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ON THE RHETORIC AND REALITY OF FIGHTING FINANCIAL FRAUD ON WALL STREET

Abstract

This article reveals the contradictions between the political rhetoric and the legal reality of contesting the Wall Street securities frauds that were responsible for the U.S. financial meltdown of 2008. In the process, it contrasts the non-criminal enforcement of the Wall Street fraudsters with the criminal enforcement or prosecution of high-profile defendants involved in major corporate frauds between 2002 and 2007 and with some 1000 prosecutions involving the Savings and Loans control frauds of the late 1980s. In light of these empirical comparisons, it suggests that when financial institutions are “too big to fail,” they are also “too big to jail.”

Keywords: Corporate Fraud, Securities Fraud, Task Forces, Wall Street.

Six weeks before Attorney General Alberto Gonzales was forced to resign from office in August 2007 for previously having approved the forced resignations of nine “liberal” U.S. attorneys, he stood before hundreds of federal prosecutors and investigators in the Great Hall of Justice to celebrate the fifth anniversary of the creation of the Corporate Fraud Task Force and to declare victory over white-collar corruption. Estab-

lished by an executive order in July 2002, this task force was President George W. Bush's signature response to what was viewed at the time as an epidemic of criminal wrongdoing in corporate America. As Bush's first Attorney General John Ashcroft had stated in his address to the CFTF's national conference on September 27, 2002:

We cannot—we will not—surrender freedom for all to the tyranny of greed for the few. Just over a year ago, Americans were called to defend our freedom from assault from abroad. Today we are called to preserve our freedom from corruption from within. You are the answerers of this call; you are the defenders of this freedom. I am grateful to you all for your leadership, and I thank you for your sacrifice and your steadfast commitment to returning integrity to American markets through justice...¹

Three months earlier, the Sarbanes-Oxley Act (SOX) had become law, endorsed by many as the most important corporate law reform measure since the passage of the securities and exchange laws of the 1930s.² While this law addresses regulatory issues such as accounting oversight, insider trading, the transparency of financial statements, auditor independency, conflicts of interests, and the resource needs of the Securities and Exchange Commission, SOX did not address the effects of the “re-opened” market conditions created by President Bill Clinton when he signed into law the Financial Services Modernization Act of 1999, which repealed that portion of the 1933 Glass-Steagall Act making “it a felony for anyone—banker, broker, dealer in securities, or savings institution—to

¹ Attorney General John Ashcroft. “Enforcing the Law, Restoring Trust, Defending Freedom.” *United States Attorney's Bulletin*. May 2003., 4.

² F.Cullen, G.Cavender, W.Maakestad, M.Benson, *Corporate Crime Under Attack: The Fight to Criminalize Business Violence*, 2nd Ed. Cincinnati, OH: Anderson Publishing, 2006., 323.

engage in the deposit-taking and securities businesses at the same time.”³ Like Dodd-Frank missed a golden opportunity to restructure securities after the Wall Street meltdown, SOX had missed a similar opportunity to reinstate elements of Glass-Steagall that could have inhibited, if not, prevented the housing boom and bust that facilitated the subsequent economic depression that we are still trying to recover from.

Otherwise known as Gramm-Leach-Bliley, the FSMA had the effect of eliminating the separation between commercial and investment banks in place since the 1930s, turning the financial markets into a free-for-all and establishing a criminogenic environment. The passage of this legislation was the culmination of economic and political elites struggling successfully to fully dismantle the regulatory regime of old, which since the stock market crash of 1929 had prevented economic meltdowns like the Wall Street catastrophe of 2007-08. It was after the 1929 crash that regulations such as Glass-Steagall were created to prevent future speculative debacles.

Lynn Turner, former chief accountant of the SEC, has argued that the existing regulatory system was not broken or outdated, but that it stood in the way of making a lot of “risky money” by way of derivatives and other types of financial instruments. In the name of opening up larger financial supermarkets and allowing “all these businesses under one roof, without a single word in the law requiring regulation of the inherent conflicts,” and by “prohibiting the SEC from being able to require regulation of investment holding companies,” Congress enabled the financial environment that would become one massive system of abuse and fraud⁴.

1. Dealing with an epidemic of corporate fraud

Both Sarbanes-Oxley and the Corporate Fraud Task Force (CFTF) responded to an avalanche of revelations occurring over an eight-month period in 2001 and 2002. Enron had collapsed in the fall of 2001. In March of 2002, Arthur Anderson, the accounting firm that handled the

³ W. Jackson, *Glass-Steagall Act: Commercial vs. Investment Banking*. Economics Division, Congressional Research Service, 1987., 3.

⁴ L. Turner, “The Systematic Dismantling of the System.” *CPA Journal*. May 2009., 16-17.

books for Enron, was charged with obstruction of justice. A few months later, Adelphia Communications announced it was adjusting its earnings statement by a billion dollars to cover hundreds of millions of dollars looted by senior executives. By the time allegations surfaced in June 2002 about the \$3 billion fraud by WorldCom executives, “the leading stock indexes seemed locked in a death spiral, with investors panicked about which public company holding their retirement funds might topple next.”⁵ As G.W. Bush told a gathering of federal prosecutors who were discussing the implications of SOX in September 2002, these “high-profile acts of deception in corporate America have shaken people’s trust in corporations, the markets and the economy. The American people need to know we’re acting, we’re moving, and we’re moving fast.”⁶

Like the CFTF, previous and subsequent white-collar task forces are essentially designed to: (1) coordinate the firepower of multiple federal law enforcement agencies, (2) deter wrongdoing in corporate suites, and (3) restore investor confidence. At the task force’s five-year commemoration, Gonzales boasted that the Department of Justice had won an unprecedented 1,236 corporate fraud convictions, including those of 214 chief executive officers and presidents, 53 chief financial officers, 23 corporate lawyers, and 129 vice presidents. The Attorney General claimed: “Our victories have been about more than just compiling statistics or making an example out of one or two bad actors. They have been about preserving the integrity of our corporate boardrooms and our financial markets...about changing a culture...about redefining the way companies do business.”⁷

On the other hand, given the number of high-profile acquittals, hung juries, and appellate reversals, not to mention “the precipitous decline in the number of major corporate fraud indictments” following Bush’s reelection in 2004, *The American Lawyer* (TAL) wanted to know: “Has the problem of corporate fraud really been solved, as Gonzales suggested at his celebration in July? Or has the Justice Department stopped trying as hard to prosecute it?”⁸ In the spring of 2006, TAL investigated the Justice Department’s record on corporate fraud prosecutions. Their massive undertaking was not made any easier by the fact that the DOJ does not keep

⁵ Daphne Eviatar, “What’s Behind the Drop in Corporate Fraud Indictments?” *Corporate Counsel*, November 1, 2007., retrieved from <http://www.law.com/jsp/cc/> (7/28/11).

⁶ Quoted in *Ibid.*

⁷ Quoted in *Ibid.*

⁸ *Ibid.*

statistics on corporate fraud (or most other serious white-collar crimes) and could not provide a complete list of the cases Gonzales had counted among his victories.

Nevertheless, *The American Lawyer* was able to create a detailed portrait of the major corporate fraud prosecutions between 2002 and 2007, by examining publicly available case records and win-loss performance statistics as well as interviewing dozens of current and former prosecutors, task force members, and white-collar criminal defense lawyers. TAL found “a highly publicized, top-down strategy that encouraged local prosecutors to charge both corporations and individual defendants with fraud.”⁹ The effort had resulted in hundreds of convictions—337 in the cases they tracked from their data on 124 investigations and 440 indictments—with the vast majority, 76 percent, coming through plea deals. Many of these corporate criminals were given significant punishments with more than fifty sentenced to upwards of five years in prison. Among those high-profile CEOs sentenced to prison were Bernard Ebbers of WorldCom and John Rigas of Adelphia.

Prosecutions of high-profile defendants were also lost or failed, some resulting from questionable tactics employed by the DOJ, such as compelling corporate defendants to wave their legal rights. From TAL’s tracking data:

- Twenty-seven defendants were acquitted at trial, including executives at Adelphia, Online Inc., PurchasePro.com Inc., and Qwest Communications Inc.
- Twenty-two mistrials occurred.
- Nine convictions were overturned on appeal, including high-profile defendants from Credit Suisse First Boston and from Merrill Lynch.

TAL’s investigation also found that after issuing detailed reports in 2003 and 2004, the task force stopped reporting its efforts in 2005, just as corporate fraud indictments slowed to a trickle. While their analyses revealed 357 indictments in major corporate cases between 2002 and 2005, there had been only 14 indictments in 2006 and 12 during the first ten months of 2007. As for such defeats in the “war on corporate crime,”

⁹ *Ibid.*

many were blamed on insufficient manpower and money to properly investigate and prosecute complex fraud cases.

For example, a co-leading prosecutor in the investigation and prosecution of former Enron chairman Kenneth Lay and CEO Jeffrey Skilling stated that the DOJ was “challenged by a lack of resources, both technical and in terms of personnel...we often felt that the defense was outgunning us on both levels.”¹⁰ David Meyer, the Principal Deputy Assistant Attorney General at the time, acknowledged that the U.S. Attorneys were not given extra staff to help prosecute corporate fraud, so they had to prioritize the cases to prosecute.

Meyer also stated that the low number of prosecutions in 2006 and 2007 had resulted from the remarkable successes of the CFTF: “You’re getting a lot more focus on compliance, and on ethics internally in corporate structures...We do believe that the success of the Corporate Fraud Task Force, in conjunction with the Sarbanes-Oxley Act, is making it more likely that fraud is being detected by corporations themselves.”¹¹ The evidence gathered by the U.S. Senate’s Permanent Subcommittee on Investigations in its final report, *Anatomy of a Financial Collapse*, tells a very different story, at least with respect to the high-stakes securities frauds and the crimes of Wall Street.

2. Not dealing with an epidemic of Wall Street financial fraud

A reduction in fraud, at least on Wall Street, was hardly the reality as portrayed by Meyer. Only eighteen months later on May 20, 2009, President Barack Obama signed into law the Fraud Enforcement and Recovery Act of 2009. The new law was designed to “improve enforcement of mortgage fraud, securities and commodities fraud, financial institutional fraud, and other frauds related to Federal assistance and relief programs, for the recovery of funds lost to these frauds, and for other purposes.”¹² Moreover, on November 13, 2009 the DOJ as part of an annual exercise announced its top ten management and performance challenges for the upcoming year. One year earlier Financial Crimes were nowhere to be found on the top ten list. In 2009, these crimes had risen to the number five position.

¹⁰ John Hueston quoted in *Ibid.*

¹¹ Quoted in *Ibid.*

¹² PUBLIC LAW 111-21—May 20, 2009. 123 STAT. 1617.

The fifth challenge also underscored that while “many types of financial fraud have increased in recent years, mortgage fraud has seen a dramatic spike, with the FBI reporting more than double the number of criminal mortgage fraud investigations over the past three years.”¹³ It was also noted that the Bureau “has seen significant growth in corporate fraud and misconduct in the securities and commodities markets at the institutional, corporate, and private investor levels” and is “currently investigating over 189 major corporate frauds, 18 of which have losses over \$1 billion.”¹⁴

A few days later on November 17th when the Obama administration unveiled its own task force to target the financial crimes that played a role in the Wall Street meltdown of 2007-08, the Attorney General, Eric Holder was joined at his side by Secretary of the Treasury Tim Geithner, Secretary of Housing and Urban Development Shawn Donovan, and the Director of Enforcement at the Securities and Exchange Commission, Robert Khuzami. During his announcement of the formation of the Financial Fraud Enforcement Task Force, Holder had this say:

We face unprecedented challenges in responding to the financial crisis that has gripped our economy for the past year. Mortgage, securities, and corporate fraud schemes have eroded the public’s confidence in the nation’s financial markets and have led to a growing sentiment that Wall Street does not play by the same rules as Main Street. Unscrupulous executives, Ponzi Scheme operators, and common criminals alike have targeted the pocketbooks and retirement accounts of middle class Americans, and in many cases, have devastated entire families’ futures.¹⁵

¹³ THE DEPUTY ATTORNEY GENERAL 2009. MEMORANDUM FOR THE ATTORNEY GENERAL. November 13.

¹⁴ *Ibid.*

¹⁵ Quoted in Joe Palazzoio, “DOJ Unveils Financial Crime Task Force.” Nov. 17, 2009., retrieved from <http://www.mainjustice.com/2009/11/17doj-to-unveil-financial-> (7/28/11.)

Reading from prepared remarks, the AG explained that the new task force to replace Bush's CFTF was larger in scope than its predecessor. Holder also emphasized that:

In the tough economic environment we face today,
one of this Administration's most important missions
is to draw upon all of the resources of the federal government to
fight financial fraud in all its forms.

The Task Force will wage an aggressive, coordinated,
and proactive effort to investigate and prosecute
financial crimes. We will marshal the criminal and civil
enforcement resources of the executive branch to
investigate and prosecute financial fraud cases;
recover stolen funds for victims, address discrimination
in lending and financial markets, and enhance
coordination and cooperation among federal, state,
local, tribal, and territorial authorities responsible for
investigating and prosecuting significant financial
crimes and violations (emphasis added).¹⁶

Back in 2009, FERA, the DOJ, and the new and improved task force on financial fraud all appeared to be on the same page as each stressed the same four areas of financial deception:

- **Mortgage fraud**, from the simplest of "flip" schemes to systematic lending fraud in the nationwide housing market;
- **Securities fraud**, including traditional insider trading, Ponzi schemes, and misrepresentations to investors;
- **Recovery Act (rescue) fraud**, to make sure the taxpayer's investment ("bailout") is not siphoned away by the dishonest few;

¹⁶ *Ibid.*

- **Discrimination**, to ensure that the financial markets work for all Americans, and that nobody is unfairly targeted based on impermissible characteristics.

In terms of how are these “policing” bodies performing? Well, let’s just say that as organizations of social control, they could not be doing more poorly than they are in achieving their official objectives.

3. Political amnesia, back to the future, and the same old empty rhetoric

By the beginning of 2012 Obama and Holder’s Financial Fraud Enforcement Network had not criminally prosecuted a single case involving any of the six largest banks in the United States. In fact, so invisible or nonexistent had the work of Obama’s first financial fraud team been, that when the President made a big deal about establishing a Financial Crimes Unit in the DOJ in his 2012 State of the Union address, few people recalled that the Obama Administration had already played the “special task force card” in its alleged fight against financial crime back in 2009. Amazingly, the “old” and the “new” financial fraud teams consisted of the same key legal, economic, and political players, including Holder, Geithner, Donovan, Khuzami, and Lanny Breuer, the head of the DOJ’s Criminal Division. All of these individuals have very close ties to the banking industry on both Wall Street and K Street.¹⁷ Not surprisingly, some five months after the announcement of the “new” FFEN task force, it has no place of work, no phone number, no email address, and no full-time office staff.

Further on down the fraudulent financial food chain, however, the Department of Justice has been busy busting and prosecuting “low-level” mortgage fraudsters. Buttressed by the actualization of the work of the Mortgage Fraud Working Group, an updated news report from June 20, 2011 covers two typical mortgage fraud cases from Operation Stolen Dreams.¹⁸ The first case involved a nine-count indictment returned from a

¹⁷ K Street refers to a geographical area in Washington, DC where the U.S. lobbying industry has set up operations.

¹⁸ OSD was the brainchild of the Financial Fraud Enforcement Task Force’s Mortgage Fraud Working Group to target fraudsters across the nation.

grand jury in Sacramento, California against Alonzo Jackson Brown III, 44, charging him with an investment fraud scheme and a mortgage fraud scheme.

In a separate and unrelated case, Leonard Bernot, 46, of Laguna Hills, California, had “pleaded guilty...before U.S. District Judge Kimberly J. Mueller to conspiracy to commit mail fraud for his part in a wide-ranging ‘foreclosure rescue’ scheme involving Head Financial Services Inc.”¹⁹ Only a little over a year before, between March 1 and June 18, 2010, Operation Stolen Dreams had become the largest collective enforcement effort to confront mortgage fraud in U.S. history. The nationwide sweep involved 1517 criminal arrests, resulting in 525 indictments representing estimated losses of more than \$3 billion. The operation also yielded “191 civil enforcement actions and the recovery of more than \$196 million.”²⁰

In reference to the Eastern District of California that charged 46 defendants with felony mortgage offenses and secured 11 guilty pleas, Herb Brown, Special Agent in Charge of the Sacramento FBI, stated that these “‘cases provide a glimpse of just how pervasive Mortgage Fraud is. We must and will continue to pursue fraudsters in the real estate and mortgage industries.’”²¹ Echoing those sentiments were U.S. Attorney Wagner for the Eastern District: “Mortgage fraud continues to be a major problem in this region, which has cost banks, borrowers, and homeowners tens of millions of dollars.” Wagner also commented that future indictments were in the works as “we will continue to pursue those industry insiders who abuse and exploit the mortgage and real estate process for their own personal gain.”²²

Of course, in the relative schemes of financial deceptions these types of frauds amount to “chump change” compared to nearly a trillion dollars in losses from the fraudulent securities actions of Wall Street. Furthermore, at the 2008 annual Minsky Conference, former Senior Deputy Chief Counsel for the Office of Thrift Supervision and white-collar criminologist William Black, provided perspective on the magnitude of these types of mortgage frauds when he underscored that the number of fraudu-

¹⁹ California RealEstateRama. “U.S. Attorney Announces Results of Mortgage Fraud Prosecutions in 12 Months Since Operation Stolen Dreams.” 2011., retrieved from <http://california.realestaterama.com/> (7/28/11.)

²⁰ *Ibid.*

²¹ Quoted in *Ibid.*

²² Quoted in *Ibid.*

lent incidents found in file reviews for fiscal year 2007 indicated around one million fraudulent loans.²³ Needless to say, the Mortgage Fraud Working Group certainly has a “caseload” too large to make much of a dent in, or to have much of a retributive effect on or to serve as restitution for, this kind of fraudulent behavior.

Inquiring minds, on the other hand, might want to know where were/are the working groups to target the other financial crimes identified not only by FERA, the DOJ, and the Obama Administration, but also from the findings of the 652-page report on *Wall Street and the Financial Crisis*? For example, where were/are the Securities and Commodities Fraud Working Group or the Financial Institutional Fraud Working Group? In terms of financial recovery, targeting these major types of frauds would considerably have upped the ante from recovering hundreds of millions or tens of billions to hundreds of billions or even trillions of dollars in lost loot and/or stolen dollars from real estate holdings, pension funds, and other institutional investments.

Take the illustration of the estimated \$5-7 trillion in lost home equities. In the case of the working group of leaders and the number of people assigned to the investigative unit of Obama’s 2012 Financial Fraud Enforcement Network, there were initially 15 attorneys, investigators, and analysts as well as 10 FBI agents. An additional 30 attorneys, investigators, and support staff from the U.S. Attorney’s Offices were scheduled to join the “unit” some time in early 2012. As noted above, this has yet to occur.

At best, that’s a total of 55 persons and amounts to “about \$100 billion of lost home equity per person assigned to this task force.”²⁴ By comparison, 100 FBI agents were assigned to the Enron case and there were about one thousand agents assigned to the Savings and Loans scandal. In the latter financial fraud, there were one hundred times as many agents assigned to a much simpler task than investigating Wall Street, which equaled about 1/40th of the losses in dollars.

²³ W. Black, Why Greenspan’s & Bush’s Regulatory Failure Allowed a “Criminogenic Environment”. Paper presented at the Levy Institute’s Minsky Conference, Annandale-on-the Hudson, NY. June 28., 2008.

²⁴ Matt Stoller, “Lanny Breuer, Task Force Leader, Doesn’t Bother Showing Up for Mortgage Fraud Press Conference.” Guess Blog at *Naked Capitalism*. Jan 27, 2012, retrieved from <http://www.nakedcapitalism.com/2012/01/lanny-breuer-task-force-leader-doesnt-bother-showing-up-for-mortgage-fraud-press-conference.html>. (1/28/12)

Bottom line: this under allocation of investigators does not contradict the pattern of the SEC's under-enforcement and the DOJ's non-enforcement of high-stakes securities fraud before, during, and after the Wall Street securities meltdown of 2007-08. Nor does it in the words of Matt Stoller represent "a serious deployment of government resources to unmask a complex economy-shaking financial scheme."²⁵ On the contrary, it appears to this criminologist to be nothing less than "good-old-fashion" state-corporate collusion, cover-up, and obstruction of justice.

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O RETORICI I REALNOSTI BORBE PROTIV FINANSIJSKE PREVARE NA VOL STRITU

Šest nedelja pre nego što je Albert Gonzales bio prisiljen da podnese ostavku na mestu Javnog Tužioca SAD u avgustu 2007. zbog odobravanja otpuštanja devet 'liberalnih' federalnih tužilaca, on je stajao pred stotinama saveznih tužilaca i istraživača u Velikoj sali pravde na proslavi petogodišnjice osnivanja Operativne grupe za korporacijsku prevanu (Corporate Fraud Task Force, dalje u tekstu OGKP) gde je proglasio pobedu nad belookovratničkom korupcijom. Osnovana izvršnom odredbom u Julu 2002., radna grupa je bila odgovor predsednika Džordž V. Buša na ono što se tada smatralo epidemijom zlodela u korporativnoj SAD. Bušov prvi Javni tužilac SAD Džon Eškroft je na prvoj nacionalnoj konferenciji OGKP 27. Septembra 2007. rekao:

Mi ne možemo – mi nećemo – predati slobodu svih zarad tiranije pohlepe manjine.
Pre malo više od godinu dana, Amerikan-

²⁵ *Ibid.*

ci su pozvani na odbranu naših sloboda od pretnje iz inostranstva. Danas smo pozvani na zaštitu slobode od unutrašnje korupcije. Vi ste odgovornici na ovaj poziv; vi ste zaštitnici ove slobode. Zahvalan sam vam na vašem liderstvu, i zahvaljujem vam se zbog vaše žrtve i čvrste privrženosti vraćanju integritetu američkim tržištima kroz pravdu...²⁶

Tri meseca ranije, Sarbanes-Oxley Akt (SOX) je pretočen u zakon, većinski prihvaćen kao jedna od najvažnijih reformnih mera korporacijskog zakona još od prihvatanja Zakona o hartijama od vrednosti i razmeni tokom 30-ih godina prošlog veka²⁷. Iako se Zakon bavio regulacionim problemima kao što su knjigoodstveni propusti, unutrašnje razmene, transparentnost finansijskih izveštaja, revisorska nezavisnost, interesni konflikti, i resursne potrebe Komisije za hartije od vrednosti i razmene (Securities and Exchange Commission, dalje u tekstu KHVR), SOX se nije bavio efektima „ponovo otvorenih“ tržišnih uslova koje je stvorio predsednik Bil Klinton potpisom Akta o modernizaciji finansijskih servisa (Financial Services Modernization Act, dalje u tekstu AMFS) 1999. godine, koji je poništio deo Glass-Steagall Akta iz 1933. gde stoji: „da je zločin da bilo ko: bankar, broker, diler hartija od vrednosti ili osiguravajuća institucija da istovremeno prima depozite i izdaje hartije od vrednosti.“²⁸ Kao što je Dodd-Frank Akt propustio sjajnu priliku da restruktuiru hartije od vrednosti posle kolapsa Vol Strita, tako je SOX propustio sličnu priliku da ponovo uspostavi elemente Glass-Steagall Akta koji su mogli da ublaže, ili možda čak spreče, naglo širenje i potom kolaps tržišta nekretnina koje je podstaklo nastanak trenutne ekonomske depresije, od koje se mi i dalje oporavljamo.

²⁶ Attorney General John Ashcroft, “Enforcing the Law, Restoring Trust, Defending Freedom.” *United States Attorney’s Bulletin*. May, 2003., 4.

²⁷ F.Cullen, G.Cavender, W.Maakestad, M.Benson, *Corporate Crime Under Attack: The Fight to Criminalize Business Violence*, 2nd Ed. Cincinnati, OH: Anderson Publishing, 2006., 323.

²⁸ W.Jackson, *Glass-Steagall Act: Commercial vs. Investment Banking*. Economics Division, Congressional Research Service, 1987., 3.

Poznat i kao Gramm-Leach-Bliley (Akt), AMFS je eliminisao podelu banaka na komercijalne i investicione koja je postojala još od 1930-ih, pretvarajući finansijsko tržište u područje „svako za sebe“, u isto vreme stvorivši kriminogenu okolinu. Usvajanje ovog zakona je bio vrhunac uspešne borbe ekonomske i političke elite da se u potpunosti otarase regulacija starog režima, koji je još od 1929. sprečavao ekonomske krize poput Vol Strit katastrofe 2007-08. Upravo su zakoni poput Glass-Steagall-a i stvoreni posle kolapsa 1929. da bi sprečili buduće spekulativne debakle.

Bivši glavni računovođa KHVR Lin Turner (Lynn Turner) je tvrdio da tadašnji sistem regulacija nije bio loš ili zastareo, već da je stajao na putu zarađivanju „rizičnog novca“ kroz tržište derivata i drugih finansijskih instrumenata. U ime otvaranja većih finansijskih „supertržišta“ i dozvoljavanju „svih poslova pod jednim krovom, bez ijedne pravne reči koja bi regulisala neizbežne konflikte,“ i time što je „sprečio KHVR da može da zahteva regulaciju holding firmi,“ Kongres je omogućio finansijskoj okolini da postane ogroman sistem zloupotrebe i prevare.²⁹

1. Bavljenje epidemijom korporativne prevare

I Sarbanes-Oxley i OGKP su odgovarali na lavinu otkrića koja su se desila u osmomesecom periodu u 2001. i 2002. godini. Enron je pao tokom jeseni 2001. U martu 2002. godine, Artur Anderson (Arthur Anderson), računovodska firma koje je vodila račune za Enron, je optužena za ometanje pravde. Nekoliko meseci kasnije, Adelphia Communications je objavila da podešava svoj profitni izveštaj milijardu dolara da pokrije stotine miliona dolara koje su pokrali direktori. Kad su navodi o prevari teške 3 milijarde dolara WorldCom direktora isplivale na površinu juna 2002. godina, „vodeći indeksi na berzi su bili zaključani u smrtnu spiralu, jer su investitori paničili oko toga koja će naredna javna firma u posedu njihovih penzionih fondova sledeća da padne.“³⁰ Buš je u septembru 2002. godine na skupu javnih tužilaca gde su se razmatrale implikacije SOX-a rekao da su ova „obmanjujuća dela visokog profila uzdrmale poverenje ljudi u korporativnu Ameriku, tržišta i ekonomiju. Američki narod mora da zna da delujemo, da se krećemo, i da se brzo krećemo.“³¹

²⁹ L. Turner, „The Systematic Dismantling of the System.“ *CPA Journal*. May 2009., 16-17.

³⁰ Daphne Eviatar, „What's Behind the Drop in Corporate Fraud Indictments?“ *Corporate Counsel*. November 1. 2007., retrieved from <http://www.law.com/jsp/cc/> (7/28/11).

³¹ Citirano u *Ibid*.

Kao i OGKP, prethodne i kasnije belookovratničke radne grupe su u suštini namenjene da: (1) usklađuju moć mnogobrojnih federalnih agencija za sprovođenje zakona, (2) da spreče nedela u korporativnim parnicama i (3) da vrate investitorima samopouzdanje. Na petogodišnjici radne grupe, Gonzales se pohvalio da je Ministarstvo pravde dobilo do tad neviđenih 1236 optužba za korporativnu prevaru, uključujući i 214 protiv generalnih direktora i predsednika, 53 glavna finansijska direktora, 23 korporativnih advokata, i 129 potpredsednika. Javni Tužilac je rekao: „Naše pobede su predstavljale više od skupljanja statistika i pravljenja primera od jednog ili dva krivca. One su predstavljale održavanje integriteta naših korporativnih odbora i finansijskih tržišta... menjanje kulture... redefinisaju načina kojim se firme bave poslom.“³²

S druge strane, s obzirom na veliki broj visoko-profilnih oslobođajućih presuda, neodlučnih porota i žalbenih preokreta, a posebno „naprasnog pada u broju optužbi za korporativnu prevaru“ od Bušovog ponovnog izbora 2004. godine, *The American Lawyer* (TAL) je istraživao: „Da li je problem korporativne prevare rešen, kao što je Gonzales tvrdio na proslavi u Julu? Ili je Ministarstvo Pravde prestalo da se trudi da ih goni?“³³ Proleća 2006. godine, TAL je ispitivao optužbe Ministarstva Pravde za korporativne prevare. Njihov veliki zadatak nije bio nimalo olakšan činjenicom da Ministarstvo Pravde ne drži bilo kakve zapise o statistikama korporativne prevare (kao i većine drugih belookovratničkih malverzacija), tako da nije mogla da dostavi punu listu slučaja kojim se Gonzales pohvalio.

Pored toga, TAL je uspeo da napravi detaljan portret optužbi za korporativnu prevaru između 2002. i 2007. kroz ispitivanje javno dostupnih slučajeva i odnosa pobeda prema porazima, kao i intervjuisanje raznih sadašnjih i bivših tužilaca, članova radnih grupa i belookovratničkih advokata. TAL je pronašao „medijski široko objavljenu strategiju od gore na dole, koja je ohrabivala lokalne tužioce da optužuju korporacije i individualne optuženike za prevaru.“³⁴ Ovaj napor je imao za svoj rezultat stotine osuda – 337 u slučajevima koje su oni izvukli iz podataka o 124 istraga i 440 optužnica – velika većina od njih, 76 procenata, od nagodbi. Mnogi korporativni kriminalci su dobili značajne kazne, uključujući i

³² Citirano u *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

više od 50 njih sa kaznama većim od pet godina zatvora. Među visokoprofilnim presudama za generalne direktore su i one za Bernarda Ebersa (Bernard Ebbers) iz WorldCom i Džon Rigasa (John Rigas) iz Adelphia Communications, obojica osuđeni na zatvorske kazne.

Parnice protiv visokoprofilnih optuženika su takođe bile izgubljene ili neuspele, neke kao rezultat spornih taktika Ministarstva Pravde, kao što je nabeđivanje korporativnih optuženika da se odreknu svojih prava. Iz podataka koje je skupio TAL:

- 27 optuženika je oslobođeno na sudu, uključujući i direktore iz firmi Adelphia, Online Inc., PurchasePro.com Inc., i Qwest Communications Inc.

- Bilo je 22 ništavnih sudskih odluka.

- 9 presuda je odbačeno žalbom, uključujući i visokoprofilne slučajeve Credit Suisse First Boston i Merryll Lynch.

Istraživanje TAL je takođe pokazalo da je posle izdavanja detaljnih izveštaja 2003. i 2004. godine, radna grupa prestala da izveštava o svom napretku 2005., baš kada su se optužbe za korporativnu prevaru smanjile na minimum. Iako je njihova analiza pronašla 357 slučajeva velikih korporativnih optužbi u periodu od 2002. do 2005., bilo ih je samo 14 tokom 2006., i 12 tokom prvih deset meseci 2007. godine. Što se tiče tih poraza u „ratu protiv korporativnog kriminala“ za mnoge od njih su okrivljeni nedostatak ljudi i novca za pravo vođenje parnica protiv kompleksnih prevara.

Na primer, jedan od vodećih tužilaca u parnici protiv bivšeg predsednika Enrona Keneta Leja (Kenneth Lay) i generalnog direktora Džefrija Skilinga (Jeffrey Skilling) je rekao da je Ministarstvo Pravde bilo „limitirano nedostatkom resursa, i tehničkih kao i ljudskih... često smo osećali inferiorno u oba smisla u odnosu na odbranu.“³⁵ Dejvid Mejer (David Meyer), prvi zamenik asistenta Javnom Tužiocu, je priznao da američkim tužiocima nije dato dodatno osoblje za pomoć gonjenju korporativne prevare, pa su morali da prioritizuju slučajeve koje će da vode.

Mejer je takođe rekao da je nizak broj optužbi tokom 2006. i 2007. godine bio rezultat neverovatnih uspeha OGKP: „Postoji sve veći fokus na saglasnost, kao i na unutrašnju etiku korporativnih struktura... Veru-

³⁵ John Hueston citiran u *Ibid.*

jemo da uspeh OGKP, uz Sarbanes-Oxley Akt, stvara veće šanse da prevare primećuju same korporacije.³⁶ Dokazi prikupljeni od strane Stalnog Pod-komiteta za Istrage američkog Senata u njihovom poslednjem izveštaju, *Anatomija Finansijskog Kolapsa*, daju potpuno drugačiju sliku, makar što se tiče prevara kod visokorizičnih hartija od vrednosti i na Vol Stritu.

2. Ne-bavljenje epidemijom finansijskih prevara na Vol Stritu

Smanjenje malverzacija, makar na Vol Stritu, nije baš bila realnost kao što je Mejer predstavljao. Samo osamnaest meseci kasnije, 20. maja 2009. predsednik Barak Obama je potpisao Akt o primenjivanju zakona protiv prevare i oporavka 2009. (Fraud Enforcement and Recovery Act, u daljem tekstu PZPO). Novi akt je napravljen da „poboljša primenu zakona protiv hipotekarne prevare, malverzacija vezanih za hartije od vrednosti i robu, prevare finansijskih institucija i drugih malverzacija povezane sa Federalnim programima za pomoć i olakšanje, za oporavak fondova izgubljenih na račun tih malverzacija, i za druge svrhe.“³⁷ Štaviše, 13. novembra iste godine, Ministarstvo Pravde je kao deo godišnje prakse objavilo deset najbitnijih menadžerskih i izvršnih izazova za narednu godinu. Godinu dana pre toga finansijski zločini nisu bili na toj listi. A 2009., ti zločini su dostigli petu poziciju.

Peti izazov je takođe naveo da iako „postoje mnoge vrste finansijske prevare, hipotekarne su doživele ogroman porast. FBI je prijavio duplo veći broj istraga o hipotekarnim prevarama nego što je to bio slučaj u prethodne tri godine.“³⁸ Biro je takođe „primetio vidljiv porast korporativnih prevara i nedela na tržištima roba i hartija od vrednosti na institucionalnom, korporativnom i individualnom investitorskom nivou,“ kao i da „trenutno istražuje 189 velikih korporativnih malverzacija, uključujući i 18 gde su gubici veći od milijardu dolara.“³⁹

³⁶ *Ibid.*

³⁷ PUBLIC LAW 111-21—May 20, 2009. 123 STAT. 1617.

³⁸ THE DEPUTY ATTORNEY GENERAL 2009.MEMORANDUM FOR THE ATTORNEY GENERAL. November 13.

³⁹ *Ibid.*

Nekoliko dana kasnije, 17. novembra, kada je Obamina administracija otkrila svoju radnu grupu protiv finansijskih zločina koji su imalu ulogu u kolapsu Vol Strita 2007-08., Javnom Tužiocu Eriku Holderu (Eric Holder) su se pridružili ministar finansija Tim Gajtner (Tim Geithner), sekretar stambenog i urbanog razvoja (Housing and Urban Development) Šon Donovan (Shawn Donovan) i Direktor za primenjivanje zakona u KHVR Robert Kuzami (Robert Khuzami). Tokom saopštenja povodom formiranja Operativne grupe za primenjivanje zakona o finansijskim prevarama (Financial Fraud Enforcement Task Force), Holder je rekao:

Mi se suočavamo sa jedinstvenim izazovima po pitanju odgovora na finansijsku krizu koja je zahvatila nasu ekonomiju u poslednjoj godini. Malverzacione šeme vezane za hipoteku, hartije od vrednosti i korporacije su erodirale samopouzdanje javnosti u državna finansijska tržišta i dovela do rastućeg osećanja da se Vol Strit ne služi istim pravilima kao Mejn Strit (Main Street, sinonim za mala i srednja preduzeća). Nesavesni direktori, operateri Poncijevih šema kao i obični kriminalci ciljaju štedne knjižice i penzione fondove Amerikanaca srednje klase, i u mnogim slučajevima su dovele do propasti budućnost celih porodica.⁴⁰

Čitajući pripremljen govor, Javni tužilac objašnjava da je nova radna grupa stvorena da zameni Bušov OGKP, i da ima veći obim od svog prethodnika. Holder je takođe istakao da:

U teškim okolnostima s kojim se suočavamo danas, jedna od najvažnijih misija ove administracije je da prikupi sve moguće resurse federalne vlasti kako bi se *borila protiv finansijske prevare u svim njenim formama*. Operativna grupa će voditi agresivni, koordinirani i proaktivni napor da istraži i goni sve finansijske zločine. Skupićemo sve resurse za sprovođenje kriminalnih i civilnih zakona da istražimo i presudimo slučajeve finansijske prevare, vratimo ukradene fondove žrtava, obratimo diskriminaciji u tržištima zajmova i finansija i poboljšamo koordinaciju i saradnju između

⁴⁰ Citirano kod Joe Palazzoio, "DOJ Unveils Financial Crime Task Force." Nov. 17. 2009., retrieved from <http://www.mainjustice.com/2009/11/17/doj-to-unveil-financial-> (7/28/11.)

federalnih, državnih, lokalnih, plemenskih i teritorijalnih vlasti zaduženih za istraživanje i presuđivanje važnih finansijskih prevara i malverzacija (dodatno istaknuto).⁴¹

Te 2009. godine se činilo da se PZPO, Ministarstvo pravde i nova operativna grupa nalaze na istoj stranici, s obzirom da su svi naglasili četiri oblasti finansijskih malverzacija:

-Hipotekarna prevara, od najjednostavnijih „obrtnih“ šema do sistematskih prevara zajmova u nacionalnom tržištu nekretnina;

-Prevara vezana za hartije od vrednosti, u koju se ubrajaju tradicionalne unutrašnje razmene, Poncijeve šeme i lažno izveštavanje investitora;

-Akt o oporavku (spasavanje) od prevare, da osigura investicije poreznih obveznika od preuzimanja od strane malog broja nepoštene populacije;

-Diskriminacija, da osigura jednak pristup finansijskim tržištima svim Amerikancima, i da niko ne bude nepravedno ciljan na osnovu nedozvoljenih karakteristika.

U tom smislu, kako funkcionišu ova „kontrolna“ tela? Moglo bi se reći da kao institucije socijalne kontrole, svoje zvanične ciljeve loše ispunjavaju.

3. Politička amnezija, povratak u budućnost, i ista stara prazna retorika

Početkom 2012. Obamina i Holderova mreža za primenjivanje zakona protiv finansijske prevare nije krivično gonila nijedan slučaj koji uključuje šest najvećih banaka SAD. Zapravo, toliko je rad prve Obamine

⁴¹ *Ibid.*

radne grupe bio nevidljiv ili nepostojeći, da kad je predsjednik napravio govor o stanju nacije 2012. gde je naglasio formiranje odseka za finansijski kriminal u Ministarstvu pravde, mali broj ljudi se setio da je njegova administracija već odigrala kartu (navodne) borbe protiv finansijskog kriminala još 2009. godine. Iznenadjujuće, „stari“ i „novi“ tim za finansijske zločine su imali iste ključne pravne, ekonomske i političke članove, uključujući i Holdera, Gajtnera, Donovana, Kuzamija i Lenija Brojera (Lanny Breuer), direktora kriminalnog odseka Ministarstva pravde. Svaki od njih ima bliske od veze sa bankovnom industrijom na Vol Stritu a takodje i Kej Stritu⁴². Zato i ne iznenadjuje da pet meseci posle najave nove radne grupe, ona nije imala zvaničnu adresu, broj telefona, e-mail adresu ili kancelarijsko osoblje.

Na dnu lanca ishrane finansijskih prevara, međutim, Ministarstvo pravde je bilo zauzeto razbijanjem i gonjenjem „malih“ hipotekarnih prevaranata. Potporeni realizacijom rada radne grupe za hipotekarne prevare (Mortgage Fraud Working Group), ažurirane vesti 20. juna 2011. opisuju dva tipična slučaja ove vrste zločina iz operacije „Ukradeni snovi.“⁴³ Prvi slučaj opisuje presudu od devet tačaka vraćenu od strane porote u Sakramentu, Kaliforniji gde se za šeme investicione i hipotekarne prevare teretio Alonzo Džekson Braun Treći (Alonzo Jackson Brown III) star 44 godine.

U zasebnom i nevezanom slučaju, Lenard Bernot (Leonard Bernot), 46, iz Laguna Hilsa, Kalifornije, se izjasnio „krivim... pred okružnim sudijom Kimberli Dž. Mulerom (Kimberly J. Mueller) za nameru da učini krivnično delo hipotekarne prevare kao deo mnogo veće šeme vezane za spasavanje od poništenja prava na oslobađanje od hipoteke, koja uključuje Head Financial Services Inc.”⁴⁴ Malo više od godinu dana pre toga, između 1. marta i 18. juna 2010., operacija „Ukradeni snovi“ je postala najveći kolektivni napor za primenjivanje zakona protiv hipotekarnih zločina u američkoj istoriji. Na nacionalnom nivou, obavljeno je 1517 hapšenja, uz 525 presuda koje predstavljaju gubitak od više od 3 milijarde dolara. Operacija je takodje prinela „191 građanskih izvršnih akcija i povrata 196 miliona dolara.“⁴⁵

⁴² K Street, ulica u Vašingtonu sa sedištim lobističkih grupa.

⁴³ Operacija „Ukradeni snovi“ je bila ideja Radne grupe za primenjivanje zakona o finansijskim prevarama, tj. odseka za hipotekarne prevare koji je ciljao zločince u celoj zemlji.

⁴⁴ California RealEstateRama. “U.S. Attorney Announces Results of Mortgage Fraud Prosecutions in 12 Months Since Operation Stolen Dreams.” 2011., retrieved from <http://california.realestaterama.com/> (7/28/11.)

⁴⁵ *Ibid.*

Pozivajući se na istočni okrug Kalifornije, koji je podigao optužnice protiv 46 osoba i osigurao 11 izjašnjavanja krivice, Herb Braun (Herb Brown), specijalni agent zadužen za Sakramentov FBI odsek, je izjavio da ovi „slučajevi pokazuju koliko je hipotekarna prevara sveprisutna. Moramo i nastaviti da gonimo prevarante u tržištima hipoteka i nekretnina.“⁴⁶ Slična osećanja je iskazao i tužilac za istočni okrug Vagner (Wagner): „Hipotekarni zločini nastavljaju da predstavljaju ogroman problem za ovaj region, koji je koštao banke, dužnike i vlasnike kuća desetina miliona dolare.“ Vagner je takođe komentarisao da rade na budućim presudama dok „nastavljamo da gonimo insajdere na tržištu koji zloupotrebljavaju i koriste procese hipoteka i nekretnina za svoju ličnu korist.“⁴⁷

Naravno, relativno poređenje finansijskih šema dovodi do zaključka da su ove prevare „sitne ribe“ u odnosu na skoro bilion dolara gubitka na račun prevara vezanih za hartije od vrednosti na Vol Stritu. Štaviše, na godišnjoj Minski (Minsky) konferenciji 2008. godine, bivši prvi zamenik glavnog savetnika za Kancelariju za nadzor štednih institucija (Office of Thrift Supervision) i belookovratnički kriminolog Vilijam Blek (William Black) je dao pogled na veličinu ovih tipova hipotekarnih prevara kada je naglasio da je broj ovakvih incidenata koji se nalazi u fiskalnom izveštaju za 2007. godinu ukazao na oko milion nezakonitih zajmova.⁴⁸ Nije potrebno reći da radna grupa za hipotekarne prevare sigurno ima preveliki broj predmeta da bi napravila neko „ulubljenje,“ ili da na bilo koji način kazni ili predstavi restituciju za ovo nezakonito ponašanje.

Ispitujuće umove, u drugu ruku, interesuje gde su (bile) radne grupe koje bi trebalo da ciljaju druge finansijske zločine identifikovane od strane PZPO, Ministarstva pravde i Obamine administracije, a takođe i od strane izveštaja u 652 strane *Vol Strit i Finansijska Kriza*? Na primer, gde su (bile) Radna grupa za prevare vezane za hartije od vrednosti i robu (Securities and Commodities Fraud Working Group) ili Radna grupa za prevare vezane za Finansijske Institucije (Financial Institutional Fraud Working Group)? U smislu finansijskog oporavka, ciljanje ovih velikih vrsta prevara bi u velikoj meri poboljšalo rezultat od povraćaja stotine miliona ili desetina milijardi do stotina milijardi ili čak biliona izgubljenih dolara na račun holdinga nekretnina, penzionih fondova i drugih institucionalnih investicija.

⁴⁶ Citirano u *Ibid.*

⁴⁷ Citirano u *Ibid.*

⁴⁸ W. Black, Why Greenspan's & Bush's Regulatory Failure Allowed a "Criminogenic Environment". Paper presented at the Levy Institute's Minsky Conference, Annandale-on-the Hudson, NY. June 28., 2008.

Uzećemo u obzir procenu od 5-7 biliona dolara izgubljenih na račun rata za obaveze prema zajmovima za nekretnine. U slučaju vođa i ljudi zaduženih za istraživanje u Obaminoj mreži za primenjivanje zakona protiv finansijske prevare (2012), u toj radnoj grupi se u početku nalazilo 15 advokata, istraživača i analitičara kao i 10 FBI agenata. Dodatnih 30 advokata, istraživača i pomoćnog osoblja je trebalo da se pridruži jedinici početkom 2012. godine. To se još nije desilo.

U najboljem slučaju, to je ukupno 55 osoba i predstavlja „oko 100 milijardi dolara izgubljenih na račun rata za obaveze prema zajmovima za nekretnine po osobi dodeljenoj toj radnoj grupi.“⁴⁹ Poređenja radi, 100 FBI agenata je dodeljeno slučaju Enrona, a 1000 agenata skandalu vezanog za štednju i zajmove. U ovom drugom slučaju prevare je bilo sto puta više agenata dodeljeno mnogo jednostavnijem predmetu nego istraživanju Vol Strita, koji je predstavljao 1/40 gubitaka u dolarima.

Kranja linija: ova premala raspodela istraživača ne ide protiv ranijeg obrasca manjka izvršenja KHVR i nedostatakizvršenja Ministarstva pravde prema zločimima vezanim za visokorizične hartije od vrednosti tokom i posle propasti tog tržišta na Vol Stritu 2007-08. Ona takođe ne predstavlja u rečima Meta Stolera (Matt Stoller) „ozbiljnu upotrebu vladinih resursa za demaskiranje komplikovane finansijske šeme koja uzdrma ekonomiju.“⁵⁰ Naprotiv, ovom kriminologu se čini kao ništa osim „dobrog starog“ dosluha između vlade i korporacija, prikrivanja i ometanje pravde.

(Prevod: Lazar Mišković)

⁴⁹ Matt Stoller, „Lanny Breuer, Task Force Leader, Doesn't Bother Showing Up for Mortgage Fraud Press Conference.” Guess Blog at *Naked Capitalism*. Jan 27. 2012, retrieved from <http://www.nakedcapitalism.com/2012/01/lanny-breuer-task-force-leader-doesnt-bother-showing-up-for-mortgage-fraud-press-conference.html>. (1/28/12)

⁵⁰ *Ibid.*