

DEPUTIZING COMPANY COUNSEL AS AGENTS OF THE FEDERAL GOVERNMENT

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Executive Summary

olicymakers must reexamine the manner in which corporations and other organizations that are suspected of wrongdoing are investigated. In the aftermath of the Enron scandal, laws like Sarbanes-Oxley, combined with recent changes to the Federal Sentencing Guidelines, have substantially increased the penalties on companies and individuals for white-collar offenses. The combination of draconian sentences, lack of meaningful judicial control over the imposition of sanctions, and the impossible burdens on company officers have jeopardized the very nature of our adversary system of justice.

To avoid the potential catastrophe of a

federal indictment, business firms are taking extraordinary steps to placate federal prosecutors. And those prosecutors now regularly insist on the following:

- That business firms surrender or "waive" their attorney-client privilege,
- That firms must pressure their employees to waive their constitutional right against self-incrimination,
- That firms facing indictment refuse to advance legal fees to employees under investigation—even if a firm concludes that an employee was just following directions or is otherwise innocent of any wrongdoing, and
- That embattled firms must discharge certain employees at the direction of the

government—even if a firm concludes that an employee was just following directions or is otherwise innocent of any wrongdoing.

Any organization that balks at the government's demands risks months of negative publicity as prosecutors characterize a legal defense as "impeding" or "obstructing" the investigation. It is no overstatement to say that the enforcement of the criminal law, at least insofar as it applies to investigations of organizations, often amounts to a state-sponsored shakedown scheme in which business firms are extorted to pay penalties that are grossly out of proportion to any actual misconduct.

Introduction

ophocles wrote, "There is a point beyond which even justice becomes unjust." Our current system of justice, at least insofar as it applies to investigations of corporations, other organizations, and their employees has already reached such a point. Although a few commentators have addressed the issue, this alarming development has drawn scant attention in discussions of legal and public policy, nor has it been properly addressed by our bar associations.¹ Among experienced whitecollar criminal practitioners, however, it is a source of increasing dismay and concern.

This development has been fueled in large part by the public reaction and political response to the most recent wave of corporate scandals. Our elected representatives have found that it is good politics to pander to the public hysteria, and politicians of both parties have been tripping over themselves to show that they are tough on corporate crime by increasing penalties, imposing mandatory minimums, and taking to task executive branch officials who are not sufficiently aggressive in the pursuit of corporate wrongdoers. Largely in response to these public and political pressures, government agencies such as the Securities and Exchange Commission and the Department of Health and Human Services have been quick to get on the bandwagon and aggressively exploit the threat of administrative death penalties—essentially excluding (or debarring) firms from any contract work with the federal government—so as to up the ante for companies under investigation. The United States Sentencing Commission has played its part too,

imposing higher and higher penalties on companies and individuals for white-collar offenses and placing a premium on "cooperation" as the only way to avoid otherwise draconian penalties.²

Unfortunately, the Department of Justice, which has traditionally served as a restraining force when the pendulum has swung too far, has itself exercised no restraint. Don't get me wrong. I find nearly all prosecutors to be generally fairminded, conscientious, and frankly easier to deal with than most civil litigators, who tend to believe that the more obnoxious you are, the better the job you are doing. Moreover, many companies and individuals who find themselves in the cross hairs of prosecutors deserve the attention they are getting, and prosecutions in many such instances are fully warranted. Nearly all federal prosecutors believe strongly that what they are doing genuinely serves the public good. But, in a way, that conviction itself can be a problem, since it can lead to overzealousness and the belief that the ends justify the means, particularly in the absence of restraining influences.

My experience as a former federal prosecutor and a longtime defense attorney has taught me that if you give anyone, even a good person, unchecked power, he or she is going to abuse it. That is what has happened today. The pendulum has swung too far. The combination of draconian sentences, lack of meaningful judicial control over the imposition of sanctions, administrative "death penalties" available to agencies in the form of debarment and exclusion, and the almost impossible burdens and palpable fears of company officers and directors created by the Sarbanes-Oxley Act and the current enforcement environment has produced an inordinate imbalance of power.3 Not

surprisingly, prosecutors have exploited their virtually unchecked power to extract and coerce ever greater concessions, jeopardizing the very nature of our adversary system. It is destruction by accretion—a staged but seemingly inexorable concentration of power that has skewed the system.

The result has been the emasculation of the defense bar and the enforcement of the criminal law in a way that is often wildly out of proportion to the perceived wrongdoing. It can be, and often is, a state-sponsored shakedown scheme in which corporations are extorted to pay penalties grossly out of proportion to any actual misconduct. Criminal sanctions, administrative sanctions, and director liability make the payment of tribute to the federal government essentially a cost of doing business. In the process, individual employees, many of whom have faithfully and loyally served their companies for years and may well not have engaged in wrongful activity, are jettisoned like detritus and left to their own devices, all in the name of "fiduciary responsibility" and "corporate integrity." That may sound like an overstatement, but it is not. To prove this, let us examine in more detail how the current system operates and the implications for our adversary system of justice.

Requiring Cooperation

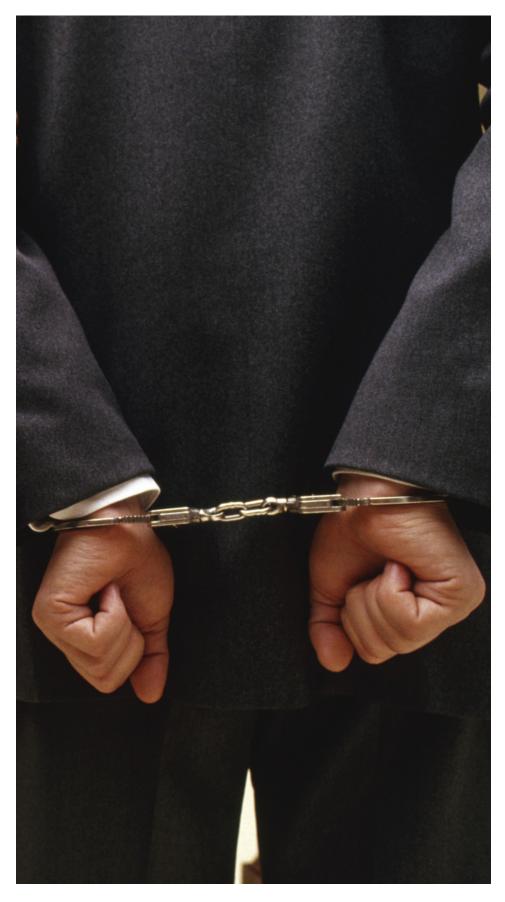
n general, prosecutors couch their assault on our adversary system of justice by insisting that they are merely taking into account an organization's "cooperation" with investigators when they make decisions about whether and what to prosecute. In 2003 then-deputy attorney general Larry Thompson promulgated "a revised set of principles to

guide Department [of Justice] prosecutors as they make the decision whether to seek charges against a business organization." As Thompson made clear, "The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of the corporation's cooperation. Too often business organizations, while purporting to cooperate with the [federal] investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation." ⁵

Thus, companies that want to cooperate fully and not "impede" investigations must adhere to the "General Principle" articulated by Thompson: "In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection." ⁶

Thompson further asserts, "Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the Government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation." 7

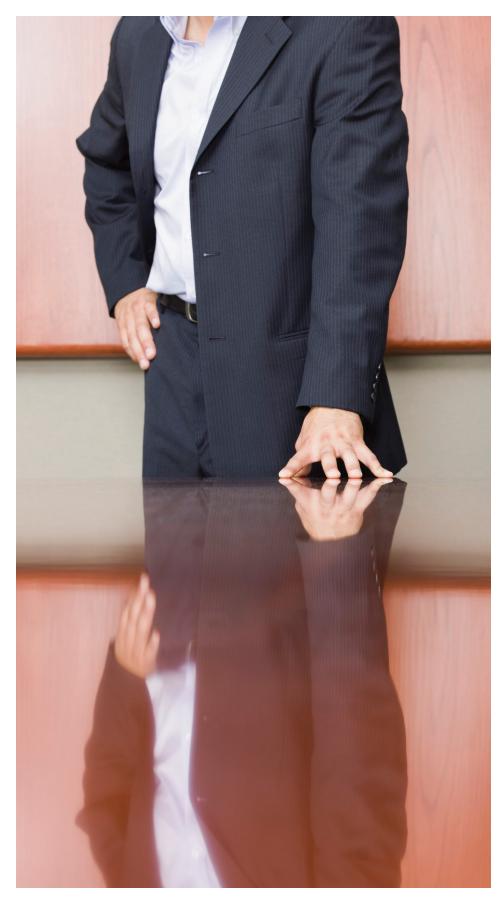
Thompson's immediate successor, James Comey, proceeded to espouse an



even stronger approach. In a 2003 interview, Comey said: "In my view, for a corporation to get credit for cooperation, it must help the Government catch the crooks. Sometimes, a corporation can provide cooperation without waiving any privileges. Sometimes in order to fully cooperate and disclose all the facts, a corporation will have to make some waiver because it gathered the facts through privileged interviews and the protected work product of counsel."

If employee interviews are to be shared with prosecutors, won't that dissuade many of them from talking to company attorneys in the first place? Comey wasn't worried; the information sharing would have "little impact" on their willingness to talk to the company's attorneys. "In any event," he adds, "that possibility does not change the fact that, in order to fully cooperate, a corporation has to help the Government solve the crime."9 When asked if this might undermine a corporation's relationship of trust with its employees, Comey said that "good corporate citizenship" requires nothing less than full cooperation by employees, concluding (rather simplistically), "Employees who have only made mistakes will understand; employees who have information about others will also understand, especially when the corporation protects them from retaliation; employees who have committed crimes, have no trust to undermine." 10

Comey also said, "It is hard for me to understand why a corporation would ever enter into a joint defense agreement, because doing so may prevent it from making disclosures it either must make if it is a regulated industry, or may wish to make to a prosecutor." Finally, he suggested that a corporation that does not have a policy of firing employees who won't consent to be interviewed by its counsel is not "acting in



its shareholders' interests," notwithstanding the fact that this may just be "an end run around the Fifth Amendment," since "of course" the government should request the results of such "interviews conducted under pain of dismissal." After all, the government "needs to find out what happened," and "interviews with employees are usually the source of the corporation's knowledge." ¹²

As if this were not enough, the November 1, 2004, amendments to the Federal Sentencing Guidelines effectively require an organization to waive the attorney-client privilege and attorney work product protection in order to receive leniency in sentencing. An amendment to the commentary to section 8C2.5 adds the following: "Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." ¹³

The Meaning of "Full Cooperation"

t is important to note that the government has repeatedly redefined what it means by "full cooperation," with each successful demand serving as the new baseline for what is expected in future cases. As a result, its demands have become so extreme that the very existence of the attorney-client privilege and attorney work product protection have been almost irretrievably undermined. As Alice Martin, the U.S. Attorney in Birmingham, Alabama, who prosecuted the Health-South Corporation, has observed, "Once one prosecutor has gotten cooperation of a certain level, that level becomes what we all now consider cooperation." 14

Some recent examples are illustrative of this phenomenon. As reported in the *New York Law Journal* in 2004, the Royal Ahold company avoided Securities and Exchange Commission sanctions by conducting a comprehensive internal investigation with outside consultants and law firms, disclosing its problems to the SEC and federal prosecutors, waiving the attorney-client privilege and work product protection, making employees in the United States and abroad available for

Nearly all companies today are succumbing to the government's escalating demands.

government interviews, and turning over to the government the results of its internal investigations. Thomas Newkirk, an associate enforcement director of the SEC, who was involved in the case, noted that Ahold provided "exemplary cooperation," and whatever the SEC asked of the company "they gave and did it as fast as humanly possible." ¹⁵

As reported by the Wall Street Journal, under pressure from the government (and no doubt mindful of the government's destruction of Arthur Andersen), the KPMG firm concluded that "full cooperation" required it to waive the attorney-client privilege and work product protection; refuse to pay the legal

costs of its partners and employees unless they agreed to talk to prosecutors; decline to enter into any joint defense agreements; agree to tell prosecutors which documents its partners and employees are requesting to use in their own defense and to provide prosecutors with copies of those documents at the same time it provides them to defense counsel; and refuse to allow defense attorneys access to the full set of documents it has provided to the government.¹⁶

By contrast, the SEC settlement with Lucent Technologies in 2004 included a \$25 million penalty for a supposed lack of cooperation.¹⁷ That lack of cooperation included a statement by Lucent's outside counsel during the investigation denying that Lucent had acted fraudulently, and a reprimand from the SEC for indemnifying employees under investigation.¹⁸

Faced with such pressures, nearly all companies today are succumbing to the government's escalating demands. Moreover, in dealing with the logistics of "cooperation," companies must rely on their counsel, who have-in essencebecome deputized by the federal government. 19 This has promoted disrespect for the law and for lawyers, who often find themselves confronted with impossibly difficult and competing responsibilities and ethical obligations. Certainly they must make it clear to employees that they represent the company and not the individual employees to whom they are speaking. But in their role as deputies for the Department of Justice, and in order to serve their client in the name of cooperation, they need to extract as much information as possible to curry favor with the government so that the company can be seen as "cooperative."

Dealing with Employees

his is not intended to denigrate the honesty or integrity of the corporate attorneys who are placed in this position. However, in order to serve their clients' interests, corporate attorneys are under a great deal of pressure to walk a very fine line when dealing with employees. Thus, one way of getting employees to open up is to advise them of their rights, but to be "economical" with advice that might "spook" them. Company counsel are much more likely to emphasize that they are "just trying to figure out what happened," as opposed to telling employees "you may want to think about getting your own lawyer."

Moreover, it has become a regular practice for company counsel to ensure that they have interviewed as many witnesses as possible (and all important witnesses) before the employees get (or the company recommends that they get) their own attorneys. Often the company and its counsel will demand that an employee submit to an interview as a condition of employment ("talk or walk"), even though the company intends to turn over the results of the interview to the government. Essentially, firms are demanding a waiver of the employee's Fifth Amendment rights as a condition of continued employment. In an interesting contrast, the Supreme Court has found that the government itself cannot make such a demand on its own employees.²⁰ Finally, the company and its counsel often demand continued cooperation and even submission by the employee to government interviews as a condition of continued employment and/or indemnification of legal fees.

Again, to report this state of affairs is not to denigrate the integrity or profes-

sionalism of the attorneys who represent companies in these circumstances. To a large extent, company counsel are simply playing the hand they've been dealt. Nonetheless, they are being placed in a tenuous position by the demands of their clients on the one hand, and the demands of the rules of professional conduct on the other. For instance, Rule 1.13(b) of the District of Columbia Rules of Professional Conduct provides, "In dealing with an organization's directors, officers, employ-

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ees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests may be adverse to those of the constituents with whom the lawyer is dealing." ²¹

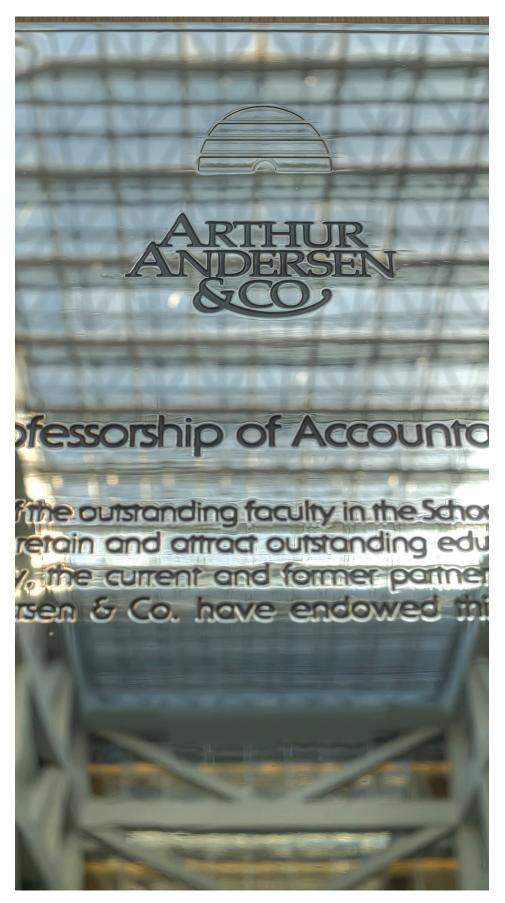
The District of Columbia Bar Legal Ethics Committee has opined that disclosure of a potential conflict of interest must be made whenever there "may be" adversity between the interests of the corporation and those of employees. Adversity may be present when "the cor-

poration has not yet irretrievably committed itself to a position in the matter, but where one such position might be adverse to the employee. Such a possible adversity would almost always arise, then, when the corporation is able to take a position adverse to the employee." ²²

Comment 9 to Rule 1.13 provides:

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.²³

Moreover, as noted in Comment 1 to Rule 4.3, unrepresented persons inexperienced in legal matters "might assume that a lawyer will provide disinterested advice concerning the law even when the lawyer represents a client. In dealing personally with any unrepresented third party on behalf of a lawyer's client, a lawyer must take great care not to exploit these assumptions." ²⁴ Comment 2 also advises that "if it becomes apparent that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer must take whatever reasonable, affirma-



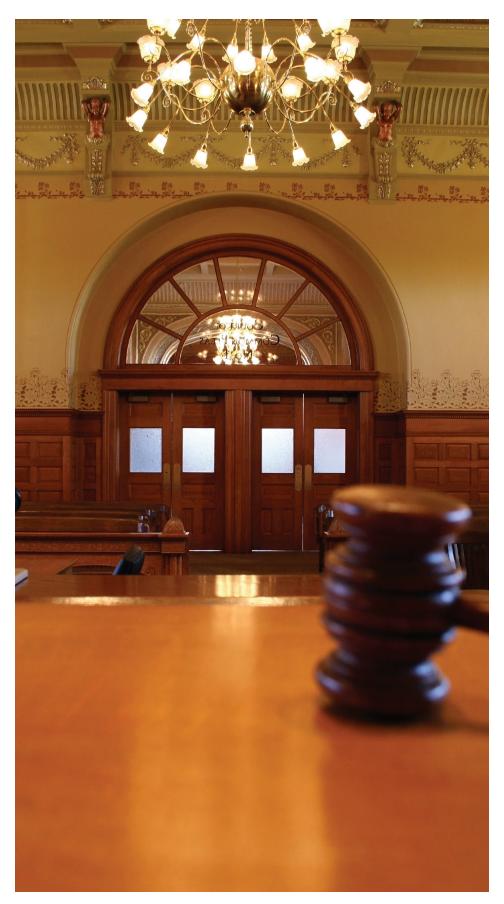
tive steps are necessary to correct the misunderstanding." ²⁵

Finally, Rule 4.4 states that "[i]n representing a client, a lawyer shall not use means... or use methods of obtaining evidence that violate the legal rights of such a person." ²⁶ The commentary to the rule provides in pertinent part that "[r]esponsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons." ²⁷

Slippery Slope

ust how slippery this slope can be is evident when the conduct of company counsel is viewed from the perspective of the company's employees. Any attorney experienced in these matters knows that most employees feel they have served the company loyally and, perhaps increasingly naively, expect the company to reciprocate that loyalty. Often the facts regarding the conduct in question are less an issue than whether the conduct is criminal; indeed the conduct under investigation may even have been standard industry practice prior to the initiation of the investigation, or it may present complex accounting, technical, or legal questions, and the employee may often have been acting at the behest of his or her superiors.

Furthermore, in almost every case, the employees are depending on the company they have served to indemnify them and pay for their legal fees—something that they understandably have come to expect as a benefit of their employment. This is a particularly difficult issue, because very few employees have the resources to afford competent counsel to represent them in an ongoing federal criminal investigation.



That the Department of Justice itself has lost touch with reality concerning these matters is clearly evidenced by statements attributed to former deputy attorney general Larry Thompson. Thompson was asked by the Wall Street Journal whether "given that legal costs can run hundreds of thousands of dollars, isn't the government being unfair to company employees if it pressures their employers not to pick up the tab?" 28 According to the Journal: "Thompson's response is that if employees really don't believe they acted with criminal intent, 'they don't need fancy legal representation' to defend themselves. There are lots of reasonably priced lawyers, he says." 29

To employees of a company, then, the company's lawyers appear to be acting duplicitously. They are not trying to protect the employee, only the company; they are extracting waivers of constitutional rights as a condition of employment and/or as a condition of payment of legal fees; and they are prejudicing the employees' ability to defend themselves and to protect their families. Under these circumstances, the sense of abandonment felt by employees is palpable and, for attorneys who have witnessed it firsthand, deeply disturbing.

Given the low esteem in which the legal profession is already held, is it any wonder that the lesson learned is "don't trust the lawyers" and that lawyers representing companies are held in contempt by the company's employees? Moreover, it is worth noting that this phenomenon makes it harder for the company to police itself and promotes disrespect for the legal profession.

Department of Justice representatives often argue against indemnifying employees by asserting that paying for counsel for

employees is a "breach of fiduciary duty to the shareholders" and a "misuse of shareholders' assets." There are at least two responses to that claim. To begin with, the department's sanctimonious expression of concern about preserving corporate assets for the shareholders is hard to swallow, given the severe financial settlements consistently coerced by the department and federal agencies out of companies by exploiting the double-barreled threats of prosecution and the imposition of administrative sanctions, such as debarment or exclusion. Those settlements, which are regularly for hundreds of millions of dollars of "shareholders' assets," are often wildly out of proportion to the conduct alleged, and are often seen by corporate boards of directors as an exorbitant cost of doing business, if not outright extortion. Thus, compared to those sums, the shareholders' assets set aside for paying employees' legal fees are truly paltry.

Furthermore, the department's argument in this context—and indeed in every other respect concerning coercion of employees and waiver of their constitutional protections in the name of company cooperation—ignores the fundamental concept of the presumption of innocence. Although undoubtedly there are some wrongdoers whose misconduct is painfully evident, life is rarely that simple. This is particularly true in the context of white-collar enforcement, where often the conduct itself may be clear but its legality (or illegality) is not.

One is left with the clear impression that the Department of Justice's protestations about a company funding counsel for its employees has little to do with concern about misuse of shareholders' assets. Instead, the department's concern seems to be that employees who have capable defense counsel will be more difficult to

coerce into pleading guilty and "cooperating." Indeed, they may actually put the government to its proof at trial, and force it to test often dubious theories of criminal liability that the company itself cannot risk testing. (Indeed, in rare moments of candor, a number of federal prosecutors have conceded as much to me.)

For example, in 2001 TAP Pharmaceut-

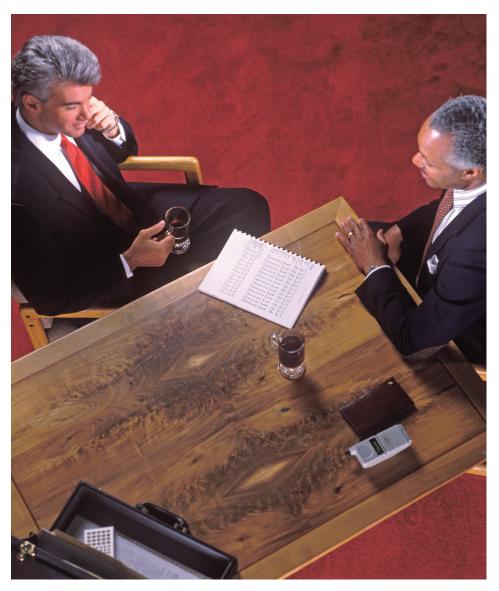
By embracing an ends-justify-themeans approach, prosecutors have been trained to view principles and practices with hundreds of years of acceptance as nothing but inconvenient nuisances and roadblocks to the facilitation of their jobs.

icals pleaded guilty to federal fraud charges for allegedly paying kickbacks and bribing doctors for prescribing Lupron, and paid \$885 million to settle criminal and civil claims. After that settlement, 11 TAP employees went to trial, arguing that the activities in question were common industry practices and were not illegal. After a three-month trial, the district court direct-

ed the acquittal of two defendants, the case against a third defendant was dismissed by prosecutors, and the other eight defendants were acquitted of all counts by the jury.³⁰

In fact, the current system of rewarding cooperation, with its expected waivers of attorney-client privilege and attorney work product protection, coerced waivers of employees' Fifth Amendment rights, forced terminations, limiting or refusing to advance legal fees for employees, and extraction of draconian penalties (particularly if the company does not "cooperate"), has created a whole generation of young prosecutors with no real conception of, or respect for, the importance of preserving client confidences and of the attorney-client privilege. It is not that these prosecutors are venal; on the contrary, they genuinely view themselves as serving the public good. But by embracing an ends-justify-the-means approach, they have been trained to view principles and practices with hundreds of years of acceptance as nothing but inconvenient nuisances and roadblocks to the facilitation of their jobs.

And that mind set has, in turn, led to another now nearly universal change in our adversary system of justice: prosecutors have become lazy, since they have the means (which they are aggressively exploiting) to have someone else do their jobs for them. Apparently, it is not enough for prosecutors to have the full weight of the federal government, its investigative agencies, and the authority of the grand jury with which to conduct their business. It is easier to compel companies and their own counsel to become deputized, under the rubric of cooperation, to do their jobs for themconduct the investigation, coerce Fifth Amendment waivers of the company's own employees, waive privilege and work prod-



uct, jettison any employees even arguably involved in the allegedly offending behavior (and decline to pay their legal fees if they have the temerity to challenge the government), and then come back to the government, hat in hand, for the government to proclaim by fiat what price the company must pay to preserve its existence.

While Rome Is Burning

iven all the tools made available to the government to effect this total aberration of our adversary system, as well as today's political climate, it is perhaps not surprising that our bar associations and our

law firms have acceded so meekly. Shame-fully, bar associations have been fiddling while Rome is burning. And if the truth be told, many of our largest and most respected law firms have come to realize that this new regime can be, and often is, a new and very lucrative business opportunity. The government now expects companies to, in essence, deputize law firms and accounting firms to do the government's work for them, and companies now feel compelled to do so as another cost of doing business and as a prerequisite for a grant of government lenity.

Under these circumstances, company lawyers rarely feel the sort of pressure attor-

neys ordinarily feel when trying to defend a client. After all, the hardball tactics of federal prosecutors have fundamentally changed the nature of corporate counsel's job-to investigate to determine if a crime took place or whether there is a defense. That would be viewed as "impeding" the government's investigation and a lack of cooperation. Instead company lawyers' job is to ferret out any potential misconduct by their own client (at considerable expense to the client) and ensure that it is documented and reported immediately to the government and that all materials (privileged or not) and all employees (Fifth Amendment or not) are provided to the government on a silver platter. It is the neutron bombing of the client that the lawyers have been handsomely paid to orchestrate. If the government is satisfied, then the company will be left standing, although many of its longtime and loyal employees will be extinguished.

For hundreds of years, lawyers have been taught the sanctity and importance of the attorney-client privilege and the attorney work product protection as central to our adversary system of justice. Indeed the existence of that privilege and that protection helps to define the role of lawyers in society and the public's perception of the fairness with which the legal system operates. At least in the context of investigations of organizations and their employees, all this is being irreparably destroyed by the government's successful assault on centuries of tradition.³¹

As Justice Wiley B. Rutledge once warned: "[I]t is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings implanted in that soil grow great and, growing, break down the foundations of liberty." ³²

Notes

1. See Richard P. Swanson, "Corporate Investigations and Common Law," *New York Law Journal* 231 (2004): 4; John Gibeaut, "Junior G-Men: Corporate Lawyers Worry that They're Doing the Government's Bidding While Doing Internal Investigations," *American Bar Association Journal* 89 (2003): 46–54.

Since this article was originally published in March 2005, there have been a number of salutary developments. First, there has been a great deal of discussion of these issues in legal, academic, and policy circles, and at symposia sponsored by bar associations and other organizations. Second, the American Bar Association Presidential Task Force on the Attorney-Client Privilege has published a number of reports and recommendations regarding the attorney-client privilege and the work product doctrine. The ABA's House of Delegates in August 2005 unanimously adopted Resolution 111, which emphasized the importance of the attorney-client privilege and work product doctrine in our adversary system of justice and condemned "the routine practice by government officials of seeking to obtain the waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage" (see http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopted.pdf). In August 2006 the ABA's House of Delegates unanimously adopted Resolution 302B which opposed "government policies, practices and procedures that have the effect of eroding the constitutional and other legal rights of current or former employees, officers, directors or agents ('Employees') by requiring, encouraging or permitting

prosecutors or other enforcement authorities to take into consideration . . . in making a determination of whether an organization has been cooperative in the context of a government investigation" whether the organization advanced or reimbursed the legal fees of an employee, entered into or continued to operate under a joint defense agreement with an employee, shared its records or other information relating to an investigation with an employee, or "chose to retain or otherwise declined to sanction an employee who exercised his or her Fifth Amendment right against self-incrimination in response to a government request for an interview, testimony, or other information" (see http://www.abanet.org/ media/docs/302Brevised.pdf). Thereafter, the Senate Committee on the Judiciary held hearings on these issues and Sen. Arlen Specter introduced legislation, the Attorney-Client Privilege Protection Act, which largely tracked the language of the two ABA Resolutions cited above (see http://thomas.loc.gov/cgi-bin/query/ z?c110:S.186). A companion (and nearly identical) bill, H. 3013, was introduced in the House with broad bipartisan support on July 12, 2007, and was overwhelmingly approved by the full House on November 13, 2007 (see http://thomas.loc.gov/cgibin /query/z?c110:H.R.3013). The Senate bill, which has now added Senators Lindsay Graham and Joseph Biden as cosponsors, is still pending approval by the Senate Judiciary Committee. See also U.S. Sentencing Commission.

2. For example, Jamie Olis, a midlevel executive of Dynegy Inc., was charged, along with two conspirators (his former boss and a company accountant), with illegally disguising company debt. The other two

defendants pleaded guilty and cooperated with the government, but Olis declined to cut a deal and exercised his right to go to trial. After his conviction by a jury, he was sentenced pursuant to the Federal Sentencing Guidelines to a term of 24 years and four months. His coconspirators were each facing a maximum sentence of five years, but were expected to receive lesser sentences as a result of their cooperation. See Kristen Hays, "Ex-Dynegy Official Gets 24 Years in Prison; Judge Follows New Rule for Harsher Penalties," Washington Post, March 26, 2004, p. E3; Simon Romero, "Ex-Executive of Dynegy Is Sentenced to 24 Years," New York Times, March 26, 2004, p. C2.

- 3. For example, in 2005, outside directors of WorldCom Inc. agreed to pay \$18 million of their own money, representing approximately 20 percent of their combined personal net worth, to settle a class action lawsuit. See Brooke A. Masters and Kathleen Day, "10 Ex-WorldCom Directors Agree to Settlement," *Washington Post*, January 6, 2005, p. E1; Jonathan D. Glater, "A Big New Worry for Corporate Directors," *New York Times*, January 6, 2005, p. C1.
- 4. Memorandum from Larry D. Thompson, Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components, United States Attorneys, Principles of Federal Prosecution of Business Organizations, 1 January 20, 2003 (hereinafter Thompson Memorandum), http://www.usdoj.gov/dag/cftf/business_organizations.pdf.
- 5. The Thompson Memorandum emphasized in a footnote that "[w]hile these guidelines refer to corporations, they

apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations." Ibid., note1.

- 6. Ibid., pp. 6-7.
- 7. Ibid., pp. 7-8.
- 8. Interview with United States Attorney James B. Comey Regarding the Department of Justice's Policy on Requesting Corporations under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection, *U.S. Attorneys' Bulletin*, November 2003, p. 1, http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5106.pdf.
- 9. Ibid., p. 3.
- 10. Ibid., p. 3.
- 11. Ibid., p. 4.
- 12. Ibid., p. 4.
- 13. United States Sentencing Commission, Guidelines Manual, §8C2.5, November 2004 (emphasis added). After receiving extensive written comments and testimony from the ABA and a broad coalition of business and other organizations (ranging from the ACLU to the Chamber of Commerce), as well as from numerous former senior Justice Department officials, the Sentencing Commission voted unanimously on April 5, 2006, to reverse the 2004 privilege waiver amendment to the Sentencing Guidelines and the change became effective on November 1, 2006 (see http://www.ussc. gov/PRESS/rel0406. htm).

- 14. Quoted in Lori P. Cohen, "In the Crossfire: Prosecutors' Tough New Tactics Turn Firms against Employees," *Wall Street Journal*, June 4, 2004, p. A1.
- 15. Quoted in Michael Bobelian, "Dodging a Bullet—Royal Ahold Shows the Benefits of Cooperation with the SEC," *New York Law Journal* 231 (2004): 4.
- 16. Cohen. See also *United States v. Stein*, 435 F. Supp. 2d 330 (2006).
- 17. Bobelian.
- 18. Ibid.; see also Cohen.
- 19. For those who might object to the characterization of company counsel as being "deputized" as agents of the government, the Computer Associates case is instructive. In that case three former executives of the company pleaded guilty to charges of federal obstruction of justice for lying to outside counsel retained by the company to investigate improprieties. The theory under which prosecutors charged them was that by lying to the outside law firm the executives had misled federal officials, since the results of the investigation conducted by the company's attorneys were provided to the government. See Alex Berenson, "Case Expands Type of Lies Prosecutors Will Pursue," New York Times, May 17, 2004, p. C1.
- 20. See *Garrity v. New Jersey*, 385 U.S. 493 (1967).
- 21. "Rule 1.13b—Organization as Client," *District of Columbia Rules for Professional Conduct*, http://www.dcbar.org/for_lawyers/ethics/legal_ethics/rules_of_professional_c

onduct/Rule_one/rule01_13.cfm.

- 22. D.C. Ethics Opinion 269, 1997 (obligation of lawyer for corporation to clarify role in internal investigation); see also John F. Savarese and Carol Miller, "Protecting Privilege and Dealing Fairly with Employees While Conducting an Internal Investigation," *Practising Law Institute: Corporate Law and Practice* 1367 (2003): 1027, 1065.
- 23. D.C. Bar, Appendix A, Rule 1.13, Comment 9 (2007).
- 24. Ibid., Rule 4.3, Comment 1 (2007).
- 25. Ibid., Comment 2.
- 26. Ibid., Rule 4.4.
- 27. Ibid., Rule 4.4, Comment 1 (2007).
- 28. Cohen.
- 29. Quoted in ibid.
- 30. See Shelley Murphy and Alice Dembner, "All Acquitted in Drug Kickbacks Case," *Boston Globe*, July 15, 2004, p. A1.
- 31. After widespread criticism of the Thompson Memorandum, the Department of Justice announced that it was going to revise its policies. Unfortunately, the Department's "new" policy is simply a dressed-up version of its "old" policy. See N. Richard Janis, "The McNulty Memorandum: Much Ado about Nothing," Washington Lawyer, February 2007.
- 32. Thomas v. Collins, 323 U.S. 516, 543 (1944).

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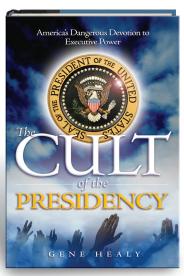
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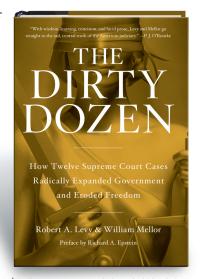
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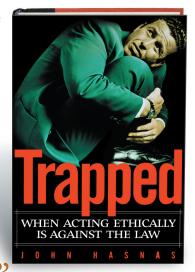
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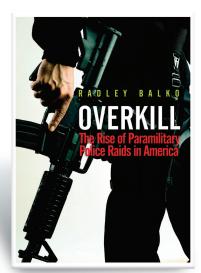
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