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# Name a tough prosecutor to succeed Holder

By Rena Steinzor

Already, the bugles are sounding a new call to battle on Capitol Hill, with conservatives threatening to give President Obama a tough time whomever he picks to succeed Eric Holder as the nation's top lawyer. It'll be interesting to see which part of Holder's record opponents will use as an excuse to confront the nominee: civil rights, voting rights, national secrecy, or something else. Here's my wish: The president should burnish his own place in history by hiring the toughest prosecutor available to continue the relentless pursuit of civil rights abuses and to turn around the disastrous, although well-founded, perception that his administration favors handling the crimes of Wall Street with kid gloves.

The genesis of that perception is a stunningly wrong-headed "too big to jail" statement Holder made at a Senate Judiciary Committee hearing in 2013: "I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute when we are hit with indications that if you do prosecute, if you do bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy."

Holder was on the defensive at the hearing because of his decision to allow HSBC bank to sign a so-called "deferred prosecution agreement" after it was caught laundering money for Mexican drug lords and serving as a banker for terrorists in Sudan and Libya. In exchange for a pay-off of \$1.25 billion, chump change for the world's third-largest, publicly held bank, the agreement did not require HSBC to plead guilty to criminal charges, nor did it impose criminal fines, instead "deferring" such charges to some unknown future time when HSBC might again admit to misbehaving. Holder's Justice Department did the same thing with the **Bank of America** (August 2014, \$17 billion) and **Citigroup** (July 2014, \$7 billion). Both giant financial institutions were on the hook for defrauding their investors during the run-up to the financial meltdown of 2008.

Of course, prosecutors can't send corporations to jail—they are inanimate paper entities. But forcing them to acknowledge that they broke criminal laws is more than a symbolic gesture, which is why corporate lawyers work so hard to avoid such outcomes. The stigma of such guilty pleas lasts, rightly spooking existing and would-be investors.

Holder tried to walk back the statement later, but his record spoke for itself. Under a policy he created when he was Deputy Attorney General during the Clinton Administration, the **manual** for federal prosecutors requires consideration of the "collateral consequences" of a potential case, defined as the "disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution." In other words, the Justice Department tells its prosecutors they should worry about driving companies out of business if they charge them with crimes.

This egregious off-ramp was spawned by the distorted fable the Fortune 100 have spun to explain the demise of Arthur Andersen, which followed its gigantic client, Enron, out of business within months after the sham finances they had erected together hit the press. The fable attributes Andersen's collapse to a criminal indictment lodged by Justice Department prosecutors. In truth, its clients had deserted the firm in droves when it was first implicated in the scandal, and the disclosure that employees had shredded tons of paper as soon as Enron was discredited hastened this exodus.

As a practical matter, the collateral damage exception means that lawyers for Fortune 100 companies accused of committing unforgivable crimes—from fraud and bribery to egregious environmental violations—routinely troop over to the Justice Department to explain how they might go out of business if indicted. This bizarre system means that all corporate executives really need to do when contemplating cutting corners in a criminal mode is to weigh the benefits of such misdeeds against the costs of doing business they might have to pay if federal prosecutors catch them in the act. They might suffer one bad day when prosecutors announce such settlements with great fanfare. But they can go on about their business without worrying about probation, much less parole.

The wise legal historian Lawrence Friedman once wrote that our criminal justice system "tells us where the moral boundaries are; where the line lies between good and bad. It patrols those boundary lines, day and night, rain or shine. It shows the rules directly, dramatically, visually, through asserting and enforcing them." President Obama should act decisively to excise the notion that prosecutors who are experts in rooting out and punishing crime should—or, for that matter, are able to—step into the shoes of the Council of Economic Advisers.

The next Attorney General should be a prosecutor, nothing more and certainly nothing less.

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