

**Written Testimony Before the United States Senate Committee of the
Judiciary**

**“Cleaning Up the C-Suite: Ensuring Accountability for Corporate
Criminals”**

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Chairman Durbin, Ranking Member Graham, Members of the Committee, and Staff: thank you for the opportunity to testify before you today about corporate prosecutions. I am the L. Neil Williams, Jr. Professor of Law at Duke University School of Law, and I have researched and tracked federal criminal prosecutions of organizations since they took their modern form in the early 2000s.¹

As legal persons, corporations can be criminals too, and never before has corporate criminal enforcement been so important in the United States and across the globe. Billion-dollar corporate criminal penalties are now regular events. And yet, concerns persist that the largest criminal offenders are corporations, but they can escape the type of punishment routinely meted out in lower-level cases. As the title of my 2011 book, “Too Big to Jail,” intended to convey, using criminal law to hold corporations accountable is inherently challenging.² It is also a comparatively recent undertaking.

Today, my goal is to give an overview of the changing landscape of federal corporate criminal enforcement. I began studying the field early in its evolution, as a new approach towards settling major federal corporate criminal cases emerged in the early aughts, in the wake of the Enron-era financial scandals.³ Deferred and non-prosecution agreements took off as a new strategy to settle the most significant corporate prosecutions without an indictment, much less a conviction. While my early work involved tracking what then amounted to dozens of large-scale cases, which I could stack in a single pile on my law school desk, by the time I wrote my 2011 book, there had been many hundreds of these largely out-of-court negotiated settlements. At the time, none were tracking federal prosecutions of organizations that did not involve sentencing in court, reflected in data maintained by the U.S. Sentencing Commission, but rather these largely out-of-court settlements.

¹ This testimony reflects my own views as a scholar and not those of Duke University, Duke University School of Law, the Wilson Center for Science and Justice at Duke Law, or any other institution.

² Brandon L. Garrett, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* (2016).

³ Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 888– 89 (2007) (describing the early rise in the use of negotiated settlements in federal corporate prosecutions).

This work led to the creation of the Corporate Prosecution Registry, in collaboration with Jon Ashley, currently a reference librarian at the Darden School at the University of Virginia.⁴ We have almost 5,000 cases digested in this freely available online repository, which mostly dates back to the early 2000s.⁵ Updating this repository is labor intensive, and Jon Ashley and I have scores of law students over the years to thank for their hard work on the Registry. The Registry has been widely used by practicing lawyers, policymakers, as well as academics, who have relied upon the data in a range of studies of corporate prosecutions and behavior.⁶

Updating the Registry has also occasionally involved federal Freedom of Information Act (FOIA) lawsuits, because some prosecution agreements with corporations had not been made public. A particular area of concern has been with regard to non-prosecution agreements and other such agreements that are not filed in a court and which as a result, are not available in the records of federal dockets. In the past, the U.S. Department of Justice (DOJ) has settled all such FOIA suits and attempted to locate each of the requested documents. The DOJ has responded similarly and cooperatively to the most recent FOIA suit, filed in 2021.⁷ However, we are still concerned that organizational non-prosecution agreements and other agreements not filed in court, particularly those entered by the various U.S. Attorney's Offices, may not always be publicly disclosed or available.

In response to transparency concerns, the DOJ recently adopted a practice of making agreements available online, with 51 cases included in a corporate crime case database since the beginning of this year.⁸ This database, although still new, represents a positive DOJ commitment to sharing more public information about corporate prosecution resolutions. Jon Ashley and I are committed to maintaining a Corporate Prosecution Registry, but we believe that this work should be a primarily public function.

The trends from these data continue to be highly informative, over a decade after I wrote "Too Big to Jail," and as we continue to update the Registry. First, one can readily see the remarkable rise in the size, but not the numbers, of federal

⁴ See Jon Ashley and Brandon L. Garrett, CORPORATE PROSECUTION REGISTRY, <https://corporate-prosecution-registry.com/browse/>.

⁵ See *Data and Documents*, CORPORATE PROSECUTION REGISTRY, <https://corporate-prosecution-registry.com/browse/>. At present, 4,471 cases are available on the Registry. However, we are presently updating the site to include about three hundred additional entries, including cases obtained through the most recent FOIA litigation, as well as more recent 2022 and 2023 cases.

⁶ We have included examples of such work, relying in part on Registry data, on our website. See *Resources*, CORPORATE PROSECUTION REGISTRY, <https://corporate-prosecution-registry.com/resources/>.

⁷ See, e.g. Justin Wise, *DOJ Sued by Law Librarian Over Non-Prosecution Records*, Law360, November 9, 2021.

⁸ See U.S. Department of Justice, Corporate Crime Database, at <https://www.justice.gov/corporate-crime/corporate-crime-case-database>.

corporate prosecutions in recent years.⁹ Over the past two decades, far more financial institutions were being charged than in the past.¹⁰ Prosecutors began to use criminal statutes such as the Bank Secrecy Act and the Foreign Corrupt Practices Act (FCPA), which had been neglected in the past. Billion-dollar criminal penalties are now an annual event; such penalties had never existed before the modern era of corporate settlements. In 2023, we have seen \$1.8 billion in total criminal penalties so far, and more may be yet to come, including a \$4 billion resolution, involving guilty pleas, recently announced with Binance Holdings Ltd., but not yet finalized.¹¹ In 2022, we observed approximately \$1.2 billion in penalties, and in 2021, it was approximately \$3.8 billion. Each year, the bulk of those total penalties come from just a handful of cases. Typically, the largest cases are mostly resolved, not through trials or guilty pleas, but rather out-of-court deals crediting companies for cooperation and compliance. Whether they deserve that credit is often hard to gauge based on the limited information that is disclosed in these deals.

Indeed, deferred prosecution agreements were never intended or imagined as a vehicle to resolve prosecutions of major corporations. They grew out of a provision in the 1974 Speedy Trial Act that reflected efforts to divert first-time and juvenile non-violent offenders for rehabilitative reasons.¹² It would be very helpful to amend the Speedy Trial Act to add dedicated provisions governing the factors relevant when a criminal case involving a firm is deferred. Instead, we have little to no judicial involvement in the approval of these agreements, as would occur for a plea bargain. Nor do we have adequate judicial oversight of these undertakings, as would occur for a civil consent decree or corporate probation under the terms of a plea agreement. When judges have occasionally intervened to potentially review or supervise corporate prosecution agreements, appellate courts have reversed such efforts.¹³

With federal judges largely relegated to a sideline role in many of the largest federal corporate prosecution cases, still commonly resolved without a conviction, the relevant decisionmaking occurs through the substantial discretion of prosecutors, as

⁹ See *Corporate Settlements*, CORPORATE PROSECUTION REGISTRY, at <https://corporate-prosecution-registry.com/visuals/>.

¹⁰ See Brandon L. Garrett, *The Rise of Bank Prosecutions*, 126 YALE L.J. F. 33, 35 (2016) (detailing changing approach towards prosecution of financial institutions).

¹¹ Press Release, *Binance and CEO Plead Guilty to Federal Charges in \$4B Resolution*, U.S. Department of Justice, Nov. 21, 2023, at <https://www.justice.gov/opa/pr/binance-and-ceo-plead-guilty-federal-charges-4b-resolution>.

¹² Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-74 (2012). Under Title 18, United States Code, Section 3161(h)(2) of the Speedy Trial Act, a judge may defer the prosecution of a defendant to permit the defendant to show “good conduct.” The provisions of the Act were generally intended to “strengthen[] the supervision over persons released pending trial” and encourage the then-“current trend” of creating diversion programs as an alternative to prosecution for low-level, nonviolent individual offenders. See H.R. Rep. No. 93-1508, at 1 (1974), reprinted in 1974 U.S.C.C.A.N. 7401, 7401; S. Rep. No. 93-1021, at 36-37 (1974); see also Anthony Partridge, Fed. Judicial Ctr., *Legislative History of Title I of the Speedy Trial Act of 1974*, at 117 (1980) (referring to good behavior).

¹³ See, e.g. *U.S. v. Fokker Servs., B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016).

guided by an evolving set of statements in the U.S. Attorney's Manual and other DOJ documents. In 1999, then-Deputy Attorney General Eric Holder cemented the growing importance of corporate prosecutions in a novel memo regarding charging corporate defendants.¹⁴ In the early 2000s, a new approach revolutionized corporate prosecutions, as the DOJ emphasized large-scale settlements using deferred and non-prosecution agreements.¹⁵ In 2015, the DOJ adopted a revision to its policies to focus on individual investigations and prosecutions.¹⁶ In February 2017, the DOJ's Criminal Fraud Section produced new guidance on evaluating corporate compliance, which was then updated in 2019 and 2023.¹⁷ In 2017 and 2018, the DOJ made a series of policy changes intended to reduce the impact of criminal prosecution on corporations.¹⁸ More recently, the DOJ has restored prior policies and adopted new ones, including regarding public selection of monitors, and a policy rewarding voluntary self-disclosures.¹⁹ It was noteworthy that in the last round of revisions to those priorities, the Department of Justice reached out to a broader set of stakeholders, including academics like myself.

However, we have not seen sharp changes in the pattern of corporate prosecution outcomes accompanying many of these various changes to DOJ policy. Some of these DOJ policy changes have been temporary, such as the change in focus to prioritize individual prosecutions, which was rescinded and then restored. Other changes have been institutional and perhaps longer lasting, like the larger numbers of prosecutors focusing on bringing anti-corruption prosecutions. Over time, concerns have grown that we not only lack sufficient information about corporate crime, but that enforcement may not be effective enough, given high-profile examples of repeat offending by corporations. What are areas of possible improvement? I outline four general areas in this testimony, focusing on areas in which Congress could play an important role.

¹⁴ See Garrett, *Too Big to Jail*, *supra* note 2, at 54-56 (providing an overview of the changing approach towards corporation prosecutions during the 1990s and early 2000s).

¹⁵ Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, Memorandum to Heads of Department Components and United States Attorneys (Jan. 20, 2003).

¹⁶ See Sally Yates, Deputy Attorney Gen., U.S. Dep't of Justice, Memorandum to Heads of Dep't Components & U.S. Attorneys, Individual Accountability for Corporate Wrongdoing, at 1 (Sept. 9, 2015), Brandon L. Garrett, *The Metamorphosis of Corporate Criminal Prosecutions*, 101 VA. L. REV. ONLINE 60, 61 (2016); Elizabeth E. Joh & Thomas W. Joo, *The Corporation as Snitch: The New DOJ Guidelines on Prosecuting White Collar Crime*, 101 VA. L. REV. ONLINE 51 (2015).

¹⁷ U.S. DEP'T OF JUSTICE, EVALUATION OF CORP. COMPLIANCE PROGRAMS (March 2023), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

¹⁸ For a summary of those 2017-2018 changes, see Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109 (2020).

¹⁹ Memorandum from DAG Monaco to DOJ on Further Revisions to Corporate Criminal Enforcement Policies (Sept. 15, 2022), <https://www.justice.gov/opa/speech/file/1535301/download>; United States Attorneys' Offices Voluntary Self-Disclosure Policy, at <https://www.justice.gov/media/1276521/dl?inline>; United States Attorneys' Offices Monitor Selection for Corporate Criminal Enforcement, at <https://www.justice.gov/media/1276526/dl?inline>.

First, federal legislation could promote more comprehensive public data collection regarding corporate crime, and it should.²⁰ The nascent DOJ database is only a first step in that direction. In other areas, the DOJ and prosecutors have long insisted on routine monitoring with public reporting, where monitors' reports for consent decrees are introduced in court and made available for review and input by stakeholders. In corporate prosecutions, however, oversight process is typically not transparent. Instead, oversight in corporate prosecutions should include public reporting, as in other areas in which there is government oversight. Further, prosecution agreements could disclose far more about the nature of the conduct that led to the prosecution.

Second, legislation should amend the Speedy Trial Act to provide a dedicated set of provisions requiring more careful judicial supervision of the approval and implementation of deferred prosecution agreements, just as legislation has already required victim notice for such settlements.²¹ The language of the Speedy Trial Act, to be sure, already makes clear that judges may or may not approve a deferred prosecution.²² However, courts have interpreted that language as foreclosing substantive review of the fairness or advisability of deferred prosecution agreements with corporations.²³ An amendment could also beneficially include clear criteria for reviewing whether proffered corporate deferred prosecution agreements serve the public interest.²⁴ That amendment could also set out criteria for judicial oversight of a corporate deferred prosecution agreement if it is approved. That oversight could involve probation supervision. Indeed, when companies plead guilty, dedicated resources for corporate probation could also improve the supervision of corporations that plead guilty.

Third, legislation could allocate more enforcement resources, to both civil regulators, and to prosecutors if a case warrants prosecution, to support more expert staff to fairly address the most complex cases. Without adequate resources, we cannot expect prosecutors to pursue convictions in the most complex corporate cases. A Corporate Prosecution Section or Division could be created at Main Justice with branch offices in key districts for corporate prosecutions, such as Southern District of New York, the Eastern District of Virginia, and the Northern District of California.

²⁰ Legislation regarding transparency in corporate settlements passed in the U.S. Senate in 2015, but was not enacted. *See* Truth in Settlements Act of 2015, S.1109, 114th Cong. (as passed by Senate, Sept. 21, 2015). As part of the Justice for Victims of Trafficking Act of 2015, Congress enhanced crime victim's rights when deferred prosecution agreements are entered with corporations. 18 U.S.C. § 3771(a)(9).

²¹ *See* Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483, 1509, 1511 (2017).

²² *See* 18 U.S.C. § 3161(h).

²³ *See, e.g.* U.S. v. Fokker Servs., B.V., 818 F.3d 733, 742 (D.C. Cir. 2016).

²⁴ An analogous change was made to highlight the importance and mandatory nature of judicial review regarding the public interest under the Tunney Act, regarding antitrust settlements. *See* 15 U.S.C. § 16(e) (2012).

The Antitrust Division has a long tradition of independent policy and consistency in practice, and it similarly has field offices.

Fourth, legislation, regulation, and enforcement guidelines could emphasize the need for effective compliance. If companies receive credit for implementing compliance remedies, we need to be sure that it is empirically tested assess the degree to which these compliance efforts are effective.²⁵ For too long, prosecutors had credited assurances that best practices were in place when resolving the most serious corporate prosecution cases. In more recent years, DOJ policies have been gradually changing to demand more testing of the quality of compliance programs, including in the revised guidance regarding compliance programs and their assessment. The DOJ asks for evidence that a program “works in practice,” including through “periodic testing.”²⁶ In resolutions regarding foreign bribery and corruption, the DOJ has also often provided that “periodic reviews and testing” should occur for all aspects of compliance.²⁷ Understandably, companies may resist spending large sums on ineffective compliance. Instead, they should be credited for conducting the type of experiments that can test the quality of compliance. Just as legislation and regulations require quality controls and quality assurance for systems to test emissions or medical outcomes, we should require quality controls and quality assurance for compliance designed to prevent criminality.

Finally, I highlight the importance of the international picture, and a changing global legal and enforcement landscape, as other countries have reacted to enforcement in the U.S. and adopted their own corporate prosecution approaches, often through legislation, rather than prosecutorial discretion.²⁸ Many of the largest corporate crime cases have involved conduct spanning the globe, and increasingly, the cooperation of foreign enforcers. The DOJ correctly credits foreign enforcement efforts, which we should promote, when resolving matters in the U.S.²⁹

²⁵ See Brandon L. Garrett & Gregory Mitchell, *Testing Compliance*, 83 L. & CONTEMP. PROB. 47 (2020).

²⁶ U.S. Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs (Updated March 2023), at <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

²⁷ See Department of Justice, Appendix C, Corporate Compliance Program, at https://www.millerchevalier.com/sites/default/files/resources/General_Alerts/DOJ_Revised-Attachment-C.pdf.

²⁸ See, e.g. Bribery Act, 2010, c. 23 § 7(1)(a)(b) (U.K.), https://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf; French Government Press Release, *Sapin II Law: Transparency, The Fight Against Corruption, Modernisation of the Economy* (6 April 2016), <http://www.gouvernement.fr/en/sapin-ii-law-transparency-the-fight-against-corruption-modernisation-of-the-economy>; News Release, *Canada to Enhance its Toolkit to Address Corporate Wrongdoing*, March 20, 2018, at <https://www.canada.ca/en/public-services-procurement/news/2018/03/canada-to-enhance-its-toolkit-to-address-corporate-wrongdoing.html>; OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (2019), at www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm.

²⁹ Memo to DOJ Working Group on Corporate Enforcement & Accountability, Policy on Coordination of Corporate Enforcement Penalties, May 9, 2018.

Getting corporate prosecutions right is not something that only federal prosecutors can or should do. I have argued that although the DOJ has made important refinements in its evolving set of approaches, the U.S. system largely relying on negotiated outcomes in corporate prosecutions does not deliver sufficient certainty for corporations, it does not adequately deter, it does not adequately remediate, and it at bottom, does not adequately serve the public interest. A greater role for lawmakers and the judiciary is much needed, so that the process does not purely depend on evolving prosecutorial discretion and the application of complex internal DOJ guidelines. I thank the Committee for its continued attention to the challenges and the importance of corporate prosecutions.