

## **The Power of an Indictment – The Legal Implications of the Demise of Arthur Andersen**

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On May 31, 2005, the Supreme Court in a 6-3 decision overturned the conviction of accounting firm Arthur Andersen (“Andersen”) on the charge of “corruptly persuad[ing]”<sup>1</sup> persons to withhold documents from an official proceeding. The Supreme Court’s decision in this case is “a bit like being acquitted years after the guillotine.”<sup>2</sup> The firm had largely been destroyed by the defection of many large publicly held clients before the conviction. Many of the firm’s 88,000 employees, most of whom never dealt with the Enron account, were at other jobs or on the unemployment rolls by the time the conviction was handed down. As one former Andersen employee noted in an interview, “It was the indictment that killed Andersen, not the conviction.”<sup>3</sup> The overruling of the conviction is not going to bring Andersen back.

In this case, the indictment alone was a death sentence; the partnership was largely destroyed before it had an opportunity to present evidence in court or, for that matter, before the government had to prove its case. While many clients remained loyal as the Enron/Andersen story broke, the biggest clients, the publicly held corporations, felt they could no longer stay with an impugned Andersen following the Department of Justice’s indictment. Thus, a Securities and Exchange Commission (“SEC”) rule along with the agency’s and the Justice Department’s unwillingness to compromise in this particular case trumped the tenet of innocent until proven guilty.

The Andersen case has been and will continue to be analyzed by many commentators for years to come. Many have analyzed the situation within Andersen that led to the erosion of its public trust and its declining standards.<sup>4</sup> Others have analyzed in depth why the firm should be found guilty.<sup>5</sup> Still others have looked how the Andersen

case and the subsequent Sarbanes-Oxley Act affect document retention and destruction policies.<sup>6</sup> The Andersen case has also been analyzed for its construction of the federal witness tampering statute.<sup>7</sup>

The aim of this article is to examine the impact an indictment can have against a limited liability partnership of professionals for the actions of a few in the court of public opinion, and the power of the government to destroy a large, well-known business with many employees who had no connection to the crime or the Enron account.<sup>8</sup> The overturning of the conviction, in this case, is not an exoneration and the firm could have been retried and found guilty. On November 25, 2005, the Friday after Thanksgiving, the Justice Department quietly announced in a press release that it would abandon its prosecution of Andersen.<sup>9</sup>

The article begins with a brief chronological description of the factual background of the case. It then examines the weight an indictment is supposed to have, followed by the standards for issuing an indictment against an entire partnership rather than just the individuals who allegedly performed wrongful acts. The notion of prosecutorial discretion is heavily emphasized, and the factors that contributed to the prosecution of Andersen are discussed. Finally, the implications of this situation are discussed in detail, as they extend beyond Enron and Andersen and are not limited by the passage of the Sarbanes-Oxley Act in 2002. While the particulars of this case suggest questionable motivations on the part of many of the participants, the intent of this article is to show the considerable power government prosecutors may exert over certain business organizations, even absent such motives. In short, the United States government has the power to destroy a partnership, such as an accounting or law firm, without the burden of trial or having to provide evidence of crime beyond a reasonable doubt.

## **Case Background**

By now, the background of the Andersen case is familiar to many. Andersen served as the “independent auditor” for Enron, a global energy markets trader. At one time, Enron was the seventh largest company in the United States.<sup>10</sup> Andersen earned fees from the Enron account averaging about \$1 million dollars per week.<sup>11</sup> Andersen had already run afoul of the SEC rules on several occasions, including involvement in fraud cases at Waste Management and Sunbeam, and settling for \$217 million a case involving the Baptist Foundation of Arizona.<sup>12</sup> Andersen was also the auditor for Global Crossing and WorldCom,<sup>13</sup> both of which followed Enron as heavily publicized corporate fraud cases at the early turn of the century.

The nation was still reeling from the attacks of September 11th when on October 16, 2001, Enron in a press release announced a \$618 million net loss for the third quarter. It also announced it would reduce shareholder equity by \$1.2 billion. The value of Enron stock, already on the decline, quickly tumbled. The next day, the SEC informed Enron of its formal inquiry into the case. Enron, in turn, informed its Andersen audit team two days later. On October 20, a conference call among Andersen partners concluded that the auditors should gather documentation related to Enron to assist the SEC investigation.<sup>14</sup>

Allegedly, on October 23, Andersen began destroying documents in Houston, per the lead Enron partner David Duncan’s insistence in following the firm’s document retention policy. Andersen received a subpoena for Enron-related documents on November 8. Duncan, through his secretary, sent an email on November 9 urging employees to stop shredding.<sup>15</sup> Andersen reported the document destruction to the SEC and the Justice Department on January 4, 2002.

What followed was a flurry of legal and public relations maneuvering. According to Kurt Eichenwald in the New York Times, prior to the indictment, the SEC wanted to settle with Andersen for \$500 million. Andersen refused, largely because of a number of class-action lawsuits filed in the wake of Enron, leaving the firm potentially liable for another \$750 million or more. Andersen reportedly was interested in settling for at least \$150 million less.<sup>16</sup>

The firm also tried to sway the public to rally to its cause. Full-page ads appeared in the Wall Street Journal and other major papers, urging that Enron and a few rogue employees, not the entire firm, were to blame. The firm hired former Federal Reserve chairman Paul Volcker to recommend changes to the firm and to help in negotiations with the federal government. Andersen employees rallied in the streets, wearing bright orange T-shirts that read “I Am Arthur Andersen.”

Despite the public relations appeals and legal negotiations, Andersen was indicted on March 14, 2002 on a single count of obstructing justice.<sup>17</sup> The Justice Department used the indictment hoping Andersen would settle quickly.<sup>18</sup> Andersen, however, was concerned that pleading guilty would cause state authorities across the country to remove its licenses. Instead, Andersen proceeded to trial, pushing to get the case through as quickly as possible to try to exonerate itself.<sup>19</sup>

Andersen was tried in the Southern District of Texas on one count of violating 18 U.S.C. § 1512(b)(2)(A) and (B):

Whoever knowingly uses intimidation or physical force, threatens, or *corruptly persuades* another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to ... cause or induce any person to ... withhold testimony, or withhold a record, document, or other object, from an official proceeding [or] alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding ... shall be fined under this title or imprisoned not more than ten years, or both.

(emphasis added). The jury deliberated for seven days, coming back deadlocked. Judge Harmon issued an Allen charge, in which the jury returns for further instructions, and the judge informs them of their duty to decide the case, and that they should listen to each other's arguments with a disposition to be convinced.<sup>20</sup> Three days later, the jury returned a guilty verdict. The court denied Andersen's motion for a judgment of acquittal. Andersen appealed. The Fifth Circuit affirmed, finding the jury instructions proper.<sup>21</sup>

At issue in the Fifth Circuit and Supreme Court appeals was what the statute meant to "knowingly ... corruptly persuad[e]" someone. The government argued that "knowingly" did not modify the phrase "corruptly persuades," thus negating the intent requirement. The prosecution convinced Judge Harmon to issue instructions to the jury that "dishonesty" was not required to find Andersen guilty, but rather that the firm merely impeded the prosecutor's fact-finding.<sup>22</sup> In other words, under the government's argument, no intent to obstruct was necessary; the facts that documents were shredded and that the absence of the documents would impede the prosecutor were sufficient for a guilty verdict.

The Supreme Court held these instructions improper. Following United States v. Aguilar<sup>23</sup>, the Court held that the statute required a "nexus" between the obstruction and a proceeding. In other words, the defendant must know that his actions are likely to affect the proceeding. Because the jury instructions failed to properly define this nexus requirement, the conviction was overturned.

The conviction itself and the subsequent appeals were meaningless with regard to the firm's survival. As an Andersen spokesman stated after the Supreme Court decision, "we pursued an appeal of this case not because we believe Arthur Andersen could be restored to its previous position but because we had an obligation to set the record

straight and to clear the good name of the 28,000 innocent people who lost their jobs at the time of the indictment.”<sup>24</sup> As this statement indicates, the indictment itself was the death of the firm. As with the instructions issued to the jury in its trial, the government did not have to establish guilt to wipe out one of the largest accounting firms in the nation. It issued the indictment, and that was enough.

### ***The Legal Standard for an Indictment and its Authority***

An indictment is “the formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person.”<sup>25</sup> An indictment, in other words, is simply an indication by a grand jury that there is sufficient evidence to go forward with a trial. The standard for an indictment is considerably lower than that for a conviction. While the standard for a criminal conviction is guilt beyond a reasonable doubt,<sup>26</sup> the standard for a grand jury to return an indictment is that the person charged is probably guilty<sup>27</sup> or that there is reasonable ground to believe him guilty.<sup>28</sup>

Significantly, grand jury proceedings are not governed by the rules of evidence.<sup>29</sup> Thus, for example, it is possible to issue an indictment on the basis of hearsay which would not be admissible during the trial.<sup>30</sup> In Costello v. United States, for example, the defendant was indicted for income tax evasion. He filed a motion to examine the minutes of the grand jury and found that the indictment was entirely based on the testimony of three government agents who had no firsthand knowledge of the transactions in question. The Supreme Court said that the Constitution required grand juries for the issuance of indictments. However, the Constitution made no mention of how grand juries should proceed. Historically, grand juries were made up of laypersons and grand juries historically could even act upon their own personal knowledge. Thus, to force the rules of evidence upon grand jury proceedings, the Court held, “would run counter to the

whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules."<sup>31</sup>

Further, indictments cannot be challenged because they are not supported by the adequate evidence.<sup>32</sup> Courts usually will not review the sufficiency of the evidence before the grand jury.<sup>33</sup> This is especially true if there is at least some<sup>34</sup> legal and competent<sup>35</sup> evidence in support of the indictment was before the grand jury. Such evidence need not necessarily involve every element of the criminal charge. Instead, there must be some evidence relative to the charge.<sup>36</sup> In fact, a single witness's testimony before a grand jury can be sufficient for an indictment.<sup>37</sup>

Thus, an indictment is not meant to have the force of a conviction. In turn, it is much easier for prosecutors to obtain. In the United States, our criminal law is premised on the fundamental notion of the defendant being innocent until proven guilty.<sup>38</sup> While an indictment does have some force and may be an indication of guilt, it is not a conviction and is not meant to have the same impact. An indictment confirms neither guilt nor innocence. It is simply the first step in a complex legal process.

### **Factors That Led to the Death of Andersen**

#### ***Charging a Partnership with Criminal Activity for the Actions of a Few***

Like a corporation, a partnership can be held criminally liable for the actions of its agents. The Supreme Court determined this in the case of United States v. A&P Trucking Co.<sup>39</sup> There, two partnerships were charged with violations of certain provisions of the Interstate Commerce Act. The district court had found that the partnerships as entities could not be charged with violating the statutes. The Supreme Court, however, reversed, looking at the definition of “person” found in 1 U.S.C. § 1: “in determining the meaning of any Act of Congress, unless the context indicates otherwise .

. . the words “person” and “whoever” include corporations, companies, associations, firms, *partnerships*, societies, and joint stock corporations as well as individuals” (emphasis added). The Court looked at Congressional intent in the statute, finding that the intent to bar the activity in question was not limited by the form of the organization.<sup>40</sup> Many carriers are organized as partnerships and the form of the organization should not trump the intent of the statute.<sup>41</sup>

While under common law, the Court noted, partnerships could not be charged with a crime, Congress had the power to change this rule. A business cannot be allowed to commit a crime simply because of its form of organization or because the partners “do not personally participate in the infraction.”<sup>42</sup> The Court made clear that charging the partnership should not punish those partners and others that were not involved in the criminal act: “The corollary is, of course, that the conviction of a partnership cannot be used to punish the individual partners, who might be completely free of personal guilt. As in the case of corporations, the conviction of the entity can lead only to a fine levied on the firm’s assets.”<sup>43</sup>

Commentators have noted that prosecutions of partnerships, particularly professional partnerships such as law and accounting firms, are rare; prosecutors generally prefer to go after the individual partners involved in the criminal activity.<sup>44</sup> Certain similarities exist in cases in which corporations and partnerships are held criminally liable. Typically these similarities are: partners and associates are involved, acting within the scope of their authority; the entity benefited from the violations, and there is a perceived need to prosecute the entire entity so that others will abide by the law.<sup>45</sup>



In Andersen's case, these factors were present. David Duncan, the lead Enron partner, plead guilty to obstructing justice. Other partners, although not all of them, were involved. All the partners, however, share in the profits of the firm, and Enron was one of Andersen's biggest and most profitable clients, bringing in about \$57 million annually in fees.<sup>46</sup> Further, as discussed in more detail below, there was a perceived need on behalf of the administration to punish Andersen as major corporate scandals erupted.

The Supreme Court's concerns about the prosecution of innocent partners and employees in A&P Trucking went unheeded in the Andersen case. Many who were not involved were harmed by the prosecution of Andersen. Many non-partners lost their jobs. Retired Andersen partners lost their savings as their interests in the firm became worthless, much as Enron shareholders and employees found their savings decimated by the stock's rapid decline. The destruction of one business caused the government to destroy another, putting more people out of work in a tough economy and wiping out the retirements of more.

### ***Prosecutorial Discretion***

The question of whether to prosecute an entire organization, then, is one of prosecutorial discretion dependent on the particular facts of the case. The Justice Department could choose to prosecute the individuals directly involved with or without prosecuting the entire partnership. Andersen knew this and, as discussed above, there was much legal wrangling, public and private, prior to the indictment. Many factors here, some appropriate, some questionable, likely contributed to the decision to prosecute the entire firm.

Publicly, the Justice Department stated two reasons to warrant the prosecution of the entire firm rather than just the individuals involved. First, it said, the shredding of the

documents warranted the rare action of indicting the entire firm, even as the lead Enron partner had already plead guilty. The government never charged Andersen with any wrongdoing regarding the audits themselves.<sup>47</sup>

Second, at the time of the Enron debacle, Andersen as a firm had already been in trouble with authorities. The Waste Management case resulted in a court injunction against the firm. The firm was barred from future misdeeds. No doubt the firm's involvement with Waste Management and other prior SEC cases contributed to the prosecutor's sense that Andersen was a firm that needed to be reprimanded and reformed. Assistant Attorney General Michael Chertoff reportedly was unmoved by notions that an indictment would destroy Andersen, describing the firm as a “recidivist” that deserved the harshest punishment.<sup>48</sup> This image of Andersen as a “recidivist” played a major role in the subsequent trial. The trial court allowed admission of evidence of Andersen’s prior bad acts with regards to its work on the Sunbeam and Waste Management accounts, and the Fifth Circuit upheld this admission.<sup>49</sup>

Other unnamed factors also likely contributed to the Justice Department’s decision to prosecute the entire firm rather than just the individual wrongdoers. Among these are intense media coverage, the magnitude of the Enron case, and political considerations throughout the Bush administration and the Justice Department.

### ***Media Coverage***

Today, the news media is global and far-reaching. The stock market boom of the 1990’s promoted wide coverage of business and corporate dealings, and CEO’s became famous. When the bubble burst, many people lost considerable sums of money, but continued to follow the market and corporate news, largely as their retirement accounts and mutual funds were tied up in the stock market. When Enron collapsed amidst a slew

of large corporate scandals, the news media were quick to cover the story. Andersen, as the corporation's auditor, was heavily scrutinized.

### ***The Magnitude of the Enron Case***

Federal prosecutors clearly considered the magnitude of the Enron debacle. Enron was the largest corporate bankruptcy in U.S. history.<sup>50</sup> While negotiating with Andersen, Chertoff called the situation "the worst case of corporate obstruction I have ever seen."<sup>51</sup> Many found their retirement savings decimated. Today the word "Enron" has become synonymous with corporate greed and scandal. "Andersen," through its relationship with Enron, has become synonymous for accounting improprieties and failure to protect shareholders through corporate audits.

### ***Political Considerations***

Politics, too, likely played a role. The fall of Enron came on the heels of the September 11 attacks, in which the government looked ineffective in protecting the populace. It also emerged from Texas, where the new President had been governor. Ken Lay, Enron's CEO, was close friends with the Bush family and his company had close affiliations with Halliburton, an energy company Vice President Cheney formerly headed.<sup>52</sup> Prior to September 11 and the collapse of Enron, President Bush's domestic policy floundered. Enron and Andersen both were major contributors to the Bush campaign.<sup>53</sup> All these factors forced the Justice Department and the Bush administration to prosecute Andersen sternly to appear effective against corporate greed.

Political considerations influenced not only the top of the administration. At the Justice Department, Michael Chertoff was the prosecutor who chose to indict Andersen. Such a high-profile case garnered political notice. He is currently secretary of the Department of Homeland Security. The Supreme Court's decision is unlikely to affect

Chertoff in his current career. His decision to prosecute the entire firm and his succession in gaining a conviction in the district court likely contributed to the advancement of his career. The subsequent overturning of the conviction is unlikely to affect his current placement.

As of this writing, Ken Lay and Jeff Skilling's trials are slated for January 2006, almost five years after Enron's collapse and four years after Andersen's. Clearly, the pro-business administration wanted to prosecute someone in the wake of the Enron disaster to look effective against illegal corporate greed and fraud. While prosecutions of the higher-ups in Enron were inevitable, the administration instead chose to pursue its accountants first. An argument can be made that the case against the top Enron executives is tougher and takes longer to put together. The shredding, on the other hand, was an easily identifiable impropriety.

Nonetheless, any questionable accounting methods began at Enron. Andersen may have signed off on the improper accounting, persuaded to do so by the large fees paid by Enron and its desire to placate a profitable client. Significantly, Andersen has never been charged with impropriety regarding its audit of Enron; its sole criminal charge amounted to destroying documents related to the account.<sup>54</sup>

The individuals who gained the most from the fraudulent scheme were the top Enron executives, not the outside accountants and auditors. Prosecuting Andersen garnered front-page headlines, making the Justice Department look as though it were doing something about corporate greed and malfeasance. Andersen may be to blame, but its crime was merely that of aiding and abetting, not the actual theft.

***SEC Rule 102(e)***

The indictment opened up the possibility of conviction. Conviction would be devastating enough, but in this case it was exacerbated by the presence of SEC Rule 102(e). Under this rule, certain people can be barred from practice before the SEC; thus, they cannot represent publicly held companies. At the time of the indictment, Andersen served as auditor for 20 percent of the country's publicly held companies.<sup>55</sup> Among those the SEC can bar are “any person who has been convicted of a felony.”<sup>56</sup> The disbarment or suspension is “deemed to have occurred when the disbarring, suspending, revoking or convicting agency or tribunal enters its judgment or order.”<sup>57</sup> In other words, an indictment should be insufficient to bar a firm from representing SEC clients.

The SEC also provides waivers allowing those who might be barred from practicing with SEC approval. In Andersen’s case, during settlement negotiations, the SEC gave no assurances that Andersen would receive a waiver if it were convicted. The SEC did promulgate regulations designed to forestall panic should Andersen collapse. These regulations allowed SEC registrants to continue to use previous Andersen reports without certain technical requirements, such as a signature, since the firm was unlikely to continue existence.<sup>58</sup> Thus, the SEC assumed Andersen would collapse even before its conviction. This pessimism contributed to a sense of Andersen's demise as a foregone conclusion and furthered the decline of the firm and the defection of major clients.

### ***Reputation and Timing***

At one time, Andersen was the most venerated accounting firm. Over the years, however, a series of scandals and poor judgments led the firm to lose much of its reputation. Given this history, Andersen knew an indictment would be problematic, if not devastating. Hence, as discussed above, it tried in vain to negotiate deals with the Securities and Exchange Commission (SEC) and the Justice Department to avoid it.

Andersen knew an indictment would be extremely troublesome to the firm in an industry where integrity and honest dealing are considered sacrosanct.

Prosecutors knew this. They also knew something of the accounting industry. The first criminal charge ever leveled against a major accounting firm came at the height of the season when publicly traded companies ask shareholders to approve their choice of auditor.<sup>59</sup> It is safe to assume that the management of no company wanted to go to its shareholders to approve an indicted accounting firm. Thus, even though the firm had yet to be convicted and this country's criminal laws are premised on the notion of innocent until proven guilty, the indictment was sufficient to make the clients leave. They left in droves, each day the departure of a major client or two would be headline news. These defections snowballed; as more companies left, other companies grew less confident in Andersen and left themselves.

While the defections were highly visible, Andersen could not actively recruit new clients to replace its losses at the time. No company would want to move from another major firm to Andersen. Further, the U.S. Government banned Andersen from bidding on federal contracts.<sup>60</sup> Andersen was losing clients and could not make up the losses.

## **Conclusion**

Many would like to call the Enron case unique. However, cases like Worldcom and Global Crossing indicate wide-scale corporate fraud is not. Further, the case of Andersen is not a unique one. In a study, Theodore Eisenberg and Jonathan Macey show that Andersen was not a unique case among large accounting firms.<sup>61</sup> Their study shows that Andersen's performance with regard to financial statements was not statistically different from the other large accounting firms.

The Sarbanes-Oxley Act, passed in the wake of the Enron/Andersen scandal, is designed to address some of these problems. However, problems of auditor independence are still relevant. The ramifications of the Andersen case are highlighted again by current events. The Justice Department recently contemplated criminal charges against one of the remaining large accounting firms, KPMG, related to its use of illegal tax shelters.<sup>62</sup> Before KPMG settled and many of the individuals involved were arrested,<sup>63</sup> the SEC contemplated whether to grant a waiver should KPMG be convicted and promulgating rules to assure large companies if KPMG collapses.<sup>64</sup> If KPMG or another major accounting firm were to collapse as Andersen did, the further consolidation and concentration of the large accounting firms into three is likely to spur other problems.

As the Andersen and KPMG cases show, prosecutorial discretion is a major factor these days in determining whether a firm can survive. While a firm may have acted improperly, it can negotiate with prosecutors, paying remuneration or fines rather than going through the publicity and expense of trial. An indictment is devastating for a firm that relies on a strong public image of honesty and integrity. Prosecutors know this, and can exploit their power over firms. An indictment takes only a little evidence to get, but can have an enormous impact.

As the decision to prosecute KPMG is considered, the question of the value of prosecuting a company must be considered. As one commentator has pointed out, a prosecution and conviction of KPMG would not harm it because “it has no soul” and the costs would be paid by partners, employees and customers.<sup>65</sup> Punishing a corporation persecutes individuals who were not involved in the wrongdoing. There is rarely opposition to corporate punishment because a corporation is seen as a soulless entity and without individual suffering since the costs are spread among many.<sup>66</sup>

Writing in the New York Times, Stanford law professor and former commissioner of the SEC Joseph Grundfest comments persuasively that “[b]ecause the only sure defense is not to attract the prosecutor’s attention in the first instance, the rise of prosecutorial power may be society’s strongest tool to enforce corporate integrity.”<sup>67</sup> Grundfest points out that many large corporations and partnerships could be destroyed simply by the government issuing criminal charges against them. Any firm or organization that requires a strong public reputation is at risk as is any organization that does business with the federal government. The power of the government over these firms, demonstrated by its destruction of Andersen, is potentially crippling.

There are other ramifications from Grundfest’s statement. If the goal is to avoid prosecutorial attention, wrongdoers may just hide their misdeeds in more complex transactions and cover-ups. Alternatively, wrongdoers may work even harder to ingratiate themselves into the political system so that prosecutors feel pressure from higher-ups and politicians to look the other way.

Grundfest argues that, in the Andersen trial, “prosecutors persuaded the trial judge to interpret the law in a way that eviscerated the government’s need to prove Andersen’s criminal intent.”<sup>68</sup> This is symptomatic of the whole system at play. The prosecutors did not have to prove their case. They punished Andersen prior to a guilty verdict. They put thousands of people who had never dealt with Enron out of work. Enron wiped out numerous 401(k)’s; the government wiped out the investments of retired Andersen partners who had invested in the firm over many years.

Grundfest questions whether stronger safeguards against prosecutors who can “exercise their life or death power over corporations”<sup>69</sup> can even be put in place, whether they come from Congress, the Justice Department, the SEC or the press. This leads to a



vicious cycle of watchdogs watching watchdogs. If prosecutors are conscientious and make balanced informed decisions about whether to prosecute cases, the problem manages itself. When, however, prosecutors are persuaded by politics, personal ambition, and the spotlight of a high profile case, even innocent organizations are in jeopardy.

The Andersen case highlights a contemporary problem in American law. As media coverage is instantaneous and omnipresent, the ramifications of the issuance of an indictment can be damning, despite the possibility of acquittal or reversal of a conviction. Prosecutors need not be overreaching, overzealous or politically motivated to destroy a major partnership or corporation and put thousands out of work. Prosecutors must be careful and discriminating in wielding the awesome power of their ability to seek and obtain indictments that are potentially lethal.

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<sup>1</sup> 18 U.S.C. § 1512(b)(2000).

<sup>2</sup> Mark Coultan, Andersen Wins in Supreme Court, SYDNEY MORNING HERALD, June 2, 2005.

<sup>3</sup> Kristen Hays, Ruling No Comfort for Ex-Andersen Workers, WASH. POST, June 1, 2005.

<sup>4</sup> Christine E. Earley, Kate Odabashian & Michael Willenborg, Some Thoughts on the Audit Failure at Enron, the Demise of Andersen, and the Ethical Climate of Public Accounting Firms, 35 CONN. L. REV. 1013 (2002-2003).

<sup>5</sup> Kathleen F. Buckley, Andersen's Fall from Grace, 81 WASH. U. L. Q. 917 (2003).

<sup>6</sup> James Dabney Miller, Esq., The Andersen Decision and Document Management Under Sarbanes-Oxley, 19 ANDREWS WHITE-COLLAR CRIME REPORTER 2 (June 30, 2005).

<sup>7</sup> Eric C. Surette, Annotation, Construction and Application of the Federal Witness Tampering Statute, 18 U.S.C.A. §1512(b), 185 A.L.R. Fed. 1 (2003).

<sup>8</sup> I should say up front that I was one of the 88,000 Andersen employees put out of work by the indictment, although I never handled the Enron account. Nonetheless, this article is not intended as any sort of defense of the firm or anyone within it.

<sup>9</sup> Accounting: Justice Department Abandons Prosecution of Arthur Andersen, Daily Tax Report (Nov. 25, 2006).

<sup>10</sup> Anderson indictment, <http://news.findlaw.com/hdocs/docs/enron/usandersen030702ind.html>

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- <sup>11</sup> Paul M. Healy & Krishna Palepu, Governance and Intermediation Problems in Capital Markets: Evidence from the Fall of Enron, 17 J. Econ. Persp. 3 (2003).
- <sup>12</sup> Allan Sloan and Mark Hosenball, Andersen's Demise Seems in the Cards, ST. PETERSBURG (RUSSIA) TIMES, March 26, 2002.
- <sup>13</sup> Id.
- <sup>14</sup> Buckley, supra note 5, at 920.
- <sup>15</sup> Duncan himself later plead guilty to witness tampering and testified for the prosecution against his former firm.
- <sup>16</sup> Kurt Eichenwald, Enron's Many Strands: The Investigation: S.E.C. Had Sought \$500 Million in Failed Talks with Andersen, N.Y. TIMES, March 20, 2002.
- <sup>17</sup> Arthur Andersen LLP v. United States, 125 S. Ct. 2129 (2005).
- <sup>18</sup> Sloan and Hosenball, supra note 11.
- <sup>19</sup> Eichenwald, supra note 15.
- <sup>20</sup> Allen v. United States, 164 U.S. 492 (1896).
- <sup>21</sup> United States v. Arthur Andersen LLP, 374 F.3d 281, 294-95 (5th Cir. 2004), *overruled by* 125 S. Ct. 2129 (2005).
- <sup>22</sup> Id.
- <sup>23</sup> 515 U.S. 593 (1995).
- <sup>24</sup> Mark Coultan, Andersen Wins in Supreme Court, SYDNEY MORNING HERALD, June 2, 2005.
- <sup>25</sup> BLACK'S LAW DICTIONARY 788 (8th edition 2004).
- <sup>26</sup> Shushan v. United States, 117 F.2d 110 (5th Cir. 1941).
- <sup>27</sup> Id.
- <sup>28</sup> United States v. Olmstead, 7 F.2d 756 (D.C. Wash. 1925).
- <sup>29</sup> United States v. John Doe, Inc. I, 481 U.S. 102 (1987); Fed. Rules Evid. 1101(d)(2).
- <sup>30</sup> United States v. Williams, 504 U.S. 36, 50 (1992); Costello v. United States, 350 U.S. 359, 364 (1956).
- <sup>31</sup> Costello, 350 U.S. at 364.
- <sup>32</sup> Id.
- <sup>33</sup> Murdick v. United States, 15 F.2d 965 (8th Cir. 1926).
- <sup>34</sup> Greenberg v. Superior Court for City and County of San Francisco, 121 P.2d 713, 715 (Cal. 1942), Howard v. State, 137 So. 532, 534 (Ala. App. 1931).
- <sup>35</sup> Tinkoff v. United States, 86 F.2d 868, 877 (7th Cir. 1936).
- <sup>36</sup> People v. Shaw, 478 N.E.2d 1142, 1150 (Ill. App. Ct. 1985).

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<sup>37</sup> McConico v. State, 458 So.2d 743, 747-48 (Ala. Crim. App. 1984).

<sup>38</sup> See generally Neb. Press Ass'n v. Stuart, 427 U.S. 539, 616 (1976) (Brennan, J., concurring) (stating in an appendix, "an accused is presumed innocent until proven guilty"); Andres v. United States, 333 U.S. 740, 745 n.5 (1948).

<sup>39</sup> 358 U.S. 121 (1958).

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id. at 126.

<sup>43</sup> Id. at 127.

<sup>44</sup> Richard E. Welch III, Elliot D. Lobel, and David S. Nalven, Criminal Liability for Professional Partnerships: Two Perspectives, 38-APR Boston Bar J. 4 (1994).

<sup>45</sup> Id.

<sup>46</sup> Healy & Palepu, supra note 10.

<sup>47</sup> Miller, supra note 6.

<sup>48</sup> Flynn McRoberts, Repeat Offender Gets Stiff Justice, CHIC. TRIB. (September 4, 2002).

<sup>49</sup> United States v. Arthur Andersen LLP, 374 F.3d 281, 288-89 (5th Cir. 2004). The Supreme Court did not address this issue in its opinion.

<sup>50</sup> Bethany McLean & Peter Elkind, The Smartest Guys in the Room vii (2003).

<sup>51</sup> Sloan and Hosenball, supra note 11.

<sup>52</sup> McLean & Elkind, supra note 49, at 87.

<sup>53</sup> Federal Election Commission Disclosure Report, available at <http://www.fec.gov> <http://www.opensecrets.org/2000elect/contrib/P00003335.htm>

<sup>54</sup> Miller, supra note 6.

<sup>55</sup> Sloan and Hosenball, supra note 11.

<sup>56</sup> 17 C.F.R. § 210.2-02(e).

<sup>57</sup> Id.

<sup>58</sup> Id.

<sup>59</sup> Sloan and Hosenball, supra note 11.

<sup>60</sup> Michael Hedges, Enron, Andersen Banned from Federal Contracts, HOUSTON CHRONICLE, March 16, 2002.

<sup>61</sup> Theodore Eisenberg and Jonathan R. Macey, Was Arthur Andersen Different? An Empirical Examination of Major Accounting Firm Audits of Large Clients, 1 J. EMPIRICAL LEGAL STUD. 263 (July 2004).

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<sup>62</sup> Gretchen Morgenson, KPMG Trying to Cut Deal on Liabilities, Filing States, N.Y. TIMES (June 23, 2005).

<sup>63</sup> See Kathryn Kennealy and Kenneth M. Breen, The KPMG Deferred Prosecution: Warning Flags for Defense Rights, 29 CHAMPION 44 (2005).

<sup>64</sup> Deborah Solomon, SEC Weighs Big Three World, WALL ST. J., June 22, 2005 at C1.

<sup>65</sup> David Wighton, The Flawed Logic of Punishing Companies, FIN. TIMES, July 28, 2005 at 19.

<sup>66</sup> Id.

<sup>67</sup> Joseph A. Grundfest, Over Before It Started, N.Y. TIMES, June 14, 2005.

<sup>68</sup> Id.

<sup>69</sup> Id.