra text accompanying note 189.

192 See FRIEDRICH, supra note 10, at 278. To address retention issues, the DOJ Tax Division requires all new attorney hires to serve four continuous years with the Division. U.S. Dep’t of Justice, Tax Division, Working for Us – Attorneys, http://www.usdoj.gov/tax/career_atty.htm (last visited Aug. 18, 2009). This retention policy is not part of the Corporate Crimes Division proposal.
The operational headquarters for the Corporate Crimes Division would presumably be centralized in Washington, D.C., like the other DOJ Divisions. Such a centralized location would permit ease of exchange of ideas and encourage cooperation with other divisions and agencies headquartered in Washington, D.C. Additionally, regional offices (also known as “field offices”) could be established as they are for the Antitrust Division. Field offices are given primary responsibility for cases arising out of assigned regions, for example, the Antitrust Division’s Chicago Field Office, located in Chicago, is assigned a region that includes all or part of twelve northern Midwestern states. In selecting cities for regional office locations, one could choose major financial centers recognizing that the local U.S. Attorney’s office will likely have expertise already and that there may be overlap in coverage, or one could choose centrally located metropolitan areas with efficient transportation systems affording easy access the entire region.

C. Corporate Fraud Division Versus Corporate Crimes Division

The above proposal contemplates a division focused upon criminal investigation and enforcement. One possible variant on this proposal, however, is to create a Corporate Fraud


Division rather than a Corporate Crimes Division to incorporate the possibility of utilizing the expertise of the division to pursue corporate violations that do not rise to the level of a criminal violation. Other DOJ litigating divisions such as the Tax Division and the Environment and Natural Resources Division include both criminal litigation sections and civil litigation sections. Several issues would arise in extending the division’s reach to include civil enforcement. First, there is the potential overlap of authority on the civil cases with other administrative agencies. Second, there is the likelihood of parallel investigations since many corporations violate both civil and criminal laws.

Early in an investigation, the question of whether conduct violates both criminal and civil laws may not be obvious. The Corporate Crimes Division would be responsible for investigating


198 This might be true especially in securities cases where the Securities and Exchange Commission is authorized to bring enforcement actions. See 5 U.S.C. § 551 et seq.; 17 C.F.R. Part 201. “When an SEC investigation uncovers potential securities violations, the violation usually is handled through administrative procedures set forth in the Administrative Procedure Act. The Commission may issue subpoenas, formal orders of investigation, or other means necessary to enforce the federal securities laws or to investigate any form of non-compliance with the securities laws.” PAMELA H. BUCY, WHITE COLLAR PRACTICE 331 (3d ed. 1998). Most criminal cases begin with the SEC’s initial investigation using its broad subpoena powers; once the SEC determines a violation was committed “willfully,” it may recommend the case for prosecution to the DOJ. Id.

corporations, but since a corporation can act only through its agents, individuals would also be subject to prosecution by the Division. If instead, a Corporate Fraud Division was created to include a civil enforcement section, care would have to be taken to follow DOJ procedures regarding parallel investigations and to protect the constitutional rights afforded individuals in criminal proceedings. Parallel proceedings raise the specter of constitutional disputes arising out of the additional constitutional protections afforded to a criminal defendant as well as differing rules of procedure. Potential issues created by parallel proceedings include protecting a defendant’s Fifth Amendment right against self-incrimination, threats to a defendant’s due process rights because of the more generous civil discovery provisions, and undermining a defendant’s Sixth Amendment right to effective assistance of counsel through use of civil discovery that can lead to production of documents in the civil litigation that would be harmful to the defendant’s interests in criminal litigation. Furthermore, ethical issues and charges of prosecutorial misconduct might arise through defendant claims of unfair pressure by the prosecution to negotiate a civil settlement unfavorable to the defendant corporation so that

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200 BRICKLEY, *supra* note 35, at §§ 3:01-:11 (describing the theories by which corporate criminal liability may be imputed through the acts of its agents).


the defendant might avoid the significant collateral consequences that might accompany a
criminal prosecution.\footnote{See Andrew Weissman & David Neuman, \textit{Rethinking Criminal Corporate Liability}, 82 \textit{Ind. L.J.} 411, 414-15 (2007) (arguing that settlements after Enron suggest that even a powerful corporation will “cave under pressure to settle to an avoid indictment, even an unjust one”); Sharon Finegan, \textit{The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law}, 111 \textit{Penn. St. L. Rev.} 625, 666 (2007) (discussing the pressure on corporations to agree to civil settlements to avoid greater criminal liability).}

A critical feature to put in place if the Division were structured to address both criminal
and civil investigations would be to have two Deputy Assistant Attorney Generals, one to head
the criminal enforcement sections, and the other to oversee the civil enforcement sections.\footnote{See Appendix.}
The civil side could duplicate the specialty litigating sections, including a financial fraud section,
government procurement fraud section, health care fraud section, and foreign commerce section.
In contrast, the appellate section, the legislative policy and regulation section, and the Economic
and Financial Analysis section would serve the entire division both in providing expertise,
training, and consistency in policy application.

\textbf{D. Challenges to Creating a Corporate Crimes Division}

The National Security Division of the Department of Justice was established on
September 28, 2006, to protect America “against international and domestic terrorism and other
This was “the first new Department of Justice division in almost 50
years.”\footnote{\textit{National Security Division Progress Report, supra} note 206 (Message from the Assistant Attorney
General, dated Mar. 28, 2008). The DOJ Civil Rights Division was created in 1957. The Civil Rights Act of 1957,}
between agencies, and coordinate efforts within the DOJ, the federal government, the state governments and the local governments to “enhance our ability to defend against terrorism.”

Just as the National Security Division was created to address the pressing issue of terrorism, the Civil Rights Division was established on the heels of the landmark U.S. Supreme Court decision, *Brown v. Board of Education*, overturning the “separate but equal” doctrine, and the Antitrust Division was formed to enforce the Sherman Act and break up the monopoly power of powerful trusts during the Progressive era. The time has come to once again call together the forces of the Department of Justice to face off against a powerful challenge to the security of the United States. Creating a Corporate Crimes Division has logical support in the consolidation of resources and expertise, as well as in addressing a scourge that is costing the American taxpayers billions of dollars, and untold value in reputation. Yet, there are some potential challenges to its creation that must be considered including the risks inherent in consolidating governmental power, the potential backlash to the disruption of the status quo, and the probable lack of support from powerful corporate interests that may have the most to lose from a concerted effort to address corporate criminality.

Promoting a division dedicated to the pursuit of addressing corporate crime consolidates power that is presently spread among several DOJ divisions and throughout the U.S. Attorneys offices across the United States. The primary risk in consolidating power is that it simplifies the

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208 NATIONAL SECURITY DIVISION PROGRESS REPORT, supra note 206, at 1.


opportunity to abuse power more directly. Although the U.S. Attorney General, the top
deputies, and the U.S. Attorneys in each district are political appointees, and the Department of
Justice is staffed with attorneys who remain across administrations and through this staff, the
DOJ has had a history of nonpartisanship in the exercise of prosecutorial decision making. However, the U.S. Attorney scandal that began in December 2006, and erupted in January 2007
is evidence that abuse of discretion is possible even within the halls of Justice. The
restructuring proposed here would place primary authority for setting policy and seeking
resources within the hands of a few, and with fewer persons making decisions regarding
prosecutions, there is more opportunity for capture and the potential to thereby limit prosecutions
overall. Moreover, although the U.S. Attorneys offices would retain authority to pursue


212 See McKay, supra note 211, at 265, 279-80; Berger v. United States, 295 U.S. 78, 88 (1935) (observing that the U.S. Attorney “may strike hard blows, [but] he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”).


214 Capture occurs when an agency, though created for the public’s interest, actually works in favor of the parties the agency was designed to regulate. See John Shepard Wiley, Jr., A Capture Theory of Antitrust Federalism, 99 HARV. L. REV. 713, 715, 725-26 (1986); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 29 (1971); Joel A. Mintz, Has Industry Captured the EPA?: Appraising Marver Bernstein’s Captive Agency Theory After Fifty Years, 17 FORDHAM ENVTL. L. REV. 1 (2005) (discussing how the "captive agency theory" conceptualized by Bernstein still has viability today in explaining the behavior of federal regulatory agencies in the 21st century). Capture is the result of lobbying, corporate consolidation, and a revolving door in which regulators ultimately work for the businesses they regulate. See MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955). A recent example would be former Treasury Secretary Henry (Hank) Paulson, who worked in the Pentagon from 1970-72, joined Goldman Sachs in 1974 and rose to chairman and C.E.O. of the company. See Landon Thomas, Jr., A Change at Treasury: Man in the News, N.Y. TIMES, May 31, 2006, at C1, available at 2006 WLNR 9291558 (recounting Paulson’s career both in and out of the government, his 32 years at Goldman (those who know him say he “bleeds Goldman blue”), and Goldman’s historical commitment to public service with many partners pursuing careers in Washington); Reuters, Goldman Gives Ex-Chief $18.7 Million Bonus, N.Y. TIMES, Jul. 4, 2006, available at 2006 WLNR 11509722. While in that position, he was tapped by the George W. Bush administration to be Treasury Secretary in 2006, and was a principal architect of the bailout programs in late 2008 and early 2009. See Jenny Anderson, Goldman Chairman Gets a Bonus of $53.4 Million, N.Y. TIMES, Dec. 20, 2006, at C2,
corporate crimes, one can envision an inability for such offices to garner more resources in that quest if there is a Division that is primarily accountable for such prosecutions. Central authority could limit the effectiveness of the pursuit of corporate criminality in any number of ways short of refusing cases. Some possibilities would be to create policies to pursue almost exclusively non-prosecution agreements or deferred prosecution agreements, to narrow the scope of the cases by size of corporation or size of loss to exclude many potential defendants, to limit funding for the division or investigators to pursue leads, or to impose administrative burdens upon the line attorneys recommending prosecution than would be encountered within the U.S. Attorneys offices. Although the corporate fraud task force and the U.S. Attorney offices can act as a

available at 2006 WLNR 22158859 (reporting that the new Goldman Sachs bonus comes as a result of record profit at Goldman Sachs six months after its former chairman and C.E.O., Henry Paulson, was selected as U.S. Treasury Secretary). When AIG released the list of beneficiaries from the federal bailout money it received, Goldman Sachs was at the top of the list, receiving $12.9 in payments owed from AIG. Mary Williams Walsh, A.I.G. Lists Firms to Which it Paid Taxpayer Money, N.Y. TIMES, Mar. 16, 2009, at A1, available at 2009 WL 4966733; William D. Cohan, Big Profits, Big Questions, N.Y. TIMES, Apr. 15, 2009, at A27, available at 2009 WLNR 6991433. Only months following a government bailout, Goldman Sachs continues to emerge from the financial crisis in strong shape, gaining market share from former rivals such as Bear Sterns and Lehman Brothers, taking on additional risk, and earning record second quarter profits in 2009 that surpass its earnings for all of 2008. Susanne Craig & Aaron Lucchetti, Goldman Gains on Rivals’ Pain, WALL ST. J., July 15, 2009, at A1.

In the face of the Bernie Madoff scandal, the SEC has been accused of being a captive agency that “roar[s] like a lion and fight[s] like a flea.” See Testimony of Harry Markopolis, supra note 21 (at p.10 of printout, but testimony is unpaginated).

A study of cases brought by Antitrust Division from 1955-1994 determined that a increase in the DOJ’s budget allocation to the Division had a “strong positive impact on the number of cases initiated” by the Division. See Vivek Ghosal & Joseph Gallo, The Cyclical Behavior of the Department of Justice’s Antitrust Enforcement Activity, 19 INT’L J. OF INDUS. ORG. 27, 27 & 48 (2001). In reaching this conclusion, the study specifically considered and refuted the possibility that funding followed increases in case activity. Id. at 42, 48.

For example, the FBI shifted investigators from white collar criminal investigations to address national security issues after 9-11. See Lichtblau et al., supra note 111, at Al (loss of 625 agents, or 36% of its 2001 levels of staffing for White Collar Crime investigations), available at http://www.nytimes.com/2008/10/19/washington/19fbi.html?ei=5070&emc=etal. Despite pleas for more money and bodies to address rise in corporate crime, those requests were ignored by the Bush administration. Id. In 2003 and 2004, the FBI began requesting more money to investigate financial fraud in housing markets, but was rebuffed by the Justice Department and budget office; overall, the agency lost 132 agents from 2001-2007, despite requests for increase of more than 1100 agents, and only 15 full-time agents devoted to mortgage fraud. Id.

For example, the Antitrust Division has a policy that requires staff to create case recommendation memoranda for recommending indictment that can be lengthy, thereby causing delays for prosecution. U.S. Dept. of Justice,
check on the power of the Division, this risk persists more or less depending upon the administration’s support for vigorous prosecution of corporate criminality. The power to abuse is already present in the current institutional structure, primarily through deprivation of resources; however, centralizing authority within a DOJ division slightly enhances that risk.

Nevertheless, centralizing responsibility by implementing a Corporate Crimes Division would provide the benefit of enhanced transparency in assessing the level of support for corporate crime fighting. The current structure makes it impossible to assess what resources are dedicated to fighting corporate crime. Thus, if an administration chooses to decrease enforcement measures against corporations, it is difficult to sort through budgets of the various divisions, litigating sections, U.S. Attorneys Offices, task forces, and investigative agencies to identify committed resources. While creating a new division would leave many of these participants in place, having a centralized body accountable to the DOJ, the White House, Congress, and the American people would incentivize the administrators of the division to

Antitrust Division Manual, Investigation and Case Development III-119 (4th ed. 2008) (G.2. Case Recommendation Procedures), available at http://www.usdoj.gov/atr/public/divisionmanual/chapter3.pdf (last updated Dec. 2008). “The case recommendation package submitted by staff should typically consist of the case recommendation memoranda, draft pleadings, a proposed press release (where applicable), and any other documents deemed most relevant to a full consideration of the case, including its critical and contested elements, and its strengths and weaknesses.” Id. at III-120. “Staff’s case recommendation memorandum should generally not exceed thirty (30) pages, except in appropriate circumstances (e.g., multi-count, multi-defendant indictments) . . . .” Id. at III-125. Of course, a thorough case recommendation analysis has the benefit of anticipating and critically analyzing potential pitfalls in the case and thereby may result in stronger cases. Id. at III-119-120.

218 See Eisenstein, supra note 145, at 226.
219 In ignoring pleas for more resources to combat fraud, the White House and Treasury indicated, ironically, to DOJ and FBI that the agencies were taking an “antibusiness attitude” that could chill corporate risk taking. See Lichtblau et al., supra note 111, at Al.
220 See id.; supra text accompanying note 215, discussing impact of financial resources on success of Antitrust Division.
221 See supra text accompanying notes 92 & 93, discussing difficulty in counting cases.
demonstrate the effectiveness of its efforts. Thus, a full accounting still may not be available, but a critical measurement could be taken. Finally, in addition to federal resources expended to pursue corporate crime, states attorneys’ general also remain available to pursue such crimes and have been a force in addressing corporate fraud locally. Action by state attorneys general may call attention to lack of federal activity and spur federal investigations and prosecutions.

Another challenge to implementing a Corporate Crimes Division could be internal resistance to institutional reform. The movement of certain litigating sections into the Corporate Crimes Division could meet resistance from within the Criminal Division (and the Civil Division if a Corporate Fraud Division is pursued). Although the corporate fraud cases are only a fraction of the overall responsibilities for those divisions, and although major fraud cases often consume a disproportionate share of resources on a per case basis, successful negotiation of a plea or settlement can lead to large fines. These fines, when averaged with the other cases pursued by

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222 See ROBERT E. GOODIN, THE THEORY OF INSTITUTIONAL DESIGN 60-62 (1996) (observing that under ideal institutional design, “a suitable pattern of screens and sanctions” should be developed to “promote a procedurally conscientious and public-spirited performance” on the part of public agents).

223 See, e.g., Segal, supra note 115, at A1 (reporting on the efforts of states attorneys general prosecute loan processors, mortgage brokers, and bank officers embroiled in the sub-prime mortgage crisis).

224 See id.

these divisions, can enhance the statistics for the division.\textsuperscript{226} Moreover, even though the
attention to corporate fraud can be easily shifted by national crisis, such as the shift of resources
to fight terrorism after the September 11, 2001 attacks, netting a large fine from a major
corporation, even if only occasionally, yields positive press. Consequently, one could envision
internal resistance to the creation of a new division that plunders from the power structure of the
well-established Criminal Division (and possibly, the Civil Division). Indeed, expanding the
new division to encompass both civil and criminal enforcement through a Corporate Fraud
Division, would invite twice the resistance in that it would draw resources away from two
divisions.\textsuperscript{227} Any resistance might be especially forthcoming in the aftermath of the creation of
the National Security Division, which also pulled forces from the Criminal Division. Yet, one
could argue that the need for both the National Security Division and the Corporate Crimes
Division arose out of the overwhelming bundle of matters handled by the single Criminal
Division, and the failure of the federal government to effectively fight threatening criminality
that undermines our national security. Quite likely removing segments from the Criminal
Division will enhance its functioning through better streamlining, while opening opportunity to
focus upon the detection, investigation and prosecution of corporate wrongdoing.

A final challenge raised in the context of this article is the likelihood of political
resistance to institutional reform. An underlying factor of superior institutional design is the

\textsuperscript{226} See, e.g., U.S. DEP’T OF JUSTICE, FY 2008 PERFORMANCE AND ACCOUNTABILITY REPORT II-11 to II-32, available at
http://www.usdoj.gov/ag/annualreports/pr2008/Table ofContents.htm; Gurney, Factors Influencing the Decision
toProsecute, supra note 143, at 619 (recognizing the “pressure to produce convictions coupled with limited
resources”).

\textsuperscript{227} See, e.g., 2008 BUDGET AND SUMMARY REPORT, U.S. DEP’T OF JUSTICE, available at
DIVISION, ACTIVITIES REPORT (Fiscal Year 2008), available at
political support necessary to implement change. Politics is influenced by money and power.\footnote{See Olson, supra note 214, at 141-43 (observing that the interests of American businesses are well represented in American politics despite its comparatively small size relative to labor organizations). “The number and power of the lobbying organizations representing American business is indeed surprising in a democracy operating according to the majority rule. The power that the various segments of the business community wield in this democratic system, despite the smallness of their numbers, has not been adequately explained.” Id. at 142. “The multitudes of workers, consumers, white-collar workers, farmers, and so on are organized only in special circumstances, but business interests are organized as a general rule.” Id. at 143.}

Those with economic means and power are often leaders in the business community who are frequently disinterested in aiding governmental oversight,\footnote{See Richard A. Posner, Theories of Economic Regulation, 5 Bell J. Econ. & Mgmt. Sci. 335, 343 (1974) (stating the economic theory of regulation rejects the use of the term “capture” as “inappropriately militaristic,” but recognizes that private interests may subvert regulation)); Arthur Levitt, Take on the Street 106-15 (2002) (SEC chair Arthur Levitt recounts how “the business lobby” and “CEOs” successfully used Congress and the SEC to thwart reform efforts, such as that by the Financial Accounting Standards Board to require that options be expensed on corporate income statements); Amy Borus, SEC Reforms: Big Biz Says Enough Already, Bus. Week, Feb. 2, 2004, at 43 (detailing the efforts of corporate managers to stifle proxy reform); Amy Borus & Mike McNamee, A Legacy that May not Last, Bus. Week, June 13, 2005, at 38 (discussing business lobbying efforts to frustrate proxy reform).} and far more interested in co-opting political leaders for governmental support of deregulatory measures.\footnote{See, e.g., Robert Manor & Stephen J. Hedges, Grahams Regulated Enron, Benefitted from Ties, Chi. Trib., Jan. 18, 2002, at 17, available at 2002 WLNR 12588287 (reporting on the close relationship between Enron and Senator Phil Graham and his wife, Wendy Graham, former chairwoman of the Commodity Futures Trading Commission). As chairwoman for the CFTC, Wendy Graham moved to lift governmental oversight on energy contracts that Enron and others traded, six days before she resign her post and five weeks later joined Enron’s board of directors. Id. In December 2000, Senator Graham sponsored the Commodity Futures Modernization Act, which included an exemption of electronic energy exchanges and is known as the so-called “Enron loophole,” “turning his wife’s deregulation decision into law.” Id.; Ginger Szala, On Second Thought, 36 Futures Ch. 10, Sept. 1, 2008, 2007 WLNR 17122395. Senator Graham had received more than $97,000 in campaign contributions from Enron. See Manor & Hedges, supra.} The struggle against powerful business interests using financial measures to gain the support of politicians is not new.\footnote{See DERBER, supra note 21, at 23-25 ( “A Gilded Age business leader wrote, ‘It matters not one iota what political party is in power or what president holds reins of office.’ The barons had no sentimental loyalty to either Democrats or Republicans because both had become parties of business, a pattern increasingly in evidence today.”); Sutherland, supra note 128, at 7-10.} Nevertheless, these are challenging times. Economic crisis abounds and in an effort to avoid greater financial downturns, the government is bailing out those who caused the crisis at the expense of those who were most harmed. Since reform is often a matter of striking when the
iron is hot,\textsuperscript{232} one must grant that the heat is full on.\textsuperscript{233} If the current administration seeks change, there is unlikely to be a better time than now.

V. Conclusion

The struggle to address corporate crime has increased as the costs of corporate crime continue to mount. Just as the physical threat of global terrorism threatens the security of people everywhere and requires a concerted effort to command a defense, so too do the costs of corporate crime as it undermines security, creating dependency on foreign capital, destabilizing financial markets, destroying personal savings, and diverting public resources from benefitting the greater good to bailing out the corrupt.

Corporations are not inherently evil, but are structured to pursue profit and minimize firm costs, frequently by shifting those costs to others. Creating a Corporate Crimes Division provides a superior institutional design that can marshal the resources and the expertise necessary to direct a concerted assault on corporate crime.

“[S]mall changes can have large democratizing effects.”\textsuperscript{234} Creating a Corporate Crimes Division to focus national policy and to pursue fraudulent activity at the outset will undermine the temptation of big business to pursue profits at any cost and protect individual investors and the public fisc from the fallout of corporate crimes. Benefits gained from a cohesive national pursuit of corporate criminality well outweigh any risks associated with such a pursuit.

\textsuperscript{232} Mary Kreiner Ramirez, Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power, 76 U. Cin. L. Rev. 183, 186 (2007) (observing that reform moments can rise to spark legislation by bringing together a coalition of willing supporters against those with power to resist reform).

\textsuperscript{233} See DERBER, supra note 21, at 333-39.

\textsuperscript{234} VERMEULE, supra note 2.
Appendix

DEPARTMENT OF JUSTICE (PROPOSED)
CORPORATE CRIMES/CORPORATE FRAUD DIVISION

Assistant Attorney General

Appellate Section

Deputy AAG Criminal Enforcement

Legislative Policy & Regulation

Economic & Financial Analysis

Deputy AAG Civil Enforcement

Financial Crimes

Procurement Fraud

Foreign Commerce

Financial Fraud

Health Care Fraud

Foreign Commerce

Procurement Fraud