Inside Criminal Justice

The Golden Handshake at Justice

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By Steven Yoder

Big law firms with white-collar practices win cases in part by raiding the enemy's talent. At least that's what they tell prospective clients.

And when the "enemy" is the government, you can't blame them for asserting bragging rights.

Take the white-shoe Washington firm Covington &

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The Golden Handshake at Justice

FEBRUARY 16, 2015

Big corporate firms increasingly snare top white-collar crime prosecutors during DOJ leadership changes. That raises awkward questions.

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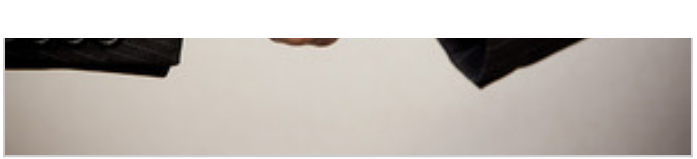
Burling. It advertises itself as “one of the few firms with lawyers who recently held senior positions in both the U.S. Department of Justice and the U.K. Serious Fraud Office.”



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Covington’s team includes three former heads of the Department of Justice (DOJ) criminal division, which prosecutes white-collar cases, and ten other former top prosecutors at the division. It also might soon include star alumnus Eric Holder. One report has him possibly returning to Covington, though he hasn’t confirmed where he’ll land after leaving as Attorney General.

Since the November election, a new group of prosecutors has jumped from the federal agency into jobs at white-collar legal defense firms. Some advocates argue that will hamper the DOJ’s effectiveness in pursuing white-collar cases.

Loretta Lynch will likely be confirmed as the new Attorney General, and her changes to the DOJ’s approach to white-collar cases will be subtle, says one defense attorney.

“It’s difficult to say that she’ll come with an agenda different from Holder’s,” Robert Anello, a partner at white-collar defense firm Morvillo Abramowitz told *The Crime Report*. But he suggested she might de-emphasize the pursuit of insider-trading crimes because they’re not as important systemically as tougher-to-prosecute cases like health care or mortgage fraud.

“(Insider trading cases) are not that difficult from a factual point of view—I think she’s sophisticated enough to focus on some of the more complex types of financial fraud,” he added.

She’ll be taking over a department that’s lost key prosecutors.

In mid-January, for example, Debevoise & Plimpton hired David O’Neil, the acting head of the criminal division; and Boies Schiller hired three prosecutors from the Manhattan U.S. Attorney’s Office who worked on high-profile insider-trading cases.

Two weeks earlier, Fried Frank took two others from a New York U.S. Attorney’s Office who worked together in its public corruption unit. And in December, Jenner & Block snapped up William Pericak, assistant chief of the criminal division’s fraud section in the Washington office.

The government litigators are following a well-trodden path. In a 2011 *Arizona Law Review* article, Berkeley

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The government litigators are following a well-trodden path. In a 2011 *Arizona Law Review* article, Berkeley Law School professor Charles Weisselberg and researcher Su Li found that three-quarters of partners in the white-collar practices of the top 200 U.S. law firms are former federal or state prosecutors.

That's true of less than 5 percent of non-white-collar partners, they found.

Hefty Payday

The study also suggests a stint at Justice offers a path to a hefty payday. Weisselberg and Li note that firms' white-collar defense practices are "not susceptible to the same types of cost controls that [corporations] seek to implement in other litigation." Average revenue per lawyer in those practices averages about $725,000 yearly, they found, using industry data.

Critics say all of that team-switching could affect how the department pursues white-collar cases, especially against the biggest corporations and mega-banks—the clients of prosecutors' future employers.

"It may be difficult to show empirically, but if they then go straight to using that inside knowledge and access on the other side, does that not create a potential problem for the public interest?" asks Janine Wedel, a professor at George Mason University's School of Policy, Government, and International Affairs and author of Unaccountable: How Elite Power Brokers Corrupt Our Finances, Freedom and Security.

She's not alone.

The Government Accountability Institute, an advocacy group headed by former Hoover Institution fellow Peter Schweizer, issued a 2012 report that documented close ties between DOJ prosecutors and white-collar firms.

"A remarkable revolving door exists among attorneys who work in government service, move to white-collar defense practices, and then continue to switch back and forth," the report concluded. "Why would a government attorney interested in returning to a lucrative field throw his potential future clients in jail?"

In their article, Weisselberg and Li ask whether "the behavior of prosecutors is influenced by the possibility of a quite profitable Big Law partnership at the conclusion of government service."

For those who claim the revolving door compromises prosecutors, exhibit A is Lanny Breuer. From 2000 to 2009, he helped lead Covington's white-collar defense practice. From there he left to become head of the

experts say

Criminal Division under Holder.

In January 2013, he returned to Covington for a reported salary of $4 million, where he once again represents clients in white-collar cases. The firm's clients have included J.P.Morgan, Bank of America, and Citigroup. In the last 15 months, the DOJ has reached settlements in lieu of prosecution with all three banks for financial fraud during the mortgage crisis.

Smaller players also have joined firms with clients the DOJ has settled with.

Lorin Reisner, former head of the Criminal Division of the U.S. Attorney's Office for New York's Southern District, left the DOJ in June 2014 to join law firm Paul Weiss, which represented Citigroup in its July 2014 settlement. And Debevoise & Plimpton, O'Neil's new employer, represented J.P.Morgan in its November 2013 settlement.

Fall in White-Collar Prosecutions

DOJ spokesman Peter Carr disputes the idea that the DOJ pulls its punches.

"Our responsibility is to bring cases when the evidence and the law support it, and we have done that in record numbers in the white-collar area since 2009," he told The Crime Report by email "That will not diminish because of regular turnover of fraud prosecutors."

Indeed, the 31,000 white-collar prosecutions that the department brought from 2009 to 2013 surpassed the figure for 2003−2008 by about seven percent. And the DOJ's 7,100 bank fraud prosecutions in 2009−2013 exceeded the total for 2003−2008 by about 5 percent.

But over a longer period, the number of white-collar cases the department pursues has fallen.

The 2009−2013 number was two percent less than 1999−2003 and seven percent lower than 1994−1998. And its bank fraud prosecutions have plummeted: the 2009−2013 figure is 35 percent less than that for 1999−2003, and 42 percent lower than 1994−1998.

The same pattern appears in data compiled by Syracuse University's Transactional Records Access Clearinghouse (TRAC) through Freedom of Information Act requests. TRAC data show that the number of white-collar prosecutions recommended by the FBI in the first 10 months of fiscal 2013 (the latest available)

was down 60 percent from the number for the same period in in fiscal 2000.

Asked about the trend, DOJ spokesman Carr replied by email that he couldn't "speak to that far back, as I don't have anyone here at the department who has knowledge of that time period."

There are other possible explanations for the drop.

After the 9/11 attacks, the DOJ under George W. Bush shifted more than 2,300 FBI field agents away from investigating white-collar and other crimes to focus on terrorism cases, according to a 2005 DOJ Inspector General's report.

But there could be another reason. Before 2003, bank regulatory agencies like the Office of Thrift Supervision had a criminal referral coordinator whose job was to coordinate reports of suspected criminal activity and help the DOJ on white-collar cases, says William Black, a law professor at the University of Missouri, Kansas City, and the federal government's director of litigation during the savings and loan crisis.

"The coordinators laid out a road map for the prosecutors to pursue those cases," Black told *The Crime Report*.

However, criminal referrals from those agencies declined to nearly zero after those positions were cut, which squeezed the number of cases that the DOJ could pursue, he says.

Black adds he's never heard an official explanation for why those positions were cut.

In either case, the DOJ's numbers do reflect a shift after 2001. Between 2001 and 2004, white-collar prosecutions dropped by about 14 percent and bank fraud cases by 38 percent. They've never returned to their pre-9/11 levels.

Focusing on Small Fry?

Beyond the numbers, critics like Black and journalist Matt Taibbi charge that the DOJ pursues criminal sentences for only relatively small-time white-collar cases.

Black says that since the appointment of Eric Holder, the DOJ has obtained a criminal sentence for only one major bank CEO involved in the mortgage fraud that led to the 2008 financial crisis: Kareem Serageldin, a

managing director at Credit Suisse who was sentenced to 30 months for hiding losses in a mortgage-backed securities trading book.

The DOJ's Carr disputes the notion that the department doesn't pursue prison time for big players. He points to a page on the DOJ's website that lists the agency's prosecutions of Rajat Gupta, a board member at Goldman Sachs sentenced to two years for insider trading; of Matthew Taylor, a Goldman Sachs vice president sentenced to nine months for fraudulently concealing a trading position in an account he managed; and of three UBS executives sentenced to between 18 and 27 months for rigging the bidding on contracts for the investment of municipal bond proceeds.

Nevertheless, Black contrasts those results with the DOJ's prosecutions of executives involved in the savings and loan crisis in the 1980s, when he says roughly 400 bank CEOs, presidents, and chairs of the board were convicted of felonies and served prison time.

"No one thinks that … in the scheme of financial frauds, [the DOJ's examples] are remotely top tier in terms of the damage done [during the financial crisis]," he adds.

And University of Virginia law professor Brandon Garrett offers evidence that the biggest companies tend to get deferred prosecutions in his November 2014 book *Too Big to Jail*. He collected information on the DOJ's 255 deferred-prosecution and non-prosecution agreements and more than 2000 corporate convictions between 2001 and 2012. Fifty-eight percent of the companies given deferred-prosecution and non-prosecution agreements were listed on a U.S. stock exchange, though they made up just 6 percent of the total number of companies against which the department got convictions.

Garrett cites a key reason that Holder himself gave at a congressional hearing in March 2013: some companies are so large that a successful prosecution could bring them down and hurt the economy.

Lynch, who has defended clients in white-collar cases as a partner at Hogan & Hartson for nine years, promised in her confirmation hearings that she wouldn't go easy on big firms.

"No individual is too big to jail," she said in response to a question. "There are certain situations where we come to a different resolution or may decide a civil resolution is appropriate, but that is only after a full and fair analysis of all the facts and the law….."

Federal law narrowly circumscribes the behavior of DOJ prosecutors who leave for private firms. Those leaving for private practice can't participate in cases they were involved in while they were with the

government. And DOJ supervisors are prohibited for 2 years from working on cases that were under their purview when they were at the department.

But that guideline doesn't affect their ability to use their contacts and knowledge on other cases.

Other parts of government apply more expansive restrictions. U.S. Senators, for example, can't lobby Congress for two years after they leave office. And a 2009 executive order by President Barack Obama barred political appointees who leave the administration from lobbying administration officials who make or advise on policy.

But for now, no one has proposed similar rules for the DOJ.

Even Wedel of George Mason University sees no easy fix.

"Because it's systemic problem, it calls for a systematic discussion and sometimes regulation," he says. "But those regulations have to be smart and anticipate the potential consequences."

For his part, defense lawyer Anello disputes that there's a revolving-door problem to begin with.

"I work with a lot of former [DOJ employees], and I would only work with one who I thought did an unbiased and zealous job when he or she was my adversary," he says. "I wouldn't hire someone who pulled his or her punches. There's no reason to think they would change their stripes when they got to my side."

Steven Yoder, a frequent contributor to The Crime Report*, writes about criminal justice, immigration and other domestic policy issues. His work has appeared in* Salon, The Fiscal Times, The American Prospect*, and elsewhere. Reachable online at @syodertweets, he welcomes comments from readers.*

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