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The Impact of Criminal Sanctions on Corporate Misconduct

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CRIMINALIZATION OF CORPORATE LAW
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GOVERNMENT "SHORTCUTS"

CORPORATE CRIMINALITY[1] IS NOT NEW TO THE LEGAL terrain. One of the landmark decisions holding a corporation liable was seen in 1909 with the case of *New York Central & Hudson River Railroad Co. v. United States*,[2] a case in which the government prosecuted a company for a violation of the Elkins Act.[3]

What has changed in recent years with respect to the prosecution of corporate criminality is that federal attorneys appear to be using more "shortcuts" in proceeding with these cases. Rather than fully investigating alleged criminal conduct, federal prosecutors seek ways to procure convictions without lengthy investigations and court trials.[4] Although these prosecutorial "shortcuts" may seem efficient (in that the federal government is prosecuting company misconduct without protracted grand jury investigations and month long trials filled with financial intricacies), it comes at a cost that may prove in the long run to make this approach inefficient.

One example of the government's use of "shortcuts" can be seen in *Arthur Andersen LLP v. United States*.[5] The government did not prosecute Arthur Andersen LLP for the underlying conduct that was the subject of the federal investigation—the Enron Corporation's accounting practices. Instead, the sole charge brought against Arthur Andersen LLP was for obstruction of a Securities & Exchange Commission proceeding resulting from the alleged destruction of documents pertaining to an

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1. Corporate criminality is used generically here to include prosecutions of corporate and other business entities.

2. 212 U.S. 481 (1909). Although corporate crimes were prosecuted prior to this decision, this case was unique because the prosecution was focused on a crime that required a mens rea element rather than just strict liability offenses.

3. *Id.*; Elkins Act, ch.708, 32 Stat. 847 (1903) (repealed 1978).

4. *See* Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. 9 (2005) (discussing the government's use of crimes such as obstruction of justice and perjury).

5. 544 U.S. 696 (2005).

audit of the Enron Corporation.[6] The "shortcut" of charging obstruction conduct as opposed to completing an investigation into Arthur Andersen's role with Enron proved unsuccessful in obtaining a criminal conviction against the company when the Supreme Court overturned a jury's guilty verdict.[7]

Although the Supreme Court vacated the conviction in the *Andersen* case, the effect of this prosecution lives on with companies. It is well-known that Arthur Andersen did not survive the government indictment and conviction.[8] It is also well-known that the reversal of the conviction provided no relief to the company.[9] Thus, even when a corporate criminal conviction is voided by the Supreme Court, companies are apprised of the severe practical ramifications of this government prosecution.

The strong message sent to companies by the prosecution in the *Arthur Andersen LLP* case allows the government another "shortcut" in corporate prosecutions. Federal prosecutors, through the use of deferred prosecution agreements, are able to procure corporate cooperation in part because of the fear of the ramifications of a government indictment.[10] Not wanting to face a possible death sentence to the company, there is often a desire on the part of companies to cooperate with federal prosecutors. Companies take on the role of mini-prosecutors to avoid being prosecuted themselves. Likewise, prosecutors can "shortcut" a lengthy investigation by having companies supply federal investigators with evidence that can form the basis for prosecutions against individuals within the company.

The Thompson Memo[11] facilitated this "shortcut." It allowed for the waiver of the attorney-client privilege and served as a focal point in having a corporation not fund the attorney fees of indicted individuals.[12] Although deferred prosecution agreements provide efficiency in the resolution of cases, provisions within these agreements can serve to discard the rights of individuals and the rights of a corporation. Proceeding with this "shortcut" method of investigation can also be inefficient because individuals within a corporation with legal questions are less likely to seek advice from the corporate counsel, as the corporate counsel may be the first person testifying against them should there be a later criminal prosecution.

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6. The case was premised on obstruction of justice as provided for in the federal statute, 18 U.S.C. § 1512 (b) (2000).

7. *See Andersen*, 544 U.S. at 698.

8. Kurt Eichenwald, *Andersen Guilty in Effort to Block Inquiry of Enron*, N.Y. TIMES, June 16, 2002, at A1.

9. Jonathan D. Glater & Alexei Barrionuevo, *Decision Rekindles Debate Over Andersen Indictment*, N.Y. TIMES, June 1, 2005, at C1.

10. *See* Michael E. Horowitz & April Oliver, *Foreward: The State of Federal Prosecution*, 43 AM. CRIM L. REV. 1033, 1036 (2005).

11. Memorandum from Deputy Attorney General Larry D. Thompson, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

12. *See, e.g.*, United States v. Stein, 435 F. Supp.2d 330, 382 (S.D.N.Y. 2006) (holding that the U.S. Attorney's Office violated the Fifth and Sixth Amendments to the United States Constitution in considering whether a company would advance attorney's fees to employees under indictment as a factor in deciding whether to indict the company).

Corporate malfeasances need to be corrected, but indictments against corporations that are not premised on the conduct under investigation may prove problematic when the conviction is flawed. Likewise, proceeding against individuals within a corporation by pitting the corporation against these individuals may in the long run prove inefficient to maintaining a sound corporate culture.[13]

13. *See* Ellen S. Podgor, *White-Collar Cooperators: The Government in Employer-Employee Relationships*, 23 CARDOZO L. REV. 795 (2002).