

White Collar Crime: A Letter from the Future

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Dear President-Elect Clinton—

Congratulations on winning the election. It was a tough race you fought against Jenna Bush. And I am sure that in the upcoming months people will have issues with the new satellite TV voting system that was just used. But, it is important that you move ahead with your agenda.

You asked that I write you concerning the term “white collar crime”—what it is, and how best your administration should handle things.

I thought I would cover three things in this letter:

First, what is white collar crime and what are the problems the government had in reporting its white collar crime statistics.

Second, some of the key mistakes made in the past in handling white collar and corporate criminal liability matters.

Finally, my suggestions for what your administration could do to better deter economic crimes.

White collar crime was a term created by a sociologist 100 years ago, in the year 1939. A man named Edwin Sutherland gave a speech to the American Sociological Society, and he said that we needed to start punishing crime committed by “men of affairs, of experience, of refinement and culture, of excellent reputation and standing in the business and social world.”² The next year he wrote a book, and oddly enough all the examples in that book were from corporations.³ Most people prosecuting or defending white collar crime, however, never really bothered to read what he wrote. If they had, they would have realized

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¹ Many of the events mentioned in this imagined letter from the future are, of course, not statements of fact. This letter was used in speeches given to the Continuing Legal Education in Georgia and the Annual Minnesota Criminal Justice Institute. The author thanks these organizations, and also thanks Paul Kish and Vince O'Brien for these opportunities. Additionally, thanks go to Dean Darby Dickerson for her support.

² Edwin H. Sutherland, *White-Collar Criminality* 5 AM. SOC. REV. 1, 8 (1940). In his later book, Sutherland referred to white collar crime as “a crime committed by a person of respectability and high social status in the course of his occupation.” EDWIN H. SUTHERLAND, *WHITE COLLAR CRIME: THE UNCUT VERSION* 7 (1983) [hereinafter *WHITE COLLAR CRIME*].

³ See *WHITE COLLAR CRIME*, *supra* note 2.

that he was a sociologist, not a criminologist, and that he was looking at a sociological phenomena occurring in corporations as opposed to individuals who were developing shell corporations, giving bribes in foreign countries, or sending viruses and worms into the internet. But he did create the term white collar crime and it certainly was in vogue for a number of years.

Now mind you, corporations had been prosecuted well before this guy Sutherland, since 1909 to be exact—when in the *New York Central* case the Court extended criminal liability to corporations even when the crime was not a strict liability crime and even when the act was not one of omission.⁴ Instead, in that case, the Court decided that despite corporations having no body—and thus not being able to be imprisoned—and having no soul—thus not able to form an intent—criminal liability would be allowed. A corporation could be held liable via respondeat superior when the acts of the employees were criminal. Corporate criminal liability was given an additional boost when a court started the “collective knowledge” theory, a theory that allowed corporations to be held criminally liable based upon the collection of knowledge from different individuals throughout a corporation. Corporations could not “compartmentalize” their actions—everything would be combined together to get criminal liability against a corporation.⁵

So what is white collar crime? The bottom line is that throughout the last 100 years no one could ever figure it out. The Department of Justice [DOJ] via the Transactional Records Access Clearinghouse [TRAC] reporting system was issuing statistics that documented a decline of about ten percent from Fiscal Year 2003 to 2004, with a continuing decline for 2005.⁶ But in ‘05 and ‘06, yes the years of corporate scandals with employees being prosecuted and corporate criminality being on a rise—the statistics were saying the opposite. I remember back then writing on my co-authored white collar crime blog that DOJ was cooking its books.⁷ And they were.

They were saying that white collar crime did not include crimes like environmental offenses, bribery, federal corruption, state and local corruption, immigration violations, Occupational Safety and Health Act [OSHA] violations, and copyright violations. Oddly enough, every white collar crime casebook seemed to include at least some of these categories. And if you go to a typical website of a United States Attorney, many of these items were listed as white collar crimes. For example, the United States Attorney’s Office for the Northern District of California described its efforts against white collar crime as follows:

⁴ *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 495–96 (1909).

⁵ *See United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987).

⁶ TIMELY NEW JUSTICE DEPARTMENT DATA SHOW PROSECUTIONS CLIMB DURING BUSH YEARS, <http://trac.syr.edu/tracreports/crim/136/> (last visited Mar. 9, 2007).

⁷ Posting of Ellen S. Podgor to White Collar Crime Prof Blog, *Is DOJ “Cooking the Books” in Its Reporting of White Collar Crime?*, http://lawprofessors.typepad.com/whitecollarcrime_blog/2005/11/is_doj_cooking_.html (Nov. 14, 2005).

The White Collar Crime Section is responsible for prosecuting a wide range of complex cases, including public corruption (such as bribery, kickback schemes, and theft of government funds), health care fraud, financial institutions fraud, bankruptcy fraud and mail and wire fraud. Civil rights cases are also monitored, evaluated and prosecuted by the section. Environmental cases are prosecuted under the Clean Water Act, Clean Air Act and other federal environmental statutes. The section also prosecutes cases involving the protection of wildlife and Food and Drug Administration cases concerning the safety of the nation's food supply.⁸

Maybe white collar prosecutions really were down, but it might have been more palatable if the statistics reported things accurately.

And even after 100 years since the term “white collar crime” was created, it really was never resolved what was, or was not, within the definition of this term. Some people started using the term economic crime.

But the government made many mistakes throughout the years with respect to white collar and corporate criminal liability. Perhaps their biggest mistake started when there was a terrible fraud scheme at a company called Enron. Perhaps while growing up you saw the show *Enron: The Musical*. It opened in Houston and became a top hit on Broadway around 2008. Although the musical was a hit, the company itself was a bust.

Now the company Enron was never prosecuted, although many individuals went to jail for their activities. One of the key players—Andy Fastow, the Chief Financial Officer [CFO] of the corporation—ended up serving less than six years when the government failed to object at his sentencing hearing to the defense arguing for a sentence below the ten years agreed upon in the plea agreement. Prosecutors found out something defense attorneys have known for years—when you don't object, the issue gets lost in oblivion because it's waived.

The courts eventually got tired of watching prosecutors giving away the kitchen sink in order to secure cooperation. People like Jeff Skilling, the Chief Executive Officer [CEO] of Enron, received a sentence of over twenty-four years. Bernie Ebbers, CEO of a company called WorldCom, received twenty-five years. And they even went so far as giving an eighty-year-old man, the Adelphia founder John Rigas, a fifteen-year sentence. And his son Timothy Rigas, the CFO of the company, received a twenty-year sentence. One poor guy, Jamie Olis, initially received a sentence of over twenty-four years, but even a staunch conservative appellate judge in the then Fifth Circuit, Edith Jones, couldn't stomach that one—she reversed the conviction.⁹ Jamie Olis ended up with six years on

⁸ The United States Attorney's Office, Northern District of California—Criminal Division, <http://www.usdoj.gov/usao/can/divisions/criminal.html> (last visited Mar. 9, 2007).

⁹ See *United States v. Olis*, 429 F.3d 540, 549 (5th Cir. 2005).

resentencing.¹⁰ But even that was pretty tough as he was just a third-year associate at a company called Dynergy, and he did not have the proper mentoring when he started this job. His boss only received a sentence of eighteen months and a co-worker got a month—just because they cooperated.¹¹ Cooperation determined the sentence.

It took a while for people to realize that the system was pretty screwed up. Loss was driving the amount of the sentence, and people who were first offenders might get thirty years for committing mortgage fraud¹² while John Walker Lindh, a man who plead guilty to assisting the Taliban was only receiving twenty years.¹³

It was amazing how long it took before people realized that white collar offenders were offenders who deserved punishment, but throwing them in jail and throwing away the key just because they exercised their right to a jury trial was just plain unconstitutional. What actually turned the tide was when the democrats won Congress in 2006, and they started indicting people who were associated with George W. Bush's administration for crimes related to defense procurement.

But back to this Enron scandal. Enron was never indicted although individuals within the company were indicted. But the government then decided to indict the accounting firm associated with Enron. The company was shredding documents right and left, so the government decided to hit them with charges of obstruction of justice. Well the company decided to go to trial. After all, the sentence was a maximum fine of \$500,000. What did they have to lose? The funny, but not so funny thing is, that they lost the initial trial, the company went under, people in offices throughout the world lost their jobs because of the indictment, and then they won in the United States Supreme Court.¹⁴ The problem was that the company was already dead. Once executed, there was not much that could be done. The number of major accounting firms in the U.S. was decreased by one, all because they failed to plead guilty or cooperate with the government.

What was even more bizarre about this situation is that this losing case for the government became its biggest case for deterrence. Law professors in the U.S. were really in trouble in that they were teaching that you deter crime when you prosecute and convict someone. Now they had to teach that you deter crime by prosecuting, even if the conviction is overturned on appeal by the highest court in the country.

¹⁰ See *United States v. Olis*, No. H-03-217-01, slip op. at 13 (S.D. Tex. Sept. 22, 2006).

¹¹ See Posting of Ellen S. Podgor to White Collar Crime Prof Blog, *Olis Re-Sentenced to Six Years*, http://lawprofessors.typepad.com/whitecollarcrime_blog/2006/09/olis_sentenced_.html (Sept. 22, 2006).

¹² See Ellen S. Podgor, *Throwing Away the Key*, 116 Yale L.J. Pocket Part 279 (2007), available at <http://thepocketpart.org/2007/02/21/podgor.html> (discussing first time offender Chalana McFarland's sentence of thirty years for mortgage fraud).

¹³ Plea Agreement, *United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002) (No. 02-37-A), available at http://www.pegc.us/archive/US_vs_Lindh/uslindh71502pleaag.pdf.

¹⁴ See *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

The result of all this was that anytime the government even raised a finger that they might be considering indicting a company, the company was on the doorstep of the government, offering them everything. Companies became mini-prosecutors for the government, giving tabbed notebooks of information to the government about employees in order to get them to stop indicting their company. More companies entered into deferred prosecution agreements during these times than had ever done so before. Companies were dropping millions of dollars and saying they would give the government everything they needed to prosecute individuals in their office, as long as the government assured them that they would not be indicted like Arthur Andersen.

You can't blame the companies for being nervous, as Arthur Andersen—a losing case—became the biggest deterrent the government could ever have. “Cooperate or we execute” was the government's mantra. In these deferred prosecution agreements they even made the corporation agree that they would not pay the attorney fees of individuals in the company, even if the corporate employee and the corporation had a contract for the payment of these fees.¹⁵

Some of these agreements were beyond belief. For example, in one agreement with Bristol-Meyers Squibb Company, the government and the company agreed to put an ethics chair at Seton Hall Law School.¹⁶ Yes, this was right in the agreement. And lo and behold, the United States Attorney that entered into the agreement with the company graduated from Seton Hall Law School. I remember being upset about this. There I was without a chair, but there was no way I would take an ethics chair brought about this way.

My other favorite incident back then was the deferred prosecution agreement between the DOJ and another accounting firm—KPMG. KPMG was actually the personal auditors for the DOJ. So they were investigating their personal auditors, and then they entered into a deferred prosecution agreement with their auditors, and they actually put into the agreement that “[t]he debarring official has determined that suspension or debarment of KPMG is not warranted because KPMG has agreed to the terms of this deferred prosecution agreement.”¹⁷

But individuals in the DOJ went too far. One judge in New York wrote a scathing opinion in a case called *Stein*¹⁸ that really put the government in its place. It all came to a peak because the DOJ starting using this memo called the Thompson Memo¹⁹ to ask for attorney-client privileged material. Former Deputy

¹⁵ See *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

¹⁶ See *Deferred Prosecution Agreement* 6 ¶ 20, <http://www.usdoj.gov/usao/nj/press/files/pdf/deferredpros.pdf> (last visited Mar. 17, 2007).

¹⁷ See *KPMG Deferred Prosecution Agreement* 26 ¶ 21, [http://www.nacdl.org/public.nsf/whitecollar/wc_DPA/\\$FILE/KPMG.pdf](http://www.nacdl.org/public.nsf/whitecollar/wc_DPA/$FILE/KPMG.pdf) (last visited Mar. 17, 2007).

¹⁸ See *Stein*, 435 F. Supp. 2d at 364.

¹⁹ See *Principles of Federal Prosecution of Business Organizations* (commonly referred to as the Thompson Memo), http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (last visited Mar. 17, 2007).

Attorney General Larry Thompson actually gave a speech at the Heritage Foundation in late November 2006, telling people that the way the memo was being used was not what he had intended. Shortly after that the DOJ finally issued a new memo—the McNulty Memo,²⁰ but it changed very little and still allowed for waivers of attorney-client privileged material.

People were up in arms. The bar groups went against the DOJ, and even the conservative groups like the Heritage Foundation and Cato Foundation were part of the coalition to stop this DOJ practice of asking for waivers of attorney-client privilege. Perhaps you heard of Senator Specter while growing up—many democrats and feminists were upset with him when he heavily questioned a woman named Anita Hill during the confirmation hearings of Supreme Court nominee Clarence Thomas (that of course, was before your father took office). But anyway, all these conservative groups, and not conservative ones like the National Association of Criminal Defense Attorneys [NADCL], got together and supported legislation proposed by Senator Specter. It was titled the Attorney-Client Privilege Protection Act of 2007.²¹ It passed overwhelmingly²² because people were just tired of the government using a memo to deprive people of the most “sacrosanct privilege”—the attorney-client privilege.

And there were other prosecutions in the last 100 years that came back to haunt the DOJ. They prosecuted this man named David Henson McNab for Lacey Act crimes.²³ He was a Honduran businessman who was engaged in the business of catching spiny tail lobsters off the coast of Honduras.²⁴

All the charges that formed the basis of the indictment against him and his three co-defendants related to a Lacey Act violation. The Lacey Act prohibits the importation of “any fish or wildlife taken, possessed, transported, or sold in violation of . . . any foreign law.”²⁵

McNab, who owned and operated a fleet of fishing vessels in Honduras, would catch lobsters off the coast of Honduras and ship them to the United States. He shipped frozen spiny lobster tails in clear plastic bags—clear so that everyone could see what he was shipping.

But on “February 3, 1999, agents of the National Marine Fisheries Service received an anonymous fax.” Who sent the fax? We don’t know. But we can

²⁰ See Principles of Federal Prosecution of Business Organizations (commonly referred to as the McNulty Memo), http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf (last visited Mar. 17, 2007).

²¹ Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007), available at <http://www.govtrack.us/data/us/bills.text/110/s/s186.pdf>.

²² As of the date of this article, this imagined fact had not yet occurred. See *supra* note 1.

²³ *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003).

²⁴ See Ellen S. Podgor, *A New Dimension to the Prosecution of White Collar Crime: Enforcing Extraterritorial Social Harms*, 37 MCGEORGE L. REV. 83 (2006) (providing a detailed discussion of the *McNab* case).

²⁵ 16 U.S.C. § 3372 (2003).

guess why they sent the fax, as the fax said that one of McNab's vessels would arrive in Alabama on February 5th with lobsters that were undersized. The fax actually included language telling the agency that Honduran law "requir[ed] that lobsters be packed in boxes for export."²⁶

The Eleventh Circuit decision issued back then tells us that upon receiving the fax the National Marine Fisheries Service "consulted with" the director general of the fish and agriculture department of Honduras. Was this legal, or wasn't it, that was the question. This administrative agency in Honduras answered the questions saying that "yes"—this was a violation of Honduran law, and it is very clear that the U.S. agents, based upon this correspondence from the Honduras administrative agency, believed that this was a violation of Honduran law.

What happened next was a forty-seven count indictment against David McNab and three others. The essence of the case revolved around the alleged violation of the Lacey Act.

At David McNab's trial, the government presented the testimony of a secretary general from the Honduran administrative agency on fisheries and agriculture who said that it was against Honduran law to ship lobsters tails under a 5.5 inch size, and that the lobsters had to be shipped in cardboard boxes.

The result—David McNab and the other defendants were convicted.

They were convicted of *smuggling*—for sending the lobsters in clear plastic bags as opposed to being in boxes and violating customs laws because it was against Honduran law. And well, they were commercial dealers and the lobsters were paid for with money. And since they deposited the money in a bank—it became money laundering. Back in those days it was common to tack on money laundering charges for white collar cases.²⁷

And they threw in conspiracy too, as there was more than one person alleged to be violating the Lacey Act.

Does this sound kind of strange?

I haven't even gotten to the strangest part.

After the conviction, the Attorney General of Honduras filed with the Eleventh Circuit Court of Appeals a declaration—

You see, these supposed regulations in Honduras were not really the law in Honduras. The declaration of Sergio Zavala Leiva, Attorney General of the Republic of Honduras, states in part:

Unfortunately, most of the documents that were used by the court to inform itself about the proper interpretation of the law of Honduras, which documents were furnished by the department of justice of the United States, present among other things, some of the following

²⁶ *McNab*, 331 F.3d at 1232.

²⁷ See Teresa E. Adams, Note, *Tacking on Money Laundering Charges to White Collar Crimes: What did Congress Intend, and what are the Courts Doing?*, 17 GA. ST. U. L. REV. 531 (2000).

problems—1) they come from functionaries without powers to issue them; 2) they failed to follow the procedure set forth in the laws of Honduras; 3) they were misrepresented before the court of the United States, since, under the laws of Honduras, they do not have legal effect because they do not express the will of the state.²⁸

The Eleventh Circuit affirmed the conviction in a 2-1 decision. The majority stated: “[W]e conclude that the Honduran laws used as the underlying predicates for the defendants’ convictions fall within the scope of the Lacey Act and were valid and legally binding during the time period covered by the indictment.”²⁹

The majority termed this a situation where the Honduran government had “‘shifted’ its position.” Justice Fay in his dissent in the Eleventh Circuit, found it very clear that the Honduran courts had spoken and that the foreign law—the law in Honduras—that was supposed to be the basis of the Lacey Act violation plain and simply was not the law of Honduras. Judge Fay stated: “The so-called ‘shift in position’ is the result of lawful litigation within the courts of a foreign nation. I think we would be shocked should the tables be reversed and a foreign nation simply ignored one of our court rulings because it caused some frustration or inconvenience.”³⁰

The Supreme Court did not accept certiorari on this case and David McNab went to jail.

Someone could have stopped McNab from going to jail. The same person who headed the office that prosecuted this case, headed the office that opposed the appeal in this case. That man was named John Ashcroft.

On April 24, 2003, the Attorney General of Honduras wrote a letter to then Attorney General John Ashcroft. Basically he thanked the government of the United States for trying to enforce the laws of Honduras through the Lacey Act. But he stated that the bottom line was that this wasn’t a violation of Honduran laws. The Attorney General of Honduras asked John Ashcroft to correct this situation. He stated: “[W]e consider that the prosecution failed to recognize on that occasion the capacity of the government of Honduras to interpret its own laws and took no heed of the official processes of the Republic of Honduras to certify in court the validity and interpretation of its own legal standards.”

The cartoon in the newspaper *Tiempo* in Honduras had Uncle Sam pointing a finger at McNab saying—I know the laws of Honduras and McNab saying but I am innocent under the laws of Honduras. And Uncle Sam then saying—what do they know about their laws?

No one ever bothered to consider that when the U.S. started prosecuting

²⁸ See Letter from Sergio Zavala Leiva, Attorney General of Honduras, to John Ashcroft, United States Attorney General (Apr. 24, 2003) (on file with the author).

²⁹ *McNab*, 331 F.3d at 1247.

³⁰ *McNab*, 331 F.3d at 1251 (Fay, J., dissenting).

individuals outside the U.S. for crimes committed outside this country they were opening the doors to the reverse happening. Yes, they were opening the door to other countries coming into the U.S. to prosecute individuals here for crimes committed in other countries.

And while everyone was busy wasting their time with these trivial events, a lot was happening in the criminal world. Criminals were busy at work with their technology and identity theft, and technology crimes were on the rise. And quite frankly, not enough was being done to stop it.

So my advice to you Chelsea Clinton is—don't sweat the small stuff. You have a lot of catching up to do to prosecute crimes related to the Internet. Most of all you need to start setting up programs to educate the youth of tomorrow about what is right and wrong in computer use. And business schools need to have a required ethics course, just like the law schools. You do need to focus on values—but values like honesty, ethical behavior, concern for others, and respect.

I am 87 years old. I write to you today with a pencil and paper—tools that no one now uses. And I am writing this letter to you, a woman who can really make a difference in helping this country keep pace with existing and forthcoming criminal conduct. I wish you the best and give my best to your mom and dad.

Signed—Ellen S. Podgor, professor emeritus, Stetson University College of Law