

## Should Trump's Foreign Policy Affect Criminal Prosecutions?

By Robert J. Anello and  
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Business has gone global. So too has business-related crime. In the interconnected business environment, white-collar criminal investigations and prosecutions frequently present cross-border issues and affect U.S. foreign relations. Indeed, in some recent high-profile cases, the Trump administration has implied that it sees law enforcement — or the lack of it — as one of the tools in its foreign policy arsenal. Allowing these foreign relations implications to influence the prosecutions of individuals would seem to violate our notions of fairness and due process. Because corporate criminal enforcement, however, is far more regulatory or policy-oriented in nature, foreign relations perhaps can be seen as a legitimate consideration in such criminal prosecution decisions.

Foreign Corrupt Practices Act (FCPA) investigations, sanctions enforcement, and prosecution of economic espionage by design deal with international issues. Even for cases brought under laws that do not necessarily implicate cross-border issues, complex fraud (LIBOR and FX manipulation conspiracies), banking crimes, and money laundering enforcement, for-

foreign relations may be implicated because of the nationality or location of the defendants. Because enforcement of the federal criminal code abroad or against foreign individuals and entities has an effect on foreign states, such cases have an impact on the relationship between the United States and other countries. For example, the recent arrest of Meng Wanzhou, the CFO of China's Huawei and daughter of Huawei's influential founder, made international headlines. Charges against Meng, Huawei, and ZTE, another Chinese telecommunications equipment maker, have significantly affected America's vital and delicate relationship with China.

President Trump has linked these cases directly to the ongoing trade negotiation with China, asserting that Huawei and ZTE may be included in the trade deal and that he would consult with Attorney General William P. Barr before acting. This suggestion — that criminal prosecutions may be influenced by U.S. foreign policy interests — was immediately criticized by some legal experts. *See, e.g.*, Phillip Bantz, "What Happens If Trump Intervenes in the DOJ's Case Against Huawei?," *Corporate Counsel* (Dec. 12, 2018) (<http://bit.ly/2UNjGMO>) (arguing that President Trump intervening in the Huawei and Meng prosecutions would send a bad message to global businesses). Unfortunately, President Trump and critics have failed to tease out the difference between foreign policy influencing the prosecution of a living, breathing human being like

Meng and those of state-created corporate entities like Huawei and ZTE. Comparing the impact of the Executive's intervention in each of these prosecutions, helps illustrate why individual and corporate prosecutions should be treated distinctly.

### INDIVIDUAL V. CORPORATE RIGHTS

Individual criminal prosecutions implicate life and liberty interests that are strictly protected by due process. Some due process rights protect human dignity — such as double jeopardy protections which allow individuals to avoid the "continuing state of anxiety and insecurity" if they had to fear a second trial for the same conduct. *Green v. United States*, 355 U.S. 184, 187 (1957). Similarly, due process protections enhance society's trust of the criminal justice system. Society's knowledge that criminal defendants are treated evenhandedly strengthens their belief in and support for the rule of law. The opposite — providing disparate treatment to the wealthy, powerful, or well-connected within the criminal justice system — undermines the rule of law and societal confidence in criminal justice. In the same vein, utilizing the criminal justice system to punish individuals — or to forgive them — because of political considerations strikes most Americans as fundamentally unfair. This rejection of political prosecutions is reflected in extradition treaties that allow the United States and its treaty partners to deny extradition requests for "political offenses." President Trump's suggestion that Meng's prosecution may

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be a part of the political negotiations could lead to Canada rejecting the U.S.'s extradition request. As Harvard Law Professor Mark Wu stated: "Any perception that her arrest is meant to offer political leverage in upcoming trade negotiations could jeopardise the success of the ongoing extradition hearings in Canadian court."

Although corporations in the U.S. enjoy some of the same due process protections as individuals, these state-created business entities do not share all of them. For example, human dignity rights like the right against self-incrimination, which preserves autonomy, does not extend to corporations. *See, e.g., Bellis v. United States*, 417 U. S. 85, 89–90 (1974) ("The privilege against compulsory self-incrimination should be 'limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.'" (quoting *United States v. White*, 322 U.S. 694, 701 (1944))). Whereas constitutional rights are inalienable for the individual, scholars have argued that whether such rights should apply to corporations needs to be part of a balancing determination. *See, e.g.,* Peter J. Henning, "The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions," 63 TENN. L. REV. 793, 801 (1996) ("The initial determination of whether a constitutional right should apply to a corporate criminal defendant should be based on the fundamental premise that the corporation's sole interest is protection from abuse of the government's power to investigate, prosecute, and sanction illegal conduct."). Henning argued that courts must "acknowledge[] that a corporation has no a priori claim to a specific constitutional right, and its interests can be outweighed by [other governmental necessities] when the potential for abuse is not significant." *Id.* In essence, corporations are a product of the law and deserve only the protec-

tions that the law affords them.

Corporations are artificial entities given life and regulated by the law. The purposes of corporate criminal prosecutions are different from the purposes of individual prosecutions. Although the United States has made the decision to subject corporations to the criminal laws, other countries such as Germany, Sweden, and Argentina do not subject legal entities to the general criminal laws. Instead, corporate misconduct is regulated through civil administrative enforcement. Yet, whether the applicable laws and processes are criminal (as in the U.S. and other common law countries) or administrative (as in many civil law countries in Europe and Latin America), the enforcement is simply a way to regulate corporate conduct and, through that, commerce.

For corporations, a criminal investigation and prosecution can be devastating, but — other than perhaps the splashy headlines and the amounts of Congressionally-created fines — a criminal prosecution does not differ significantly from a regulatory proceeding. No meaningful distinctions can be drawn between the way a company may be punished as part of being held criminally liable for its conduct and the sanctions that may be applied by a regulatory authority if Congress so decides. A company cannot go to jail. Thus, the criminal prosecution of a company is simply another manifestation of our regulatory structure. The laws being enforced against corporations are ultimately solely economic in nature and result predominantly in a financial penalty. The crimes are more typically *malum prohibitum*, bad because they are prohibited, rather than *malum in se*, bad in themselves. Criminal antitrust, securities, and tax laws define *malum prohibitum* offenses that control the way commerce is conducted. These factors make it more reasonable to consider concerns, such as foreign policy implications, when deciding on corporate prosecutions.

## PRESIDENT TRUMP'S WILLINGNESS TO MIX CRIMINAL PROSECUTIONS AND FOREIGN POLICY

Meng's arrest during a layover at Vancouver International Airport by Canadian authorities acting on a U.S. warrant pursuant to charges filed in the Eastern District of New York (EDNY) made front-page headlines in the U.S. and China. Huawei was charged alongside with Meng in EDNY and, more recently, was also separately charged in the Western District of Washington with attempting to steal trade secrets from T-Mobile, to which it was supplying phones.

In 2017, ZTE plead guilty to conspiracy to unlawfully export electronics to Iran and North Korea in violation of U.S. sanctions, to obstruction of justice, and to making false statements to federal investigators. ZTE was fined \$287 million for its criminal conduct. Its criminal fine, forfeiture, and civil fines, including a fine for violating the settlement terms, totaled over \$2 billion.

When President Trump suggested he might intervene in Meng's case, competing headlines blared on CNN ("Trump sets 'terrible precedent' by crossing red line on Huawei case") and FOXBusiness ("Trump has authority to pardon Huawei CFO to close China trade deal: Judge Napolitano"). John Demers, Assistant Attorney General for National Security, was forced to weigh in at a Senate hearing, stating that the Justice Department does "law enforcement. We don't do trade." He added: "We follow the facts and we vindicate violations of US law. That's what we're doing when we bring those cases, and I think it's very important for other countries to understand that we are not a tool of trade when we bring the cases." Demers' statements revealed that the Justice Department found it important to be perceived as evenhanded. He asserted that Meng's prosecution was the Justice Department's independent decision, not the result of an order from the President.

President Trump, however, has been willing to combine foreign policy and U.S. criminal prosecutions as evidenced by the fact that other countries have discussed U.S. prosecutions and investigations with President Trump. According to Turkish President Tayyip Erdogan, he and President Trump discussed a Turkish state-owned institution under U.S. criminal investigation. This discussion occurred within weeks of Turkey's release of an American pastor who had been held on terrorism charges.

### **FOREIGN POLICY SHOULD NOT INFLUENCE PROSECUTIONS OF INDIVIDUALS**

The public has an interest in ensuring — and typically insists — that all defendants are treated fairly — that they neither receive a benefit nor suffer a detriment due to influences outside of the case and their individual characteristics. The State Department stepping in to dictate or even influence the result of an individual's criminal prosecution would distort our criminal justice system. Such interference would not only infringe upon the individual's due process rights, but also would undermine our confidence in the impartial administration of justice. The disfavor of such improper interference is reflected in the constitutional prohibition on bills of attainder, laws that declare individuals guilty of a crime. The structure of the Constitution makes clear that although the executive branch enforces the law, it must do so impartially, and guilt or innocence must be assigned only by an independent factfinder applying the law evenhandedly.

Interference by the Executive in individual criminal prosecutions not only raises significant due process concerns, but also could (rightly) undermine the public's faith in the independence and fairness of the criminal justice system. Thus, the State Department should not step in on decisions whether a foreign national is prosecuted or pardoned even though such

prosecutions can have a significant effect on U.S. foreign relations. *See, e.g.,* Robert Williams & Preston Lim, "Huawei Arrest Raises Thorny Questions of Law Enforcement and Foreign Policy," *LAWFARE* (Dec. 7, 2018 11:06 AM) (<http://bit.ly/2Gv42vu>) (considering "the extent to which federal law enforcement decisions may or may not be walled off from broader foreign policy considerations," and concluding that "[t]he arrest of Meng undoubtedly complicates the administration's efforts to achieve its objectives in bilateral trade negotiations").

The rule of law requires steadfastness in the administration of justice as any deviation, no matter how pressing the circumstances, undermines confidence in the system. As William Reinsch, the Scholl chair for international business at the Center for Strategic and International Studies, has observed, because the United States is committed to the rule of law, "[o]ur history is that things like [the Meng prosecution] proceed through the criminal justice system and justice is blind. Trump is basically saying he might interfere with this process, which is a terrible precedent."

Not only would politicizing Meng's arrest set a terrible precedent that would undermine the rule of law, it also encourages bad behavior by less-responsible global actors. On the international stage, such interference could be seen by foreign states as confirming their beliefs that the U.S. criminal justice system is susceptible to foreign policy interests and that hostage-taking disguised as a criminal prosecution is an appropriate and effective way to influence U.S. policy. Linking prosecutions like Meng's to the accomplishment of foreign policy goals, rather than simply the administration of justice, encourages other countries to do the same.

The perception that Meng's arrest is geopolitically motivated or that her prosecution can be influenced by geopolitics leads to the type of behavior we see regularly from China — the ar-

rest of two Canadians in response to Canada detaining Meng. Not dissimilarly, after Su Bin, a Chinese national living in Canada was arrested pursuant to U.S. charges of cyberespionage, China arrested and held for over two years Julia and Kevin Garratt, Canadian Christian aid workers. The United States should avoid encouraging such actions by not stooping to this tit-for-tat behavior.

The arrest and prosecution of foreign nationals is a repeat-play game. Oftentimes, this game is played with countries that have poor human rights records and where we do not place much faith in their domestic criminal justice systems. Invariably, countries like China, Russia, and Turkey may be seen as employing arrests and prosecutions to influence the United States rather than to seek justice. Such reprisals would turn human beings into bargaining chips. Both the due process considerations of our judicial system and the foreign policy implications counsel against allowing extrajudicial interference in the prosecution of individual criminal defendants.

Whereas the State Department should not interfere with apolitical criminal prosecutions within the United States, human rights concerns demand the opposite when an individual is treated as a political pawn. When a regime imprisons and prosecutes an individual for political purposes, the United States and other countries that value the rule of law must use their geopolitical muscle to halt such behavior. Consequently, when North Korea imprisoned Otto Warmbier, it was incumbent on the United States, as well as other nations, to apply political pressure to demand his release. Unfortunately, for Mr. Warmbier and his family, it was too little, too late.

### **THE IMPACT OF CRIMINAL PROSECUTION OF MULTINATIONAL CORPORATIONS ON FOREIGN RELATIONS**

Although criminal prosecutions of individuals — or declinations — can

have an impact on America's relationships with other states, criminal prosecutions of multinational corporations are vastly more likely to have such an impact and the impact is typically significantly greater. The Volkswagen diesel emission prosecution had a major effect on U.S.-German relations by touching various German constituents — shareholders, employees, pensioners, suppliers, customers, and German voters. In August 2017, the German Finance Ministry called the emissions scandal a risk to Germany's economy and said that it was impossible to quantify its impact. German politicians became tougher on their own auto industry and supported tougher international regulations because most German voters concluded that the German government had been too lenient with the auto industry.

Whether or not the United States allows foreign policy to influence criminal prosecutions, it likely will be perceived to be doing so even by its closest allies. For example, in 2012 when he was mayor of London, Boris Johnson questioned the motivation for the investigation of Standard Chartered's violation of sanctions against Iran. He said, "[y]ou can't help wondering whether all this beating up of British banks and bankers is starting to shade into protectionism; and you can't help thinking it might actually be at least partly motivated by jealousy of London's financial sector — a simple desire to knock a rival." Prosecutions of large, multinational corporations implicate foreign policy suggesting that the State Department's concerns should be considered when pursuing such investigations.

### FOREIGN POLICY CAN IMPACT CORPORATE CRIMINAL PROSECUTIONS

The judicial system, perhaps rightfully, can take its lead from the State Department on matters relevant to U.S. foreign policy. *See, e.g., Republic of Panama v. Republic Nat. Bank of New York*, 681 F. Supp. 1066, 1070–71 (S.D.N.Y. 1988) (holding that where

two governments claim to represent a foreign state, the State Department's "recognition of one is conclusive"). Furthermore, in determining whether to prosecute and how to resolve charges against corporations, prosecutors should consider the impact on innocent third parties. In fact, collateral consequences are one of the Filip factors prosecutors consider when deciding whether and how to proceed in a criminal prosecution of a corporation. The Justice Department's United States Attorneys' Manual advises that "[p]rosecutors may consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases."

Allowing foreign policy to influence corporate criminal prosecutions is simply a combination of these two accepted influences — state department expertise and consideration of collateral consequences. The State Department is in a good position to judge both the collateral consequences of a criminal prosecution on other countries and their citizens as well as the collateral consequences of such prosecutions on U.S. foreign relations and to advise the Department of Justice accordingly.

Foreign policy, like all politically-made policy, is acceptable as the impetus for regulatory action. Because the invocation of criminal law against corporations is such regulatory action, foreign policy is a valid consideration in whether and how to proceed with a criminal prosecution of a company.

The prosecutions of Huawei and ZTE do not present the same concerns as the prosecution of Meng. First, in the case of ZTE, the biggest threat was not from criminal sanctions but from a regulatory action. "ZTE's future began looking dubious in mid-April, when the Commerce Department banned the company from buying any American products for seven years as punishment for lying about efforts to resolve

the issues that led to the sanctions violation. The ban threatened to cripple ZTE's global telecommunications business and put Chinese employees out of work, a huge embarrassment for President Xi Jinping of China." Ana Swanson & Kenneth P. Vogel, "Faced with Crippling Sanctions, ZTE Loaded Up on Lobbyists," *N.Y. Times*, Aug. 2, 2018, at A9. Second, even though there may be a tit-for-tat response, as many have predicted, with Chinese regulators penalizing American companies as retribution for the prosecution of Huawei, such regulatory harm in China is part of the risk American companies run by doing business in China.

Although the prosecution of Meng and Huawei are related, they should be handled differently when it comes to allowing foreign policy to influence prosecutorial decisions. The President and State Department should not interfere with individual prosecutions as doing so fundamentally intrudes on constitutional rights, infringes due process, and leads to the treatment of individuals as mere bargaining chips. On the other hand, because the due process rights of corporations do not have the same underpinnings and because corporate criminal prosecutions are more akin to regulatory enforcement, foreign policy considerations can and should be considered in prosecutorial decisions.

