

Takeaways From White Collar Criminal Enforcement In 2021

By **Brook Dooley, Eric MacMichael, Nicholas Goldberg and Cody Gray** (January 13, 2022, 5:51 PM EST)

With the verdict in the high-profile trial of Theranos founder Elizabeth Holmes, it is time to close the book on white collar criminal enforcement in 2021 and take a look back.

By the numbers, white collar criminal prosecutions in 2021 were up from 2020, when COVID-19 limited the government's ability to bring cases, but down compared to long-term trends. Indeed, white collar prosecutions in fiscal year 2021 were down approximately 25% from five years ago and down approximately 50% from 2011 and 2001.^[1]

Even so, practitioners had plenty to pay attention to in 2021, including the Holmes and Varsity Blues trials, the new administration's enforcement priorities, and the continuing effects of the COVID-19 pandemic. Below we look back at the biggest stories of 2021 in white collar crime.

High-Profile Trials

Theranos and Elizabeth Holmes

The long-awaited trial of Theranos' Holmes was the white collar trial of the year.^[2] Holmes faced 11 counts of wire fraud and conspiracy to commit wire fraud relating to schemes to defraud Theranos investors and patients.

During the three-month trial, the government called 29 witnesses in an effort to prove that Holmes knowingly misled investors and patients about her company's blood-testing capabilities in order to raise money.

Among other misstatements, the government alleged that Holmes overstated the technical capabilities of Theranos' analyzer, gave misleading demonstrations of its technology, misled investors about the company's financial stability, and misrepresented the company's relationships with pharmaceutical companies, Walgreens Co. and the U.S. Department of Defense.

The defense made the risky — but perhaps necessary — decision to call Holmes to testify in her own defense. Altogether, Holmes spent seven days on the witness stand defending her actions as well-intentioned and providing context to the government's evidence.

Holmes also pointed the finger at Theranos' former chief operating officer Ramesh "Sunny" Balwani who will be tried separately this year. During highly emotional testimony, Holmes also accused Balwani of controlling and sexually abusing her throughout their decadelong relationship.

Holmes' gamble to testify in her own defense did not completely pay off. After seven days of deliberations, the jury convicted her on one count of conspiracy to defraud investors and three counts of wire fraud for defrauding investors.

The jury acquitted Holmes of charges she defrauded patients and hung on three counts of wire fraud tied to statements made by Holmes to investors before problems began to mount at Theranos. Holmes' team has promised an appeal.

Varsity Blues



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The long-running Varsity Blues investigation was finally presented to a jury in 2021.[3] On Oct. 8, 2021, a jury convicted Gamal Abdelaziz and John Wilson of conspiring to get their children into top universities as recruited athletes by using fake profiles and paying hundreds of thousands of dollars in bribes to university officials.

Abdelaziz, a former casino manager, and Wilson, a hedge fund founder, were the first of the 57 people charged in the high-profile college admissions scandal to proceed to trial. The trial spanned 11 days, and the jury of six men and six women deliberated for approximately 10 hours before finding the defendants guilty on all charges.

The government did not call the scheme's mastermind William "Rick" Singer to the stand. Instead, the prosecution relied heavily on the defendants' statements captured in tape-recorded phone calls with Singer and emails involving the defendants and other parents. In one particularly damaging tape, the jury heard Abdelaziz say "I love it" when Singer told him about how good his daughter's fake basketball profile turned out.

The defense countered by pointing the finger at Singer, arguing that he was a con man who misled the defendants and concealed critical parts of the scheme, including where the parents' money was going.

The parents also focused on notes that Singer took on his phone shortly after he was first arrested claiming that government agents were loud and abrasive with him, and forced him to "tell a fib" about what he had told the parents on the critical question of where the money was going.

The defendants' appeal will raise interesting and novel legal questions, including whether admissions slots constitute property for purposes of the wire fraud statutes and whether a payment to the alleged victim of the crime — in this case, the colleges — can constitute bribery.

Biden Administration

In 2021, practitioners watched as President Joe Biden's administration unveiled a more aggressive approach to white collar criminal enforcement.

Deputy Attorney General Lisa Monaco set the tone in an October speech to the American Bar Association's National Institute on White Collar Crime, declaring that it is unambiguously the administration's first priority to prosecute the "individuals who commit and profit from corporate malfeasance." [4]

Monaco emphasized that the fear of losing should not deter prosecutors and that they should "be bold in holding accountable those who commit criminal conduct."

At the same time, the U.S. Department of Justice announced three changes to its policies regarding corporate crime.

First, the DOJ restored prior guidance requiring that, to receive cooperation credit, corporations under investigation must identify all individuals involved in potential misconduct, regardless of their position, status or seniority.

Under the prior administration, companies were only required to disclose information regarding individuals the company determined to be substantially involved in potential wrongdoing.

Second, the DOJ declared that all prior misconduct — including overseas conduct — must be evaluated when prosecutors are considering possible resolutions for companies under criminal investigation. No longer will the DOJ look only to prior misconduct like the conduct under investigation.

Third, the DOJ rescinded prior guidance that suggested that corporate monitors would be the exception and not the rule. Prosecutors are now free to require the imposition of monitors to supervise companies' compliance with plea, nonprosecution and deferred prosecution agreements.

The Biden administration also announced several enforcement priorities.

Corruption

In June, Biden declared that countering corruption is a core U.S. national security interest [5] and in December, the administration published the U.S. Strategy on Countering Corruption. [6] The administration will be aided in its efforts by the Anti-Money Laundering Act of 2020, which became effective on Jan. 1.

Among other provisions, the act expands the authority of the DOJ and the U.S. Department of the Treasury to subpoena records from foreign banks that maintain correspondent accounts in the U.S.

Cybersecurity and Cryptocurrency

With events like the ransomware attack on Colonial Pipeline Co., cybersecurity was in the news in 2021 and the Biden administration has made prosecuting cybercrime a priority. Among other measures, the DOJ announced it will use the False Claims Act to pursue cybersecurity-related fraud by government contractors. [7]

At the same time, the DOJ announced the creation of a National Cryptocurrency Enforcement Team to investigate and prosecute misuses of cryptocurrency, including money laundering crimes conducted using virtual currency exchanges.[8]

U.S. Securities and Exchange Commission Chairman Gary Gensler has also made it clear that cryptocurrency is a high priority for the SEC in the Biden administration, declaring that "Right now, we just don't have enough investor protection in crypto. Frankly ... it's more like the Wild West." [9]

Antitrust

The Biden administration has also made antitrust enforcement a top priority. Indeed, 2021 was a busy year for criminal enforcement of the Sherman Act.

In November 2021, the DOJ scored a victory in *U.S. v. Jindal*, when the U.S. District Court for the Eastern District of Texas held for the first time that wage-fixing constitutes a per se antitrust violation that may be charged criminally.[10]

The DOJ indicted two employees of an unnamed Texas healthcare staffing company, alleging that they conspired with competitors to share pay rates for physical therapists.[11] The court denied defendants' motion to dismiss, holding that the alleged wage-fixing agreements were tantamount to price fixing and, therefore, per se illegal.[12]

The DOJ also brought the first criminal indictments related to so-called no-poach agreements in 2021 in *U.S. v. Surgical Care Affiliates LLC* in the U.S. District Court for the Northern District of Texas, *U.S. v. Ryan Hee* in the U.S. District Court for the District of Nevada, and *U.S. v. DaVita Inc.* in the U.S. District Court for the Central District of California.[13]

The DOJ alleges that companies and their employees participated in a conspiracy not to solicit each other's employees. The defendants moved to dismiss, arguing that there is no consensus that agreements not to solicit employees are anticompetitive. Those motions remain pending, but the court's ruling that wage-fixing may be criminally charged as a per se antitrust violation bodes well for DOJ in the no-poach cases.

2021 ended with a setback for the DOJ in its prosecution of 10 poultry executives accused of participating in a price-fixing conspiracy in *U.S. v. Penn* in the U.S. District Court for the District of Colorado. On Dec. 16, 2021, after a seven-week trial, a federal judge in Colorado in the U.S. Court of Appeals for the Sixth Circuit declared a mistrial after jurors deadlocked on the government's charges.[14]

A retrial is set for Feb. 22, 2022.[15]

Trump

Even as the Biden administration was announcing its white collar policy priorities, former President Donald Trump and those in his orbit remained firmly planted in the headlines in 2021.

Jan. 6, 2021, Investigation

The U.S. House of Representatives' Select Committee to Investigate the Jan. 6 Attack on the U.S. Capitol has already yielded one prosecution and may yield more.

In November, former Trump senior adviser Steve Bannon was charged with two counts of criminal contempt for defying a subpoena from the committee. Bannon refused to comply with the subpoena, citing Trump's executive privilege.

In December, the committee voted to hold former White House chief of staff Mark Meadows in contempt after

he, too, defied the committee's subpoena. The House committee has maintained that executive privilege is in the sole purview of the current president, not former ones, and Biden has waived executive privilege in both cases.

The DOJ is still weighing potential criminal contempt charges against Meadows.

New York Attorney General Investigations

Former Manhattan District Attorney Cyrus Vance Jr.'s long-running investigation of the Trump Organization Inc. gained steam in 2021.

In February, Vance obtained the former president's tax returns, after a yearslong effort by Trump to shield them from scrutiny. In June, Vance's office indicted the Trump Organization and chief financial officer Allen Weisselberg on tax fraud, conspiracy, grand larceny and other charges stemming from an alleged 15-year scheme to evade taxes on perks and other executive compensation.[16]

Meanwhile, Trump filed a lawsuit to block New York Attorney General Letitia James' parallel probe of his organization's business practices.[17]

Trump alleges that the New York Attorney General's Office has violated his rights under the first, fourth and 14th Amendments to the Constitution, and is an abuse of process because it is a "thinly-veiled effort to publicly malign Trump and his associates."

Trump's lawsuit faces long odds and James has stated that her investigation will continue undeterred.[18]

Durham Investigation

In September, special counsel John Durham indicted former Perkins Coie LLP partner Michael Sussmann for making a false statement to the FBI in the final days of the 2016 presidential campaign.[19]

The indictment alleges that Sussmann informed then-FBI general counsel James Baker about a secret channel between the Trump Organization and a Russian bank, triggering widespread media coverage and an FBI investigation.

But, according to the indictment, Sussmann falsely told Baker that he was not acting on behalf of any client when he was actually acting on behalf of the Hillary Clinton campaign and an unnamed tech executive.

COVID-19

The COVID-19 pandemic also continued to affect the world of white collar criminal enforcement in 2021, despite the rollout of several vaccines.

Pandemic-related restrictions persisted in many courts in 2021, including limitations on in-person proceedings, orders mandating increased sanitation procedures and rules providing for social distancing. These restrictions fluctuated over the course of the year as case counts ebbed and flowed, but will likely continue in 2022 as society continues to grapple with the delta and omicron COVID-19 variants.

The virus's spread continued to be acute in prisons and jails. As of Dec. 16, 2021, approximately 31% of federal inmates and 24% of Federal Bureau of Prisons staff have had COVID-19, and 273 federal inmates and seven members of the Federal Bureau of Prisons staff have died from the disease.[20]

The rapid spread of the disease led to a massive increase in the number of federal prisoners seeking compassionate release — a practice that peaked in late 2020 but continued in 2021. Courts granted about one in five of those motions in 2020 and 2021, according to data released by the U.S. Sentencing Commission.[21]

The pandemic also yielded new prosecutorial tools and a number of prosecutions. Congress passed the COVID-19 Consumer Protection Act, which makes it unlawful to engage in a deceptive act or practice associated with the treatment, cure, prevention, mitigation or diagnosis of COVID-19, or a government benefit related to COVID-19.[22]

The Federal Trade Commission began enforcing the act last spring, including, for example, in an action against St. Louis-based chiropractor Eric Anthony Nepute for deceptively marketing products by Quickwork LLC as being scientifically proven to treat or prevent COVID-19.[23]

The DOJ also prosecuted hundreds of individuals for fraudulent schemes that sought to exploit the Coronavirus Aid, Relief and Economic Security Act relief programs, including, for example, a Texas resident who applied for 15 Paycheck Protection Program loans across multiple companies and fraudulently secured \$17.3 million in loans.[24]

These robust enforcement efforts are likely to continue in 2022.

Van Buren

In *Van Buren v. U.S.*, [25] the U.S. Supreme Court continued its trend of narrowing the reach of federal criminal statutes that appear broadly written. In doing so, the court gave a glimpse into how its new composition may impact white collar jurisprudence going forward.

Van Buren resolved a circuit split over the reach of the Computer Fraud and Abuse Act, which subjects to criminal liability anyone who "intentionally accesses a computer without authorization or exceeds authorized access," and thereby obtains information.[26]

Nathan Van Buren was a police sergeant who ran a license plate search in a state law enforcement computer database in exchange for \$5,000, in the course of an FBI sting operation.[27]

Van Buren argued that the "exceeds authorized access" clause applies only to individuals — unlike him — who obtain information to which their computer access does not extend, while the government argued that the clause incorporates purpose-based limitations on an individual's use of a computer that are contained in, among other things, contracts and workplace policies.[28]

In an opinion focused primarily on the statute's language and structure, the court held that the "exceeds authorized access" clause "covers those who obtain information from particular areas in the computer — such as files, folders or databases — to which their computer access does not extend," and "does not cover those who, like Van Buren, have improper motives for obtaining information that is otherwise available to them." [29]

Van Buren suggests the court will continue following a pattern of narrowly construing federal criminal statutes while evincing concerns about overcriminalization and skepticism of the government's ability to impose guardrails on ambiguous laws through the exercise of prosecutorial discretion.[30]

Looking Ahead to 2022

Here are the trends and trials we will be watching out for in 2022

Theranos II

Balwani will stand trial in 2022, and we'll be watching to see how his defense takes advantage of having had a preview of the government's case in the Holmes trial and whether the government changes its case in any respects.

Varsity Blues II

The remaining parents who have not reached plea deals with the government are set to go trial in June. As with the Balwani trial, we'll be watching to see how the prosecution and defense vary their strategies.

Sussman Trial

We'll be watching in May as Sussman goes on trial for his alleged false statements to the FBI.

Uptick in White Collar Prosecutions?

Will the Biden DOJ's policy changes, changed enforcement priorities and new U.S. attorneys reverse the trend of slumping white collar prosecutions?

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[1] White Collar Prosecutions for 2021 Continue Long Term Decline, TRAC Reports (Aug. 9, 2021).

[2] United States v. Holmes, 18-CR-00258 (N.D. Cal.).

[3] United States v. Colburn et al., 19-CR-10080 (D. Mass.).

[4] Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

[5] Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (June 3, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/>.

[6] United States Strategy on Countering Corruption (December 2021), available at <https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf>.

[7] Deputy Attorney General Lisa O. Monaco Announces New Civil Cyber-Fraud Initiative (Oct. 6, 2021), available at <https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-new-civil-cyber-fraud-initiative>.

[8] Deputy Attorney General Lisa O. Monaco Announces National Cryptocurrency Enforcement Team (October 6, 2021), available at <https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-national-cryptocurrency-enforcement-team>.

[9] Remarks Before the Aspen Security Forum (Aug. 3, 2021), available at <https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03>.

[10] **United States v. Neeraj Jindal** , No. 20-cr-00358, Dkt. 56 (E.D. Tex.).

[11] See *id.*, Dkt. 1; United States v. John Rodgers, No. 21-cr-00011, Dkt. 1 (E.D. Tex.).

[12] Jindal, No. 20-cr-00358, Dkt. 56 at 16.

[13] United States v. Surgical Care Affiliates, LLC, No. 21-cr-00011 (N.D. Tex.); United States v. Ryan Hee, No. 21-cr-00098 (D. Nev.); United States v. DaVita Inc., No. 21-cr-00229 (D. Colo.).

[14] United States v. Penn, No. 20-cr-00152, Dkt. 923 (D. Colo.).

[15] *Id.*, Dkt. 920.

[16] The People of the State of New York v. The Trump Corp., dba The Trump Organization, No. 1473/2021 (Sup. Ct. N.Y.).

[17] Trump v. James, No. 5-at-99999, Dkt. 1 (N.D.N.Y.).

[18] Attorney General James Responds to Trump Lawsuit (Dec. 20, 2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-responds-trump-lawsuit>.

[19] United States v. Sussmann, No. 21-cr-00582, Dkt. 1 (D.D.C.).

[20] See Bureau of Prisons, <https://www.bop.gov/coronavirus/> (last visited Dec. 16, 2021).

[21] See U.S. Sentencing Comm'n, Compassionate Release Data Report, Calendar Years 2020 to 2021, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf>.

[22] See Federal Trade Commission, <https://www.ftc.gov/enforcement/statutes/covid-19-consumer-protection-act-2021-consolidated-appropriations-act>.

[23] See Federal Trade Commission, <https://www.ftc.gov/news-events/press-releases/2021/04/first-action-under-covid-19-consumer-protection-act-ftc-seeks> (last visited Dec. 16, 2021).

[24] See <https://www.justice.gov/criminal-fraud/cares-act-fraud> (list of CARES Act prosecutions); <https://www.justice.gov/opa/pr/texas-man-pleads-guilty-24-million-covid-relief-fraud-scheme> (prosecution of Dinesh Sah).




[25] 141 S. Ct. 1648 (2021).

[26] *Id.* at 1652–54; see also 18 U.S.C. § 1030(a)(2).

[27] 141 S. Ct. at 1652–53.

[28] *Id.* at 1652–55.

[29] *Id.* at 1652.

[30] See, e.g., *Bond v. United States* , 572 U.S. 844 (2014); *Yates v. United States* , 574 U.S. 528 (2015); *Marinello v. United States* , 138 S. Ct. 1101 (2018).