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As they appeared before the U.S. Senate Banking Committee last month, financial regulators seemed more than a bit discomfited when asked about the last time they took a big bank to trial. It was a rhetorical question more than anything. And the media played it up as another example of what some see as the government's "too-big-to-fail" approach to regulating the banking sector. In fact, there was more to it than that. The Committee's not-so-subtle rebuke underscored a fundamental divide in how financial crime is being regulated in the United States. It is not about any kind of selective willingness to push a case to trial. Few cases go to trial these days, particularly when the government gets involved.

Rather, it is about how differently the U.S. treats financial crime depending on whether it falls within the arena of antitrust or financial regulation. Only with the former has the government shown any kind of zeal to put the individual wrongdoers behind bars. Indeed, seeking criminal sanctions and jail time has become the driving force in the Obama administration's redoubled efforts to stamp out illegal cartel activity. But when the banks have been implicated for their various mortgage machinations and other acts of financial malfeasance, nary a noise is made about any criminal prosecution. To the contrary—it is most often just a fiscal slap on the wrist and they are on their way.

There are several very recent exemplars of this seemingly perverse enforcement paradigm. Only two months ago, the Federal Reserve and Comptroller of the Currency entered into an $8.5 billion settlement with the likes of Bank of America, JP Morgan Chase, Wells Fargo, and Citigroup to resolve allegations of foreclosure abuses. That same day, Bank of America reached a separate $11.6 billion deal with the government-controlled housing agency Fannie Mae to resolve claims of faulty mortgage sales. And only a month before that, HSBC agreed to pay $1.9 billion for facilitating money laundering by some of the world's nastiest drug cartels and transacting with several countries subject to international sanctions. ING, Barclays, Credit Suisse, Wachovia, and several other banks also have recently paid hundreds of millions of dollars to settle similar types of charges.

Serious fines yes. But even more serious offenses. Yet in none of these enforcement proceedings were criminal sanctions imposed, let alone jail time for the principal perpetrators. The closest the government has come in this current surge of financial regulation is the recent UBS LIBOR settlement. In addition to the sizeable $1.5 billion fine the government imposed on the bank, the government also secured a guilty plea and is seeking individual criminal charges.

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But even there, the government's criminal pursuit has been criticized as coming up short. The guilty plea was only for wire fraud from a Japanese subsidiary of the bank. And the quest for criminal charges is only against two former mid-level traders. According to the *New York Times*, this was just "another questionable bank settlement" unlikely to "deter future wrongdoing" and merely serves to shield the parent company and its senior management from criminal prosecution.

The government's failure to criminally go after any of those who contributed to the massive financial meltdown from which the economy still reels is particularly noteworthy. No doubt, it was a complex event with numerous contributing factors. But it is equally clear at this point that key players in the banking industry and their mortgage maneuverings played a significant role in the crash. We know what happened. We know who was involved. There is no great mystery here.

But, for whatever reason, the government has taken a softer, gentler approach to dealing with what amounts to one of the most devastating financial crimes in history. Other than a failed attempt several years ago to go after two Bear Stearns fund managers accused of lying to investors, the government has refused to unsheathe or even threaten the use of serious criminal sanctions against any of the financial institutions that dominate this industry. Hence the well-worn catchphrase—"too big to fail; too big to jail."

This regulatory approach, however, is far removed from the one the government employs when it comes to antitrust enforcement. For years, the Antitrust Division of the Department of Justice has operated under the guiding principle that monetary sanctions go only so far in deterring illegal behavior. This is particularly so when the bulk of the fine is merely a payback (and partial payback at that) of the massive windfall the company (and top executives) recovered from the illicit conduct.

Take the recent HSBC settlement. The $1.9 billion it paid out was a record fine for the serious financial transgressions in which the bank engaged. But that amount represented only a trifle of the close to $17 billion in profits the bank pulled in last year. Senator Chuck Grassley (R-Iowa), the ranking member of the Senate Judiciary Committee, complained that the settlement was "hardly even a slap on the wrist" for a company caught "aiding and abetting drug lords and terrorists." He excoriated the government for failing to prosecute the bank criminally and cautioned that it sends out a clear message that "crime actually does pay." The financial markets agreed. The bank's share price actually rose after the settlement was announced.

The Antitrust Division is very much in tune with the shortcomings of this kind of constrained enforcement mentality. That is why so central to its enforcement strategy, and one that continues to get ever-more play, is the agency's ready use of criminal sanctions—whether it be against the company itself, or the executives directing or acquiescing in the misbehavior. The Division has made it a focal point of its regulatory charge to hit the malefactors hard with a strong criminal punch. That means criminal fines (tethered to the principle of punishment not recoupment) and, even more importantly, jail time.

The Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA") has greatly assisted the Division in this drive. Originally passed in 2004, and reauthorized in 2010, it increased the maximum criminal fine for antitrust violations from $10 million to $100 million for corporations, and from $350,000 to $1 million for individuals. It also increased the maximum jail time from 3 years to 10 years. At the time of its passage, the Act was heralded by the head of the Antitrust Division as a powerful enhancement to "one of the Division's core missions, its anti-cartel enforcement program[,] . . . aid[ing] in the continued successful detection, prosecution, punishment, and deterrence of hard core cartel activity." When it comes to criminal activity, the Division means business and seldom misses an opportunity to tell you so.

It is no wonder that, in recent years, the Antitrust Division has been sending more and more antitrust scofflaws to jail for longer and longer periods of time. The number of individuals sentenced has increased, from roughly 11 per year (between 1995 and 1999), to 17 per year (between 2000 and 2004), to 25 per year (between 2005 and 2011). The average length of sentence has increased, from roughly 8 months (during the 1990s), to 20 months (over the past decade), to 25 months (over the past three years). And most markedly, the annual number of prison days has increased from roughly 3,300 (during the 1990s), to 12,700 (over the past decade), to a whopping 23,400 (over the past few years).

Lately, it seems not a month goes by without the agency trumpeting the latest corporate executive it is hauling off to jail for engaging in illegal cartel activity—dozens of top executives involved in a host of cartels (auto parts, LCD panels, municipal bonds, optical disk drives) this past year alone.

So which is the right approach to take in enforcing financial crime? There certainly is the reasonable concern that mere monetary fines are not doing enough to get the banks to behave. But there also is some legitimacy to the parallel concern that bringing these banks down criminally could negatively impact a still teetering economy. On the other hand, there is no question that the threat of jail time adds a powerful deterrent to would-be lawbreakers. But is the ever-increasing parade of antitrust offenders behind bars doing as much as we think to scare companies and their executives straight? It is not at all clear that it is. The truth is that nothing seems to be working all that well on the deterrence front. Not the influx of record fines the banks are dishing out, nor the swelling ranks of antitrust criminals doing time. Financial crime is still at an all time high and showing no sign of retreat.

Which brings us back to last month's Senate Banking Committee hearing where financial regulators were given so much grief for admitting their failure to take any of the big Wall Street banks to trial. In defending his agency's action, the Comptroller of the Currency, one of the agencies that supervises national banks and federal thrifts, summarized a widely held view among financial regulators: "We primarily view the tools that we have as mechanisms for correcting deficiencies. So the primary motive for our enforcement actions is really to identify the problem, and then demand a solution to it on an ongoing basis."

To many, this was nothing but a thinly veiled concession that the financial regulators had abandoned their posts in the aftermath of the financial crisis. But maybe the Comptroller has a point. And maybe the unending attack on the failure to go criminal on the financial industry is misguided. There is a clear divergence in financial and antitrust regulation, but it is not at all clear as to which approach, if any, is yielding the necessary results.

So maybe the focus in all of this should be less about pushing one set of regulators to be more like the other, and more about finding the best way to reach the common goal of maintaining the integrity of our markets and the strength of our economy. That could mean a greater willingness to impose criminal sanctions, including jail time. It could mean steeper monetary fines. It could mean requiring internal monitors for longer periods of time and with greater access to and authority over corporate operations. It could mean greater use of the exclusion remedy—suspending companies or their executives from contracting with the government or participating in the regulated industry at all. Or it could mean none of these and instead employing alternative deterrence strategies that have yet to be formulated.

The point is that we are still trying to figure out what works best in curbing financial crime. And the radically different paths taken by antitrust enforcers and financial regulators presents as much a problem as it does an opportunity to work towards a more coherent and effective approach to attacking this stubborn scourge on our economic health and security.