

**June 1, 2005**

SUPREME COURT UNANIMOUSLY OVERTURNS ARTHUR ANDERSEN CONVICTION

(Arthur Andersen LLP v. United States)

On May 31, 2005, the U.S. Supreme Court unanimously overturned the criminal conviction of *Arthur Andersen LLP v. United States*. Andersen was convicted on one count of witness tampering when senior company officials merely requested employees to comply with Andersen's lawful document retention policy. Documents were shredded that were later sought by the Securities and Exchange Commission in the Enron investigation. In an opinion written by Chief Justice Rehnquist, the Court held that contrary to the position of the Justice Department, the jury instructions failed to require a finding that Andersen had criminal intent to violate the law. Andersen was convicted by a jury based on instructions that required conviction even if Andersen honestly and sincerely believed that following the company's document retention policy was lawful.

“The Court sent a stinging rebuke to the Department of Justice for its abusive prosecutorial conduct,” said Paul Kamenar, WLF's Senior Executive Counsel. “Enforcing vague criminal statutes and regulations causes damage to the economy, employees, and shareholders of unfairly targeted companies,” Kamenar added.

The Justice Department responded to the decision with a statement that said the Department believed that the “destruction of documents in anticipation of an investigation by the Securities and Exchange Commission violated the law.” However, Andersen was never charged with the destruction of any document because the law clearly did not cover the situation where there was no ongoing agency proceeding at the time. That is why the Department of Justice came up with a novel theory of charging Andersen with witness tampering when its supervisors merely requested employees to follow Andersen's document retention policy.

During oral argument on April 27, 2005, the Assistant Solicitor General readily admitted to the justices that while it was perfectly lawful for any Andersen employee to destroy company documents, it was somehow criminal for a supervisor to remind employees to follow the document retention policy. The Justice Department's response yesterday also indicated that they might retry the case.

The Justice Department's statement that it thought destroying documents was unlawful when, in fact, it was not, is not only remarkable, but also makes it clear that Andersen should never have been prosecuted in the first place. “Instead of deciding whether to retry the case and

waste more taxpayers' money, the Justice Department should apologize to Arthur Andersen and its 28,000 employees who lost their jobs due to its misguided prosecution,” Kamenar added.

The Washington Legal Foundation (WLF) had filed a brief in the case on behalf of itself and the U.S. Chamber of Commerce, both at the initial certiorari stage and on the merits. At the petition stage, the Justice Department was so arrogant about the case that it initially filed a waiver with the Supreme Court rather than respond to Andersen's petition with a brief. The Court subsequently ordered the Solicitor General to respond. The Court then granted review and received additional briefs on the merits from WLF in the case. The case was closely watched by the business community because an adverse ruling would subject thousands of businesses to criminal prosecution and witness tampering merely for failing to retain documents that may be subject to any future government agency investigation.

Subsequent enacted amendments to the Sarbanes-Oxley law appear to make it unlawful to destroy documents even though no agency proceeding has been instituted. However, the Court's *Andersen* decision suggests that there has to be a “nexus” to a concrete proceeding; otherwise, there may be due process violations for criminalizing otherwise innocent conduct. In any event, the decision seems to confirm that company lawyers who advise their clients to follow a company's lawful document retention policy would not be liable for criminal prosecution for witness tampering.

WLF's briefs were filed with the *pro bono* assistance of Carter Phillips, Virginia A. Seitz, and Eamon P. Joyce of Sidley Austin Brown & Wood LLP in Washington, D.C.

WLF has litigated numerous cases opposing overcriminalization of business activity, particularly where federal prosecutors file criminal charges against a company and its owners and managers for minor regulatory infractions without showing the necessary criminal intent.

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For further information, contact WLF Senior Executive Counsel Paul Kamenar at 202-588-0302. WLF's briefs in the Arthur Andersen case are posted on its website at www.wlf.org.