INSIDIOUS DESIGN OR INSTRUMENT OF PROGRESS: THE MULTI-AGENCY INITIATIVE TO CHOKE OFF UNDESIRABLE BUSINESSES' ACCESS TO THE FINANCIAL WORLD

Comment*

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I. INTRODUCTION

"We know that no one ever seizes power with the intention of relinquishing it. Power is not a means; it is an end."[1]

The fictional world numbed the American populace.[2] For decades novelists and producers alike preached the dangers of an overreaching bureaucracy, profited from the image of a totalitarian life, and inundated the population with tales of tyranny.[3] Like the boy who cried wolf one too many times, the majority no longer heeds the warnings.[4] Instead, the majority dismisses the cries of abuse and calls to action as political pandering or with barely contained eye rolling.[5] Just because a scenario more commonly appears in fiction, however, does not keep it from ever becoming a reality.[6]

Consider the following: a Native American tribe, isolated geographically from more prosperous locations, takes advantage of the opportunities of a digital world by starting an online, short-term loan business.[7] Tribal leadership makes sure to comply with all licensing regulations and local,

1. GEORGE ORWELL, 1984 263 (1950).

2. *See infra* notes 3–5 and accompanying text.

3. *See generally, e.g.*, SUZANNE COLLINS, THE HUNGER GAMES (2008) (painting a chilling vision of futuristic America); YEVGENY ZAMYATIN, WE (Mirra Ginsburg trans., 1983) (1921) (chilling readers with tales of a totalitarian society taken to the extreme); ORWELL, *supra* note 1 (predicting a terrifying, all-seeing government).

4. *See Guilty Until Proven Innocent? A Study of the Propriety & Legal Authority for the Justice Department's* Operation Choke Point*: Hearing Before the Subcomm. on Regulatory Reform, Commercial, & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 11–13 (2014) (statement of Adam J. Levitin, Professor of Law, Georgetown University Law Center) [hereinafter Levitin Testimony], *available at* http://judiciary.house.gov/_cache/files/f6210f6f-68eb-49b6-b617-167eecfdfe3b/levitin-testimony.pdf (dismissing the slippery slope argument).

5. Timothy Johnson, *Updated: How Conservative Media's Conspiracy Targeted an Anti-Fraud Program*, MEDIA MATTERS (June 4, 2014, 11:48 AM), http://mediamatters.org/blog/2014/06/04/how-conservative-medias-conspiracy-targeted-an/199585.

6. *See infra* notes 7–13 and accompanying text. Look to, for example, Operation Choke Point—a multi-agency initiative aimed at preventing banks from doing business with an ever-growing list of disfavored industries. *See infra* Part II.

7. *See* Barry Brandon, *The Feds Choke Off Native American Income*, WALL ST. J. (Sept. 8, 2014, 7:18 PM), http://online.wsj.com/articles/barry-brandon-the-feds-choke-off-native-american-income-1410218309.

state, and federal laws.[8] The business prospers and leadership uses the revenues to improve services—such as housing, education, health care, and justice—within the community.[9] Then, out of the blue, the tribe's local bank cuts all ties.[10] Inquiries reveal that the federal government contacted community banks and informed them that they should end all relationships with the online lenders or "face 'the highest levels of scrutiny they could imagine.'"[11] And just like that, the business ends.[12] A perfectly legitimate, albeit "high-risk," industry is left to fail, choked off from access to the very banking services it needs to survive.[13]

Texans fare no better.[14] Speedy Cash, Inc., a payday lending business, provides much-needed alternative financial services for the 40% of Texans who get turned away from brick-and-mortar financial institutions precisely in their moment of need.[15] Speedy Cash complies with all Texas licensing and examination requirements.[16] It discloses up front the total cost of the loans and warns consumers that the loan should only be used for short-term, immediate needs.[17] Further, its ninety-seven stores across the state employ hundreds of hard-working Texans who might not otherwise have jobs.[18] Yet, much like the Native American tribe, it recently fell victim to Operation Choke Point.[19]

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8. Letter from Sean P. Duffy, U.S. Cong., to Martin Gruenberg, Chairman, FDIC, and Eric Holder, U.S. Attorney Gen. (Oct. 21, 2013) [hereinafter Duffy Letter], *available at* http://www.microbilt.com/communications/Letter-to-FDIC-and-DOJ(102113).pdf.

9. *See id.*

10. *Id.*

11. *Id.* (quoting regional FDIC agents who visited Wisconsin banks in 2013).

12. *See* Brandon, *supra* note 7.

13. *See* STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 113TH CONG., THE DEP'T OF JUSTICE'S "OPERATION CHOKE POINT": ILLEGALLY CHOKING OFF LEGITIMATE BUSINESSES? 7–9 (Comm. Print 2014) [hereinafter COMM. PRINT] (noting that the reputational risk of an industry alone may trigger federal investigations).

14. *See infra* notes 15–22 and accompanying text.

15. *See* FDIC, 2011 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 127 (2012) [hereinafter FDIC, 2011 FDIC NATIONAL SURVEY], *available at* https://www.fdic.gov/householdSurvey/2011/2012_unbankedreport.pdf. The survey defines unbanked households as a household where no member of the family has a checking or savings account. *Id.* at 142. By contrast, an underbanked household is one that uses alternative financial services such as payday loans, rent-to-own services, pawn shops, non-bank money orders, non-bank check-cashing services, non-bank remittances, or refund anticipation loans. *Id.* at 4.

16. *See Texas OCCC Notice and Fee Schedule - Store Locations*, SPEEDY CASH, http://www.speedycash.com/rates-and-terms/texas/stores-fees/ (last visited Apr. 18, 2015).

17. *See id.*

18. *See id. See generally Economy at a Glance*, U.S. DEPARTMENT LAB. (Feb. 20, 2015), http://www.bls.gov/eag/eag.tx.htm (listing Texas's unemployment rate at 4.9% for August 2014).

19. *See Guilty Until Proven Innocent? A Study of the Propriety & Legal Authority for the Justice Department's* Operation Choke Point*: Hearing Before the Subcomm. on Regulatory Reform, Commercial, & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 14 (2014) (statement of David H. Thompson, Managing Partner, Cooper & Kirk, PLLC) [hereinafter Thompson Testimony], *available at* http://judiciary.house.gov/_cache/files/97dfa8fb-8fa4-4926-a6e5-fa45d15e6772/statement-of-david-h-thompson-re-operation-choke-point.pdf.

After a seventeen-year banking relationship, Speedy Cash received a termination notice from Bank of America.[20] Bank officers expressed regret but stated that the company's status as a short-term credit provider made any further relationships impossible in light of Operation Choke Point pressures.[21] Even though it runs a perfectly legal and profitable business, Speedy Cash now faces an uphill battle in trying to open new accounts with unwilling lenders just to stay alive.[22] Although these stories may feel like the far-fetched daydreams of a dystopian novelist, they, along with other disturbing reports, have become an ever-increasing reality.[23]

This Comment seeks to scrutinize this new reality by surveying the current federal administrative actions aimed at stifling undesirable, but nonetheless legal, businesses.[24] Specifically, it analyzes whether the federal government exceeded its authority by executing Operation Choke Point without adequate legal justification.[25]

Part II begins by examining the origins of Operation Choke Point.[26] It addresses the concerns that caused this policy's enactment and asks whether these concerns justify the degree of government intervention into private business affairs seen today.[27] Additionally, Part II tracks the evolution of Operation Choke Point—both the expansion of the initiative to new industries, as well as the evolving precedent created by enforcement actions.[28] Next, Part III reviews the agencies' interpretation of key language in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) and discusses how this reading negates the purpose of the statute.[29] Part IV narrows the scope of this Comment to investigate the potentially disastrous effects that unrestrained administrative enforcement power has on the Texas economy.[30] Finally, Part V provides administrative and legislative solutions to combat the dangers of this unchecked initiative.[31]

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20. *Id.*

21. *Id.*

22. *See id.*

23. *See* Danielle A. Douglas, *Banks to Payday Lenders: Quit the Business or We'll Close Your Account*, WASH. POST, Apr. 11, 2014, http://www.washingtonpost.com/business/economy/banks-to-payday-lenders-quit-the-business-or-well-close-your-account/2014/04/11/afd34976-c0c6-11e3-bcec-b71ee10e9bc3_story.html; William Isaac, *'Operation Choke Point': Way Out of Control*, AM. BANKER (Apr. 22, 2014, 3:00 PM), http://www.americanbanker.com/bankthink/operation-choke-point-way-out-of-control-1067013-1.html (noting the former chairman of the FDIC's concerns that the initiative allows unelected bureaucrats to assault the very foundation of democracy and the free-market economy); Glenn Harlan Reynolds, *Justice Department Shuts Down Porn Money: Column*, USA TODAY (May 26, 2014, 6:07 PM), http://www.usatoday.com/story/opinion/2014/05/26/justice-department-porn-stars-first-amendment-column/9594113.

24. *See* discussion *infra* Parts II–III.

25. *See* discussion *infra* Part II.

26. *See* discussion *infra* Part II.B.

27. *See* discussion *infra* Part II.D.

28. *See* discussion *infra* Part II.C.

29. *See* discussion *infra* Part III.

30. *See* discussion *infra* Part IV.

31. *See* discussion *infra* Part V.

II. OPERATION CHOKE POINT: A HISTORICAL PERSPECTIVE

"It was a bright cold day in April, and the clocks were striking thirteen."[32]

A. A Chilling Summer: America's Discovery of a Worrisome New Initiative

In summer 2013, the media caught wind of a new area of executive overreach.[33] A multi-agency initiative, spearheaded by the Department of Justice (DOJ or the Department) and the Federal Deposit Insurance Corporation (FDIC) (collectively, the Agencies), had begun investigating banks that provide services to industries engaged in "questionable financial ventures."[34] Although the task force expressed a commitment to limiting efforts to the eradication of consumer fraud, it also proudly proclaimed its desire to "chang[e] the structures within the financial system" by "choking . . . off" those targeted businesses from "the very air they need to survive."[35] Payday lending quickly became a prime target.[36] As an alternate financial service, payday lending operates as the primary or only credit option available to the underbanked or unbanked American population.[37] Though regularly demonized as a "debt trap," the payday lending industry grew in popularity among this underserved populace, issuing approximately $18.6 billion in loans in 2012 alone.[38] Understandably, agency actions to eliminate this industry caused congressional concern.[39]

In a letter signed by thirty members of Congress, Representative Blaine Luetkemeyer sought answers.[40] He accused the DOJ and the FDIC of taking unilateral action that exceeded the regulatory authority granted to them by Congress.[41] Focusing on the DOJ's stated intent to choke off businesses from

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32. ORWELL, *supra* note 1, at 1.

33. *See* Peter Weinstock, *Regulators Gang Up on Banks, Third-Party Payment Processors*, AM. BANKER (Aug. 22, 2013, 9:44 PM), http://www.americanbanker.com/bankthink/regulators-gang-up-on-banks-and-third-party-payment-processors-1061533-1.html; Alan Zibel & Brent Kendall, *Probe Turns Up Heat on Banks*, WALL ST. J., Aug. 7, 2013, http://wsj.com/news/articles/SB10001424127887323838204578654411043000772.

34. *See* Zibel & Kendall, *supra* note 33.

35. *Id.* (quoting a Department of Justice (DOJ) official).

36. *Id.*

37. *See* FDIC, 2011 FDIC NATIONAL SURVEY, *supra* note 15, at 4. More than one in four households—28.3%—are either unbanked or underbanked. *Id.*

38. *See* Weinstock, *supra* note 33; Zibel & Kendall, *supra* note 33.

39. *Cf.* Letter from Blaine Luetkemeyer, U.S. Cong., to Eric Holder, U.S. Attorney Gen., and Martin Gruenberg, Chairman, FDIC (Aug. 22, 2013) (on file with author) [hereinafter Luetkemeyer Letter], *available at* http://www.fisca.org/Content/NavigationMenu/GovernmentAffairs/RecentCongressionalActivity/Luetkemeyer&HouseRepublicansLetter_to_Holder-Gruenberg.pdf (demanding a response to media reports of agency actions related to Operation Choke Point).

40. *Id.* The majority of the signatories represent congressional districts located in the South or Midwest; by far, more unbanked or underbanked individuals live in the South than any other region. *See id.*; FDIC, 2011 FDIC NATIONAL SURVEY, *supra* note 15, at 51.

41. Luetkemeyer Letter, *supra* note 39.

necessary capital, Representative Luetkemeyer emphasized the potential negative impact that shutting down payday lenders would have on millions of Americans.[42] He highlighted the Legislature's intent to allow the continued provision of these short-term loan products and reminded the Agencies of the limitations on their power to act.[43] The DOJ responded with assurances of actions focused solely on the illegal activity of fraudsters and the banks that assisted them.[44] For a while, tensions appeared to ease.[45]

Then, the DOJ began sending termination notices.[46] As bank after bank sent longtime customers account-closure letters, Congress once again became alarmed.[47] Yet again, representatives sent letters demanding answers.[48] This time, agency assurances failed to placate concerns, and the House Committee on Oversight and Government Reform initiated a formal investigation.[49] The findings were alarming.[50]

The Committee reported a startling divergence.[51] On paper, Operation Choke Point remained committed to rooting out consumer fraud.[52] In reality, however, the initiative aimed its attention at forcing banks to terminate their relationships with "'high-risk' or otherwise objectionable" industries.[53] Through backdoor enforcement actions taken under § 951 of FIRREA, agency directors subjected more than fifty banks to costly subpoenas and time-consuming negotiations with proposed consent decrees containing language that banned the banks from maintaining current or future relationships with certain categories of lawful businesses.[54] The precedential

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42. *Id.*

43. *Id.* (noting that the Dodd-Frank Wall Street Reform and Consumer Protection Act evidenced a congressional acknowledgment of the need for both online and storefront short-term credit products).

44. STAFF OF H.R. COMM. ON OVERSIGHT & GOV'T REFORM, 113TH CONG., THE DEP'T OF JUSTICE'S "OPERATION CHOKE POINT": ILLEGALLY CHOKING OFF LEGITIMATE BUSINESSES? 323–24 (Comm. Print 2014) [hereinafter APPENDIX 2] (Sept. 2013 Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney Gen., to Blaine Luetkemeyer, U.S. Cong.), *available at* http://oversight.house.gov/wp-content/uploads/2014/05/Appendix-2-of-2.pdf.

45. *See generally* Duffy Letter, *supra* note 8 (evidencing a nearly two-month lapse in congressional concern over the initiative).

46. *See generally* APPENDIX 2, *supra* note 44, at 339–49 (testimony before Congress by the Financial Service Centers of America on the impact of recent regulator supervisory and enforcement actions) (compiling bank account termination notices).

47. *See* Duffy Letter, *supra* note 8.

48. *See id.*

49. *See* APPENDIX 2, *supra* note 44, at 306–10 (letter from Darrell Issa, U.S. Congress, to Eric Holder, U.S. Attorney General).

50. *See generally* COMM. PRINT, *supra* note 13 (summarizing the findings of the oversight committee).

51. *See id.* at 2–3.

52. *See id.*

53. *See id.*

54. *Id.* at 3–4, 6. One compliance officer stated that receiving a subpoena would induce panic. Interview with K.M., Compliance Officer, in Lubbock, Tex. (Sept. 19, 2014) [hereinafter Compliance Officer Interview]. Receipt would force the bank to hire consultants, economists, and attorneys specializing in the area. *Id.* He estimated that merely complying with a subpoena could end up costing the bank upwards of a quarter of a million dollars. *Id.*

value of these actions alone worried insiders, with one commentator summing up fears by stating, "It should also send a troubling message . . . that at any point regulators can force [banks] to stop processing legal transactions simply because they don't like a particular merchant or industry."[55]

B. The Innocent Beginnings of an Agency Executioner

Operation Choke Point began as an unnamed plan to reduce consumer fraud in the banking world.[56] Joel Sweet, an Assistant United States Attorney, made his name prosecuting fraudulent payment processors out of the Philadelphia Attorney General's office.[57] After several years and countless successful suits, Sweet noticed a disconcerting trend.[58] Various federal agencies each worked independently to combat different areas of financial fraud; however, limited resources, inadequate remedies, and creative defendants combined to produce very few real fixes.[59] In the context of third-party payment processors, this issue was particularly concerning.[60]

Sweet identified fraudsters' growing use of third-party payment processors to gain access to the banking system while masking their illegitimate operations.[61] Due to a loophole in the Treasury Department's definition of "money transmitter," regulatory agencies do not classify third-party payment processors as a "Money Services Business."[62] As such, they do not have to register with the United States Financial Crimes Enforcement Network (FinCEN) or comply with regulations mandated by the Bank Secrecy Act.[63] Consequently, Sweet noted that prosecuting fraudulent merchants felt like a game of whack-a-mole—you knock out one illegal business only to find two more in its place.[64] As an innovative solution, he proposed that the Consumer Protection Branch (CPB) of the DOJ

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55. *See* Weinstock, *supra* note 33; Zibel & Kendall, *supra* note 33 (quoting Peter Barden, Spokesman for the Online Lenders Alliance).

56. STAFF OF H.R. COMM. ON OVERSIGHT & GOV'T REFORM, 113TH CONG., THE DEP'T OF JUSTICE'S "OPERATION CHOKE POINT": ILLEGALLY CHOKING OFF LEGITIMATE BUSINESSES? 18 (Comm. Print 2014) [hereinafter APPENDIX 1] (Operation Choke Point proposal), *available at* http://oversight.house.gov/wp-content/uploads/2014/05/Appendix-1-of-2.pdf.

57. *See id.* at 13 (e-mail from Michael Bresnick, Executive Director, Financial Fraud Enforcement Task Force, U.S. Department of Justice, to Stuart F. Delery, U.S. Assistant Attorney General).

58. *See id.* at 18–19 (Operation Choke Point proposal).

59. *See id.* at 19. For example, the Federal Trade Commission (FTC) focused on targeting merchants and payment processors who committed fraud on consumers. *Id.* Efforts went largely unrealized, however, due to inadequate civil remedies and the fraudsters' frequent shedding of one corporate identity for another. *Id.* By contrast, bank regulators, while better situated to address risky third-party payment processor relationships, concerned themselves only with fraudsters' effects on financial institutions and not their effects on consumers. *Id.*

60. *See id.* at 18–19.

61. *Id.*

62. *Id.* at 236 (Consumer Protection Branch (CPB), DOJ, and CPB–FTC joint training event).

63. *Id. See generally* 12 U.S.C. §§ 1951–1959 (2012) (outlining the procedural requirements financial institutions must comply with under congressional mandate).

64. *See* APPENDIX 1, *supra* note 56, at 217 (CPB, DOJ, and CPB–FTC joint training event).

partner with various other agencies, such as the FDIC, the Office of the Comptroller of the Currency, the Federal Bureau of Investigations, and the United States Postal Inspection Service, to stop fraud at its source—the bank.[65] Sweet hoped that scrutinizing the banks would encourage them to more carefully vet potential clients before providing account access.[66] He knew that if his plan could choke off fraudsters' access to the national banking system, it would ultimately force the illegitimate businesses to fold.[67]

Sweet proposed using objective criteria, such as rate-of-return data, to target ten banks suspected of willfully turning a blind eye to their customers' engagement in consumer fraud.[68] His team would then initiate contact with each of these institutions to investigate whether bank executives knew or had reason to know about the fraudulent payments being processed.[69] Depending on the results of the investigation, his team would "decide whether to negotiate a prospective compliance agreement, file a FIRREA complaint, open a [grand jury] investigation, or close the file."[70] At the same time, both civil and criminal charges could be lodged against the third-party payment processors and fraudulent merchants whose presence sparked the initial scrutiny.[71] Sweet posited that with his plan, "[l]egitimate banks will become aware of perhaps unrecognized risk, and corrupt banks will be exposed."[72] Sweet promised his bosses that they would see results within 180 days—immediate protection from the stamping out of fraud at the ten targeted banks and future protection from those untargeted banks who, ever sensitive to the possibility of civil or criminal liability, diligently reviewed regulations regarding their duty to protect consumers from fraudsters.[73]

Sweet's superiors approved, and the DOJ soon issued its first batch of subpoenas to the targeted banks.[74] Encouraged by the program's initial success, the DOJ quickly expanded upon Sweet's narrowly defined

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65. *Id.* at 20 (Operation Choke Point proposal).

66. *See id.* at 19–20.

67. *See id.* at 20.

68. *See id.* at 21 (Operation Choke Point proposal), 217 (CPB, DOJ, and CPB–FTC joint training event).

69. *See id.* at 19–20 (Operation Choke Point proposal).

70. *Id.* at 21.

71. *Id.*

72. *Id.* at 20.

73. *See id.* at 20–21.

74. *Id.* at 29 (February 2013 request for issuance of subpoenas). Initial subpoenas went to banks believed to have processed remotely created checks (RCCs) and remotely created payment orders (RCPOs) in the past. *Id.* at 31–32. RCCs and RCPOs typically initiate from telephone or Internet transactions, such as monthly payments to a utility company. *See Remotely Created Checks*, FED. FIN. INST. EXAMINATION COUNCIL, http://ithandbook.ffiec.gov/it-booklets/retail-payment-systems/payment-instruments,-clearing,-and-settlement/check-based-payments/remotely-created-checks.aspx (last visited Apr. 18, 2015). Although commonly used for legitimate purposes, RCCs and RCPOs, like other kinds of electronic debits, create an inherent risk of fraud. *See id*.

initiative.[75] Several smaller agencies and state attorney general's offices, hearing of the program's goal of combatting consumer fraud, swiftly jumped on board.[76] Recognizing that they operated in a "target-rich environment," the DOJ began flirting with the idea of encompassing other problematic industries that had some connection, however tenuous, to the potential for fraudster abuse.[77] Within two months, Sweet's limited, consumer-focused plan evolved into the start of something insidious.[78]

C. Evolution and Eradication: Operation Choke Point Today

Since its inception in November 2012, Operation Choke Point has expanded to encompass a wide variety of lawful industries including firearms and ammunition sales, adult entertainment, check cashing, payday lending, and third-party payment processors.[79] Recognizing that it has the financial world running scared, the DOJ has abandoned all vestiges of restraint, casting a wide dragnet by subpoenaing banks and applauding itself on the collateral damage.[80] Although fully aware that investigative scrutiny will cause banks to terminate longstanding relationships with legitimate lenders, the DOJ remains unapologetic.[81] Instead, it somewhat circuitously informs these lenders that they merely need to convince the targeted banks of the Agencies' error, all while the DOJ continues to threaten civil or criminal penalties stemming from the bank's relationship with the lenders.[82] Unsurprisingly, lenders find little success.[83] As noted by one financial services member in testimony before Congress, Operation Choke Point has led to an alarming number of account terminations "based solely on politicized regulatory

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75. *See* APPENDIX 1, *supra* note 56, at 50–53 (Operation Choke Point eight-week status report).

76. *See id.* at 172 (Operation Choke Point four-month status report). By the four-month mark, six states including Texas had expressed interest in assisting with Operation Choke Point. *See id.*

77. *See id.* at 50–51, 53 (Operation Choke Point eight-week status report).

78. *See generally* COMM. PRINT, *supra* note 13, at 3–4, 6 (concluding that Operation Choke Point operated outside the bounds of law and accordingly must be dismantled).

79. Letter from Darrell Issa, Chairman, House Comm. on Oversight & Gov't Reform, to Martin J. Gruenberg, Chairman, FDIC (June 9, 2014) (citations omitted), *available at* http://oversight.house.gov/wp-content/uploads/2014/06/2014-06-09-DEI-Jordan-to-Gruenberg-FDIC-Choke-Point-and-Reputational-Risk.pdf; APPENDIX 2, *supra* note 44, at 327–28 (testimony before Congress by the Financial Service Centers of America on the impact of recent regulator supervisory and enforcement actions).

80. *See* APPENDIX 1, *supra* note 56, at 331, 334 (Operation Choke Point six-month status report) (congratulating the initiative on succeeding in an area where agencies had previously seen only limited success—shutting down online payday lending).

81. *See id.* at 336.

82. *Compare id.* (noting that the merchants can avoid account termination simply by "present[ing] sufficient information to the banks to convince them that their business model and lending operations are wholly legitimate"), *with* APPENDIX 2, *supra* note 44, at 333 (testimony before Congress by the Financial Service Centers of America on the impact of recent regulator supervisory and enforcement actions) (citing an email from a Texas bank to a terminated merchant stating that although the merchant has done a brilliant job and is obviously legitimate, the bank still must terminate ties due to ongoing federal pressures).

83. *See* APPENDIX 2, *supra* note 44, at 326–27 (testimony before Congress by the Financial Service Centers of America on the impact of recent regulator supervisory and enforcement actions).

pressure and informal intimidation related to the products and services being offered by legal, licensed and regulated businesses."[84]

Bank officers, although outwardly compliant with federal demands, harbor doubts.[85] The DOJ's sudden, sharp focus has prompted some compliance officers to ask: Why now and why these specific industries?[86] No new financial service industries have emerged, and recent technological advances pose no more risk for fraud than usual.[87] Additionally, as one Texas compliance officer noted, federal regulators already have resources in the shape of the Bank Secrecy Act and the Anti-Money Laundering Act, so why funnel money into a new, untested initiative?[88] Personally, he attributes the recent changes to a shifting ideology within the DOJ.[89] He might just be right.[90] After all, the CPB—an integral section of the DOJ—informs Operation Choke Point investigators that "[s]ome bankers are not too smart—you may have to push their noses into the muck before they smell it."[91]

III. STATUTORY PERVERSION: HOW A MISINTERPRETATION OF FIRREA HAS PERMITTED THE USE OF ENFORCEMENT POWERS NOT ENVISIONED BY THE LEGISLATURE

"Obedience is not enough. Unless he is suffering, how can you be sure that he is obeying your will and not his own?"[92]

The DOJ improperly relies on § 951 of FIRREA to lend an inappropriate impression of legality to their unlawful actions.[93] First, a look at the plain meaning of the text along with its legislative history shows that the Department's use of § 951 fails to conform to the statute's language and runs counter to the purpose of its passage.[94] Additionally, analysis of the limited number of cases used by the Department reveals distinguishing characteristics that make the decisions' broad holdings inapplicable to Operation Choke Point actions.[95] Finally, scrutinizing the unfair advantages

84. *Id.* at 326. In one week alone, fourteen different lenders—including one operating out of Irving, Texas—reported terminated bank accounts. *Id.* at 331.

85. *See* Compliance Officer Interview, *supra* note 54.

86. *Id.*

87. *See id.*

88. *Id. See generally* 12 U.S.C. § 1831m–1 (2012) (regulating the creation and use of reports on the safety and soundness of financial institutions); 12 U.S.C. §§ 1951–1959 (2012) (outlining the procedural requirements financial institutions must comply with under congressional mandate).

89. Compliance Officer Interview, *supra* note 54.

90. *See* APPENDIX 1, *supra* note 56, at 239 (CPB, DOJ, and CPB–FTC joint training event).

91. *Id.*

92. ORWELL, *supra* note 1, at 266.

93. *See infra* Part III.A–C.

94. *See infra* Part III.A.

95. *See infra* Part III.B.

that a § 951 suit confers upon the government's illegal actions exposes the paradox of the DOJ financially destroying banks with the very statute meant to prevent the financial institution's collapse.[96]

A. FIRREA Explained: A Deeper Look at the Perplexing Text

Although Sweet proposed that Operation Choke Point only proceed under FIRREA in limited circumstances, internal documents reveal that DOJ officials rely almost exclusively on § 951.[97] Section 951(g) grants agency officials the power to issue administrative subpoenas "[f]or the purpose of conducting a civil investigation in contemplation of a civil proceeding under this section."[98] Subpoenas issued under this section task the recipient with expeditiously making available an expansive range of documents and witnesses.[99] Depending on the results of the inquiry, the Attorney General may then file charges under § 951(c).[100] The procedural standards governing prosecution, such as the burden of proof and statute of limitations, are also contained within this all-encompassing text.[101] Finally, in the event of a conviction, the statute lays out monetary penalty guidelines for punishment.[102] Although facially the statute seems perfectly suited to its current use, a closer examination of both the statute's purpose and plain language reveals otherwise.[103]

1. A Jaunt into the Minds of Our Congressmen

Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 in response to a nationwide crisis in the thrift industry.[104] A combination of deregulation, economic downturn, and

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96. *See infra* Part III.C.

97. APPENDIX 1, *supra* note 56, at 57 (April 2013 request for issuance of subpoenas). After codification, FIRREA's individual sections were scattered throughout titles 12 and 18 of the United States Code. *See, e.g.*, 12 U.S.C. § 1833a (2012). What was originally known as § 951 is today located in title 12, § 1833a. *See* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 951, 103 Stat. 183, 498 (1989) (codified as amended at 12 U.S.C. § 1833a). Notwithstanding codification, courts, government agencies, and other interested parties continue to refer to the statute by its old designation. *See, e.g.*, United States v. Bank of N.Y. Mellon, 941 F. Supp. 2d 438, 443 (S.D.N.Y. 2013); COMM. PRINT, *supra* note 13, at 4.

98. 12 U.S.C. § 1833a(g)(1).

99. *Id.* § 1833a(g)(1)(C).

100. *Id.* § 1833a(a), (c); *see also id.* § 1833a(e) (limiting persons entitled to sue under this statute to the United States Attorney General). Section 951(c) enumerates fourteen different "[v]iolations to which [a] penalty [under FIRREA] is applicable." *Id.* § 1833a(c); *see infra* Part III.A.2.

101. 12 U.S.C. § 1833a(f), (h).

102. *Id.* § 1833a(b).

103. *See infra* Part III.A.1–3.

104. H.R. REP. NO. 101-54, pt. 1, at 291 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 87. The thrift industry, also known as the savings and loan industry, operated to provide the populace with affordable housing funds in the form of long-term, low, fixed-rate mortgages. *Id.*

rampant fraud caused the failure of several thrift institutions, which in turn resulted in the insolvency of the Federal Savings and Loan Insurance Corporation (FSLIC).[105] Initial investigations found that many of the failed thrift institutions shared several characteristics—a heavy reliance on unstable funding, poor underwriting and loan administration standards, and "unsafe and unsound" operating practices that "exposed [the failed thrift institutions] to risks far beyond what was prudent."[106] In response, Congress and President George Bush crafted a bipartisan bill aimed at bailing out the failed thrift institutions and preventing the crisis from reoccurring in the future.[107]

FIRREA, as the bill became known, primarily sought to "promote a safe and stable system of affordable housing finance through regulatory reform."[108] Congress recognized that the taxpayer-funded bailout of the failed thrift industry would be costly.[109] Consequently, it sought to completely overhaul the accepted method of industry insurance and supervision.[110] As part of this plan, Congress crafted several provisions that enhanced the enforcing agencies' bite when prosecuting misconduct.[111] Although the finished statute contained several of these enforcement and penalty provisions, the primary focus—both in statute length and in committee discussions—remained salvaging the insolvent FSLIC and the institutions it insured.[112]

The few remarks devoted specifically to the commercial banking institutions (as opposed to the related, but distinct, thrift institutions) reveal an unequivocal congressional intent to increase industry stability and reduce the risk of failure through an enhancement of enforcement powers to prosecute those persons who commit fraud upon a bank.[113] Congress noted that commercial banks, like the thrift industry, suffered large numbers of failures during the 1980s.[114] Also like the thrift industry, the commercial banks could attribute a large number of those failures to intentional acts of managerial fraud and insider abuse.[115] Prior to the passage of FIRREA, neither the courts nor Congress had resolved the question of whether federal

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105. *Id.* at 291–92. Much like the FDIC today, the FSLIC insured the public's deposits in federally insured thrift institutions up to a set amount. *Id.*

106. *Id.* at 300 (quoting a report by the United States Government Accountability Office). For example, thrifts supervised by the Federal Home Loan Bank of Dallas registered a capital of negative $4.4 billion at years end in 1988. *Id.* at 304.

107. *See id.* at 304, 307–10 (adopting "Never Again" as the theme of the committee's deliberations).

108. *Id.* at 410.

109. S. REP. NO. 101-19, at 6 (1989).

110. H.R. REP. NO. 101-54, pt. 4, at 2. By contrast, Congress only secondarily concerned itself with changes to other areas of banking law. *See id.*

111. *See id.*, pt. 1, at 391–403.

112. *See generally id.*, pt. 1 (devoting only 10 out of approximately 243 pages of legislative history to considerations of the enforcement and penalty provisions).

113. S. REP. NO. 101-19, at 2, 9–10.

114. *Id.* at 2.

115. *See* H.R. REP. NO. 101-54, pt. 1, at 299–300.

agencies could initiate enforcement actions against these institution-related individuals.[116] FIRREA provided much-anticipated clarity.[117]

In no uncertain terms, Congress stated its intent to "expand[] the enforcement powers of the banking regulatory agencies by allowing civil and criminal penalties to be imposed" on institution-related parties.[118] The Senate defined an institution-related party to mean:

> a director, officer, employee, agent, controlling shareholder (other than a holding company), or other person participating in the conduct of the affairs of an insured financial institution or a subsidiary of an insured financial institution, or any person who has filed or is required to file a change-in-control notice with the appropriate Federal banking agency.[119]

It further defined any "other person participating in the conduct of the affairs of an insured financial institution or subsidiary of an insured financial institution" to include "an independent contractor (including an attorney, appraiser, or accountant) who knowingly or recklessly participates in a wrongful action that had or is likely to have an adverse effect on an insured institution."[120] Noticeably missing from the list of those that could now be prosecuted under FIRREA's expanded enforcement powers are the financial institutions themselves.[121]

It is a basic tenant of statutory construction that when a provision defines something, those terms not included in the definition shall be excluded from the meaning.[122] The same principle should hold true when determining legislative intent from a well-documented record.[123] Here, Congress specifically limited who it intended to expose to liability under the new enhanced enforcement powers.[124] The DOJ's current policy of holding individual banks liable for potentially ruinous damages not only expands the enforcement powers far beyond what Congress intended, but also runs completely contrary to the stated purpose of FIRREA—to increase stability and reduce the risk of failure in the financial institutions industry.[125]

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116. *Id.*, pt. 1, at 392–93.

117. *See id.*

118. *See, e.g.*, *id.*; S. REP. NO. 101-19, at 37; 136 CONG. REC. E2672-01 (daily ed. Aug. 3, 1990) (statement of Hon. Nicholas Mavroules), 1990 WL 111608 (Westlaw).

119. S. REP. NO. 101-19, at 63.

120. *Id.*

121. *Cf. id.* (expansively listing those parties now subject to criminal and civil actions under FIRREA).

122. *See* Stenberg v. Carhart, 530 U.S. 914, 942 (2000).

123. *Cf. id.* at 943 (focusing on the legislature's avoidance of limiting language when defining a term to indicate its proper broad interpretation).

124. S. REP. NO. 101-19, at 63.

125. *See id.* at 2. *See* Settlement Agreement at 4, United States v. First Bank of Del., No. 12-CV-6500 (E.D. Pa. Nov. 19, 2012), *available at* http://www.buckleysandler.com/uploads/1082/doc/First_Bank_of_Delaware__SETTLEMENT_AGREEMENT.pdf (forcing bank to shut its doors after imposing $15.5 million in civil penalties in the form of a settlement agreement).

2. Plunging into the Text

By the plain language of the statute, the Attorney General may not rely upon the broad investigative powers granted by FIRREA unless it intends to conduct "a civil investigation in contemplation of a civil proceeding under this section."[126] Civil proceedings may be initiated when the Attorney General suspects either a violation of, or a conspiracy to violate, one of fourteen different statutes.[127] Of those statutes, five specifically apply whenever the violation at issue affects a federally insured financial institution—18 U.S.C. §§ 287, 1001, 1032, 1341, and 1343.[128] Of note, the Attorney General cannot succeed on a statutory action under any one of the above five statutes without first proving the element of intent.[129]

Briefly running through the possible statutes, § 287 provides for criminal prosecution when a person makes a false, fictitious, or fraudulent claim to a person or agency of the United States.[130] Interestingly, this section does not allow punishment for all false or fraudulent claims made.[131] Instead, it only allows for the prosecution of those who: (1) intentionally make a fraudulent claim (2) to the federal government or a person or agency acting on its behalf.[132] Section 1001 also covers fraudulent representations, expanding the scope to cover any matter within the federal government's jurisdiction.[133] Specifically, it punishes those who intentionally make false or fraudulent representations, who conceal or falsify a material fact, or who knowingly create or use false documents.[134] Finally, § 1032 encompasses

126. 12 U.S.C. § 1833a(g)(1) (2012).

127. *Id.* § 1833a(c)(1)–(3).

128. *Id.* § 1833a(c)(2). The agencies have not used any of the remaining nine statutes—18 U.S.C. §§ 215, 656, 657, 1005, 1006, 1007, 1014, 1344, and 15 U.S.C. § 645(a)—in the course of their prosecution. *See, e.g.*, Consent Order for Permanent Injunction and Civil Money Penalty at 12, United States v. Four Oaks Fincorp, Inc., No. 5:14-CV-14-BO (E.D.N.C. Apr. 25, 2014) [hereinafter Consent Order for Permanent Injunction], *available at* http://docs.justia.com/cases/federal/district-courts/north-carolina/ncedce/5:2014cv00014/133335/22/0.pdf?ts=1398512564 (proceeding under 18 U.S.C. § 1343); United States v. Bank of N.Y. Mellon, 941 F. Supp. 2d 438, 449–50 (S.D.N.Y. 2013) (proceeding under 18 U.S.C. §§ 1341 and 1343).

129. *See* 18 U.S.C. § 1001 (2012) (requiring that defendant act "knowingly and willfully"); 18 U.S.C. § 1032 (2012) (stating that defendant must act knowingly); United States v. Precision Med. Labs., Inc., 593 F.2d 434, 443 (2d Cir. 1978) (holding that both 18 U.S.C. §§ 287 and 1341 require an element of knowledge); United States v. Dupre, 339 F. Supp. 2d 534, 539 (S.D.N.Y. 2004) (describing "intent to defraud" as an essential element of an 18 U.S.C. § 1343 action). Contrast this intent requirement with the government's fishing exercise under Operation Choke Point. *See* APPENDIX 1, *supra* note 56, at 45 (remarks by Michael J. Bresnick, Executive Director, Financial Fraud Enforcement Task Force, Department of Justice, at the Exchequer Club of Washington, D.C.).

130. 18 U.S.C. § 287 (2012).

131. *See id.*

132. *Id.*

133. 18 U.S.C. § 1001 (2012).

134. *Id.*

those wrongful actors who knowingly conceal or remove assets subject to receivership, conservatorship, or liquidation by the FDIC or its affiliates.[135]

By comparison, §§ 1341 and 1343 encompass fraud committed either through the mail or by wire, radio, or television.[136] Aside from the method of transmission, the courts interpret the essential elements of the two violations identically: (1) an intent to defraud (2) in an effort to gain money or property.[137] Only a specific intent to commit the fraud will support a conviction under these statutes; mistakes or good faith actions by a defendant that lack an intent to deceive fall short.[138] Further, the intent to defraud must contemplate causing some sort of harm to the intended victim.[139] While the Attorney General need not prove actual harm, she does need to show that the defendant intended harm to result from his or her fraudulent actions.[140] To date, the United States has only proceeded under § 1343 in Operation Choke Point actions.[141]

3. Considerations upon Resurfacing

A plain meaning analysis and considerations of FIRREA's history and purpose make clear that the DOJ lacks the statutory authority for ongoing or future investigations under § 951.[142] As a preliminary matter, the statute only authorizes the Attorney General to initiate investigations in contemplation of filing suit under § 951.[143] All of the possible § 951 violations, however, require as essential elements the specific intent to commit fraud and an intent to harm the expected victim.[144] Thus, in order to initiate investigations, the Attorney General must anticipate being able to sue the defendant for fraud with an intent to cause harm that affects a federally insured financial institution.[145]

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135. 18 U.S.C. § 1032 (2012).

136. 18 U.S.C. §§ 1341, 1343 (2012). Note, § 951 only subjects an actor to FIRREA penalties when the violation of one of these sections is one "affecting a federally insured financial institution." 12 U.S.C. § 1833a(c) (2012). The statute does not define "affecting a federally insured financial institution," leaving the proper interpretation open to debate. *See id.*

137. *See* Fountain v. United States, 357 F.3d 250, 255 (2d Cir. 2004); United States v. Dinome, 86 F.3d 277, 283 (2d Cir. 1996).

138. *See* United States v. Loney, 959 F.2d 1332, 1337 (5th Cir. 1992); United States v. Piepgrass, 425 F.2d 194, 199 (9th Cir. 1970) (holding that mere knowledge of an unsavory scheme is not enough to support a fraud finding). *But cf.* United States v. Reicin, 497 F.2d 563, 571 (7th Cir. 1974) (holding that acting with "reckless indifference as to whether a representation is true or false" is enough to satisfy the specific intent to defraud element (quoting Irwin v. United States, 338 F.2d 770, 774 (9th Cir. 1964))).

139. United States v. Chandler, 98 F.3d 711, 715 (2d Cir. 1996).

140. *Loney*, 959 F.2d at 1337.

141. *See* Civil Complaint at 5, United States v. First Bank of Del., No. 12-CV-6500 (E.D. Pa. Nov. 19, 2012); Consent Order for Permanent Injunction, *supra* note 128, at 12.

142. *See supra* Part III.A.1–2.

143. *See supra* Part III.A.2.

144. *See supra* Part III.A.2.

145. *See supra* Part III.A.2.

Operation Choke Point, however, encourages lawsuits against banks.[146] Specifically, the program seeks to prosecute banks for possessing the specific intent to defraud and cause harm to themselves.[147] While such an action seems highly unlikely, rare circumstances could feasibly produce this set of facts.[148]

But these are not rare circumstances.[149] Under Operation Choke Point, the DOJ has issued subpoenas pursuant to § 951 to a vast number of banks.[150] Yet none of the subpoenas propose to investigate banks for intentionally committing fraud upon themselves.[151] Further, none of the subpoenas address any instances where the bank intended to commit harm upon a victim.[152] Instead, the DOJ issues subpoenas to investigate instances of consumer fraud being allegedly perpetrated by customers of the bank.[153]

Most troubling, the DOJ recognizes the inappropriateness of this use of FIRREA's authority.[154] Internal documents reveal that the Department recognized that consumer fraud lies outside the scope of § 951's purpose and language.[155] The DOJ acknowledged that consumer fraud only affected a federally insured financial institution in the form of theoretical reputational risk—a tenuous connection at best.[156] Nonetheless, the government posited that it could circumvent this limitation by relying upon a trio of utterly distinguishable cases: *United States v. Johnson*, *United States v. Bennett*, and *United States v. Bank of N.Y. Mellon*.[157]

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146. *See* APPENDIX 1, *supra* note 56, at 19–21 (Operation Choke Point proposal).

147. *See id.* (encouraging the program to proceed under § 951 of FIRREA, which prosecutes entities for intentionally committing fraud that affects a federally insured financial institution); *supra* Part III.A.2.

148. *See* United States v. Countrywide Fin. Corp., 996 F. Supp. 2d 247, 249 (S.D.N.Y. 2014) (concluding that a bank knowingly committed fraud upon its federally insured parent bank with reckless indifference for the harm caused).

149. *See infra* notes 150–52 and accompanying text.

150. *See* APPENDIX 1, *supra* note 56, at 332–34 (Operation Choke Point six-month status report). As of November 2013, the DOJ admitted to serving subpoenas on approximately fifty banks. *See id.* at 492, 498 (Operation Choke Point internal memorandum). Additionally, Community Financial Services' recent lawsuit to shut down Operation Choke Point, along with the eighty banking institutions known to have cut ties with various disfavored businesses, supports the logical conclusion that the number has continued to grow. *See* Complaint for Declaratory and Injunctive Relief at 2, 5, Cmty. Fin. Servs. Ass'n of Am., Ltd. v. FDIC, No. 14-CV-953 (D.D.C. June 5, 2014), *available at* http://www.cfsaa.com/Portals/0/legal/lawsuit/cfsa_complaint.pdf.

151. APPENDIX 1, *supra* note 56, at 179–81 (July 2013 request for issuance of subpoenas).

152. *See id.* at 176 (July 2013 request for issuance of subpoenas), 57–58 (April 2013 request for issuance of subpoenas).

153. *Id.* at 57–58 (April 2013 request for issuance of subpoenas).

154. *See id.* at 330, 337 (Operation Choke Point six-month status report).

155. *See id.*

156. *See id.*

157. *See id.*

B. Affecting a Federally Insured Financial Institution: The Government's Bread and Butter

The phrase "affecting a federally insured financial institution" converts a normal fraud case to an action subject to the hefty monetary penalties of § 951.[158] At the time of Operation Choke Point's inception, no court had defined this phrase in the context of an action under FIRREA.[159] A few courts, however, had interpreted the similar phrase "affect[] a financial institution" in the context of sentence enhancement.[160] In this context, the courts held the phrase to apply to both economic and noneconomic effects on a financial institution stemming from the prosecuted offense.[161] Particularly relevant for the Department's actions, in dicta the courts listed examples of noneconomic effects, such as negative publicity or reputational harm, which would satisfy the standard in this context.[162] In its six-month status report, the DOJ latched on to these interpretations, hoping to bolster its admittedly weak claim of an effect.[163] Unfortunately for the DOJ, the case law's dissimilar context distinguishes these decisions from Operation Choke Point's unlawful actions.[164]

For example, in *Johnson*, the court defined "affected a financial institution" to encompass a variety of economic and noneconomic impacts.[165] There, a former bank teller faced criminal prosecution after embezzling more than $1 million from her place of employment.[166] The teller, faced with sentence enhancement, tried to contend that the phrase was unconstitutionally vague.[167] In the alternative, the teller claimed the sentence enhancement did not apply because her actions caused no harm to the bank.[168]

The court rejected both arguments.[169] First, the court noted that in the context of sentence enhancement, the phrase "affecting financial institutions" enjoyed a particularly broad interpretation.[170] Recognizing that such a liberal reading could conceivably create a vagueness issue, the court nonetheless denied the teller's constitutional claim on the grounds that the surrounding

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158. *See* 12 U.S.C. § 1833a(a)–(b) (2012). As a default rule, penalties range from $1 million for a single violation to $5 million for an ongoing violation. *Id.* § 1833a(b). This maximum range can be increased when the violation results in a pecuniary gain for the violator or a pecuniary loss for the victim. *Id.* § 1833a(b)(3).

159. *See* APPENDIX 1, *supra* note 56, at 330, 337 (Operation Choke Point six-month status report).

160. United States v. Bennett, 161 F.3d 171, 192–93 (3d Cir. 1998); United States v. Johnson, 130 F.3d 1352, 1355 (9th Cir. 1997).

161. *See Bennett*, 161 F.3d at 192–93; *Johnson*, 130 F.3d at 1355.

162. *See Bennett*, 161 F.3d at 193; *Johnson*, 130 F.3d at 1355.

163. *See* APPENDIX 1, *supra* note 56, at 330, 337 (Operation Choke Point six-month status report).

164. *See infra* notes 183–90 and accompanying text.

165. *Johnson*, 130 F.3d at 1355.

166. *Id.* at 1353.

167. *Id.* at 1353–54.

168. *Id.* at 1355.

169. *Id.* at 1354.

170. *See id.*

language of this particular statute narrowed its reach to only a discrete set of circumstances.[171] Specifically, the court determined that the phrase's broad applicability only applied to those persons who derived more than $1 million from their offense.[172] Logically speaking, an offense deriving such a high pecuniary gain would have more than just a minor effect on the defrauded financial institution.[173]

As to the applicability argument, the court noted that "[A] person of ordinary intelligence would certainly realize that embezzling over $1,000,000 from a small local lending institution like the victim here would constitute conduct affecting the bank."[174] Calling the economic effect "profound," the court went on to list other noneconomic ways in which the bank suffered harm.[175] Although the court, in dicta, listed damage to the bank's reputation as a noneconomic effect, it never held that this effect alone would support application of the enhancement phrase.[176]

Similarly, in *Bennett*, the court again held the phrase "affecting a financial institution" satisfied when the defendant's fraud netted him more than $3 million and cost the bank more than $18 million in litigation and settlement costs.[177] There, a businessman developed a complex pyramid scheme involving bank loans, non-profit status, and a falsified board of directors for a related shell corporation.[178] Eventually, his scheme unraveled and the defrauded investors sued both the businessman and the bank.[179] In considering whether the businessman met the standard for sentence enhancement, the court reasoned that the bank suffered significant harm affecting a financial institution in the form of multi-million dollar legal fees and negative publicity that harmed the bank's reputation.[180] As with *Johnson*, the *Bennett* court did not hold that a noneconomic effect alone would satisfy the "affecting" standard.[181] Instead, the court determined that as a whole, the costly lawsuit along with the reputational harm met the requirement.[182]

By comparison, here the DOJ alleges no monetary loss to accompany its noneconomic concerns.[183] Instead, the Department focuses on the hypothetical reputational hit that a bank might suffer *if* it developed a name

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171. *Id.*
172. *Id.*
173. *See id.* at 1355.
174. *Id.* (alteration in original) (quoting the district court opinion).
175. *Id.*
176. *See id.* For that matter, the court never held that any noneconomic effect, by itself, will support application of the phrase "affect a financial institution." *See id.*
177. United States v. Bennett, 161 F.3d 171, 192–93 (3d Cir. 1998).
178. *Id.* at 174–75.
179. *Id.* at 175.
180. *Id.* at 193.
181. *See id* at 193–94.
182. *See id.*
183. APPENDIX 1, *supra* note 56, at 330, 337 (Operation Choke Point six-month status report).

for perpetrating consumer fraud.[184] While *Johnson* and *Bennett* may support the idea that a financial institution can be affected in the event of both economic and noneconomic harm, they fail to support the Department's actions here.[185]

Further, *Johnson*'s broad interpretation of the statute does not apply in the context of Operation Choke Point.[186] Here, no surrounding statutory language limits the "affecting" phrase of FIRREA to a discrete set of circumstances.[187] Instead, a broad reading of the statute opens the floodgates of liability to encompass all of the minor, everyday realities of the banking world.[188] The only possible economic harm contemplated by the DOJ is the liability on chargebacks the bank could suffer if it allowed an insolvent fraudster to bogusly charge consumers' accounts.[189] This fear, however, encompasses a pretty attenuated increase of risk not contemplated by the court's broad reading in *Johnson*.[190]

1. United States v. Bank of New York Mellon *and the Broad Trend It Spawned*

In April 2013, Operation Choke Point received an unexpected gift.[191] The District Court for the Southern District of New York released an opinion that, for the first time, looked at the "affecting a federally insured financial institution" language in the context of § 951 of FIRREA.[192] To the DOJ's delight, the court decided that a bank could affect itself through its commission of fraud.[193] The Department seized upon this ruling, championing the case as legitimizing its unlawful FIRREA investigations.[194] In reality, however, the court's ruling merely reflected one district's broad application of the statute in a set of fairly narrow facts.[195]

In *Bank of New York Mellon*, the court concluded that a bank could affect itself for the purpose of satisfying the "affecting a federally insured

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184. *See id.*

185. *See supra* notes 165–82 and accompanying text.

186. *See supra* notes 170–71 and accompanying text.

187. *Cf.* United States v. Johnson, 130 F.3d 1352, 1354 (9th Cir. 1997) (permitting a broad interpretation because other statutory language properly narrowed the statute to apply only to a discrete set of circumstances).

188. *See id.* For example, if *Johnson*'s broad interpretation could stand absent the qualifying $1 million language, a consumer opening a checking account would affect a financial institution. *See id.*

189. *See* APPENDIX 1, *supra* note 56, at 330, 337 (Operation Choke Point six-month status report).

190. *See supra* notes 170–71 and accompanying text.

191. *Cf.* APPENDIX 1, *supra* note 56, at 330, 337 (Operation Choke Point six-month status report) (deciding the first case to interpret "affecting a federally insured financial institution" in support of the agencies' actions).

192. United States v. Bank of N.Y. Mellon, 941 F. Supp. 2d 438, 443 (S.D.N.Y. 2013).

193. *Id.* at 463.

194. *See* APPENDIX 1, *supra* note 56, at 492, 497 (Operation Choke Point internal memorandum).

195. *Cf. Bank of N.Y. Mellon*, 941 F. Supp. 2d at 463–83 (denying a motion to dismiss allegations of fraud where defendants affirmatively acted with an intent to defraud during several different instances).

financial institution" requirement of § 951.[196] There, an employee of the Bank of New York Mellon (BNYM), along with BNYM itself, actively engaged in a trading scheme meant to defraud and deceive its customers.[197] Specifically, both the employee and BNYM made several fraudulent misrepresentations to investors about pricing and netting practices related to investments.[198] The court noted that BNYM employees knew their practices did not conform to industry standards, but they consciously chose to conceal that fact and to mislead customers about how they priced trades.[199] In 2011, investors discovered the fraud.[200] Several customers, including other federally insured financial institutions, realized they had been duped and filed suits in state and federal forums.[201] At the time of trial, BNYM faced several billion dollars in potential liability as well as possible criminal and civil sanctions.[202]

At trial, the defendants argued that they did not meet the requirements of § 951 because their actions did not commit harm upon a federally insured financial institution—i.e., there was no victimization—and because a bank cannot commit fraud upon itself.[203] The court rejected both arguments.[204] First, the court considered the victimization theory.[205] Looking to both the structure of the statute as well as the legislative history of FIRREA, the court concluded that § 1343 only requires proof of intent to cause harm to some victim in an intentional scheme affecting a bank.[206] Although the court explicitly rejected defendants' victimization theory, it did note that precedent required the effect on the bank to be both negative and direct.[207] The court reasoned that, in this instance, ample evidence existed of harm befalling federally insured financial institutions as a result of the defendants' fraud.[208] The court pointed out that several other banking institutions, as customers of BNYM, suffered financial losses stemming from the misrepresentations and concealment.[209] Additionally, the court noted that BNYM itself faced billions of dollars in liability, exposure to criminal and civil sanctions, and the loss of a huge base of defrauded customers as a result of its practices.[210]

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196. *Id.* at 463.
197. *Id.* at 443–44.
198. *Id.* at 463.
199. *Id.* at 443.
200. *Id.* at 448.
201. *Id.* at 450.
202. *Id.* at 449.
203. *Id.* at 451.
204. *Id.*
205. *See id.* at 451–56.
206. *See id.*
207. *Id.* at 458–60 (remarking that attenuated or remote consequences did not affect a financial institution within the meaning of the phrase).
208. *See id.* at 458–59.
209. *See id.* at 450.
210. *See id.* at 449, 458–59.

In short, both BNYM and an intended victim base (its investors) directly suffered serious negative effects from the fraud.[211]

Moving to the self-affecting theory, the court concluded that the legislative history of FIRREA did not preclude the imposition of liability upon a bank for committing acts of intentional fraud that affected itself.[212] The court stated that Congress enacted FIRREA to stop the outright deception and insider abuse that contributed to the meltdown of the thrift industry in the 1980s.[213] In enacting § 951, Congress looked to punish whoever committed fraud, even if that whoever worked for or was the bank being affected.[214] The court noted, however, that the same basic principles of fraud still applied in self-affecting theories.[215] Thus, it still took either "affirmative misrepresentations or . . . omissions of material information that the defendant has a duty to disclose" to satisfy §§ 1341 and 1343 claims.[216]

Since the *Mellon* decision, two more cases coming out of the District Court for the Southern District of New York have cited the self-affecting theory in their holding.[217] First, in *United States v. Countrywide Financial Corp.*, the court held that a bank's fraudulent misrepresentations concerning the quality of loans it sold directly affected its own operations.[218] There, a bank created a loan origination program for subprime mortgages that severely loosened underwriting policies, then it sold the loans as "prime investments" to two government-sponsored entities.[219] Company policy instituted a daily loan quota, and management instructed loan officers to lie to the entities about the quality and default rate of the loans sold.[220] As a result of the pervasive misrepresentations, omissions of fact, and outright lies, the bank ended up losing billions of dollars settling repurchase claims.[221] Additionally, the fraud resulted in the insolvency of both government-sponsored entities, wiping out several federally insured financial institutions' corporate investments along the way.[222] The court reasoned that in light of such prevalent fraud and catastrophic damages, no doubt existed as to the defendant bank's effect on a federally insured financial institution.[223]

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211. *See supra* notes 208–10 and accompanying text.
212. *Bank of N.Y. Mellon*, 941 F. Supp. 2d at 463.
213. *Id.* at 454.
214. *See id.* at 463.
215. *See id.*
216. *Id.* (quoting United States v. Autuori, 212 F.3d 105, 118 (2d Cir. 2000)).
217. *See* United States v. Wells Fargo Bank, N.A., 972 F. Supp. 2d 593, 629 (S.D.N.Y. 2013); United States v. Countrywide Fin. Corp., 961 F. Supp. 2d 598, 605 (S.D.N.Y. 2013).
218. *Countrywide Fin. Corp.*, 961 F. Supp. 2d at 605.
219. *Id.* at 602–03.
220. *Id.* at 603 (listing one incident where a defendant bank officer chastised a concerned underwriting manager, exclaiming: "Son of a bitch. You need to get with the program. We need to keep funding these loans to keep the lights on." (quoting the Amended Complaint)).
221. *Id.* at 605.
222. *Id.* at 604.
223. *See id.* at 605.

Similarly, in *United States v. Wells Fargo Bank, N.A.*, the court held that § 951 did not exempt from prosecution those banks whose fraudulent activities harmed their own operations.[224] There, Wells Fargo participated in a direct endorsement lender program, which required the bank to follow the United States Department of Housing and Urban Development (HUD) regulations during the issuance of federally insured home mortgage loans.[225] Starting in 2001, Wells Fargo began consciously disregarding the required regulations, relaxing underwriting standards, and intentionally miscertifying loans as eligible for federal insurance.[226] This scheme of fraudulent misrepresentations culminated in the default and subsequent recoupment requests for more than one thousand home mortgage loans.[227] The court reasoned that Wells Fargo, through its intentionally fraudulent scheme, suffered a direct harm by increasing its exposure to litigation risk it would not have otherwise been subject to.[228] Further, the court noted that Wells Fargo also suffered significant actual harm in the form of legal expenses and likely penalties.[229]

Although the court earned its place in history as the first to interpret "affecting a federally insured financial institution" in the context of § 951, champions of the Southern District of New York's interpretation may find their reliance misplaced.[230] Neither *Mellon* nor the cases that followed stand for a broad reading in all circumstances.[231] Instead, all three cases represent an extreme set of circumstances not present in the typical Operation Choke Point investigation.[232]

2. *Distinguishing* Mellon *and Its Progeny from an Operation Choke Point Lawsuit*

The typical Operation Choke Point investigation contains circumstances vastly different from those in *Mellon*, *Countrywide*, or *Wells Fargo*.[233] To

224. United States v. Wells Fargo Bank, N.A., 972 F. Supp. 2d 593, 629 (S.D.N.Y. 2013).

225. *Id.* at 600.

226. *Id.* at 602.

227. *See id.* at 603.

228. *Id.* at 631 (citing United States v. Serpico, 320 F.3d 691, 695 (7th Cir. 2003), for the proposition that increased risk can serve as an effect on a financial institution in instances when the risk increases as a direct result of the fraudulent scheme).

229. *Id.*

230. 12 U.S.C. § 1833a(c)(2) (2012); *see infra* Part III.B.2.

231. *See Wells Fargo Bank, N.A.*, 972 F. Supp. 2d at 629; United States v. Countrywide Fin. Corp., 961 F. Supp. 2d 598, 605 (S.D.N.Y. 2013); United States v. Bank of N.Y. Mellon, 941 F. Supp. 2d 438, 458–59 (S.D.N.Y. 2013).

232. *Compare Countrywide Fin. Corp.*, 961 F. Supp. 2d at 605 (finding widespread, affirmative acts of fraud causing billions of dollars in damages both to the defendant bank and other federal financial institutions), *with* APPENDIX 1, *supra* note 56, at 492, 495–97 (Operation Choke Point internal memorandum) (relating circumstantial evidence of passive failure to act and the potential for harm as the basis of the DOJ's FIRREA investigations).

233. *See infra* notes 234–46 and accompanying text.

begin with, here the DOJ lacks knowledge of rampant and intentional fraud at the time it submits subpoena requests.[234] Unlike *Countrywide*, where the government produced ample evidence of the bank encouraging and even mandating fraudulent practices, the DOJ proceeds against banks on the basis of whispers and circumstantial evidence.[235] Internal documents reveal that the DOJ locates merchants possibly engaged in consumer fraud, then proceeds against banks on the theory of imputed liability.[236] So far these fishing expeditions have revealed possible misconduct in only a handful of cases.[237] Without clear-cut evidence of fraudulent intent or affirmative acts of misrepresentation, such as that seen in *Mellon*, *Countrywide*, or *Wells Fargo*, a broad reading of the statute's language would permit the imposition of liability in countless cases not contemplated by the Legislature.[238]

Additionally, differences emerge when considering harm.[239] The DOJ acknowledged that the banks subject to subpoena have suffered no actual harm as a result of their provision of services to alleged fraudsters.[240] By contrast, in all three of the cases coming out of New York, the court found that the banks suffered significant financial harm.[241] Such disparate facts mandate disparate treatment.[242] The circumstances of *Mellon*, *Countrywide*, and *Wells Fargo* allowed the courts to advance a broad interpretation of the statute, free of qualms; ample evidence of wrongdoing, coupled with serious harm done both to the offending bank and other federally insured financial institutions, made imposition of liability a no-brainer.[243] On the other hand, the Department typically offers only circumstantial evidence of possible

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234. *See* APPENDIX 1, *supra* note 56, at 56–58 (April 2013 request for issuance of subpoenas).

235. *Compare Countrywide Fin. Corp.*, 961 F. Supp. 2d at 602–04 (listing company directives and employee incentives encouraging continuation of the fraudulent scheme), *with* APPENDIX 1, *supra* note 56, at 492, 495–97 (Operation Choke Point internal memorandum) (relating circumstantial evidence of banks' passive failure to police customers).

236. *See* APPENDIX 1, *supra* note 56, at 330, 337 (Operation Choke Point six-month status report). Department documents consistently accuse the targeted banks of participating in schemes to defraud consumers based solely on the fact that the banks also do business with alleged fraudsters. *See, e.g.*, *id.* at 492, 494–97 (Operation Choke Point internal memorandum).

237. *See id.* at 492, 498–99 (Operation Choke Point internal memorandum). As of November 2013, the DOJ served approximately fifty subpoenas to banks. *Id.* at 492, 498.

238. *See supra* notes 234–36 and accompanying text. For example, the Attorney General could accuse a bank of wrongfully participating in a customer's ongoing fraud scheme when it failed to immediately terminate an account holder who obtained goods through a bad check. *Cf.* United States v. Bank of N.Y. Mellon, 941 F. Supp. 2d 438, 454–56 (S.D.N.Y. 2013) (reflecting on a legislative purpose to stabilize the banking industry and to prevent further need for taxpayer-funded bailout of the banks).

239. *See infra* notes 240–41 and accompanying text.

240. *See* APPENDIX 1, *supra* note 56, at 330, 337 (Operation Choke Point six-month status report).

241. *See* United States v. Wells Fargo Bank, N.A., 972 F. Supp. 2d 593, 629 (S.D.N.Y. 2013); United States v. Countrywide Fin. Corp., 961 F. Supp. 2d 598, 605 (S.D.N.Y. 2013); *Bank of N.Y. Mellon*, 941 F. Supp. 2d at 458–59. *But see* United States v. Loney, 959 F.2d 1332, 1337 (5th Cir. 1992) (determining that a defendant need not prove actual harm for a claim to be sufficient).

242. *See infra* notes 243–45 and accompanying text.

243. *See Wells Fargo Bank, N.A.*, 972 F. Supp. 2d at 629; *Countrywide Fin. Corp*., 961 F. Supp. 2d at 605; *Bank of N.Y. Mellon*, 941 F. Supp. 2d at 458–59.

misconduct and conjecture to show potential economic and noneconomic harm.[244] To date, no court interpreting § 951 has found an effect on a federally insured financial institution with such meager facts.[245] While it is true that bad actors in the banking industry need to be stopped, better methods exist than subjecting hundreds of banks to the economically deleterious effects of a FIRREA suit.[246]

C. Misinterpretations and the Destruction They Sow

Proceeding under FIRREA offers the Department certain unfair advantages not found in the typical regulatory suit.[247] A reduced burden of proof, an extended statute of limitations, and a hefty set of available penalties allow the DOJ to improperly use this protection-minded statute to bully financial institutions into either terminating banking relationships or facing financial ruin.[248] After all, termination or ruin truly are a bank's only options when a regulatory agency, wielding the power of the federal government, tells a bank: "[W]e have generally found that activities related to payday lending are unacceptable for an insured depository institution."[249]

1. Bringing Down the Hammer: A Look at the Arsenal FIRREA Provides

To begin, FIRREA grants the federal government the power to issue subpoenas in anticipation of the filing of civil suits under § 951.[250] Although the administration of subpoenas section fails to expressly lay out procedures governing issuance, the language of the statute grants the Attorney General license to act any time she reasonably believes a violation of one of the statute's fourteen enumerated offenses occurred.[251] This broad reading

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244. *See* APPENDIX 1, *supra* note 56, at 492, 497 (Operation Choke Point internal memorandum); *cf. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d at 631 (noting that increased risk of harm is only relevant when the increase stems from some action the bank would not have taken absent the fraudulent scheme).

245. *Cf. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d at 629–31 (finding documented evidence of fraud and substantial harm); *Countrywide Fin. Corp.*, 961 F. Supp. 2d at 605 (discovering explicit fraud and billions of dollars in financial harm); *Bank of N.Y. Mellon*, 941 F. Supp. 2d at 458–59 (noting long-term fraud and widespread economic and noneconomic damages).

246. *See infra* Part V.

247. *See* 12 U.S.C. §§ 1951–1959 (2012); 18 U.S.C. § 986 (2012).

248. *See* 12 U.S.C. § 1833a (2012).

249. Letter from M. Anthony Lowe, Reg'l Dir., FDIC, to Bd. of Dirs. at Ohio Bank (Feb. 15, 2013), *available at* http://oversight.house.gov/wp-content/uploads/2014/10/Regional-Director-Letter.pdf.

250. 12 U.S.C. § 1833a(g).

251. *Id.* § 1833a(g)(1). *But see id.* § 1833a(g)(2) (stating that the same limitations and procedures that apply to civil investigative demands issued under 18 U.S.C. § 1968 apply to subpoenas issued under this section); 18 U.S.C. § 1968(a) (2012) (stating only that a demand may be issued prior to the initiation of civil or criminal proceedings involving racketeering). Each of the fourteen offenses from the statute involve some type of fraud, and courts require fraud to be pled with particularity; it follows that the Attorney General should, at minimum, possess information relating to proof of the individual elements of a fraud claim. *See* FED. R. CIV. P. 9(b); Ashcroft v. Iqbal, 556 U.S. 662, 686 (2009).

permits the Attorney General powers not possible under those statutes designed to prosecute bad actors in the banking world.[252] For example, § 951 provides for sweeping orders of document production and allows the Attorney General to summon an unlimited number of witnesses at the time and location of her choosing.[253] Any failure to comply will be punished as contempt.[254] By contrast, the Bank Secrecy Act only allows the appropriate parties to request for inspection a discrete set of records already maintained by the banks under the law.[255] Similarly, the Annunzio-Wylie Anti-Money Laundering Act severely limits the use of subpoenas, only allowing issuance after the federal government has commenced an action for forfeiture in rem.[256]

Section 951 of FIRREA also lowers the burden of proof the Attorney General must carry in actions under the mail and wire fraud statutes.[257] Commonly regarded as two of the more broad criminal statutes, mail or wire fraud charges can apply to virtually every financial transaction in the modern world.[258] Typically, the higher burden of proof required for a criminal conviction tempered the potential for over-application of these charges by the government.[259] With FIRREA, however, these expansive statutes extend into the domain of civil penalties, reducing the Attorney General's burden of proof to the more accommodating preponderance of the evidence standard.[260] Along the same lines, § 951 prolongs the statute of limitations far beyond what is generally seen in civil or criminal fraud statutes.[261] Under § 951, the Attorney General can pursue suits for up to ten years after the cause of action's accrual, further increasing a bank's burden of production by forcing it to dig up records long-since buried by disuse.[262]

Finally, closing out the arsenal are the potentially ruinous penalties provided for under the statute.[263] Section 951 sets out a number of options for the imposition of a penalty.[264] At the lower end of the spectrum, a single

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252. *See* 12 U.S.C. § 1958; 18 U.S.C. § 986 (2012).

253. 12 U.S.C. § 1833a(g)(1)(A)–(C).

254. *Id.* § 1833a(g)(2).

255. *See* 12 U.S.C. §§ 1829b, 1958 (2012). Regulations promulgated by the Secretary of the Treasury and the Board of Governors of the Federal Reserve System set out what records banks are required to keep and how long those records must be maintained. 12 U.S.C. § 1829b(b). Further, the Secretary of the Treasury must make a yearly report to Congress listing every time it exercised its power under the statute. *Id.* § 1829b(h).

256. *See* 18 U.S.C. § 986.

257. 12 U.S.C. § 1833a(f).

258. Jay Williams et al., *FIRREA: An Old Acronym Is Turning into the Government's New Hammer on Banks and Other Financial Institutions*, 129 BANKING L.J. 579, 580–81 (2012).

259. *See id.* at 581.

260. *See* 12 U.S.C. § 1833a(f).

261. Williams et al., *supra* note 258, at 582.

262. 12 U.S.C. § 1833a(h).

263. *See id.* § 1833a(b).

264. *See id.* § 1833a(b)(1)–(3).

violation under the statute could cost a wrongdoer $1 million in fines.[265] Continuing violations result in penalties ranging between the lesser of $1 million per day or $5 million total.[266] Any violation netting the wrongdoer a pecuniary gain—regardless of how small—or resulting in another's financial loss can exceed both of the above numbers, capping out only at the actual gain or loss realized.[267] By contrast, the Bank Secrecy Act imposes a maximum civil penalty of $10,000 on a wrongdoer.[268] Criminal penalties cap out even lower at $1,000 per violation.[269]

In sum, § 951 grants the Attorney General a wide range of tactics by which it can stomp out financial fraud.[270] Through a deliberate misreading of FIRREA, the DOJ has misappropriated this power, circumventing the narrow confines of those statutes meant to penalize banks and expanding its prosecutorial power far beyond that envisioned by Congress.[271]

2. The Paradox of Financially Destroying a Bank by a Statute Meant to Protect

As a result of the DOJ's misinterpretations, even those banks that comply with all of the DOJ's requests find themselves harmed financially by a statute that was created to protect them.[272] Receipt of a subpoena triggers survival mode at the targeted bank, as compliance officers struggle to produce "an enormous universe of documents related to every conceivable aspect of the bank's relationship with payment processors and merchant-clients."[273] Responding to subpoenas alone can cost the bank between $100,000 and $400,000.[274] Fighting back would require hiring consultants, economists, and attorneys specializing in this area, pushing the cost north of a quarter of a million dollars in the simplest of cases.[275] Knowing the huge penalties that could be imposed if any wrongdoing was found, many banks choose instead to take the lesser of the financial hits—terminating profitable

265. *Id.* § 1833a(b)(1).
266. *Id.* § 1833a(b)(2).
267. *Id.* § 1833a(b)(3).
268. 12 U.S.C. § 1955(a) (2012).
269. 12 U.S.C. § 1956 (2012).
270. *See* 12 U.S.C. § 1833a.
271. *See supra* notes 250–70 and accompanying text.
272. *See infra* notes 273–76 and accompanying text.
273. *See* APPENDIX 2, *supra* note 44, at 308 (letter from Darrell Issa, U.S. Congress, to Eric Holder, U.S. Attorney General); Compliance Officer Interview, *supra* note 54.
274. Compliance Officer Interview, *supra* note 54.
275. *See id.*; *see also Recent False Claims Act and FIRREA Suits, Settlements, and Decisions Involving Financial Institutions*, BUCKLEY SANDLER LLP, http://www.buckleysandler.com/uploads/1082/doc/Recent-FIRREA-Cases_BuckleySandler-LLP_v14.pdf (last visited Apr. 20, 2015) (collecting data on FIRREA settlements ranging from $1.2 million to $25 billion).

relationships with those customers who first provoked the Department's ire.[276]

For some banks, termination is not an option.[277] For example, in late 2012 the Attorney General reached a settlement agreement with First Bank of Delaware regarding wrongdoing on the bank's part.[278] The settlement required the bank to pay $15.5 million in fees and to surrender its charters, licenses, and deposit insurance.[279] Unable to continue operations, the bank went into receivership—a scenario that FIRREA was designed to prevent.[280] Although this case arose prior to Operation Choke Point, its "success" served as the impetus for the creation of the multi-agency initiative.[281] Similarly, its outcome serves as a warning for those banks currently targeted: comply with the Agencies' directives or join the list of failed institutions.[282]

IV. WHY IT MATTERS: OPERATION CHOKE POINT'S EFFECT ON THE TEXAS ECONOMY

"[T]he Party did not seek power for its own ends, but only for the good of the majority."[283]

As a federal initiative, Operation Choke Point has the potential to negatively impact millions of Americans.[284] Southern states such as Texas, however, will likely feel the brunt of the blow.[285] Generally speaking, southern consumers rely more heavily on available alternative financial services than their northern counterparts.[286] Responding to this need, payday lending and third-party payment processing businesses have sprung up throughout the region.[287] As a result, federal efforts to choke the life out of

276. Compliance Officer Interview, *supra* note 54. Note, when Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, it expressly considered the area of payday lending. *See* 12 U.S.C. § 5514(a)(1) (2012). That Congress chose to regulate rather than terminate the industry evidences a clear congressional intent to allow for the continuation of payday loans' existence. *Cf. id.* (establishing the Bureau of Consumer Financial Protection to supervise payday lending).

277. *See generally* Settlement Agreement, *supra* note 125 (forcing the bank to discontinue operations).

278. *Id.* at 4.

279. *Id.*

280. *Id.* at 3; *see* S. REP. NO. 101-19, at 2 (1989).

281. *See* APPENDIX 1, *supra* note 56, at 13 (email from Michael J. Bresnick, Executive Director, Financial Fraud Enforcement Task Force, Department of Justice, to Stuart F. Delery, Assistant Attorney General).

282. *See* Settlement Agreement, *supra* note 125, at 3–4.

283. ORWELL, *supra* note 1, at 262.

284. *See infra* Part IV.A.

285. *See infra* notes 286–88 and accompanying text.

286. *See* FDIC, 2011 FDIC NATIONAL SURVEY, *supra* note 15, at 42 tbl.6.

287. *See* Thompson Testimony, *supra* note 19, at 3–4.

these industries will disproportionately affect both consumers and businesses in the South.[288]

A. Consumer Concerns

The southern region has, by far, the largest number of unbanked and underbanked individuals.[289] Although the South contains only 37.3% of national households, nearly half of all the unbanked households reside in this region.[290] Further, 43.1% of all the underbanked households populate this area.[291] Texas specifically holds the distinction of being among one of the ten states with the highest percentage of unbanked and underbanked households in the nation.[292] Adding the two measures together, a startling 40% of Texas households are not fully banked.[293] Understandably, the availability of alternative financial services occupies an area of high importance.[294]

Alternative financial services encompass both transactional and credit products.[295] Transactional products include the provision of non-bank money orders, non-bank check cashing services, and non-bank remittances.[296] Credit products encompass the realm of payday loans, pawnshops, rent-to-own stores, and refund anticipation loans.[297] Consumers in the South rely on both credit and transaction products much more heavily than individuals in the rest of the nation.[298] For example, in its 2011 survey of unbanked and underbanked households, the FDIC outlined various characteristics of individuals that had used alternative financial services in the last thirty days.[299] One of the more startling results indicated that 44.4% of those who had used these services resided in the South.[300]

In Texas, 52.4% of the population uses alternative financial services.[301] Of that number, 43.9% of the unbanked households and 44.2% of the underbanked households admit to using credit products, such as payday

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288. *See infra* Part IV.A–B.

289. FDIC, 2011 FDIC NATIONAL SURVEY, *supra* note 15, at 11. The FDIC report breaks the United States into four different regions for discussion purposes: the South, the Northeast, the Midwest, and the West. *Id.* at 11 n.15. The survey places Texas in the southern classification. *Id.*

290. *Id.* at 11.

291. *Id.* at 12.

292. *Id*. at 13 tbl.C-1.

293. *Id.*

294. *See id.* at 42 tbl.6.

295. *Id.* at 6.

296. *Id.*

297. *Id.*

298. *See id.* at 42 tbl.6.

299. *Id.*

300. *Id.*

301. FDIC, ADDENDUM TO THE 2011 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS: USE OF ALTERNATIVE FINANCIAL SERVICES 28 tbl.B-1 (2012) [hereinafter FDIC, ADDENDUM], *available at* http://www.fdic.gov/householdsurvey/2011/2013_AFSAddendum_web.pdf.

loans.[302] Quite obviously, traditional banks fail to serve over half of the Texas population.[303] Millions of Texans rely heavily on the existence of these alternative financial services, and efforts to choke off businesses supplying this demand will have dire consequences to the underserved consumer.[304]

Payday loans are a staple in the alternative financial services' credit product line.[305] Financial regulators often demonize payday loans, labeling them immoral debt traps that must be abolished.[306] By and large, however, the American population disagrees.[307] In a study regarding government regulation of payday loans, 95% of those surveyed responded that they believed the decision to use payday lending should be left entirely up to the consumer.[308] Further, 96% of those who used payday loans reported that the experience proceeded as—or better than—expected.[309]

While payday loans, with their high interest rates and compounding fees, might seem unnecessary to some, Congress has recognized their existence as a necessary evil.[310] A removal of the short-term loan industry would not eliminate the common issues that force an underserved segment of the population to these storefronts.[311] Instead, the absence of legal loan options would force underserved consumers to resort to less savory methods of meeting their short-term financial needs.[312] Although the DOJ should be commended for its determination to stamp out consumer fraud, Operation Choke Point fails to further this goal.[313] Actions taken pursuant to this initiative violate the law, ignore congressional intent, and seriously impact millions of unbanked and underbanked Texans that depend on the continued existence of the short-term lending industry.[314]

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302. *Id.* at 29–30.

303. *See id.* at 28.

304. *See id.*; *State and County QuickFacts: Texas*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/48000.html (last updated Mar. 31, 2015, 3:14 PM). Texas has a population of 26.95 million. *Id.* Accordingly, 14.12 million Texans rely on alternative financial services and would be adversely affected if these businesses had to shut down due to their lack of access to banking systems. *See* FDIC ADDENDUM, *supra* note 301, at 28.

305. *See* FDIC, 2011 FDIC NATIONAL SURVEY, *supra* note 15, at 40.

306. *See* Zibel & Kendall, *supra* note 33.

307. *See* CMTY. FIN. SERVS. ASS'N OF AM., PAYDAY LOANS AND THE BORROWER EXPERIENCE 3 (2013), *available at* http://www.cfsaa.com/Portals/0/Harris_Interactive/CFSA_HarrisPoll_SurveyResults.pdf. Ninety-five percent of the borrowers surveyed reported that they valued having the ability to take out payday loans at their option. *Id.* Ninety-five percent also stated that they believed payday loans provided a much-needed safety net during unexpected financial crises. *Id.* Finally, 87% of those surveyed indicated that they believed payday loans helped consumers bridge monthly gaps in their finances. *Id.*

308. *Id.* at 13.

309. *Id.* at 6.

310. *See* 12 U.S.C. § 5514(a)(1) (2012); Thompson Testimony, *supra* note 19, at 4–5.

311. *See* FDIC, 2011 FDIC NATIONAL SURVEY, *supra* note 15, at 40 fig.6.20.

312. *See* Thompson Testimony, *supra* note 19, at 3.

313. *See supra* Part III.

314. *See supra* Parts III–IV.A.

B. Implications for the Larger State Economy

Third-party payment processors operate as financial intermediaries between a bank and a merchant.[315] These entities provide businesses with access to electronic payment networks, process merchants' sales, and engage in limited underwriting of merchant accounts.[316] Many small or mid-size businesses find the cost of establishing a direct relationship with a bank for the processing of credit and debit transactions prohibitively high.[317] Yet, failure to accept credit transactions severely restricts a small business's already limited customer base.[318] As a result, many smaller businesses rely on their relationships with third-party payment processors for daily operation.[319]

In Texas, small businesses represent 98.6% of all employers in the state.[320] They employ approximately half of the private workforce and created more than 139,000 new jobs in the state in 2011.[321] Of those businesses 88% could be classified as extremely small, employing nineteen or fewer employees at each firm.[322] The large majority of these small firms are organized as sole proprietorships, which, in many instances, lack both the corporate guidance and the financial power to establish the more costly direct relationships with the bank.[323] Regardless, in the aggregate, small businesses are crucial to the fiscal condition of the state.[324]

As Operation Choke Point aims to shut down access to the third-party payment processing systems, many small businesses are feeling the effects.[325] The DOJ's increased pressure and attempts to impose vicarious liability on the payment processing system require processors to alter their risk

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315. APPENDIX 1, *supra* note 56, at 42 (remarks by Michael J. Bresnick, Executive Director, Financial Fraud Enforcement Task Force, Department of Justice, at the Exchequer Club of Washington, D.C.).

316. JEFFREY A. EISENACH, NERA ECON. CONSULTING, ECONOMIC EFFECTS OF IMPOSING THIRD-PARTY LIABILITY ON PAYMENT PROCESSORS 2 (2014), *available at* http://www.electran.org/wp-content/uploads/Exhibit-A-NERA-Study.pdf.

317. *See Guilty Until Proven Innocent? A Study of the Propriety & Legal Authority for the Justice Department's* Operation Choke Point*: Hearing Before the Subcomm. on Regulatory Reform, Commercial, & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 5 (2014) (statement of Peter Weinstock, Partner, Hunton & Williams LLP) [hereinafter Weinstock Testimony], *available at* http://judiciary.house.gov/_cache/files/4457c7a2-d311-4f28-916b-94204374177b/weinstock-testimony.pdf.

318. *See id.*

319. *See id.*

320. U.S. SMALL BUS. ADMIN., SMALL BUSINESS PROFILE: TEXAS 1 (2014), https://texaswideopenforbusiness.com/sites/default/files/pdfs/SBA-%20Texas%20Profile%202014.pdf. The small business administration defines small businesses as "firms having fewer than 500 employees." *Id.* at 3.

321. *Id.* at 1.

322. *See id.* at 3 tbl.3.

323. *See* Weinstock Testimony, *supra* note 317, at 5; U.S. SMALL BUS. ADMIN., *supra* note 320, at 3 tbl.3.

324. *See* U.S. SMALL BUS. ADMIN., *supra* note 320. In the third quarter of 2013, annual income from sole proprietorships totaled $172.4 billion. *Id.* at 2.

325. *See* EISENACH, *supra* note 316, at 8.

management procedures.[326] Forced into the role of regulators, processors will have no choice but to pass on the higher cost of doing business to the merchants they serve.[327] Increased cost may force smaller businesses out of the market altogether, while a decreased risk tolerance will likely prevent new companies with liberal return policies from ever even getting their businesses off the ground.[328] For Texas, where small business success affects a huge percentage of the population, Operation Choke Point's continued existence poses a significant threat to the larger economy.[329]

V. HOW TO FIGHT: RECOMMENDATIONS FOR RESTRAINT AND REFORM

"If there is hope . . . it lies in the proles."[330]

Since first coming to the public eye in summer 2013, popular opinion regarding Operation Choke Point has been overwhelmingly negative.[331] News outlets labeled the enterprise "devious," while critics deemed the initiative a "bigger abuse of power than Watergate."[332] Trade associations report widespread discrimination as their members find themselves unofficially blacklisted at a growing number of financial institutions.[333] Indian tribes watch their only source of income disappear as online businesses, unable to sustain themselves without access to payment systems, wither and die.[334] And various consumers ranging from pawnshops to porn

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326. *Id.* at 10–11. Prior to Operation Choke Point, third-party payment processors primarily self-regulated their operations. *See Guilty Until Proven Innocent? A Study of the Propriety & Legal Authority for the Justice Department's* Operation Choke Point*: Hearing Before the Subcomm. on Regulatory Reform, Commercial, & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 2 (2014) (statement of Scott Talbott, Senior Vice President of Government Affairs, The Electronic Transactions Association) [hereinafter Talbott Testimony], *available at* http://judiciary.house.gov/_cache/files/435f5f45-6a05-4c09-9387-8cb03251f2c0/talbott-testimony.pdf. Because payment processors could end up liable for reimbursement in the instances of fraud, the industry as a whole had a strong incentive to monitor the merchants they served. *Id.* With Operation Choke Point, however, the federal government seeks to impose multi-million dollar penalties on payment processors for the alleged wrongdoing of their customers. EISENACH, *supra* note 316, at 10–11. This increased cost necessarily decreases the processors' risk tolerance, ultimately resulting in entire categories of legitimate, but somewhat risky, merchants (such as those running start-up companies with little to no credit history) being denied services. *Id.*

327. Talbott Testimony, *supra* note 326, at 9.

328. *See id.* at 8–9.

329. *See supra* notes 320–28 and accompanying text.

330. ORWELL, *supra* note 1, at 69.

331. *See, e.g.*, Weinstock, *supra* note 33; Zibel & Kendall, *supra* note 33.

332. Sabrina Eaton, *Rep. Jim Jordan Examines Whether the Feds Made Banks Drop Accounts of Disfavored Businesses*, CLEVELAND.COM (Oct. 21, 2014, 6:15 PM), http://www.cleveland.com/open/index.ssf/2014/10/rep_jim_jordan_examines_whethe.html (quoting Ted Saunders, CEO of Community Choice Financial Inc.); David Keene, *The Devious Designs of Operation Choke Point*, WASH. TIMES, Aug. 25, 2014, http://www.washingtontimes.com/news/2014/aug/25/keene-the-devious-designs-of-operation-choke-point.

333. APPENDIX 2, *supra* note 44, at 330–32 (testimony before Congress by the Financial Service Centers of America on the impact of recent regulator supervisory and enforcement actions).

334. *See* Duffy Letter, *supra* note 8.

stars blame the program for sudden, unexpected account terminations.[335] It comes as no surprise that Americans' confidence in our government has hit an all-time low.[336]

Lawmakers tried to respond.[337] Dozens of letters flew between congressional offices and the bigwigs at the DOJ and FDIC.[338] Although the spotlight caused the FDIC to redact its official list of "high-risk" businesses, the arbitrary targeting continued behind closed doors.[339] In January 2014, as part of an ongoing investigation, Darrell Issa, Chairman of the House Committee on Oversight and Government Reform, requested that the DOJ provide the Committee with all documents pertaining to Operation Choke Point.[340] The resulting 853 pages of internal communication were stunning in their candor.[341] Various emails and memorandum revealed a systematic targeting of legitimate businesses and a recognition of the extralegal nature of the Department's actions.[342] Chairman Issa concluded the investigation with the issuance of a scathing report decrying Operation Choke Point and calling for a complete dismantling of the program.[343]

In June 2014, Representative Luetkemeyer introduced a bill entitled End Operation Choke Point Act of 2014.[344] The legislation effectively addressed the issue by amending various statutes, such as FIRREA, to prohibit the unlawful actions of the DOJ and FDIC.[345] Although a web survey indicated that 93% of the American population supported Representative Luetkemeyer's actions, the bill never got off the ground.[346] While its referral to the House Committee of Financial Services sparked a hearing on the matter, no vote was ever held.[347]

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335. *See, e.g.*, Kelsey Harkness, *Meet Four Business Owners Squeezed by Operation Choke Point*, DAILY SIGNAL (Aug. 12, 2014), http://dailysignal.com/2014/08/12/meet-four-business-owners-squeezed-by-operation-choke-point/; Reynolds, *supra* note 23.

336. *See* Justin McCarthy, *Americans Losing Confidence in All Branches of U.S. Gov't*, GALLUP (June 30, 2014), http://www.gallup.com/poll/171992/americans-losing-confidence-branches-gov.aspx.

337. *See, e.g.*, Duffy Letter, *supra* note 8; Luetkemeyer Letter, *supra* note 39.

338. *See, e.g.*, Duffy Letter, *supra* note 8; Luetkemeyer Letter, *supra* note 39; APPENDIX 2, *supra* note 44, at 306–10 (letter from Darrell Issa to Eric Holder).

339. APPENDIX 2, *supra* note 44, at 335–36 (testimony before Congress by the Financial Service Centers of America on the impact of recent regulatory, supervisory, and enforcement actions).

340. *Id.* at 306–10 (Letter from Darrell Issa, U.S. Congress, to Eric Holder, U.S. Attorney General).

341. *See generally* COMM. PRINT, *supra* note 13 (reporting on the contents of the subpoenaed documents).

342. *See, e.g.*, *id.* (discussing the contents of numerous subpoenaed emails and memos); APPENDIX 1, *supra* note 56, at 18–22 (Operation Choke Point proposal) (noting initial focus on third-party payment processors), 49–53 (Operation Choke Point eight-week status report) (questioning the legality of proceeding under FIRREA), 54 (e-mail from Deputy Assistant Attorney General regarding payday lending) (stating that Operation Choke Point expanded its focus to include payday lending).

343. COMM. PRINT, *supra* note 13, at 11.

344. End Operation Choke Point Act of 2014, H.R. 4986, 113th Cong. (2014).

345. *See id.*

346. *See H.R. 4986 End Operation Choke Point Act of 2014*, POPVOX, https://www.popvox.com/bills/us/113/hr4986 (last visited Apr. 20, 2015).

347. H.R. 4986.

Occurring simultaneously were Representative Luetkemeyer's efforts to pass an amendment to the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2015.[348] In a perfect example of a knee-jerk reaction, the amendment sought to prohibit the DOJ from using funds authorized by the bill to carry forth its initiative.[349] Alas, the reactionary measure never made it to the Senate floor.[350] With this latest failure, Congress's attempts to "choke off" Operation Choke Point ended.[351]

But hope springs anew.[352] In early January 2015, the owner of a gun store recorded his credit union's explanation for the termination of his account.[353] Although the credit union never explicitly named Operation Choke Point, the manager blamed the closure on pressures from a federal agency.[354] In the conversation the manager explained:

> So [the federal examiners] came in, looked at our books, and looked at everything and said um "here's some accounts that we feel like that we're going to regulate you on" and so they kind of put the screws to us as far as what we could and couldn't do type thing. . . . Our hands [were] tied by it. . . . There [were] about a dozen of them crawling around the building, you know, and they were just, you know, hammering us.[355]

The termination went viral.[356] Although the credit union now denies that Operation Choke Point influenced its decision, the damage remains.[357] Federal lawmakers have once again stepped up pressure to end the unlawful

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348. *See 'Operation Choke Point' Amendment Accepted over Concerns of Program Overreach*, CREDIT UNION NAT'L ASS'N (June 2, 2014), http://www.cuna.org/Stay-Informed/News-Now/Washington/-Operation-Choke-Point--amendment-accepted-over-concerns-of-program-overreach/ [hereinafter *'Operation Choke Point' Amendment Accepted*].

349. *See id.* The amendment showed a deep misunderstanding of how Operation Choke Point operates. *See id.* Rather than shouldering the burden for Operation Choke Point, the DOJ shifts these costs onto the banks it investigates. *See* APPENDIX 1, *supra* note 56, at 18–22 (Operation Choke Point proposal). The manpower necessary for prosecution comes both from joint agency efforts and temporary attorney details. *See id.* Relatively few DOJ resources are ever expounded in the efforts. *Id.* at 19.

350. Commerce, Justice, Science, and Related Agencies Appropriations Act, 2015, H.R. 4660, 113th Cong. (2014). Although a bipartisan majority from the House supported the amendment in a voice vote, the bill never made it past the Senate floor. *'Operation Choke Point' Amendment Accepted*, *supra* note 348.

351. *See* H.R. 4660.

352. *See infra* notes 353–59 and accompanying text.

353. *Hawkins Guns Targeted by Operation Choke Point*, U.S. CONSUMER COAL., http://usconsumers.org/hawkinsguns/ (last visited Apr. 20, 2015).

354. *See id.*

355. *Id.* (transcribed from audio recordings 6 and 7).

356. *See, e.g.*, Michael Patrick Leahy, *Operation Choke Point: Feds Pressure Credit Union to Close Wisconsin Gun Dealer's Bank Account*, BREITBART (Jan. 14, 2015), http://www.breitbart.com/big-government/2015/01/14/operation-choke-point-feds-pressure-credit-union-to-close-wisconsin-gun-dealers-bank-account/; Todd Zywicki, *Operation Choke Point Closes Another Gun Store's Bank Account*, WASH. POST, Jan. 14, 2015, http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/14/operation-choke-point-closes-another-gun-stores-bank-account/.

357. *See* Zywicki, *supra* note 356.

initiative.[358] More importantly, the FDIC has publicly denounced its role in the scandal and issued a new Financial Institution Letter backing away from its previous categorization of high-risk industries.[359] Now is the time to act.[360]

Through two simple steps, lawmakers can end the extralegal aspects of Operation Choke Point while maintaining an increased focus on prosecuting instances of consumer fraud.[361] First, regulators need to implement binding industry guidelines for the payment-processing sector.[362] Third-party payment processors engage in self-regulation; although some may be vigilant in the fight against fraud, bad actors have little incentive to comply with the existing voluntary standards.[363] Addressing this inadequacy should aid efforts to reduce consumer fraud and remove the regulatory concerns that spurred Operation Choke Point to action.[364] Second, Representative Luetkemeyer needs to reintroduce the End Operation Choke Point Act.[365] Currently, the initiative occupies the public eye.[366] Representative Luetke-meyer needs to take advantage of the public sentiment and zealously push for the passage of his bill.[367] The combined effect of these two steps should effectively address agency concerns regarding financial fraudsters while ending the harmful effects of the Agencies' illegal actions.[368]

A. Step One: Regulatory Reform

From the beginning, the founders of Operation Choke Point complained that a loophole in the Treasury Department regulations allowed third-party payment processors to escape federal supervision.[369] In most cases, third-party payment processors do not fall within the federal definition of a "money transmitter."[370] As a result, the payment processors do not have to comply with Money Services Business guidelines, which include registration

358. *See* Kelly Riddell, *FDIC Attempts to End Operation Choke Point with Letter, Action*, WASH. TIMES, Jan. 28, 2015, http://www.washingtontimes.com/news/2015/jan/28/fdic-attempts-end-operation-choke-point-letter-act/.

359. *See id.*; FDIC, Financial Institution Letter: Statement on Providing Banking Services, FIL-5-2015 (Jan. 28, 2015) [hereinafter FDIC, Financial Institution Letter], *available at* https://www.fdic.gov/news/news/financial/2015/fil15005.pdf.

360. *See supra* notes 358–59 and accompanying text.

361. *See infra* Part V.A–C.

362. *See infra* Part V.A.

363. *See infra* Part V.A.

364. *See infra* Part V.A.

365. *See infra* Part V.B.

366. *See infra* Part V.B.

367. *See infra* Part V.B.

368. *See infra* Part V.A–B.

369. APPENDIX 1, *supra* note 56, at 112 (training materials for Operation Choke Point).

370. *Id.*; Bank Secrecy Act Regulations; Definitions and Other Regulations Relating to Money Services Businesses, 76 Fed. Reg. 43,585 (July 21, 2011) (to be codified at 31 C.F.R. pts. 1010, 1021–22).

with the FinCEN and compliance with the Bank Secrecy Act.[371] Instead, processors largely self-regulate.[372] Unfortunately, bad actors abound.[373] In Operation Choke Point training slides, the DOJ noted that fraudsters use payment processors to steal more than $40 billion from consumers every year.[374] In one particularly egregious example, a bad actor known as Payment Processing Center, LLC, advertised a specialization in those types of transactions prohibited by the National Automated Clearing House Association (NACHA) rules.[375] Quite obviously, self-regulation alone does not work.[376] Although illegal in its enforcement actions and overly broad in its reach, Operation Choke Point correctly concluded that this type of fraudulent activity needs to stop.[377]

As a legal alternative to the DOJ's plan, the Treasury Department should formally adopt the guidelines proposed by the Electronic Transactions Association (ETA) in March 2014.[378] The electronic transactions industry, through the input of its various members, voluntarily undertook the writing of a best practices guide for merchant and independent sales organization underwriting and risk management.[379] The ETA purposed its guidelines to "eliminate prohibited and undesirable merchants from entering into or remaining in the card acceptance ecosystem."[380] To achieve this result, the guidelines:

> [I]dentify thresholds, based on input from the working group, at which [members] may consider flagging prospective merchants for more in-depth underwriting and existing merchants or portfolios for review and potential action. While the thresholds may vary as is determined by individually-

371. APPENDIX 1, *supra* note 56, at 112 (training materials for Operation Choke Point).

372. *But see* Levitin Testimony, *supra* note 4, at 7–8 (discussing National Automated Clearing House Association (NACHA) regulations and the effect on payment processors). NACHA is a non-profit membership association of banks. *Id.* at 4. Third-party payment processors are subject to the rules governing Automated Clearing House transactions promulgated by NACHA. *Id.* at 7–8. NACHA rules require depository institutions to monitor the return rates of third-party payment processors for unauthorized transactions. *Id.* Once return rates exceed a set amount, either the depository institution or the payment processor must submit a plan to NACHA that proposes a reduction to the return rate. *Id.* That proposed reduction must then actually take place and must stay below pre-plan levels for 180 days. *Id.* Failure to follow these guidelines results in NACHA's imposition of fines or suspension of the depository institution. *Id.* Although payment processors do not suffer direct consequences, repeated failure to follow NACHA guidelines could result in the processor losing its account at a depository institution. *See id.*

373. *See* APPENDIX 1, *supra* note 56, at 67–113 (training materials for Operation Choke Point).

374. *Id.* at 69.

375. *Id.* at 82.

376. *See supra* notes 372–75 and accompanying text.

377. *See supra* Part III.

378. *See generally* ELEC. TRANSACTIONS ASS'N, GUIDELINES ON MERCHANT AND ISO UNDERWRITING AND RISK MONITORING (2014), *available at* http://www.electran.org/wp-content/uploads/ETA-Guidelines-Merchant-ISO-Underwriting-Risk-Monitoring.pdf (setting guidelines for self-regulation of the payment processing industry).

379. *Id.* at 6.

380. *Id.* at 1.

> defined policy, each ETA Member in the card acceptance ecosystem should establish red flags or quantitative thresholds, based on varying parameters, for the underwriting and monitoring of merchant accounts. . . . These flags and lines will not always dictate action; however, when [members] have identified a merchant for review based on the defined policies and thresholds, [they] should carefully notate the merchant's record or file to reflect the factors considered in the review and the basis for making a decision about, or actions taken with respect to, the merchant as suggested throughout this document.[381]

Ultimately, these guidelines establish a clear standard of high-risk behavior and increase the diligence required of payment processors.[382] Rather than focusing on the non-specific reputational risk relied upon by Operation Choke Point, ETA's guidelines provide processors with workable and enforceable standards of conduct.[383]

The Department of the Treasury's adoption of ETA's guidelines as enforceable regulations would provide officials with a legal method of pursuing the bad actors in this industry.[384] The Treasury's regulation could establish a supervisory role for FinCEN as well as a set of defined penalties for failure to comply.[385] This would eliminate inadequacies in federal supervision of the payment processing industry and effectively address the consumer fraud issue that led to Operation Choke Point's creation.[386]

B. Step Two: Administrative Restraint

From a legal standpoint, nothing exists to explicitly restrain the Agencies' actions under Operation Choke Point.[387] Although arguably outside the bounds of the law, the DOJ's actions have yet to come before a court.[388] The past two years prove that the Agencies cannot be trusted to self-regulate their own behavior.[389] Congress needs to step into this void and

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381. *Id.* at 2.

382. *See* EISENACH, *supra* note 316, at 10.

383. *See id.*

384. *Cf.* APPENDIX 1, *supra* note 56, at 112 (training materials for Operation Choke Point) (noting that under the current law federal regulators have limited oversight of payment processors).

385. *See generally* ELEC. TRANSACTIONS ASS'N, *supra* note 378 (lacking penalties for non-compliance or provisions for agency supervision). As a program of voluntary self-regulation, the ETA's guidelines will continue to assist only those honest actors in the payment processing industry. *Cf.* EISENACH, *supra* note 316, at 9–10 (noting that guidelines seek to avoid "bad actor" merchants, not stop bad actor processors). By comparison, agency supervision and the imposition of penalties can also stop fraudsters from taking advantage of the largely unregulated industry. *See* APPENDIX 1, *supra* note 56, at 112 (training materials for Operation Choke Point).

386. *See supra* notes 384–85 and accompanying text.

387. *See infra* notes 388–90 and accompanying text.

388. *See supra* Part III.B.2.

389. *See supra* Part II.C.

pass Representative Luetkemeyer's bill, putting a stop to Operation Choke Point once and for all.[390]

Representative Luetkemeyer's bill aims to end Operation Choke Point through the amendment of four different major acts: The Federal Deposit Insurance Act, the Federal Credit Union Act, FIRREA, and the USA Patriot Act.[391] Discussing first the acts with a more minor role, Representative Luetkemeyer proposes adding language to the Federal Deposit Insurance Act and the Federal Credit Union Act that addresses the propriety of federal agencies prohibiting, discouraging, or restricting banks from engaging in customer relationships with legal, licensed entities.[392] Moving to FIRREA, Representative Luetkemeyer proposes three major changes.[393] First, he seeks to add language that clarifies the necessary effect of the "affecting a federally insured financial institution" section of the statute.[394] Next, the FIRREA amendments lay out new requirements for the subpoena section of the statute.[395] The changed language requires that the Attorney General request all subpoenas from the court.[396] Further, it sets a standard for the grant of subpoenas, requiring the Attorney General to first identify "specific and articulable facts showing that there are reasonable grounds to believe that the information or testimony sought is relevant and material to an ongoing civil proceeding under this section."[397] Finally, the FIRREA amendments require that, much like the Bank Secrecy Act, the Attorney General's Office submit a yearly report to Congress chronicling both its use of subpoenas and the settlements it enters into under the statute.[398] Concluding the bill, Representative Luetkemeyer attempts to combat the fraud concerns spawning the Agencies' action by amending the USA Patriot Act to strengthen the fight against consumer fraud.[399]

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390. *See supra* notes 387–89 and accompanying text. In February 2015, Senator Marco Rubio introduced his own legislation to end Operation Choke Point. A Bill to Terminate Operation Choke Point, S. 477, 114th Cong. (2015). Similar to earlier reactionary actions, this legislation seeks only to deny funding to the DOJ. *See supra* text accompanying note 349. Further, this bill concerns itself only with Operation Choke Point's effect on the firearms industry, ignoring entirely the larger issue of third-party payment processers and payday lenders. S. 477 § 2. Finally, this legislation has no co-sponsors, and industry experts approximate that it has only a 2% chance of passing. *See id.* As such, it does not offer any real solutions to the issues presented and should not be considered a viable alternative to Representative Luetkemeyer's more comprehensive plan. *See id.*

391. End Operation Choke Point Act of 2014, H.R. 4986 §§ 1–5, 113th Cong. (2014).

392. *Id.* §§ 1–2.

393. *Id.* § 4.

394. *Id.*; 12 U.S.C. § 1833a(c)(2) (2012).

395. H.R. 4986 § 4.

396. *Id.*

397. *Id.* By comparison, the current statute allows the Attorney General to issue a subpoena at her own discretion, with the only standard governing issuance being that the subpoena be used "[f]or the purpose of conducting a civil investigation in contemplation of a civil proceeding. 12 U.S.C. § 1833a(g).

398. *Id.*; *see* 12 U.S.C. § 1829b(h) (2012).

399. H.R. 4986 § 5.

Although Representative Luetkemeyer's legislation failed to pass during the last session, this year will be a different story. For better or worse, one party now controls both the Senate and the House of Representatives.[400] Thus, the typical partisan gridlock that has paralyzed Congress for the last several years should not play a role in this year's session.[401] Further, the popular sentiment towards Operation Choke Point, although never particularly positive, has plunged sharply in the last several months.[402] A second investigation and damaging report made by the House Committee on Oversight and Government Reform—this time looking into the role the FDIC played in Operation Choke Point—resulted in the federal agency renouncing its role in the scandal.[403] With one of Operation Choke Point's major supporters pulling away, the DOJ will be hard-pressed to continue ignoring congressional pressure to end the operation.[404] Congress should exert this necessary pressure with the passage of the End Operation Choke Point Act—a move that would retain the initiative's focus on consumer fraud issues while removing the arbitrary and illegal aspects of its execution.[405]

VII. CONCLUSION

Although initiated as a progressive instrument of fraud prevention, Operation Choke Point's illegal methods of enforcement and arbitrary discrimination make clear that this devious design needs to end.[406] Operation Choke Point began as a proactive multi-agency initiative to end consumer fraud in the banking industry.[407] Recognizing that bad actors frequently took advantage of both banks and payment processors, the overwhelmed Attorney General's Office created an innovative solution to its problems: target banks suspected of aiding in the consumer fraud rather than the fraudsters

400. Stephen Collinson, *Republicans Seize Senate, Gaining Full Control of Congress*, CNN (Nov. 5, 2014, 10:43 AM), http://www.cnn.com/2014/11/04/politics/election-day-story/.

401. *See id.*

402. Todd Zywicki, *FDIC Retreats on Operation Choke Point?*, WASH. POST, Jan. 29, 2015, http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/29/fdic-retreats-on-operation-choke-point/.

403. *See id.*; STAFF OF H.R. COMM. ON OVERSIGHT & GOV'T REFORM, 113TH CONG., FEDERAL DEPOSIT INSURANCE CORPORATION'S INVOLVEMENT IN "OPERATION CHOKE POINT" 2 (Comm. Print 2014) [hereinafter COMM. PRINT FDIC]. On January 28, 2015, the FDIC released a new Financial Institution Letter encouraging banks to make risk determinations on a case-by-case basis rather than due to the "reputational risk" posed by certain industries. FDIC, Financial Institution Letter, *supra* note 359. This is in sharp contrast from its earlier instructions to banks regarding the reputational risk posed by an enumerated list of high-risk industries. *See* COMM. PRINT FDIC, *supra*, at 4.

404. *See* Ian McKendry, *FDIC Move Hailed as Beginning of End for Operation Choke Point*, AM. BANKER (Jan. 28, 2015, 5:38 PM), http://www.americanbanker.com/news/law-regulation/fdic-move-hailed-as-beginning-of-end-for-operation-choke-point-1072414-1.html; Evan Weinberger, *FDIC Can't Ease 'Choke Point' on Its Own, Industry Says*, LAW360 (Jan. 28, 2015, 6:41 PM), http://www.law360.com/articles/616069/fdic-can-t-ease-choke-point-on-its-own-industry-says.

405. *See* End Operation Choke Point Act of 2014, H.R. 4986, 113th Cong. §§ 1–5 (2014).

406. *See supra* Parts III–IV.

407. *See supra* Part II.B.

themselves.[408] Unfortunately, illegal methods of prosecution proved far more effective than the legal alternatives, and the program quickly expanded its narrow scope.[409] Today, the DOJ has abandoned all pretenses of restraint, indiscriminately sending out subpoenas in a poorly veiled attempt to choke off lawful but disfavored businesses from access to the very financial systems they need to survive.[410]

The DOJ improperly relies on § 951 of FIRREA for its enforcement actions.[411] Congress originally created FIRREA to increase stability and reduce the risk of failure in the financial institutions industry.[412] Section 951 helped accomplish this goal by subjecting those who committed fraud on a federally insured financial institution to multi-million dollar penalties.[413] To temper this power, the statute required the Attorney General to prove the wrongdoer had both the specific intent to defraud as well as the intent to cause harm to an intended victim.[414] Here, the DOJ can prove neither.[415] Ignoring the plain text of the statute altogether, the DOJ instead issues subpoenas alleging only that fraudsters use the bank to perpetrate consumer fraud.[416] Such actions, it alleges, are supported by case law.[417]

But the DOJ is wrong.[418] Although cases where the Attorney General has held a bank liable under FIRREA do exist, their circumstances vary significantly from the facts present.[419] In each of those instances, the Attorney General presented overwhelming evidence of banks intentionally engaging in long-lasting fraudulent schemes.[420] Further, under those facts, the fraudulent acts exposed the affected banks to millions of dollars in potential liabilities as well as both civil and criminal sanctions.[421] By contrast, here the DOJ relies on circumstantial evidence and inferential leaps.[422] To date, no case interpreting § 951 has allowed the imposition of liability in even remotely similar circumstances.[423] To do so now ignores both the language and the intent of the statute and exposes innocent banks to potentially ruinous damages.[424]

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408. *See supra* Part II.B.
409. *See supra* Part II.B–C.
410. *See supra* Part II.C.
411. *See supra* Part III.A.
412. *See supra* Part III.A.1.
413. *See supra* Part III.C.1.
414. *See supra* Part III.A.2.
415. *See supra* Part III.A.3.
416. *See supra* Part III.A.3.
417. *See supra* Part III.A.3.
418. *See supra* Part III.B.
419. *See supra* Part III.B.
420. *See supra* Part III.B.1.
421. *See supra* Part III.B.
422. *See supra* Part III.B.2.
423. *See supra* Part III.B.1–2.
424. *See supra* Part III.

Banks are not the only ones to suffer.[425] Through the regulatory pressure and informal intimidation accompanying a FIRREA suit, the DOJ has successfully caused the account terminations of countless lawful but disfavored businesses.[426] Payday lenders and third-party payment processors were particularly hard hit.[427] From a consumer standpoint, payday lenders occupy a niche market, catering to those denied service by the more traditional financial institutions.[428] On the business side, third-party payment processers provide small businesses with low-cost access to the otherwise inaccessible electronic payment networks.[429] Texas relies on both industries to thrive.[430] As such, continued actions under Operation Choke Point threaten to undermine the Texas economy and harm those low-income consumers the DOJ means to protect.[431]

Thus, both financial regulators and federal lawmakers need to act.[432] First, the Department of the Treasury needs to adopt the ETA's proposed guidelines as formal regulations.[433] After significant input from its members, the ETA adopted comprehensive guidelines for the self-regulation of the payment processing industry.[434] Unfortunately, bad actors do not follow voluntary guidelines and fraudsters continue to prosper.[435] If the Department of the Treasury was to make the guidelines mandatory, however, federal agencies could legally put a stop to many of the consumer fraud issues that inspired Operation Choke Point's creation.[436] On the legislative side, Congress needs to enact Representative Luetkemeyer's End Operation Choke Point Act.[437] The bill not only forbids federal agencies from instructing banks to terminate relationships with lawful, licensed entities, but it also makes clear the legal scope of actions under FIRREA.[438] Enactment of the bill would stop the DOJ's extralegal actions and ensure that regulators could never again proceed in this way.[439] Until the legislature acts, banks and businesses alike are left in limbo, waiting and wondering where the DOJ's arbitrary displeasure might next fall.[440]

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425. *See supra* Parts IV–V.
426. *See supra* Part II.C.
427. *See supra* Part IV.
428. *See supra* Part IV.A.
429. *See supra* Part IV.B.
430. *See supra* Part IV.
431. *See supra* Part IV.
432. *See supra* Part V.
433. *See supra* Part V.A.
434. *See supra* Part V.A.
435. *See supra* Part V.A.
436. *See supra* Part V.A.
437. *See supra* Part V.B.
438. *See supra* Part V.B.
439. *See supra* Part V.B.
440. *See supra* Part II.C.