

AMERICAN BANKER

How Holder's Surprising 'Too Big to Jail' Admission Changes Debate

By: Rob Blackwell and Victoria Finkle - March 6, 2013

WASHINGTON — Attorney General Eric Holder's stunning admission that it was difficult to prosecute large banks because of the potential economic impact may be a turning point of the drive to break them up.

For years, lawmakers from both political parties have questioned why some institutions appear to be "too big to jail." But in recent weeks, the issue has gained more prominence, particularly after Sen. Elizabeth Warren took center stage while grilling regulators on the issue last month.

Holder's remarks, in which he said it "does become difficult for us to prosecute them" because institutions have "become too large" hands those lawmakers some powerful ammunition that they are likely to use to shape the debate in the weeks, months and years ahead.

"It's another glaring example that 'too big to fail' is alive and well," said Sen. David Vitter, R-La., who is co-authoring legislation to break up the big banks, in an interview. "If megabanks have a decided, quantifiable market advantage on the order of \$83 billion a year, and if megabanks are so big the Justice Department, as enunciated today, will think twice and three and five and ten times about prosecuting them in a way they never would for other institutions, I think the American people's reaction to that is, these banks are not just 'too big to fail' or 'too big to prosecute' — the bottom line is they're just too big."

In a tweet to his followers, Sen. Sherrod Brown, D-Ohio, who is co-authoring the bill with Vitter, said he was "shocked by AG Holder's statement that megabanks are too big to jail."

"Laws should apply equally to Ohio community banks and Wall Street," Brown wrote.

Outside analysts agreed this helped Vitter's and Brown's cause.

"This adds fuel to that fire," said Mark Calabria, director of financial regulation studies at the Cato Institute. "I'm surprised he admitted that DOJ has been pulling their punches, which to me is a shocking admission. There's no ambiguity here."

To be sure, Justice officials have signaled these concerns before, most notably Lanny Breuer, assistant attorney general of the Justice Department's criminal division, who acknowledged last fall that he has worried about the economic impact of prosecuting large banks.

But Holder's remarks appeared even more direct than Breuer's comments and marked the first time such concerns have been raised by a top member of President Obama's cabinet. Moreover, they also seem to conflict with official administration policy, which says that the Dodd-Frank Act of 2010 effectively ended too big to fail.

"It's pretty much an admission that Dodd-Frank didn't end too big to fail," Calabria said.

While Holder is likely to receive criticism from within the administration, his comments did not appear off the cuff, either. During a back and forth with Sen. Charles Grassley, R-Iowa, Holder repeated several times that the issue was a significant issue.

"I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if we do prosecute — if we do bring a criminal charge — it will have a negative impact on the national economy, perhaps even the world economy," Holder said. "I think that is a function of the fact that some of these institutions have become too large."

Holder added that the size of banks "has an inhibiting influence, impact on our ability to bring resolutions that I think would be more appropriate."

That appears to contrast sharply with the comments of Comptroller Thomas Curry, who just last week insisted that "too big to jail" did not exist.

"As important as they are, they should not be considered immune from prosecution when circumstances warrant," Curry told the National Association of Attorneys General. "No institution should be viewed as too big to prosecute."

(For the record, the OCC cannot pursue criminal action against banks. That is the sole purview of the Justice Department.)

Holder's comments, however, dovetail extremely well with arguments put forth by Vitter, Brown, Grassley, and Warren. Brown and Vitter are expected to introduce a joint bill shortly that would effectively break up the big banks.

While most observers say the bill is a long shot, Holder's remarks help in part because they are so easy for the American public to understand.

Many are still angry about the 2008 bank bailouts, and they now have an on-the-record confirmation from Justice's top official that the department is treating big banks softly just because they are large. Compare it to how law enforcement typically treats American citizens when they break the law — often times by throwing the book at them — and it's easy to understand how that anger could grow into more popular support for a big bank breakup.

It's a point that Warren and others seem to know well. In her first Senate Banking Committee hearing last month, she made the "special treatment" argument in pointing out why big banks need to be reined in.

"There are district attorneys and U.S. attorneys who are out there every day squeezing ordinary citizens on sometimes very thin grounds, and taking them to trial in order to make an example, as they put it," said Warren. "I'm really concerned that 'too big to fail' has become 'too big for trial.' That just seems wrong to me."

To be sure, the bill from Brown and Vitter remains an uphill struggle. While breaking up the big banks may play well with the American public and the rank-and-file of both political parties, the

Democratic and Republican leadership have not embraced it. Yet Holder's comments are likely to reverberate for some time to come.

"We continue to doubt that 'too big to fail' legislation can pass in this Congress but Holder's statement will unquestionably add additional momentum to the legislative effort," said Isaac Boltansky, a policy analyst at Compass Point Research & Trading.