Countering Capture:

A Political Theory of Corporate Criminal Liability

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In order to effectively deter organizational misconduct, countries must hold companies liable for their organizational misconduct. Some scholars argue, however, that countries should not impose criminal liability on companies and instead should rely entirely on civil liability, which can impose the same sanctions on companies as criminal liability. This claim that corporate civil enforcement is as effective as criminal enforcement is incorrect because it overlooks how the choice between the two affects companies' ability to use their political influence to undermine corporate enforcement intensity. This Article shows that eliminating federal corporate criminal liability would undermine deterrence because large corporations would be better able to leverage their political influence over Congress and the White House to reduce corporate enforcement if companies are not criminally liable for two reasons. First, civil enforcement is more vulnerable to political influence channeled through Congress and the White House than criminal enforcement. Second, eliminating corporate criminal enforcement would leave civil enforcement more vulnerable to companies' political influence, less effective at deterring corporate misconduct, and less likely to pursue individual wrongdoers.

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INTRODUCTION

Corporate misconduct is best deterred when corporate and individual liability for organizational misconduct is structured to achieve two primary goals.[1] First, corporate liability must be sufficiently broad and substantial to ensure that corporations do not profit from their employees' misconduct. Second, individual wrongdoers must face a material and salient risk of sanctions for their organizational misconduct. To achieve this latter goal, enforcement officials need to structure corporate enforcement policy to induce companies to detect, self-report, and fully cooperate by providing evidence on the entire scope of the misconduct and the identity and complicity of those responsible. Enforcement officials also need to pursue the individuals responsible for the misconduct.[2]

Currently, federal authorities strive to achieve these goals by combining broad corporate criminal and civil liability for organizational misconduct governed by *respondeat superior* with a corporate criminal enforcement policy that rewards corporate self-reporting and full cooperation. It also favors individual criminal and civil liability for misconduct.[3] This structure has enabled the United States to enter into more corporate criminal settlements with large companies than any other country[4] and to sanction many individual

1. Jennifer Arlen, *The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLES APPROACH 156, 159 (Abiola Makinwa & Tina Søreide eds., 2020).

2. Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 695 (1997); *see* Arlen, *supra* note 1, at 161–77 (discussing optimal enforcement policy); Jennifer Arlen & Lewis Kornhauser, *Battle for Our Souls: A Psychological Justification for Individual and Corporate Liability for Organizational Misconduct*, U. ILL. L. REV. (forthcoming 2022) (showing that deterrence analysis predicated on empirical insights from psychology yields similar conclusions); *also see infra* Part I.B. (describing the optimal structure of individual and corporate liability as one that focuses on individual sanctions).

3. *See* Jennifer Arlen, *Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Corporate Criminals into Corporate Cops*, *in* CRIMINALITA D'IMPRESSA E GIUSTIZIA NEGOZIATA: ESPERIENZE A CONFRONTO 91 (Stefano Manacorda & F. Centonze eds., 2018) (discussing the strengths and limitations of the U.S. system).

4. ORG. FOR ECON. COOP. & DEV., THE LIABILITY OF LEGAL PERSONS FOR FOREIGN BRIBERY: A

wrongdoers.[5] Corporate criminal liability has been an important part of this effort to deter corporate misconduct.

Yet some leading scholars assert that the government should not impose criminal liability on corporations on the ground that the state can achieve its deterrence objectives at a lower social cost solely through corporate civil liability[6] with substantial monetary sanctions.[7] These scholars argue that corporate criminal liability is unnecessary because civil liability can impose the same costs on companies as criminal liability: monetary penalties,[8] collateral consequences,[9] mandated internal reforms, and a monitor. In addition, these scholars claim that procedural differences between criminal and civil enforcement do not justify imposing corporate criminal liability.[10]

The argument that government-imposed corporate civil liability is as effective as corporate criminal liability rests on the unstated assumption that the relative effectiveness of criminal and civil enforcement depends entirely on the laws governing sanctions and procedures. This is not the case. Relative enforcement effectiveness also depends on criminal and civil enforcement officials' respective willingness to pursue corporate enforcement. Specifically, it depends on their relative willingness to impose material sanctions on large corporations for misconduct, induce full corporate cooperation, and pursue individual wrongdoers. Enforcement authorities are not equally willing or able to use the tools available to them to pursue effective corporate enforcement because they are differentially vulnerable to having their corporate enforcement efforts undermined by elected officials seeking to promote the interests of large companies.

Large corporations have both the motivation and the financial resources to intervene to reduce corporate enforcement. They can do so by inducing elected public officials to use their influence over agencies to reduce the likelihood of corporate enforcement.

STOCKTAKING REPORT 8 (2016), https://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf [https://perma.cc/QC5Y-VJZT] [hereinafter THE LIABILITY OF LEGAL PERSONS FOR FOREIGN BRIBERY].

5. In the United States., many individual wrongdoers escape sanction. Brandon Garrett, *Individual and Corporate Criminals*, *in* THE RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 40, 40 (Jennifer Arlen ed., 2018). Nevertheless, the United States appears to have successfully sanctioned more individuals for organizational misconduct by large companies than have other countries. *See* Arlen, *supra* note 1, at 159–60 (discussing France and the United Kingdom).

6. Throughout this Article, the terms "civil liability" and "civil enforcement" refers to all civil or administrative sanctions imposed by government authorities. It does not include private civil litigation. This Article focuses on federal corporate criminal and civil liability and does not address the political economy of corporate liability imposed by the states. For a discussion of that issue, see *infra* note 111.

7. *See* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1497 (1996); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 331 (1996). Other scholars propose replacing criminal *respondeat superior* with corporate criminal liability predicated on indicia of corporate culpability. *See, e.g.*, William Laufer & Alan Strudler, *Corporate Intentionality, Desert and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285 (2000); Mihailis E. Diamantis, *The Body Corporate*, 83 LAW & CONTEMP. PROBS. 133 (2020); Samuel Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006); *cf.* Miriam Baer, *Propping up Corporate Crime with Corporate Character*, 103 IOWA L. REV. ONLINE 88 (2018).

8. *See* Khanna, *supra* note 7, at 1493; Fischel & Sykes, *supra* note 7, at 331–32.

9. *See* Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 87, 128–38 (Jennifer Arlen ed., 2018) (discussing federal law on collateral sanctions).

10. Khanna, *supra* note 7, at 1509; Fischel & Sykes, *supra* note 7, at 331.

Accordingly, the claim that pure civil corporate enforcement is as effective as joint criminal and civil enforcement is not valid if eliminating corporate criminal liability would improve companies' ability to use their political influence to suppress corporate enforcement.

This Article evaluates the political economy of corporate enforcement and shows that eliminating corporate criminal liability would enhance large companies' ability to use their political influence to reduce corporate enforcement effectiveness for two reasons.[11] First, corporate civil enforcement is more vulnerable to companies' political influence than corporate criminal enforcement because both the President and Congress have a greater ability to intervene to reduce corporate civil enforcement intensity.[12] Second, eliminating corporate criminal liability would leave corporate civil enforcement more vulnerable to companies' political influence than it is at present because coordination with criminal enforcement reduces civil enforcement's vulnerability to capture and increases its effectiveness.[13]

Civil enforcement is more vulnerable to companies' political influence channeled through the President or Congress than criminal enforcement because the President and Congress are each better able to use their influence the identity—and thus ideology—of enforcement agencies' senior leadership to reduce the intensity of corporate civil enforcement. The President and members of Congress can influence the selection of the senior leadership of both criminal and civil agencies.[14] This authority directly impacts civil enforcement intensity because civil agencies' senior leadership tends to directly control their agencies' enforcement decisions. By contrast, the senior political appointees in the Department of Justice in Washington, D.C. do not directly control criminal enforcement; instead authority over federal corporate criminal enforcement decisions is dispersed. The Department of Justice grants the 94 individual U.S. Attorneys' Offices considerable autonomy over corporate enforcement decisions. U.S. Attorneys are not required to obtain prior approval from senior political leadership at Main Justice before bringing most

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11. This Article focuses on the political economy of corporate *enforcement*—the decision to bring an enforcement action. This issue differs from the political economy of the substantive laws governing corporate criminal liability, which others have analyzed. *See, e.g.*, Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L. REV. 95 (2004). Companies have incentives to try to reduce corporate criminal enforcement even when they do not want to push Congress to eliminate corporate criminal liability altogether. *See* Daniel Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 760–83 (1998) (discussing why Congress seeks to reduce corporate liability by reducing enforcement instead of by narrowing the scope of liability).

12. *See infra* Parts III.A, B (discussing the relative vulnerabilities to political influence channeled through the President and Congress). For a discussion of why enforcement by state authorities is an inadequate substitute for federal corporate criminal enforcement, see *infra* notes 109–10.

13. Thus, although civil authorities can often impose substantial sanctions that can dwarf criminal fines, *see generally* Cindy R. Alexander, Jennifer Arlen & Mark A. Cohen, *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 J.L. & ECON. 393 (1999) (providing data on criminal and civil penalties for publicly held firms), civil enforcement alone is less effective than criminal enforcement if civil authorities do not wield the power they have. Criminal enforcement helps make civil enforcement more effective. *See infra* Part III.C. (explaining how corporate criminal enforcement enhances corporate civil enforcement); Khanna, *supra* note 11, at 108 (noting that civil authorities can use this authority effectively when they can coordinate with criminal authorities).

14. *See infra* Parts III.A, B. (describing how Congress exerts more influence over senior leadership of civil agencies than criminal agencies).

corporate criminal enforcement actions.[15] Thus, influence over the selection of Attorney General and other senior officials in Main Justice does not give elected officials direct influence over corporate criminal enforcement intensity.

In addition, civil enforcement is more vulnerable to political influence because members of Congress are better able to use their authority over agencies' budgets to undermine corporate civil enforcement. The differential influence over civil and criminal enforcement is particularly pronounced when either the White House favors active enforcement, but powerful members of Congress do not, or when the White House favors weak corporate enforcement, but individual U.S. Attorneys in important offices (such as the SDNY) are committed to vigorous corporate criminal enforcement. Eliminating corporate criminal liability would thus undermine deterrence by shifting control over corporate enforcement to agencies that are more vulnerable to companies' political influence.

Eliminating corporate criminal liability would also undermine deterrence by leaving civil enforcement more vulnerable to capture than it is at present. Corporate criminal enforcement can spur civil enforcement to act, in spite of political pressure, because companies cannot as easily use political influence to mute civil enforcement when criminal authorities have intervened and shone a spotlight on corporate misconduct. Corporate criminal liability also reduces capture by enabling coordinated civil and criminal enforcement, which can both reduce civil enforcement's vulnerability to capture and increase its effectiveness.[16] Coordinated enforcement lowers civil agencies' enforcement costs and improves effectiveness, thereby reducing Congress's ability to mute civil enforcement by constraining agencies' budgets. Coordinated enforcement enables civil authorities to benefit from prosecutors' superior ability to induce companies to fully cooperate.[17] Corporate full cooperation reduces costs by shifting the burden of substantial investigation costs to companies.[18] It also can improve effectiveness by producing evidence that otherwise might not be practically available.[19]

Coordinated enforcement can also improve the deterrent effect of civil enforcement

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15. *See id.* (discussing how Congress influence agencies' enforcement intensity).

16. Coordination also may benefit the public by precluding companies from being able to deny their misconduct. *See* Jacob Elberg, *Health Care Fraud Means Never Having to Say You're Sorry*, 96 WASH. L. REV. 371, 382–83, 391 (2021) (stating that while criminal resolutions generally do not permit subsequent corporate denials, civil corporate resolutions under the False Claims Act generally permit corporations to deny their misconduct); *cf.* AM. L. INST., PRINCIPLES OF THE LAW OF COMPLIANCE AND ENFORCEMENT § 6.25 (AM. L. INST. 2021) (providing guidelines for admissions of facts and denial of culpability in civil and administrative corporate resolutions) [hereinafter PRINCIPLES OF CORPORATE ENFORCEMENT].

17. *See infra* notes 101–02; Jennifer Arlen & Samuel Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697, 706 (2020) (discussing current law and practice).

18. Corporate cooperation also lowers the social costs of investigations because companies can detect and investigate their own misconduct more cost-effectively than the government. Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 144, 165–66 (Keith Hylton & Alon Harel eds., 2012); Arlen, *supra* note 1, at 162–63.

19. *See* Anthony O'Rourke, *Parallel Enforcement and Agency Interdependence*, 77 MD. L. REV. 985, 1030–48 (2018) (providing an in-depth analysis of the potential benefits of coordinated investigations and enforcement to both prosecutors and civil enforcement authorities); *cf.* SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE 172–73 (2016) (describing how prosecutors benefit from regulatory agencies' ongoing oversight of business entities).

by increasing civil authorities' propensity to pursue individual wrongdoers. Individual liability is essential to deterrence.[20] Civil authorities tend to be less inclined to pursue individuals for intentional or knowing misconduct than are criminal authorities because they often have a regulatory mission, in addition to enforcement authority. They can satisfy the former through efforts to reform the firm, which is less costly than individual enforcement. As a result, they are less likely to pursue individual wrongdoers when acting alone. Coordinated enforcement reduces the cost to civil authorities of pursuing individual wrongdoers by enabling them to benefit from corporate cooperation induced by prosecutors, which includes evidence about individual wrongdoers.[21] Coordinated enforcement also changes civil authorities' political calculus relating to individual enforcement, as inaction is more visible—and thus more politically costly—when prosecutors pursue individuals.

Most of the benefits of coordinated enforcement would be lost if corporate criminal liability were eliminated—even if individual wrongdoers remained subject to both criminal and civil liability.[22] Accordingly, eliminating corporate criminal liability would undermine deterrence by reducing the likelihood of corporate enforcement, increasing its costs, and reducing enforcement against individual wrongdoers.

The analysis in this Article proceeds as follows. Part I shows how corporate criminal liability can be structured to optimally deter corporate crime. It then presents some scholars' arguments that civil and criminal corporate liability are equally capable of achieving this goal. Part II provides an overview of public choice theory and details the pathways through which the President and Congress can influence agencies. Part III shows that civil enforcement is more vulnerable to political influence (emanating from either the White House or Congress) than criminal enforcement and explains why civil enforcement is less vulnerable to capture when it can coordinate with corporate criminal enforcement. Part IV concludes.

I. STRUCTURING INDIVIDUAL AND CORPORATE LIABILITY TO DETER CORPORATE CRIME

This Part summarizes federal law on corporate liability for employees' misconduct and explains how corporate criminal enforcement can optimally deter corporate crime.[23] It then presents the claim that the government can effectively, even preferably, deter organizational misconduct through corporate civil liability alone.

20. *See infra* Part I.B.

21. U.S. Dep't of Just., Just. Manual, § 9-28.700 (2018) (explaining that in order to gain value for cooperation, companies need to identify individual wrongdoers and provide facts relating to their involvement) [hereinafter Just. Manual].

22. See *infra* Part III.C.1 (explaining why pure individual criminal liability would not promote effective coordinated civil and criminal enforcement as well as joint individual and corporate criminal liability).

23. For a discussion of why deterrence, and not retribution or restitution, should be the primary goal of corporate criminal liability, see, for example, PRINCIPLES OF CORPORATE ENFORCEMENT, *supra* note 16, § 6.02 cmts. h & j; Arlen, *supra* note 1, at 161 n.17; Samuel W. Buell, *Retiring Corporate Retribution*, 83 LAW & CONTEMP. PROBS. 25, 25 (2020) (explaining that retribution requires the imposition of suffering and is thus inapplicable to corporations).

A. Current Federal Enforcement Policy

Under U.S. federal law, companies are criminally liable for organizational misconduct committed by any employee in the scope of employment with some intent to benefit the firm.[24] Under current federal criminal enforcement policy, however, companies can avoid conviction and obtain a more favorable resolution—such as a declination with disgorgement, a deferred prosecution agreement (DPA), or a non-prosecution agreement (NPA)[25]—if they self-report or fully cooperate with law enforcement and undertake full remediation.[26] Federal criminal enforcement policy also encourages prosecutors to pursue enforcement actions against individual wrongdoers.[27]

Federal authorities are not restricted to criminal sanctions. In most cases, companies and individual wrongdoers also can be subject to civil or administrative penalties. These monetary penalties can be substantial.[28] In addition, in some cases civil or administrative enforcement can trigger collateral sanctions such as debarment, thereby precluding the firm from doing business with the government.[29]

Criminal and civil authorities often coordinate their efforts when investigating and settling cases of corporate misconduct, especially in cases involving large firms.[30]

B. Optimal Structure of Individual and Corporate Liability

Broad corporate criminal liability, structured to both ensure firms do not profit from misconduct and induce them to self-report and fully cooperate, can optimally deter organizational misconduct when combined with active enforcement against individual wrongdoers.[31]

Corporate crimes are committed by employees, usually for personal benefit.[32] Thus,

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24. *See, e.g.*, N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909) (establishing *respondeat superior* as the standard to govern corporate criminal liability); United States v. Dye Constr. Co., 510 F.2d 78, 82 (10th Cir. 1975) (employing *respondeat superior* to govern corporate criminal liability for intentional misconduct).

25. NPAs and DPAs are criminal settlements that resolve a matter without a formal conviction. Companies subject to DPAs and NPAs can pay substantial fines and usually are required to admit to the facts of the misconduct. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 886–93 (2007). For an example of such an enforcement policy, see PRINCIPLES OF CORPORATE ENFORCEMENT, *supra* note 16.

26. Just. Manual, *supra* note 21, §§ 9-28.000, 9-47.120; *see* Arlen & Buell, *supra* note 17, at 706–09 (explaining U.S. corporate enforcement policy).

27. Just. Manual, *supra* note 21, § 9-28.210.

28. For example, both the Antitrust Division and the Environment and Natural Resources Division of the Department of Justice can impose treble damages.

29. *E.g.*, Alexander & Arlen, *supra* note 9, at 128–38 (discussing federal law on collateral sanctions); *see also* Garrett, *supra* note 25, at 879.

30. *See generally* O'Rourke, *supra* note 19; *see also* Brandon L. Garrett, *Collaborative Organizational Prosecution*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 154, 154 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 253 (2015) (discussing how the SEC and criminal authorities can benefit from pooling their authority).

31. Arlen & Kornhauser, *supra* note 2. U.S. corporate criminal law and enforcement policy have multiple features designed to promote effective deterrence—although additional reforms are still needed. *E.g.*, Arlen, *supra* note 3 (discussing needed reforms); Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 204 (2016) (same).

32. Jonathan Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315, 319 (1991); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833,

criminal sanctions for individual wrongdoers are essential to effective deterrence.[33] Current federal criminal enforcement policy on individual liability is consistent with this requirement.[34]

Yet individual liability alone is not enough.[35] Consistent with federal law, companies must also be held liable for all misconduct by their employees acting within the scope of employment. Corporate liability is needed to induce companies to prevent—rather than promote—misconduct.[36] It is also needed—and should be structured—to induce corporate self-reporting and cooperation with enforcement authorities.[37]

Self-reporting and full cooperation are essential because individual liability does not deter unless individual wrongdoers face a material risk of being caught and sanctioned.[38] Enforcement officials generally cannot create a material risk of sanction on their own because they only detect a small fraction of organizational misconduct. Corporations are better able to detect and investigate their employees' misconduct than external authorities.[39] They can also more effectively identify and obtain evidence against the

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834 (1994).

33. Arlen, *supra* note 1, at 161–62; Arlen & Kornhauser, *supra* note 2; *see also* Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265, 275–76 (2014) (discussing how individual prosecutions must be frequent, not sporadic, in order to be effective).

34. Although law and policy are optimal, individuals appear not to be prosecutors as often as would be optimal. *See, e.g.*, Garrett, *supra* note 5, at 51–56 (discussing the goals of corporate prosecution and organizational deterrence).

35. Individual civil liability does not suffice because optimal deterrence cannot be achieved through high sanctions. Individual wrongdoers usually do not have sufficient assets to pay the optimal fine. Prison is so socially costly that lengthy sentences are not an optimal solution to a low probability of detection. Moreover, absent corporate liability, individual wrongdoers' risk of detection and sanction is too low to be sufficiently salient to deter. Arlen & Kraakman, *supra* note 2, at 691–92; *see also* Arlen, *supra* note 18, at 170–71.

36. *E.g.*, Arlen & Kraakman, *supra* note 2; Arlen & Kornhauser, *supra* note 2. Companies do not have adequate incentives to prevent misconduct if they are not liable because, absent corporate liability, companies can retain the profit of their employees' misconduct. Pure individual liability only provides companies with incentives to reduce misconduct to the extent that the company must pay employees higher wages to compensate them for their expected criminal liability. But companies do not incur such costs with intentional misconduct because intentional misconduct does not constitute an unavoidable cost to employees working for the firm. They can avoid this cost by obeying the law. Arlen, *supra* note 18, at 169–70. Companies' wage enhancements, when they occur, also will be less than optimal because they are based on employees' expected liability and employees' assets which are generally less than the benefit of the misconduct. Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345 (1982); *see also* A. Mitchell Polinsky & Steven Shavell, *Should Employees be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT'L REV. L. & ECON. 239, 241 (1993). Pure individual liability also would be inefficient because it would not induce companies to self-report or cooperate. Arlen, *supra* note 18; *see infra* note 39 and accompanying text.

37. Arlen & Kraakman, *supra* note 2, at 706–07; Arlen, *supra* note 1, at 164–65; *see also* PRINCIPLES OF CORPORATE ENFORCEMENT, *supra* note 16 (discussing corporations should not be able to avoid liability by showing they had an effective compliance program); *cf.* Arlen & Kornhauser, *supra* note 2 (discussing the multitude of ways companies can structure employment to induce crime).

38. *See* Arlen, *supra* note 1, at 156; MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT 146–48 (2012); Dan Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 366 (1997) (same).

39. Arlen & Kraakman, *supra* note 2, at 690–91; Arlen, *supra* note 1, at 164–65. Public enforcers detect a small amount of the corporate misconduct that occurs. By contrast, companies' internal systems can detect and substantiate far more misconduct. Arlen & Kraakman, *supra* note 2, at 713 n.62; *see* Eugene Soltes, *The Frequency of Corporate Misconduct: Public Enforcement Versus Private Reality*, 26 J. FIN. CRIME 923, 923–25

individuals responsible for misconduct. Thus, to deter effectively, enforcement officials need to structure corporate liability to induce companies to (1) detect, investigate, and self-report misconduct and (2) fully cooperate by sharing evidence about the misconduct and the role of the individual wrongdoers.

Companies will not self-report and fully cooperate unless corporate enforcement policy ensures that companies fare better if they self-report or fully cooperate and remediate than if they do not. Thus, enforcement policy must threaten companies with enormous sanctions, including conviction, if they fail to self-report or fully cooperate, and at the same time offer those that self-report or fully cooperate the option to resolve through a DPA, NPA, or other, more favorable form of criminal settlement with much lower sanctions.[40] Current federal enforcement policy is consistent with this approach.[41]

C. Traditional Economic Argument Against Corporate Criminal Liability

The analysis of optimal deterrence of corporate misconduct has tended to focus on corporate criminal liability. Yet some scholars claim that the government can deter as effectively and at a lower social cost by relying entirely on corporate civil liability. Since the chief consequences of criminal liability for corporations—monetary penalties and potential collateral sanctions—can also be imposed through civil liability, these scholars argue that there is no need to impose corporate criminal liability as long as civil authorities are empowered to impose equivalent sanctions.[42]

Yet the claim that pure civil corporate liability would be as effective as joint civil and corporate criminal liability rests on the implicit assumption that corporations would face the same threat of an enforcement action, with the same penalties, and structured as effectively to induce corporate self-reporting, cooperation, and remediation, under a regime of pure civil liability as under a regime of coordinated criminal and civil corporate enforcement. This assumption is incorrect in the case of federal enforcement because

(2019) (providing evidence from several publicly-held firms' internal reporting systems); *cf.* Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2214 (2010) (finding that the government rarely detects frauds and more are brought to light by the firm's employees).

40. Arlen & Kraakman, *supra* note 2, at 166; Arlen, *supra* note 18, at 173–89; *see* PRINCIPLES OF CORPORATE ENFORCEMENT, *supra* note 16, §§ 6.17–6.20; Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 87, 87–109 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (discussing civil liability for corporate misconduct). For a discussion of additional factors vital to deterrence, see Arlen, *supra* note 1.

41. Just. Manual, *supra* note 21, §§ 9-28.000, 9-47.120. Although the current federal policy is consistent with this approach, it could be improved. *See, e.g.*, PRINCIPLES OF CORPORATE ENFORCEMENT, *supra* note 16; *see, e.g.*, Arlen, *supra* note 3 (discussing needed reforms); Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 U. CHI. L. REV. 323, 375–85 (2017) (discussing needed reforms to the DOJ's approach to non-trial resolutions that impose mandated compliance reforms).

42. *See* Khanna, *supra* note 7, at 1477–78; Fischel & Sykes, *supra* note 7, at 320. These scholars also claim that corporate criminal liability is not justified by either procedural differences between criminal and civil liability or the purported enhanced reputational damage costs of corporate criminal liability. Khanna, *supra* note 7, at 1501–09 (concluding that the desire to impose costs from reputational damages generally does not justify corporate criminal liability); Fischel & Sykes, *supra* note 7, at 332; *cf.* Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757 (1993) (noting that corporations do not incur costs from reputational damage for all crimes); Alexander & Arlen, *supra* note 9, at 97–124 (arguing that corporations do not incur costs from reputation damage for all crimes; moreover, reputational damage costs can be reduced by post-crime public remediation efforts).

eliminating corporate criminal liability would enhance companies' ability to use their political influence to undermine corporate enforcement. Civil liability also would be less effective absent criminal enforcement.

II. POLITICAL ECONOMY OF CORPORATE LIABILITY FOR MISCONDUCT

This Part shows how companies can leverage elected federal officials' need for campaign contributions to give them indirect influence over federal agencies' enforcement intensity.

A. Interest Group Politics as a Threat to Effective Corporate Enforcement

Companies can profit from their employees' misconduct. Thus, they are better off when the risk of corporate enforcement is too low to deter misconduct. They also profit from low corporate enforcement intensity because active enforcement imposes substantial costs on them both directly—in the form of sanctions—and indirectly—through their resulting increased expenditures on compliance and investigations.[43] Companies thus have substantial incentives to reduce corporate enforcement.

Companies can reduce the risk of corporate enforcement by leveraging their influence over elected federal officials to induce them to intervene to reduce the risk of corporate enforcement.[44] Companies can use their substantial campaign contributions and lobbying activities to induce elected officials to act on their behalf because elected officials need companies' campaign contributions and face an electorate that tends to be uninformed about government actions that do not directly and substantially affect them.[45] Companies focus their efforts on reducing corporate enforcement, rather than on repealing corporate liability, because politicians are more receptive to this approach. Removal of corporate liability would lead to public outcry either immediately or during the next corporate scandal. By contrast, corporate enforcement intensity can be undermined in ways that fall below the public's radar.[46] Companies tend to focus their influence efforts on elected

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43. Companies can take numerous steps to deter and detect misconduct. *See generally* Arlen & Kraakman, *supra* note 2; *cf.* Veronica Root Martinez, *The Compliance Process*, 94 IND. L.J. 203 (2019) (suggesting approaches for improving compliance program effectiveness).

44. *See infra* Parts III.A, B. Large, politically-powerful corporations generally favor interventions designed to mute the overall risk of corporate enforcement. Nevertheless, with respect to specific types of enforcement—i.e., antitrust—powerful corporations with competing preferences may compete for political influence. Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

45. *See generally* MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION (1965); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); GORDON TULLOCK, THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING (1989); JAMES BUCHANAN, TOWARDS A THEORY OF A RENT-SEEKING SOCIETY (James M. Buchanan, Robert D. Tollison & Gordon Tullock eds., 1980). Companies can either exert influence on existing officials or work to elect new officials whose ideology favors their interests. Joseph Kalt & Mark Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984) (noting that interest groups seek to elect politicians whose preexisting policy preferences favor their interests).

46. Richman, *supra* note 11; *see also* Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L. REV. 95, 105 (2004) (concluding that many companies may prefer criminal liability to civil liability). Congress's practice of taking public action to look tough on corporate misconduct while using the power of the purse to undercut enforcement was on full display following the financial crisis. Publicly, Congress enacted financial fraud legislation and authorized substantial amounts to the DOJ and FBI to pursue

officials rather than line prosecutors because they can lawfully influence elected officials through campaign contributions[47] and certain lobbying payments.

Companies' capacity to reduce federal enforcement intensity depends on both their ability to influence the President or members of Congress and these elected officials' ability to use their influence to reduce corporate enforcement. Companies' ability to undermine enforcement through these pathways is more likely to succeed when the targeted elected officials are affiliated with a political party that has embraced an anti-regulatory, pro-business agenda. Both the President and Congress have a variety of pathways through which they can seek to reduce corporate enforcement intensity,[48] as discussed in the next section.

B. How Political Actors Can Influence Federal Enforcement

1. The President's Channels for Influence

Presidents generally are bound by either law or customary norms against intervening directly in specific enforcement decisions by either independent agencies, such as the Securities and Exchange Commission (SEC), or criminal prosecutors.[49] Nevertheless, Presidents can indirectly affect federal agencies' enforcement priorities by using their power to appoint and, in some cases, terminate the heads of federal agencies. Presidents can also influence agencies indirectly through their influence over agency budgets.

Two types of agencies have authority over enforcement: executive agencies, whose heads the President both appoints and can fire at will, and independent agencies with multi-

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financial fraud. Yet, below the radar, Congress immediately undermined enforcement by providing the DOJ and FBI only a fraction of the amounts authorized. Richman, *supra* note 33, at 273–74.

47. This Article focuses on capture channeled through political actors. In addition, public officials can be influenced by their desire for private sector employment following public service. *See, e.g.*, Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 45 (2010); KAY LEHMAN SCHOLZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 343 (1986); *cf.* PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY 193–97 (2021) (discussing Curtis Wright, the FDA official who approved Purdue Pharma's OxyContin without ascertaining its addictiveness, was subsequently hired by Purdue Pharma with a salary of nearly $400,000). Yet this potential source of influence is unlikely to play a material role with enforcement officials with jurisdiction over firms in multiple industries, such as federal prosecutors and SEC officials. These enforcement officials enjoy a range of lucrative career opportunities following public service beyond the firms they pursue. Moreover, their future career prospects are enhanced by establishing a reputation for effectiveness while in office. Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 LAW & CONTEMP. PROB. 193, 205–06, 209–10 (2017); Richman, *supra* note 33; STEPHEN J. CHOI & A.C. PRITCHARD, SECURITIES REGULATION: CASES AND ANALYSIS 233–34 (2005).

48. *See generally* Barkow, *supra* note 47; Richman, *supra* note 11; Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

49. *See* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1211–14 (2013) (explaining that limitations on Presidential interference in agencies' adjudicative decisions are a result of conventions, not formal rules); Richman, *supra* note 11, at 776–77 (discussing the political costs to companies of intervening to prevent specific prosecution or classes of prosecution); *see also* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2207–14 (2018) (noting that following Watergate, norms and reinforcing institutions constrain the President from interfering in FBI investigations and individual enforcement decisions); *cf. infra* note 75 (discussing instances where Presidents have violated this norm).

member commissions,[50] whose leadership the President appoints but can only fire for cause.[51] A President can exert ongoing influence over executive agencies through his ability to fire the agency's leadership without cause.[52] A President also can indirectly influence both types of agencies through his authority to appoint the agency's leadership and influence the selection of a majority of an agency's governing commission. As a result, a President with anti-regulatory or anti-corporate enforcement leanings can effectively set an agency's policy priorities by appointing leaders that favor his agenda.[53]

In addition, at many agencies, the future public-sector career prospects of the senior leadership depend on their willingness to promote policies favored by the leadership of their political party—particularly the President.[54] Thus, a President often can use his influence over senior leadership of both independent and executive agencies to curtail corporate enforcement, should he so choose, even though the leadership of the former is protected from termination.

Finally, a President can indirectly influence agencies through his ability to propose a budget. He can use this pathway to influence both the resources available to an agency as a whole and, with some agencies, can channel resources to, or away from, specific activities within the agency.

Presidents can use these techniques to insulate companies from active enforcement without incurring the political cost of looking soft on corporate crime by obfuscating the reduction in corporate enforcement in a public increase in enforcement in other areas that are popular with their constituents. For example, the DOJ's prioritization under recent

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50. In *Seila Law*, the Supreme Court held that it is unconstitutional to limit the President's power to remove the head of an independent agency led by a single individual who is vested with significant executive power. Seila L. L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2187 (2020).

51. Formally agencies fall into two categories. In practice, the situation is more nuanced as a result of conventions that affect political influence. For example, although the courts have concluded that the leadership of the SEC can only be fired for cause, Professor Vermeule claims that SEC Commissioners are protected from at-will termination by conventions, not statutes. Vermeule, *supra* note 49, at 1166–67. Similarly, U.S. Attorneys traditionally have been protected from political influence by a convention against Presidents firing them for political reasons. *Id.* at 1167. *But cf. infra* note 71 (discussing U.S. Attorneys fired for political reasons).

52. *See* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1138 (2000) ("The protection against [removal except for cause] . . . continues to be the critical criterion by which scholars typically distinguish between 'independent' and executive branch agencies."); Barkow, *supra* note 47, at 26–41 (examining how well "design features traditionally associated with independent agencies" address the "problem of capture and one-sided political pressure"); Kirti Datla & Richard Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 786–89 (2013) (explaining how varying levels of removal protection can affect the President's ability to influence agencies' decision-making); *cf.* Vermeule, *supra* note 49, at 1174–81 (arguing that senior leaders of some non-independent agencies are protected by unwritten conventions that impede political influence).

53. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277 (2001) (discussing how Presidents use their appointment power to staff agencies with people who shared their policy agenda); Barkow, *supra* note 47, at 30 (noting that Presidents can influence agencies through their appointment power because political appointees tend to follow the President's agenda); Vermeule, *supra* note 49, at 1180 (concluding that Presidents can influence an agency's agenda through their power to appoint the agency's leadership). Control through appointment is facilitated by heightened polarization of the political parties. Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 477–91 (2008).

54. *E.g.*, Barkow, *supra* note 47; Richman, *supra* note 11; Bagley & Revesz, *supra* note 48; Stewart, *supra* note 48.

Republican Presidents of anti-terrorism, narcotics, immigration, and Medicare fraud simultaneously focused resources on areas of enforcement popular with the party's base and obscured the reduction in attention to enforcement against large, publicly-held firms.[55]

2. Congress's Pathways to Influence

Congress has two channels for influencing agencies' policies and decisions. First, powerful members of Congress can affect enforcement agencies' policies indirectly through their influence over who is selected as the agencies' leadership. The Senate can refuse to approve—or excessively delay the approval of—Presidential appointees who are committed to policies with which Congress strongly disagrees, although Congress often chooses not to wield this stick.

Should it so choose, Congress also can ensure that the agency's leaders represent companies' interests through its authority to set the qualifications for agencies' governing commissions.[56] For example, requirements that the leadership includes members from the relevant industry[57] helps companies influence the agency's policies. Finally, powerful Congress members can use, and increasingly have used, their political influence to get their former staffers appointed to independent agencies' governing commissions.[58] These staffers tend to be loyal to—and share the policy preferences of—their former bosses, enabling Congress members to exert ongoing influence over agencies' policies.[59]

In addition, Congress can use its authority over an agency's budget and appropriated funds to affect an agency's policy. Congress can undermine corporate enforcement by starving the agency of the resources needed to effectively detect, investigate, or sanction corporate misconduct under its jurisdiction.[60] This is a particularly effective tool for reducing corporate enforcement when applied to agencies whose primary mandate is to regulate and pursue enforcement actions against corporations. Congress can also indirectly reduce resources available to enforcement by enacting laws that impose new

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55. *See* Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2100 (2009) (stating that white collar cases suffer when Main Justice prioritizes immigration and drug cases).

56. Brian D. Feinstein & M. Todd Henderson, *Congress's Commissioners: Former Hill Staffers at the S.E.C. and Other Independent Regulatory Commissions*, 38 YALE J. ON REG. 175, 182–83 (2021).

57. *Id.* at 181–84.

58. *Id.* Indeed, forty to seventy-five percent of the commissions following independent regulatory commissions are composed of people who are former congressional staffers: Consumer Products Safety Commission (50%), Equal Employment Opportunity Commission (66%), Federal Communications Commission (75%), Federal Elections Commission (50%), Federal Energy Regulatory Commission (60%), Federal Trade Commission (40%), National Labor Relations Board (50%), Nuclear Regulatory Commission (60%), and Securities and Exchange Commission (40%). *Id.* at 185–86.

59. *Id.* at 193, 195, 199–201, 214, 229; *see also* Robert H. Salisbury & Kenneth A. Shepsle, *Congressional Staff Turnover and the Ties That Bind*, 75 AM. POL. SCI. REV. 381, 394 (1981) (discussing how staffers are loyal to the legislature that hires them); Barbara S. Romzek & Jennifer A. Utter, *Congressional Legislative Staff: Political Professionals or Clerks?*, 41 AM. J. POL. SCI. 1251, 1265–66 (1997) (concluding that a congressional norm places a high premium on staffer loyalty to the specific congressperson for whom they work).

60. *See* Richman, *supra* note 11, at 793–98 (Congress can most effectively leverage its budgetary authority to curtail enforcement by agencies with narrow mandates, such as the IRS or ATF). For example, Congress retains budgetary control over the SEC by not allowing it to retain the fees it charges companies—fees that would be sufficient to fund its operations. *See SEC Funding*, CFA INST., https://www.cfainstitute.org/en/advocacy/issues/sec-funding [https://perma.cc/DWP9-X7MQ].

responsibilities on a federal agency that consume resources that otherwise would have gone to enforcement.[61] Finally, congressional oversight committees can use hearings and reporting requirements to influence agencies to focus on activities other than corporate enforcement.[62] To the extent metrics are publicly salient or tied to future budgets, this oversight will shift resources from other activities, such as enforcement.[63]

III. How Criminal Enforcement Can Militate Against Capture

This Part shows that joint imposition of civil and criminal corporate liability is superior to sole reliance on civil corporate liability because elected officials can more effectively undermine corporate enforcement when companies only face civil liability for organizational misconduct. Criminal enforcement is less vulnerable to companies' political influence channeled through either the President or Congress than is civil enforcement.[64] In addition, civil enforcement is more effective under a regime of coordinated civil and criminal enforcement than when companies only face civil liability.

A. Relative Vulnerability to Political Influence Channeled Through the President

Corporations can more effectively use their political influence with the President to undermine civil corporate enforcement (when the President is so inclined) because the President has more ability to use his influence to reduce civil enforcement than criminal enforcement.

The White House can indirectly influence both criminal and civil enforcement priorities through the President's authority to appoint—and in some cases, his ability to remove—the senior officials overseeing the relevant agency.[65] Thus, when the President is committed to an anti-corporate enforcement agenda, the leadership of both criminal and civil authorities will be as well.[66] This impacts these agencies' policies and resource allocations.

Yet the impact of this channel of influence on corporate enforcement is far greater in the case of civil enforcement than criminal enforcement. The President's ability to undermine corporate enforcement depends on whether the senior leadership he appoints

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61. For example, The Dodd-Frank Wall Street Reform and Consumer Protection Act imposes 67 mandatory rule-making obligations on the SEC. *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, SEC. & EXCH. COMM'N, https://www.sec.gov/spotlight/dodd-frank.shtml [https://perma.cc/A6UT-2DFC].

62. *See, e.g.*, Rachel Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1139 (2016).

63. *See* Richman, *supra* note 11, at 792-93 (discussing control through oversight hearings and metrics).

64. *See* Richman, *supra* note 11 (suggesting that corporate criminal enforcement tends to be relatively insulated from capture); BUELL, *supra* note 19, at 204 (concluding that the "federal criminal justice machinery is not captured by political interests when it comes to business crime"); *see also* Barkow, *supra* note 62 (discussing under-enforcement by regulatory authorities); Bagley & Revesz, *supra* note 48, at 1287–90 (explaining enforcement of environmental regulations). This is not to say that political influence never affects criminal enforcement. *See infra* notes 71, 75, and accompanying text. But such interference occurs infrequently. Companies can more effectively leverage their political influence to produce a systematic reduction in corporate civil enforcement than corporate criminal enforcement.

65. *See* Barkow, *supra* note 47, at 42; Richman, *supra* note 55, at 2102–04 (discussing the unprecedented effort by the George W. Bush Administration to appoint loyalists to the DOJ throughout the chain of command).

66. *See* Barkow, *supra* note 47 (noting that public actors can be influenced by their desires for private sector employment following service); *see also* Renan, *supra* note 49, at 2237 (positing that norms grant the President control over agency policy-making); Kagan, *supra* note 53.

directly controls corporate enforcement decisions. The senior leadership of civil enforcement agencies generally directly controls their agencies' enforcement decisions. For example, consider independent agencies such as the SEC and CFTC. Notwithstanding both agencies' "independent" designations, the President's policy agenda—as expressed through his choice of agency leadership—directly influences these agencies' enforcement decisions because each agency's director of enforcement cannot pursue an enforcement action without first obtaining the approval from the agency's Commission.[67] Thus, these agencies' politically-appointed leadership can intervene directly to reduce corporate enforcement intensity either by denying approval to enforcement actions or failing to put the enforcement director's requests for approval on the Commission's calendar. The resulting veto power given to the senior leadership also impacts corporate investigations. Line officials tend to steer clear of complex corporate investigations when the agency's leadership consistently vetoes such actions or leaves them languishing on the back burner.

Similarly, enforcement by civil divisions of the Department of Justice is also subject to direct political influence. The Attorney General can appoint Deputy and Assistant Attorney Generals with authority over the various civil divisions who prefer a less-aggressive approach to corporate enforcement. These political appointees have direct authority over civil enforcement decisions by those in their division.

By contrast, the President generally does not directly influence criminal enforcement decisions through his appointment power. Most federal corporate criminal investigations and enforcement actions fall under the purview of prosecutors in the 94 U.S. Attorneys' Offices.[68] The President has less direct influence over U.S. Attorneys than other executive officials. There is a strong convention and policies against the White House intervening in specific criminal enforcement decisions.[69] In addition, although the President appoints U.S. Attorneys, the appointment process involves considerable local input, which tends to leave U.S. Attorneys less directly tied to the White House.[70] U.S. Attorneys also historically have enjoyed the protection of a convention against at-will termination by the President.[71]

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67. SEC, DIV. OF ENF'T, ENFORCEMENT MANUAL § 2.5.2. (2017); CFTC, DIV. OF ENF'T, ENFORCEMENT MANUAL, § 3.3 (2020); *see* Barkow, *supra* note 62, at 1142–43 (discussing the SEC Commission's control over SEC enforcement). Thus, while these agencies have regional offices, not unlike the regional U.S. Attorney's offices, ultimate authority over SEC enforcement resides with the Commission. *Id.*

68. *Cf. infra* note 73 (discussing the control that offices in Main Justice have over certain types of prosecutions).

69. *See* Vermeule, *supra* note 49 and accompanying text.

70. *See* Richman, *supra* note 11, at 780–81 (discussing the political economy of criminal enforcement).

71. *See* Vermeule, *supra* note 49, at 1201–03 (discussing the convention against Presidents engaging in at-will termination of U.S. Attorneys); Richman, *supra* note 55, at 2109–10 (discussing federal prosecutorial discretion and Congress's ultimately failed effort to constrain it). In 2006, President George W. Bush and Attorney General Gonzales famously violated this convention by firing seven U.S. Attorneys deemed not sufficiently loyal. *See* Vermeule, *supra* note 49, at 1202–03; Richman, *supra* note 55, at 2104–05. The incident triggered congressional hearings. Attorney General Gonzales resigned in 2007. Vermeule, *supra* note 49, at 1202; *cf. infra* note 75 (discussing instances where Presidents have violated this norm). President Trump and Attorney General Barr appear to have violated this convention by firing Geoffrey Berman, the U.S. Attorney for the Southern District of New York. *See* Barbara Campbell, Ryan Lucas, Colin Dwyer & Jason Slotkin, *President Trump Fires Top U.S. Prosecutor Who Investigated His Allies, Barr Says*, NPR (June 20, 2020, 12:30 AM), https://www.npr.org/2020/06/20/881148365/geoffrey-berman-u-s-attorney-who-prosecuted-trump-allies-says-he-wont-quit [https://perma.cc/M2TJ-DSRU].

In addition, in contrast with civil agencies, U.S. Attorneys' enforcement decisions are not directly controlled by senior leadership at the DOJ. Instead, U.S. Attorneys have considerable authority over criminal enforcement decisions in their districts.[72] U.S. Attorneys generally determine what cases their office will bring and usually do not need approval from a political appointee in Washington, D.C. before bringing an enforcement action.[73] Thus, U.S. Attorneys can pursue corporate criminal enforcement actions even when the President would like to reduce corporate criminal enforcement.

Finally, U.S. Attorneys also can be more independent because the reputation and future career prospects of U.S. Attorneys in the offices responsible for most corporate criminal cases (e.g., those in the Southern and Eastern Districts of New York) tend to depend on their success in corporate criminal enforcement cases, as opposed to their loyalty to the President. Thus, these U.S. Attorneys (and their line prosecutors) have strong incentives to establish their reputations by pursuing high-profile criminal enforcement actions against large firms even when the President would prefer to reduce corporate criminal enforcement.[74]

Thus, a President who wants to reduce corporate enforcement can more readily ensure that his preferences are translated into inaction by civil enforcement authorities than criminal prosecutors. This is not to say that Presidents, and those acting on their behalf, never interfere with corporate criminal enforcement decisions. Senior DOJ officials have intervened on behalf of politically influential companies in individual corporate criminal cases brought by U.S. Attorneys' offices, in some cases with terrible consequences for the country.[75] In addition, for some types of cases, the White House can indirectly influence criminal cases through civil agencies or Main Justice. For example, a U.S. Attorneys' Office generally will not and, in some cases, cannot bring certain types of cases—such as

72. *E.g.*, Just. Manual, *supra* note 21, § 9-2.001 (specifying that to gain value for their corporation, companies need to identify individual wrongdoers and provide facts relating to their involvement)

73. *See* O'Rourke, *supra* note 19, at 996; Richman, *supra* note 11, at 780–85 (discussing the political economy of criminal enforcement); *see also* Kahan, *infra* note 89, at 486–87 (discussing federal prosecutorial discretion). The degree of prosecutorial discretion has varied over time as a result of interventions by Congress and the DOJ. *See* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1430 (2008) (explaining that U.S. Attorneys have ultimate authority over which corporate cases to bring).

74. *See, e.g.*, Brewster & Buell, *supra* note 47, at 205–07 (discussing how companies cannot easily directly or indirectly influence federal enforcement officials' corporate enforcement decisions); Richman, *supra* note 11, at 779 (discussing the political economy of criminal enforcement).

75. For example, Patrick Keefe reports that, under George W. Bush, senior Department of Justice Officials, including Assistant Attorney General for the Criminal Division Alice Fisher and Deputy Attorney General Paul McNulty, intervened to block John Brownlee, U.S. Attorney for the Western District of Virginia, from bringing felony charges against Purdue Pharma and three senior officials for their intentional off-label and fraudulent marketing of OxyContin. This political interference allowed the Sackler family to continue Purdue Pharma's aggressive sales of OxyContin with deadly consequences. KEEFE, *supra* note 47, at 262–85; *see also* BETH MACY, DOPE SICK: DEALERS, DOCTORS, AND THE DRUG COMPANY THAT ADDICTED AMERICA (2018).

Other infamous instances of political interference with criminal enforcement do not involve corporate criminal enforcement. Instead, they tend to entail interference in cases with political ramifications. *See generally* CARL BERNSTEIN AND ROBERT WOODWARD, ALL THE PRESIDENT'S MEN (1974); *see also* Rebecca Roiphe, *A Typology of Justice Department Lawyers' Roles and Responsibilities*, 98 N.C. L. REV. 1077, 1077 (2020) (discussing Attorney General Barr's actions impacting investigation of President Trump); Miriam Baer, *Corporate Crime's Demise*, 47 J. CORP. L. 887, 904 (2022), or efforts to ensure loyalty by U.S. Attorneys. *E.g.*, Richman, *supra* note 55, at 2102–04 (discussing the decision by George W. Bush and his Attorney General to fire U.S. Attorneys deemed insufficiently loyal).

tax, antitrust, environmental, health care fraud, and actions arising from the Foreign Corrupt Practices Act of 1977 (FCPA)—without the cooperation of the relevant specialized civil agency or office in Main Justice.[76] This enables companies to use political influence over civil agencies and Main Justice to suppress criminal enforcement, particularly in areas such as tax and environmental misconduct.[77] Similarly, U.S. Attorneys can and do consult with Main Justice prior to pursuing cases against large firms in some cases. Nevertheless, the decentralization of criminal enforcement, combined with U.S. Attorneys' personal incentives to be perceived as effective, makes it more difficult for companies to use their influence with the President to suppress corporate criminal enforcement actions on a national scale, even when the President opposes active enforcement.[78]

B. Relative Vulnerability to Political Influence Channeled Through Congress

Criminal enforcement also is less vulnerable to companies' political pressure channeled through Congress than is civil enforcement. Congress has two pathways for influencing agencies' enforcement decisions, both of which are more effective with civil enforcement than criminal enforcement.[79] First, members of Congress can affect corporate enforcement intensity through their influence over who is appointed to lead an agency. Indeed, members of Congress are increasingly using their political leverage to get loyal former staffers appointed to leadership positions at independent civil agencies.[80] Congress members can use these appointments to undermine civil enforcement because, as previously discussed, civil agencies' senior leadership generally directly controls their agencies' enforcement decisions. By contrast, Congress cannot readily place loyal staffers in senior criminal enforcement positions, at least in part because staffers generally do not possess the requisite enforcement experience. Moreover, this channel of influence is less effective because, as previously explained, senior political appointees in Main Justice do not have veto authority over most corporate enforcement actions.[81]

Congress also can undermine corporate civil enforcement by starving agencies of the funds needed to investigate and pursue corporate enforcement. Civil enforcement agencies

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76. Brewster & Buell, *supra* note 47, at 202 (noting that while U.S. Attorneys have discretion over whether to pursue most federal criminal cases under their jurisdiction, they must first obtain consent from an office within Main Justice to pursue certain violations, such as violations of the FCPA).

77. Companies' success in undermining criminal enforcement varies across subject areas and administrations. For example, both Clean Air and Clean Water Act enforcement was materially less under the Trump administration than under either the Bush or Obama administrations. David M. Uhlmann, *New Environmental Crimes Project Data Shows That Pollution Prosecutions Plummeted During the First Two Years of the Trump Administration*, ENV'T CRIMES PROJECT (2020), https://repository.law.umich.edu/other/163/ [https://perma.cc/RHV3-6VEF].

78. *See* Richman, *supra* note 11, at 779; *see generally* O'Rourke, *supra* note 18 (discussing the advantages to civil and criminal enforcement of coordination); Renan, *supra* note 30 (same); *see also* Kevin Davis, *Anticorruption Law and Systemic Corruption: The Role of Direct Responses*, in 17 REVISTA DIREITO GV art. no. e. 2129 (2021) (discussing differences in enforcement authorities and benefits of coordination); GLEN O. ROBINSON, AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW 78 (1991) (noting that interest groups can more readily influence agency rule-making than legislation because agency rule-making authority is vested in a small group of people).

79. *See generally* Barkow, *supra* note 47 (discussing elected officials' pathways for influencing independent agencies).

80. *See supra* text accompanying notes 58–59.

81. *See supra* text accompanying notes 67–78.

are not self-funding. They must return to Congress annually for funds.[82] Congressional leaders on the relevant budgetary and oversight committees can mute enforcement both by starving agencies of funds and by signaling that budgetary favors depend on the agency not aggressively pursuing large firms.[83] Civil agencies, which are focused on the regulation of, and enforcement against, large firms, are particularly vulnerable to congressional intervention through budgetary constraints because members of Congress seeking to serve powerful companies' interests can do so by curtailing corporate enforcement by these agencies without curtailing enforcement in other areas that their constituents care about.

By contrast, Congress cannot readily use its power over the purse to reduce corporate criminal enforcement. Although Congress sets the budgets of both the U.S. Attorneys' Offices and the criminal division of the Department of Justice, Congress funds criminal enforcement at these divisions in general. The budgets thus cover *all* aspects of criminal enforcement; corporate criminal enforcement is not a separate line item.[84] As a result, Congress cannot easily use its budgetary interventions to undermine corporate criminal enforcement because any effort to starve the U.S. Attorneys' Offices and Criminal Division would curtail these offices' ability to pursue the types of cases that the constituents of pro-business, anti-regulation, members of Congress want to be prosecuted. These cases include immigration, drug enforcement, anti-terrorism, and fraud affecting public programs, such as Medicare.[85] Consequently, Congress can regularly use its budgetary control to influence civil agencies to curtail corporate enforcement but cannot readily do so with corporate criminal enforcement.[86]

Congress also can reduce the resources available to civil agencies to pursue corporate enforcement cases through other means that are not effective with criminal authorities. For example, Congress can enact laws that impose substantial new duties on a civil regulatory

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82. *See, e.g.*, Barkow, *supra* note 47, at 22–23, 42 (stating Congress uses the budgetary process to exert control over independent agencies); RICHARD F. FENNO, JR., THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS 291–92 (1966) (stating Congress's limitation and control over agencies' budgets and ways of spending); *see also* CFA INST., *supra* note 60 (the technology and communications budgets of only three Wall Street firms is ten times larger than the SEC's FY2019 budget).

83. *See generally* Maria M. Correia, *Political Connections and SEC Enforcement*, 57 J. ACCT. & ECON. 241 (2014) (discussing influences on SEC); Roger L. Faith, Donald R. Leavens & Robert D. Tollison, *Antitrust Pork Barrel*, 25 J.L. & ECON. 329 (1982) (discussing influences on FTC); Franklin G. Mixon, Jr., *Public Choice and the EPA: Empirical Evidence on Carbon Emissions Violations*, 83 PUB. CHOICE 127 (1995); William J. Hunter & Michael A. Nelson, *Tax Enforcement: A Public Choice Perspective*, 82 PUB. CHOICE 1 (1995) (discussing influences on IRS) for evidence that legislators use their influence to mute civil agency enforcement; *see also* ARTHUR LEVITT & PAULA DWYER, TAKE ON THE STREET: HOW TO FIGHT FOR YOUR FINANCIAL FUTURE 132–33 (2002) (describing an incident in which the SEC's attempt to institute auditor-independence rules resulted in a threatened cut in funding).

84. *E.g.*, U.S. DEP'T OF JUST., FY 2022 CONGRESSIONAL BUDGET SUBMISSION (2022), https://www.justice.gov/doj/fy-2022-congressional-budget-submission [https://perma.cc/6L3A-U7FX]. By contrast, the Environmental and Natural Resources Division, Civil Rights Division, and Bureau of Alcohol, Tobacco, Firearms and Explosives are single-issue divisions that each receive their own budgets. *Id.* This facilitates political influence over enforcement in those areas channeled through Congress's power over the purse.

85. Congress has less ability to use the power of the purse to curtail corporate criminal enforcement because the criminal division's mandate includes crimes whose prosecution is favored by constituents of anti-regulatory legislators, such as drug cases and immigration. In some cases, Congress enhances its budgetary power to curtail enforcement it disfavors by placing authority over disfavored enforcement areas— such as firearms and taxes— with specialty agencies that it can underfund at a lower political cost. Richman, *supra* note 11, at 793–94, 798.

86. *Id.* at 777.

agency without providing additional resources. This technique forces the agency to shift resources away from other activities, such as corporate enforcement. Congress can use this technique with civil agencies because many civil agencies are both regulators—with rulemaking and oversight authority—as well as enforcement authorities. Congress thus can adopt laws that obligate regulators to adopt regulations within a specific period of time, or perform specific oversight duties, thereby diverting resources from enforcement.[87] This technique does not work with criminal enforcement. Congress can enact criminal laws that would require an expenditure of resources to enforce, but it cannot direct enforcement authorities to take specific actions to enforce such laws. Federal prosecutors generally enjoy complete discretion over which enforcement actions to pursue,[88] giving them discretion over internal resource allocation.[89]

Finally, congressional oversight committees can influence civil enforcement authorities by imposing reporting requirements that signal policy priorities whose fulfillment can be expected to result in a more favorable budget. Congress cannot reliably use this technique to reduce corporate criminal enforcement, however. Congress can hold oversight hearings that impose costs on criminal enforcement authorities deemed insufficiently attentive to their concerns. Yet Congress rarely holds such hearings. When Congress does hold such hearings, they tend to focus on particular enforcement techniques—such as Attorney-Client privilege waivers—and generally do not use them to steer prosecutors away from corporate enforcement.[90]

Thus, federal corporate criminal enforcement is less vulnerable to political interference than federal civil enforcement.

C. Corporate Criminal Enforcement Enhances Corporate Civil Enforcement

Corporate criminal liability also reduces capture by helping to insulate civil corporate enforcement from political influence designed to undermine it. It also can make civil enforcement more effective.

Civil agencies often wear two hats: they are both regulators and enforcement officials. Budgetary constraints can lead civil agencies to lean away from enforcement and towards softer regulatory interventions that seek to induce companies to remediate the misconduct

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87. *See* O'Rourke, *supra* note 19, at 1053 (discussing how congress undermined CFTC enforcement by enacting legislation that increased the agency's responsibility without providing adequate funding); CFA INST., *supra* note 60 (discussing the same for the SEC).

88. Congress can seek to limit and politicize certain types of prosecutions by adopting laws requiring preapproval of certain types of prosecutors by senior officials in Main Justice. Richman, *supra* note 11, at 802–05; *see supra* note 75 (discussing political interference by Main Justice). But this is not an effective technique for reducing corporate enforcement because preapproval simply enhances the influence of the President, who may favor strong enforcement. Richman, *supra* note 11, at 809–13 (discussing why Congress may prefer prosecutors to retain discretion).

89. Federal prosecutors generally have absolute discretion over whether and when to prosecute. *See* Richman, *supra* note 11, at 758, 761; *see also* Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 479 (1996) (discussing federal prosecutorial discretion). Senators usually avoid entangling themselves in specific criminal cases, although political interference can occur. *See supra* note 75 and accompanying text.

90. *See* Richman, *supra* note 11, at 789–93 (discussing that Congress has not used its ability to hold hearings and affect budgets to directly curtail corporate criminal enforcement).

without imposing penalties.[91] Remedial regulatory interventions often impose lower costs on companies than criminal enforcement, thus generating less corporate pushback. But they also are less effective at deterring misconduct than is enforcement when they allow companies to retain their profits from crime. Congress thus can benefit companies by curtailing agencies' resources as this will lead them to curtail enforcement in favor of softer and often less effective regulatory interventions that companies prefer.

Corporate criminal liability can act as a counterweight to Congress's pernicious influence. It can promote effective corporate civil enforcement by increasing the political cost to civil authorities of inaction, reducing their investigation and enforcement costs, and increasing their effectiveness.[92] Corporate criminal enforcement increases the political costs to civil authorities of failing to pursue corporate misconduct by enabling enforcement by other enforcement officials—federal prosecutors. Prosecutors may be more active against companies because they are neither captured by a single industry nor as vulnerable to political interference.[93] Additionally, federal prosecutors presented with material corporate misconduct cannot choose between a regulatory and enforcement response. If they want to act, they must pursue a corporate criminal resolution.[94] Criminal enforcement can induce civil enforcement because corporate criminal resolutions often receive considerable attention from the press. This public attention shines a spotlight on the misconduct and incentivizes civil authorities to pursue corporate enforcement action to avoid the public criticism that can result from inaction.[95] Criminal enforcement also provides civil authorities political cover to pursue corporate enforcement, as companies are less inclined to spend political capital to block civil enforcement when they would be subject to criminal enforcement regardless.[96]

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91. O'Rourke, *supra* note 19, at 1008–09 (civil regulators have two distinct goals: (1) deterrence-oriented enforcement and (2) regulatory interventions aimed at remediating violations that are not criminal). Soft regulatory interventions are unlikely to be effective if companies retain the profits of their employees' misconduct because companies retain incentives and the ability to indirectly encourage misconduct. Arlen, *supra* note 1, at 164; Arlen & Kornhauser, *supra* note 2 (discussing the many ways that companies can promote misconduct by their employees).

92. *See id.* at 1021, 1033–35 (discussing how parallel proceedings can reduce civil enforcement authorities' investigation costs and enhance their access to information).

93. *See* Renan, *supra* note 30, at 261–64, 277–78 (explaining how multi-agency pooling can mute capture by both expanding the interest groups with influence over the agencies' activities and diminishing Congress' influence exerted through oversight committees and resource constraints); Richman, *supra* note 55, at 2118 (proposing how multi-agency enforcement can help insulate enforcement authorities from capture); *see also* Barkow, *supra* note 47, at 55–56 (discussing how shared enforcement responsibility can promote independence unless the captured agency is given primary responsibility over enforcement); Davis, *supra* note 78, at 19; Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1367–68 (2013) (discussing how coordination between agencies may reduce the risk of agency capture).

94. The prospect of a civil investigation may increase the likelihood of a criminal investigation because both criminal and civil authorities regularly derive material benefits from coordination. *See* O'Rourke, *supra* note 19, at 1039–41 (discussing the investigative benefit to prosecutors of parallel proceedings).

95. Civil enforcement also can be propelled to action by enforcement actions by state enforcement authorities. For example, enforcement actions by New York Attorney General Elliott Spitzer appear to have spurred the SEC into action. *See* Rachel Barkow, *The Prosecutor as Regulatory Agency*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 177 (Anthony S. Barkow & Rachel E. Barkow eds., 2011). Yet state enforcement is not an adequate substitute for federal corporate criminal enforcement. See *infra* note 105.

96. Corporate criminal liability is a particularly important counterweight when civil authorities are

Corporate criminal liability also promotes coordinated criminal and civil corporate enforcement, which enables civil authorities to pursue enforcement actions even when Congress underfunds them.[97] Civil and criminal authorities share the costs of a coordinated investigation[98] and benefit from each other's specialized expertise. They also can leverage each other's investigative advantages,[99] including federal prosecutors' capacity to investigate without the disclosure burdens imposed on civil authorities.[100]

Coordinated enforcement also enables civil authorities to benefit from federal prosecutors' greater ability to induce companies to "fully cooperate"[101] by investigating misconduct and sharing their findings with enforcement authorities.[102] Criminal authorities often are better able to obtain full corporate cooperation that identifies the full scope of the misconduct and provides evidence against individual wrongdoers than are civil authorities as a result of stronger enforcement policies promoting full cooperation and greater willingness to impose serious sanctions on firms that do not fully cooperate.[103] This

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especially vulnerable to capture because they oversee a single industry. Single-industry agencies are more vulnerable to capture because the regulated industry tends to be both the dominant interest group lobbying the agency and the main source of agency officials' future employment. *See* Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 98–101 (1992) (noting that Congress creates single-industry agencies to bolster Congress's control).

97. While some express concern that coordinated enforcement causes civil agencies to pursue enforcement instead of a softer "responsive regulation" approach, The shift towards enforcement is socially beneficial when, absent coordinated enforcement, civil authorities are overly inclined to take a softer approach as a result of corporations' political influence instead of using enforcement to deter misconduct. *See* O'Rourke, *supra* note 19, at 1008–10. Moreover, responsive regulation can be improved by coordinated civil and criminal enforcement. Regulatory interventions often seek to ensure that the firm remediates the root causes of the misconduct. Yet regulators, acting alone, may not conduct the full investigation needed to determine the full scope of the misconduct and the identity of those responsible. Absent this information, remediation will be incomplete. Federal prosecutors are encouraged to identify the full scope of the misconduct and identify and obtain evidence against the individuals responsible. This additional evidence can reveal additional root causes—the misconduct of which regulators were unaware—such as policies governing promotion and compensation—and identify individuals, including supervisors, who would remain a source of future misconduct if retained. This information can improve the effectiveness of civil regulatory remediation.

98. For a discussion of the benefits to both civil and criminal authorities of coordinated enforcement, as well as the sources of conflict, see O'Rourke, *supra* note 19.

99. *See* Renan, *supra* note 30, at 253–54 (coordinating between the SEC and federal prosecutors can expand the toolkit available to SEC enforcement authorities); O'Rourke, *supra* note 19, at 1012–13, 1022, 1030–31, 1038–40 (discussing differences in expertise, information collection benefits, and other cost-reduction benefits of coordinated enforcement); *see also* Garrett, *supra* note 30, at 154 (discussing benefits to prosecutors and federal regulators of close coordination). Civil authorities also benefit to the extent that defendants are less likely to lie in a coordinated investigation due to greater fear of prosecutors bringing False Statements charges under 18 U.S.C. § 1001 when interviewed by prosecutors and civil enforcement officials.

100. Civil authorities can benefit from prosecutors' ability to investigate without the disclosure obligations of civil discovery. Defendants in parallel enforcement cases often obtain a stay of the civil action, which suspends civil discovery by the defendant. Yet the civil agency remains free to obtain information from the defendant in a separate regulatory investigation. O'Rourke, *supra* note 19, at 1016–17. The agency also can obtain evidence produced by corporate cooperation.

101. *See* Just. Manual, *supra* note 21, §§ 9-28.700, 9-28.720 (discussing the additional information that can be gained by incentivizing corporations to cooperate).

102. *Id.*; *see also infra* note 103 (discussing civil agencies' policies on corporate cooperation).

103. For example, following BNP Paribas's failure to fully cooperate, the DOJ insisted that it plead guilty and pay an $8.9 billion penalty. *BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions*, DEPT. OF JUST. (June 30,

enhanced corporate cooperation thus can alleviate civil authorities' resource constraints by shifting a substantial portion of the investigation costs to private actors. It also can increase enforcement authorities' likelihood of obtaining actionable evidence about misconduct because corporations are better able to investigate themselves than are outside authorities. Companies are better informed about their own operations, legal risks, and personnel; they have greater access to, and understanding of, their documentary and digital evidence;[104] and can operate without the Constitutional constraints imposed on prosecutors when questioning employees.[105] Coordinated enforcement thus helps civil authorities pursue corporate enforcement even when Congress underfunds them.[106]

Coordinated enforcement also enhances the likelihood that civil authorities will sanction individual wrongdoers for intentional misconduct. Individual wrongdoers often escape sanction when civil enforcement authorities pursue a purely regulatory, remedial approach to corporate enforcement.[107] By contrast, federal criminal investigations are supposed to identify individual wrongdoers.[108] Corporations seeking credit for full cooperation from criminal authorities are expected to identify individual wrongdoers and provide evidence against them.[109] Consequently, coordination with criminal authorities can provide civil authorities with evidence against individual wrongdoers that they often would not have otherwise obtained, facilitating their ability to pursue individual enforcement actions, which are vital to deterrence.

1. Coordination on Individual Enforcement Actions Would Not Suffice

Eliminating corporate criminal liability would substantially reduce civil authorities' benefit from coordinated enforcement even if individual wrongdoers continued to be subject to both criminal and civil liability.[110] Without corporate criminal liability,

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2014), https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial [https://perma.cc/U766-NNV4]; *cf.* PRINCIPLES OF CORPORATE ENFORCEMENT, *supra* note 16, § 6.17–6.20 (providing enforcement guidelines to govern firms that fail to fully cooperate).

Civil authorities regularly seek corporate cooperation, but many civil authorities have not adopted enforcement policies that provide companies with strong incentives to fully cooperate. Moreover, those civil authorities that have done so—such as the SEC and CFTC—do not consistently require "full cooperation" that includes evidence against individuals as a prerequisite to gaining credit for cooperation. Potential explanations include political influence, and civil authorities' focus on corporate remediation, as distinct from deterrence and individual enforcement. Thus, absent corporate criminal liability, civil authorities will often pursue a narrower and less complete investigation. *Id.* § 6.05, Reptr. Notes d–f (discussing civil agencies' approach to cooperation credit). Indeed, civil authorities may eschew enforcement altogether in favor of a softer reform-oriented regulatory response that may not ensure that corporate crime does not pay.

104. Arlen & Buell, *supra* note 17, at 706–07; Arlen & Kraakman, *supra* note 2, at 694.

105. *See* Arlen & Buell, *supra* note 17, at 713–27 (noting that in the United States, companies' investigative advantage depends in part on laws governing internal investigations that favor private over public actors.).

106. Full cooperation also enhances civil authorities' ability to remediate the misconduct by providing them information on the full scope of the misconduct needed to identify its full root causes.

107. *See* O'Rourke, *supra* note 19, at 1038.

108. Just. Manual, *supra* note 21, § 9-28.210.

109. *Id.* § 9-28.700; *see* Arlen, *supra* note 1; Arlen, *supra* note 31.

110. Nor are state enforcement actions or private civil actions an adequate substitute for federal criminal enforcement. Private litigants cannot bring damages actions for misconduct that does not produce an adequate, tangible harm, such as data privacy violations and foreign corruption. In addition, private litigants will not impose optimal corporate liability designed to induce self-reporting and full cooperation because they want to maximize

coordination with prosecutors would occur less frequently, later in the investigation, and would not include the benefit of the corporate cooperation that prosecutors produce.

Eliminating corporate criminal liability would dramatically decrease coordination between civil and criminal authorities by reducing—and indeed often eliminating—prosecutors' incentives to coordinate.[111] Criminal and civil enforcement authorities coordinate only when it is in their mutual interests to do so.[112] When companies are criminally liable, both criminal and civil enforcement authorities have strong incentives to coordinate if initial evidence suggests organizational misconduct probably occurred because each can be relatively confident of obtaining a corporate resolution. Once misconduct is established, corporate liability is readily proved. Thus, each can benefit from early coordination.[113]

By contrast, without corporate criminal liability, prosecutors often will not coordinate with civil authorities' investigations and, when they do, would intervene at a later stage and have less assistance to offer. Prosecutors restricted to pursuing individual wrongdoers often cannot be confident at the outset that an investigation into organizational misconduct will yield evidence sufficient to produce an individual conviction, even if they are confident that organizational misconduct occurred. Individual criminal liability is more difficult to establish than corporate criminal liability because individual *mens rea* is often difficult to prove, and individuals are more likely to go to trial.[114] Prosecutors cannot always reliably identify and obtain actionable evidence against the individuals responsible for the misconduct, especially if they cannot use corporate criminal liability to induce full corporate cooperation. Finally, in some situations, prosecutors who could have pursued the

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recovery from companies and thus will not offer to reduce corporate damages to obtain information on individual wrongdoers, who tend to be asset constrained). *See* Jennifer Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 720 (1992) (explaining why private civil corporate liability for Fraud on the Market securities fraud is not efficient).

State Attorneys' General and local District Attorneys also are not good substitutes for federal prosecutors. First, states' criminal laws often do not apply to many important forms of misconduct, such as foreign corruption and money laundering by financial institutions. Second, most states have excessively narrow laws governing corporate criminal liability. Finally, state Attorneys General and District Attorneys are often elected officials—leaving them directly vulnerable to corporate political influence. This may partly explain why state enforcement officials have collaborated to pursue a few cases involving large companies with high public salience (such as tobacco and opioids) but otherwise have generally not been active in pursuing large publicly held firms for their misconduct.

111. This is not to say that coordination never occurs in cases that only involve individuals. For example, criminal and civil authorities regularly coordinate in health care fraud cases against physicians. Yet, in these cases, enforcement officials often start the investigation with substantial information about the misconduct, provided either through analysis of the federal government's Medicaid and Medicare database or by a whistleblower motivated to provide substantial information by the bounty provisions of the Qui Tam statute. *See generally* David F. Engstrom, *Bounty Regimes*, *in* THE RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 334, 334–62 (Jennifer Arlen ed., 2018) (discussing federal whistleblower laws). In many other areas, however, enforcement officials commence investigations with substantially less information, leaving them uncertain about whether the investigation will pay off.

112. *See* O'Rourke, *supra* note 19, at 1030–48 (detailing the benefits and costs to civil regulators and prosecutors of parallel proceedings).

113. *See supra* Part III.C.

114. For example, some forms of corporate misconduct, such as certain forms of money laundering by financial institutions, can be predicated on an organization's breach of its legal duty to have an effective system without any one individual having willfully caused the violation.

company cannot pursue the individuals for example, because they are foreign citizens, the crime occurred overseas, and either prosecutors cannot obtain jurisdiction over the individual or principles of comity favor allowing a foreign jurisdiction to prosecute the individual.[115] As a result, prosecutors often will be unwilling to join a civil authority's investigation at the early stages, when coordination matters most, because, at that stage, they obtain too little expected benefit.

The elimination of corporate criminal liability also would reduce prosecutors' incentive to coordinate later in the investigation because their lack of early involvement may alter the investigation in ways that reduce their expected benefit from its fruits. Prosecutors involved in an investigation from the beginning are expected to ensure from the outset that the investigation is designed to identify and obtain evidence against individuals. By contrast, civil authorities often focus on corporate remediation instead of enforcement. Thus, civil authorities may not seek to identify or obtain evidence about individual wrongdoers. As a result, they often do not require companies seeking favorable settlements to provide the level of cooperation needed to produce actionable evidence against individual wrongdoers. Given this, prosecutors asked to join a mature investigation cannot assume that a civil authority's investigation will provide them with the identities of, or sufficient evidence against, individual wrongdoers needed to induce prosecutors to join the investigation. And prosecutors would lack the ability to use corporate criminal liability to induce corporate cooperation that provides this evidence. Consequently, prosecutors would participate in far fewer investigations if corporate criminal liability were eliminated, given the uncertainty about whether coordinating with civil authorities would yield a successful individual conviction.

In addition, in the case of civil authorities that do not require corporations to fully cooperate with evidence against individuals as a condition of a settlement, the loss of corporate criminal liability would increase the monetary cost to civil authorities of thorough investigations, reduce the quality of the information available to them, and eliminate an important source of insulation from corporate political influences seeking to mute corporate civil enforcement actions. The combined effect can be expected to shift civil agencies away from enforcement and towards softer regulatory responses that provide less deterrence.

IV. CONCLUSION

Governments cannot deter corporate crime effectively unless companies are held liable for their employees' crimes and are subject to an enforcement policy that induces companies to fully investigate and self-report or fully cooperate with respect to corporate misconduct. Some scholars claim that governments can achieve effective deterrence through civil corporate liability alone, given the potential for substantial civil penalties.[116]

The claim that corporate civil liability is as effective as corporate criminal liability is

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115. For example, under the FCPA, a U.S. company can be held criminally liable for foreign bribery by a noncitizen employee or agent based on a bribe payment that was made overseas. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-3. In this situation, U.S. prosecutors may choose to refrain from pursuing the wrongdoer if either they are confident that overseas prosecutors will deal with him or if they cannot gain jurisdiction over, or extradition of, the person.

116 *See supra* Alexander et al., *supra* note 13.

incorrect because it ignores the fact that federal civil enforcement authorities are more vulnerable than federal prosecutors to companies' political influence channeled through both Congress and the President. Congress has considerable ability to leverage its budgetary authority to mute civil corporate enforcement but cannot as easily use its budgetary authority to limit corporate criminal enforcement. The President also can more effectively curtain civil corporate enforcement through his authority to select the senior leadership of these agencies because the leadership of civil agencies generally directly controls enforcement decisions. By contrast, the Department of Justice's senior criminal leadership generally does not directly control most corporate criminal enforcement decisions. Consequently, eliminating corporate criminal liability would enhance companies' ability to use their influence to reduce enforcement intensity by shifting sole control over corporate enforcement to civil authorities. This would likely reduce both the frequency of federal corporate enforcement actions and the magnitude of sanctions.

Eliminating corporate criminal liability would also undermine deterrence by reducing the effectiveness of civil enforcement and increasing its cost. Corporate criminal liability enables cooperative enforcement, which decreases civil authorities' vulnerability to budget constraints. It also renders civil authorities more effective by increasing the political cost of passivity. Cooperative enforcement also improves civil enforcement by enhancing their ability to obtain full corporate cooperation. Full corporate cooperation reduces the cost of civil investigations. It also produces evidence against individual wrongdoers, thereby promoting the vital goal of sanctioning individual wrongdoers.

Thus, eliminating corporate criminal liability would undermine deterrence by making corporate enforcement materially less likely. Companies are less likely to deter misconduct—and may induce it— when the crime is profitable and material sanctions unlikely.[117] Eliminating corporate criminal liability also would undermine deterrence by reducing individual wrongdoers' risk of sanction. Thus, the political economy of enforcement is an important consideration that should impact decisions about the optimal scope of corporate criminal and civil liability for corporate misconduct.

The conclusion that corporate criminal enforcement is vital to the United States' ability to optimally deter corporate misconduct does not imply that criminal enforcement eliminates the pernicious effect of companies' political influence. The claim is simply that this political influence is less than it would be absent corporate criminal liability. Nor does this Article argue that the current structure of U.S. corporate criminal enforcement is optimal. Many aspects of the U.S. system would benefit from reform.[118] The central claim of this Article is simply that the elimination of corporate criminal liability should not be on the menu of reforms considered by federal officials.

Finally, the conclusion that corporate criminal enforcement is important for deterrence in the United States may not extend to other countries because it is grounded in specific features of the political economy of the U.S. federal system.[119] Corporate criminal

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117. *See, e.g.*, Arlen & Kraakman, *supra* note 2 (explaining that corporate liability is needed to induce companies to deter misconduct)*;* Arlen & Kornhauser, *supra* note 2 (same); *see generally* BAZERMAN & TENBRUNSEL, *supra* note 38 (discussing how corporations increase employees' risk of misconduct).

118. Many thoughtful articles include suggestions on how to reform U.S. corporate criminal enforcement. The American Law Institute recently adopted the Principles of Corporate Criminal, Civil and Administrative Enforcement that offers suggestions for reform. *See* PRINCIPLES OF CORPORATE ENFORCEMENT, *supra* note 16.

119. *Cf.* Arlen & Buell, *supra* note 26, at 753–54 (explaining how the differences in countries' laws

liability may be less vital to deterrence in countries that have adequately insulated civil enforcement from political influence and provided enforcement authorities with adequate resources and sanctioning authority or that have left criminal enforcement authorities more vulnerable to political influence than civil authorities. In most countries, however, corporate misconduct is underenforced. Thus, the default should favor imposing both criminal and civil corporate liability in the hope that a diversified approach will increase effective enforcement.

governing public and private investigations of corporate misconduct can affect the optimal corporate enforcement policy).