Cato Looks at DOJ Deals

December 4, 2014
By Robert Feinberg

The Cato Institute hosted a presentation Dec. 3 of the new book Too Big to Jail: How Prosecutors Compromise with Corporations, showcasing the remarkable scholarship of its author, Brandon Garrett, a professor at the University of Virginia Law School, with comments by another expert who has done prodigious work in the field, James Copland, senior fellow and director of the Center for Legal Policy of the Manhattan Institute.

The panel was moderated by Gabriel Latner, legal associate at Cato, who noted that prosecutors have been making increasing use of plea agreements with corporations accused of criminal wrongdoing, providing that the corporations will not be prosecuted, or prosecution will be deferred, in return for payment of fines and promises to take steps to curb the alleged behavior in the future.

Until Garrett took advantage of the Freedom of Information Act to assemble a massive database of these agreements, very little useful research had been done. Fittingly the panel offered experts who approached the topic from somewhat opposing vantage points but whose views ultimately overlapped.

Garrett began his talk by recounting the scene of Reinhard Siekaczek, an official of Siemens AG, one of the largest government contractors in the world, greeting arresting agents with the words, "I've been expecting you." The suspect was accused of acting as the "banker" for more than $1 billion in bribes paid to secure contracts throughout the world. The company pled guilty and paid $450 million in fines to U.S. authorities, part of a total of $1.6 billion paid for alleged violations of the Foreign Corrupt Practices Act.

As part of the deal, Siemens agreed to hire not one, but two corporate monitors, one for Germany and one for the U.S. With a cynical tone Garrett reported that the new leadership of Siemens has lauded the work of the monitors and given them the most prominent space at its headquarters, evidently to dramatize the transformation of the company.

Garrett found that plea agreements were virtually unknown through the first 204 years of American history. Then in the next decade there were a mere 17, but in the last decade the number has spiked to more than 300, with the largest fines paid by foreign corporations, with critics contending that the nexus with the U.S. is very tenuous, such as payment of a bribe in dollars that pass through the U.S. banking system. Garrett found that employees of target firms were only charged in 35 percent of cases, and hardly any CEOs have gone to jail.

Finally, Garrett used the term "cosmetic compliance" to describe conditions that use vague

language to prescribe reforms corporations are supposed to adopt and only rarely provide for audits to determine whether reforms are actually taking place. Increasingly such auditing involves the hiring of prominent former prosecutors, which these experts agreed presents an issue of conflicts of interest as prosecutors see how much their former colleagues are making and how much fun they say they are having.

Landmark documents in this field are the so-called "Thompson memo" written by Larry Thompson when he was at the Justice Department to set forth the factors that went into the decision to prosecute Arthur Andersen in the Enron scandal, which ultimately led to the dissolution of the firm.

Perhaps as a reaction, Attorney General Eric Holder has opined that the economic impact of prosecutions needed to be taken into account, and he had to walk back this idea in response to adverse press reaction.

Copland raised four questions about the plea agreements: 1) the nature of liability for the conduct of corporations, which are artificial entities that must act through agents; 2) the broad extension of U.S. authority to foreign jurisdictions; 3) the appropriateness of prosecuting drug companies for "off-label" uses where the companies have truthfully disclosed the risks; and 4) an array of "rule of law" issues raised by the opportunity for prosecutors to profit when they leave government service and go to work for the defense bar.

The panelists agreed that more transparency is needed as to the nature of these agreements. A lively debate is bound to continue over whether corporations are being unfairly targeted or they are getting away cheaply by paying fines they can charge to the cost of doing business as long as they pay tribute to prominent lawyers Copland derided as "English majors with law degrees."