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Enron's True Lesson: Political Opportunism
by Fred S. McChesney*

The Enron episode currently playing on center-stage in Washington teaches important lessons. For most commentators (including learned academic ones), the issues requiring Congressional scrutiny start with internal managers' responsibility for directing their firms, and continue with external auditor surveillance of inside management. Shortcomings traced to inside management and outside audits then are said to require federal-government correction.

That perspective is all wrong, however. Enron does have lessons to teach, but not those. There are five lessons, in fact, culminating with the most instructive one of all: how supposed "crises" benefit opportunistic politicians.

Start with the first lesson: stuff happens. Firms fail all the time —our bankruptcy laws create incentives to take more risk on the front end, with the knowledge that courts will sort out problems created by risk-taking that proves excessive after the fact. Albeit the most spectacular, Enron was but one of a record number of bankruptcies last year.

True, as Enron demonstrates, failures don't just happen randomly. Directors may direct negligently; managers may manage to benefit themselves rather than the firm and its shareholders. Likewise, outside auditors may be negligent, or succumb to conflicts of interest.

But (second lesson) there are laws in every state that regulate these sorts of problems, under which shareholders have legal recourse. The legal "duty of care" requires that directors do their jobs, for which they are well paid. When directors fail in that duty, shareholder class actions (so-called "derivative" suits) are available for redress. Likewise, if auditors have breached their contract to audit competently, they are liable to the firm hiring them and to investors they know will rely on their audits.

Were all this not so, corporate directors and auditing firms would not carry insurance —which they do. Were this not so, Arthur Andersen would not have offered Enron shareholder and creditor groups three quarters of a billion dollars to settle foreseeable litigation. (Since this was an initial offer, any final settlement predictably will cost Arthur Andersen more than that.)

Moreover, the incentive system at work among lawyers ensures that injured shareholders will have their day. The plaintiff bar does not miss alleged corporate or

auditor misconduct, as the Enron saga has certainly demonstrated. Lawyers have lined up, competing for the lucrative right to represent Enron shareholders. When managers fail to perform because of conflict of interest rather than just mistake, as was allegedly the case for some of Enron's management, the legal rules make plaintiff recoveries relatively easy. That in turn increases plaintiffs' incentive to sue and fans lawyers' ardor to round up plaintiffs.

By law, further, recoveries will come from the personal wealth of those who fell short or had conflicting interests. So, if money was improperly siphoned from corporate coffers to personal pockets, Enron's lack of funds would not matter. The money, or the assets purchased with the money, is still there. Enron's directors and officers are not paupers. Also, if they or their auditors have deliberately deceived creditors and stockholders, they have committed crimes, and can be prosecuted and imprisoned for them.

In other words, practically nothing about the Enron episode raises new issues. Firms fail —no one can legislate away investor risk. To the extent that failure is due to misfeasance, malfeasance, nonfeasance or shortcomings in anything else that shareholders had a right to expect from their management-agents, shareholders already have legal recourse. Ditto for creditors. As The Naked Gun's Leslie Nielsen would say, "just keep moving...nothing interesting here."

Which raises a third, crucial lesson. Not only are shareholders already protected legally, but in the American legal system they are protected by state law. (I have not read of any Congressional committee evaluating the laws already protecting Enron shareholders, have you?) Although Ralph Nader and others tried hard to federalize corporate law in the 1960s and 1970s, nothing of the sort resulted. Just as there is no federal law of contracts, or federal law of property, there is no national corporate law. Similarly, any criminal fraud here is covered by existing state law. (There is a national system of securities regulation, but the Enron story is not about securities violations other than those already illegal by standards of traditional state-law fraud.)

So why all these klieg lights and reporters in Washington? Well, because a newsworthy event without him in the news makes a politician shudder. You can call Senators and Congressmen anything you want...just don't call them late for dinner. If need be, they'll host the dinner. Washington's elected suits can always call hearings, to which television brings its lights, flames to which reporters then are drawn.

So welcome to Congress's Enron dinner. Is there any major problem lacking a current remedy for which Washington could plausibly offer a solution? No. But if you stage a hearing, they will come.

Lesson Four, then: even if there is nothing constructive for Washington to do, it strives to create the illusion of doing something, as long as somebody is paying

attention. All of this happens because of the property rights in the legislative system. If Congressman Snort heads a committee and wants a hearing, he gets it. Congress has lots of Snorts and plenty of committees.

At first, all this seemed more pitiable than harmful. A successful politician needs steady publicity-vide or ergo sum —and before Enron it had been a while between fixes. The war against the Taliban wasn't cutting it —raise your hand if you're against the Bush push into Afghanistan —and air time for Congress was paltry compared to that for the commander-in-chief. What's the harm in skewering a few rich Texans who fell down on the job, maybe even criminally?

Not much perhaps, if the issue is just Enron. But that's the fifth, critical lesson. Enron is not about Enron. Congress's real goal is saddling the political system with new campaign finance laws, and Enron provides an excuse to re-ignite enthusiasm for the cause. Enron is a pretext, but one that offers a great political opportunity.

After the Bush election, recall, campaign "reform" was a headline-grabber until September 11, after which media interest in the issue deflated. With the media looking elsewhere, Congress lost interest also. But with the media back to cover Enron, Congress now hopes to ratchet the good-guy/bad-guy stories about one firm's finances and political contributions into a cry for national campaign legislation.

The political strategy of converting past tragedies into unrelated legislation is not new. President Kennedy's death begot Great Society programs. Ironically, many of the supposed "soft money" campaign-finance problems now said to need reforming arise from Congressional legislation in the wake of Watergate.

Enron is just the latest opening that a newsworthy story offers to opportunistic politicians, even when they can't do much about the underlying events or problems. Of course, there is no joy when investors take a bath —is anybody in favor of a Fortune 100 company cratering? But Enron itself is yesterday's water under the bridge. As politicians circle the Washington sky over Enron's remains, the issue is not what they will do today for corporate shareholders. There is nothing that needs doing nationally. The question is whether a crafty Congress can use Enron tomorrow to snatch back the chance for campaign legislation that seemed lost just months ago.

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