

Getting the government to right a wrong

By Peter G. Verniero

Sometimes you can fight city hall — or in this case, the federal government.

For the past several months, critics have claimed that the so-called Thompson memorandum, which guided federal prosecutors in making decisions on whether to indict companies, was unfair. Thanks to an unprecedented coalition of lawyers, bar leaders and civil libertarians — and with a little help from the federal judiciary — the memo has been set aside. Named after its author, Larry Thompson, then the deputy attorney general, the memo had spelled out how a corporation could win favorable treatment by turning over to prosecutors documents otherwise shielded by the attorney-client privilege or by halting the payment of legal fees incurred by executives under indictment or review.

Defense lawyers perceived the Thompson memo as a not-so-subtle threat from Uncle Sam to their clients: Cooperate or perish.

For many if not most companies, an indictment is the equivalent of a death sentence because a mere criminal charge can trigger the loss of government contracts and cause other severe hardships.

Forget that the attorney-client privilege is the oldest privilege in the law, developed over centuries to foster candid conversations between a lawyer and client. Forget that corporations and business managers have rights like the rest of us. Under the Thompson memo, corporations felt compelled to give up their protections and shred their copies of the Constitution to avoid the death knell of a criminal indictment.

In response, a diverse group of stakeholders, including representatives of the American Civil Liberties Union and the U.S. Chamber of Commerce, protested the effects of the Thompson memo, urging its revision or repeal.

Members of Congress started to think aloud about limiting the Thompson rules by legislation.

A federal judge in New York declared that parts of the Thompson memo improperly infringed on the constitutional right to counsel by compelling corporations to refrain from paying the legal defense costs of their employees.

This week the Justice Department reacted. It replaced the Thompson memo with a new set of standards authored by the current deputy attorney general, Paul McNulty. The government is still permitted to seek confidential documents under certain circumstances. The rules state clearly, however, that prosecutors cannot define cooperation in terms of whether a corporation has

furnished such documents by waiving the attorney-client privilege.

Nor can investigators routinely take into account whether the entity is subsidizing an executive's defense.

In a speech announcing the new memorandum, McNulty echoed much of what the critics had been saying. Supported by state law, many companies are required under their bylaws or by contract to pay an employee's legal bills. In that setting, the federal government should not penalize companies for doing what they are properly obligated to do.

Just as important, McNulty acknowledged that preserving candid conversations between a lawyer and his corporate client will make it easier "for companies to detect and remedy wrongdoing."

This is what a system of corporate accountability should be about — encouraging a culture of compliance, rewarding good behavior and, when warranted, punishing criminal conduct.

No honest observer wants to see corporate wrongdoing go unpunished. Still, constitutional protections must apply to everyone, even to those business leaders who are perhaps less sympathetic than others whose rights we take pride in preserving.

It's too early to know whether the new rules will hold up to their promise. As with most policies, the true effect of the McNulty memorandum will be measured by the manner in which it is applied in specific cases.

But the fact that it was adopted at all is newsworthy. At a time when we are polarized and divided on many critical issues, an unlikely coalition of leaders showed what can happen when people put their differences aside and work toward a common goal.

Moreover, in an era when judicial decisions frequently are questioned and criticized, a single judge had the good sense and feeling of independence to rule that the federal government was wrong. Opinion makers of all political stripes who unfairly attack the judicial branch should take note.

Whether the government was persuaded by its critics to replace the Thompson memo — or felt forced to do so by virtue of legislative rumblings or judicial rulings against it — the Justice Department nonetheless righted itself. In other words, our sometimes messy democratic system worked its will.

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