WHY CAN'T OBAMA BRING WALL STREET TO JUSTICE?

Maybe the banks are too big to jail. Or maybe Washington's revolving door is at work.

BY PETER J. BOYER AND PETER SCHWEIZER

WITH THE Occupy protesters resuming battle stations, and Mitt Romney in place as the presumptive Republican nominee, President Obama has begun to fashion his campaign as a crusade for the 99 percent—a fight against, as one Obama ad puts it, "a guy who had a Swiss bank account." Casting Romney as a plutocrat will be easy enough. But the president's claim as avenging populist may prove trickier, given his own deeply complicated, even conflicted, relationship with Big Finance.

Obama came into office vowing to end business as usual, and, in the gray post-crash dawn of 2009, nowhere did a reckoning with justice seem more due than in the financial sector. The public was shaken, and angry, and Wall Street seemed oblivious to its own culpability, defending extravagant pay bonuses even while accepting a taxpayer bailout. Obama channeled this anger, and employed its rhetoric, blaming the worldwide economic collapse on "the reckless speculation of bankers." Two months into his presidency, Obama summoned the titans of finance to the White House, where he told them, "My administration is the only thing between you and the pitchforks."

The bankers may have found the president's tone unsettling. Candidate Obama had been their guy, accepting vast amounts of Wall Street campaign money for his victories over Hillary Clinton and John McCain (Goldman Sachs executives ponied up $1 million, more than any other private source of funding in 2008). Obama far outraised his Republican rival, John McCain, on Wall Street—around $16 million to $9 million. As it turned out, Obama apparently actually meant what he said at that White House meeting—his administration effectively would stand between Big Finance and anything like a severe accounting. To the dismay of many of Obama's supporters, nearly four years after the disaster, there has not been a single criminal charge filed by the federal

FROM LEFT: JEMAL COUNTESS—GETTY IMAGES, MARIO TAMA—GETTY IMAGES, SIMON DAWSON—BLOOMBERG—GETTY IMAGES, PAUL J. RICHARDS—AFP—GETTY IMAGES government against any top executive of the elite financial institutions.

"It's perplexing at best," says Phil Angelides, the Democratic former California treasurer who chaired the bipartisan Financial Crisis Inquiry Commission. "It's deeply troubling at worst."

Strikingly, federal prosecutions overall have risen sharply under Obama, increasing dramatically in such areas as civil rights and health-care fraud. But according to the Transactional Records Access Clearinghouse, a data-gathering organization at Syracuse University, financial-fraud prosecutions by the Department of Justice are at 20-year lows. They're down 39 percent since 2003, when fraud at Enron and WorldCom led to a series of prosecutions, and are just one third of what they were during the Clinton administration. (The Justice Department says the numbers would be higher if new categories of crime were counted.)

"There hasn't been any serious investigation of any of the large financial entities by the Justice Department, which includes the FBI," says William Black, an associate professor of economics and law at the University of Missouri, Kansas City, who, as a government regulator in the 1980s, helped clean up the S&L mess. Black, who is a Democrat, notes that the feds dealt with the S&L crisis with harsh justice, bringing more than a thousand prosecutions, and securing a 90 percent conviction rate. The difference between the government's response to the two crises, Black says, is a matter of will, and priorities. "You need heads on the pike," he says. "The first President Bush's orders were to get the most prominent, nastiest frauds, and put their heads on pikes as a demonstration that there's a new sheriff in town."

Obama delivered heated rhetoric, but his actions signaled different priorities. Had Obama wanted to strike real fear in the hearts of bankers, he might have appointed former special prosecutor Patrick Fitzgerald or some other fire-breather as his attorney general. Instead, he chose Eric Holder, a former Clinton Justice official who, after a career in government, joined the Washington office of Covington & Burling, a top-tier law firm with an elite white-collar defense unit. The move to Covington, and back to Justice, is an example of Washington's revolving-door ritual, which, for Holder, has been lucrative—he pulled in $2.1 million as a Covington partner in 2008, and $2.5 million (including deferred compensation) when he left the firm in 2009.

Top bankers after meeting with Obama, who told them, "My administration is the only thing

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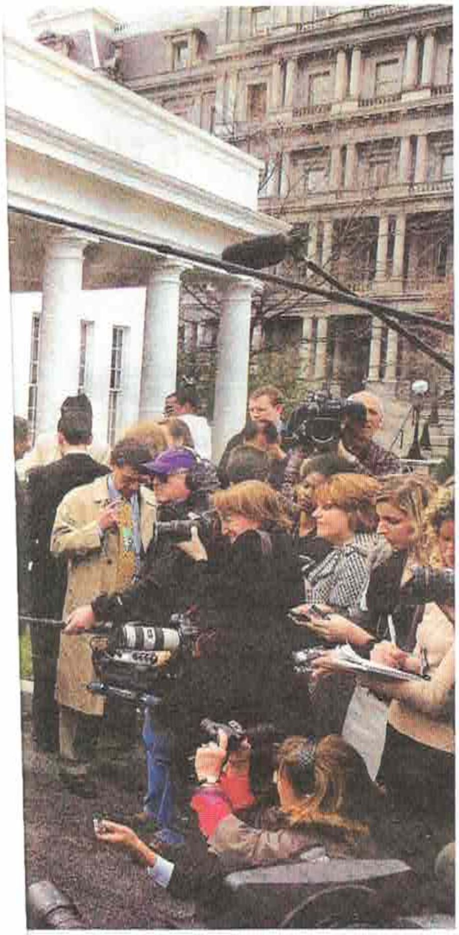
Putting a Covington partner—he spent nearly a decade at the firm—in charge of Justice may have sent a signal to the financial community, whose marquee names are Covington clients. Goldman Sachs, JPMorgan Chase, Citigroup, Bank of America, Wells Fargo, and Deutsche Bank are among the institutions that pay for Covington's legal advice, some of it relating to matters before the Department of Justice. But Holder's was not the only face at Justice familiar to Covington clients. Lanny Breuer, who had co-chaired the white-collar defense unit at Covington with Holder, was chosen to head the criminal division at Obama's Justice. Two other Covington lawyers followed Holder into top positions, and Holder's principal deputy, James Cole, was recruited from Bryan Cave LLP, another white-shoe firm with A-list finance clients.

Justice's defenders point out that prosecuting financial crime is a complicated matter requiring the highly specialized expertise found in the white-collar defense bar. But some suggest there is also the potential for conflicting interest when the department's top officials come from lucrative law practices representing the very financial institutions that Justice is supposed to be investigating. "And that's where they're going back to," says Black. "Everybody knows there is a problem with that." (Two members of Holder's team have already returned to Covington.) A spokesperson for Covington was not available for comment. (*Newsweek* uses the firm as outside counsel.)

Justice's inaction regarding the big Wall Street firms is not for a lack of suspicious activity. Three different government entities exhaustively examined the practices that contributed to the financial collapse, and each has referred its findings to the



between you and the pitchforks."

THE LACK OF PROSECUTIONS IS 'PERPLEXING AT BEST. IT'S DEEPLY TROUBLING AT WORST,'

says Phil Angelides of the Financial Crimes Inquiry Commission.

department for possible criminal investigation. One such matter involved a 2007 transaction by Goldman Sachs, in which Goldman created an investment, based on mortgage-backed securities, that seemed designed to fail. Goldman allowed a client who was betting against the mortgage market to help shape the investment instrument, which was called Abacus 2007-AC1; then both Goldman and the client bet against the investment without informing other clients (whose investments were wagers on its success) how the securities included in the portfolio were selected. These uninformed clients lost more than $1 billion on the investment. In 2010, the Securities and Exchange Commission charged Goldman with securities fraud "for making materially misleading statements and omissions" in marketing the investment. The SEC, which conducts only civil litigation, referred the case to Justice for criminal investigation.

A year later, in April 2011, the Senate Permanent Subcommittee on Investigations, chaired by Democrat Carl Levin, after a two-year inquiry, issued a fat report detailing several transactions, including Goldman's Abacus deal, that Levin and his staff believed should be investigated by Justice as possible crimes. The subcommittee made a formal referral to the department (as did the federal Financial Crisis Inquiry Commission, chaired by Phil Angelides), and Levin publicly stated his view that criminal inquiry was warranted. Goldman executives, including the firm's chief executive officer, Lloyd Blankfein, started hiring defense lawyers.

Meanwhile, Obama's political operation continued to ask Wall Street for campaign money. A curious pattern developed. A *Newsweek* examination of campaign finance records shows that, in the weeks before and after last year's scathing Senate report, several Goldman executives and their families made large donations to Obama's Victory Fund and related entities, some of them maxing out at the highest individual donation allowed, $35,800, even though 2011 was an electoral off-year. Some of these executives were giving to Obama for the first time.

Justice insists that political operations such as fundraising are kept strictly distanced from the department, in order to avoid even the appearance of political influence. But the attorney general and his team are not unfamiliar with the process; Holder was himself an Obama bundler—a fundraiser who collected large sums from various donors—in 2008, as were several other lawyers who joined him at Justice.

It would be a leap to infer these Goldman contributions were made—or received—as quid pro quo for dropping a criminal investigation. Still, the situation constitutes what one Justice veteran acknowledged is a "bad set of facts."

Maintaining public faith in the justice system is one of the reasons why people such as Angelides continue to call for a rigorous criminal investigation into Wall Street. "I think it's fundamental that people in this country need to feel that the justice system is for everyone—that there's not one system for those people of enormous wealth and power, and one for everyone else," he says.

In July 2010, three months after the SEC charged Goldman in the Abacus case, the agency reached a settlement with the firm. Goldman agreed to pay $550 million, but admitted no wrongdoing. The agency touted the amount of the fine as the biggest ever—but to Goldman it was a relative pittance. The fine amounted to about 4 percent of the sum that Goldman paid its executives in bonuses ($12.1 billion) in 2007, the year of the Abacus transaction.

Earlier this year, it was reported that Goldman executives were feeling optimistic that the Justice inquiry would not result in criminal charges against the firm, or its executives. Goldman declined to comment on the case, as did the Justice Department. But spokeswoman Alisa Finelli said, "When we find credible evidence of intentional criminal conduct—by Wall Street executives or others—we will not hesitate to charge it. However, we can and will only bring charges when the facts and the law convince us that we can prove a crime beyond a reasonable doubt." Holder, speaking in February at Columbia University, said that while "we found that much of the conduct that led to the financial crisis was unethical and irresponsible ... we have also discovered that some of this behavior—while morally reprehensible—may not necessarily have been criminal."

Midway through his State of the Union speech this year, President Obama announced plans "to create a special unit of federal prosecutors and leading state attorneys general to expand our investigations into the abusive lending and packaging of risky mortgages that led to the housing crisis," and he vowed again to "hold accountable those who broke the law."

That portion of the speech had a familiar ring. In November 2009, Attorney General Holder, with Treasury Secretary Timothy Geithner at his side, announced the creation of another special unit–the Financial Fraud Enforcement Task Force–that was similarly charged with investigating securities and mortgage fraud that contributed to the financial meltdown. Since its creation, that task force, which critics say was drastically under-resourced, has produced not a single conviction (or even indictment) of a major Wall Street player related to the financial disaster.

Some who heard the president's State of the Union speech thought they discerned a hidden purpose behind his new "special unit"–the Residential Mortgage-Backed Securities Working Group, as it would be called. The day before the president's speech, state attorneys general from around the country met in Chicago with Justice officials to discuss a proposed national settlement with five major banks, including JPMorgan Chase and Bank of America, over questionable foreclosure practices. The administration was pushing the settlement, as were the banks. But a handful of attorneys general were resisting the settlement, believing it gave too much away to the banks–including protection from mortgage-related investigations that were still unfolding. These holdout state officials were supported by a coalition of activists, who argued that the banks would never make meaningful concessions–such as the reduction of principal on underwater mortgages–unless they faced the threat of investigation.

One of those activists, Mike Gecan, of the Industrial Areas Foundation, says he was disheartened when he heard Obama's speech, and the news that New York Attorney General Eric Schneiderman would be co-chairing the new "working group." Schneiderman, who is in the tough-guy mold of his predecessors, Eliot Spitzer and Andrew Cuomo, had been a leader of the state holdouts; now, Gecan feared, Schneiderman had been co-opted by the Chicago Way. "I'm from Chicago, I've seen this game played my whole life," he says.

Gecan's view seemed vindicated two weeks later, when Obama announced that the settlement had been reached.

Nearly three months later, it is not clear what, if any, progress the "working group" has made. The unit was only promised 55 investigators, attorneys, and support staff–a tiny fraction of the resources afforded to

Frustration over the lack of action has fueled the Occupy movement.

similar groups investigating the S&L and Enron/WorldCom scandals–and it is not clear that even that commitment has materialized. "I think what happened is what usually happens: the administration rope-a-doped," says Gecan. "There's no office, there's no director, there's no staff, there's no space, there's no phone."

Last month, Gecan wrote an op-ed article for the New York *Daily News*, calling upon Schneiderman to quit the group in protest (Schneiderman's office did not respond to requests for an interview). In the meantime, Gecan said, he will work to bring pressure on Obama. "There's a little presidential campaign that's going to start, and we're going to make this issue central to this campaign," he said.

It may be, as the attorney general points out, that Wall Street was greedy, stupid, and immoral, without actually breaking any laws. But the powers of the Justice Department are immense, and a more aggressive prosecutor surely could have found cases to make. Black, the UMKC professor, says the conduct could well have violated federal fraud statutes–"securities fraud for false disclosures, wire and mail fraud for making false representations about the quality of the loans and derivatives they were selling, bank fraud for false representations to the regulators."

The absence of prosecutions, and the fact that the cops on the beat hail from the place that represents the banks, does not sit right with many who hoped Obama would fulfill his promise to hold Big Finance accountable. The left's frustration fuels the Occupy movement, and chills the Democratic base. And it gives Romney, the career capitalist, an opening he is avidly exploiting.

Through last fall, Obama had collected more donations from Wall Street than any of the Republican candidates; employees of Bain Capital donated more than twice as much to Obama as they did to Romney, who founded the firm. By this spring, however, resolution had come to the GOP contest, and Wall Street could see a friendly alternative to Obama. While most of Romney's contributions so far come mainly from the financial sector, Obama's donations from Wall Street have dropped sharply.

But this turn may yet help Obama, playing into the Romney-as-plutocrat theme. Just the other week, the Republican candidate quietly slipped into a fundraiser at the home of hedge-fund king John Paulson, who made a killing shorting mortgage futures (including about $1 billion on the Abacus deal). The Obama campaign pounced. Obama may yet fully liberate his inner populist–that Obama who in 2010 in an off-Prompter moment uttered a sentence that made blood run cold on Wall Street: "I do think at a certain point you've made enough money." **NW**

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