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No Retreat Now

The long fight to protect the attorney-client relationship against aggressive prosecutors can only end with legislation.

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Our two organizations, the Heritage Foundation and the National Association of Criminal Defense Lawyers, are at opposite ends of the conservative-to-liberal spectrum. But for more than three years we have both been laboring, separately and together, to convince the Department of Justice that it erred gravely by adopting enforcement policies that dramatically damage the attorney-client relationship.

Last month, David Laufman, a former chief of staff to one of the deputy attorneys general in whose name the department issued these harmful policies, wrote a commentary in *Legal Times* ["Give Justice a Break," Aug. 18, Page 60] that called for us to "stand down" because we've "already won one of the most remarkable retrenchments in Justice enforcement policy in the department's history."

Part of his argument is correct. In a July 9 letter to Congress, the Justice Department acknowledged the need to change most or all of the offending policies. And last week Deputy Attorney General Mark Filip formally announced new guidelines that constitute, to borrow Laufman's words, "a further rollback of corporate enforcement policies."

On the same day that Filip spoke, a much-anticipated judicial decision also pointed in the right direction. The U.S. Court of Appeals for the 2nd Circuit upheld the dismissal of criminal charges against 13 former employees whom accounting giant KPMG had "thrown under the bus" to avoid being indicted itself. Federal prosecutors had pressured KPMG to stop paying the employees' legal fees. The 2nd Circuit agreed with the lower court that prosecutors had thereby interfered with the employees' Sixth Amendment right to counsel.

But while Laufman's characterization of Justice's "rollback" may be accurate, and while the KPMG decision may prove cautionary and curtail abuses by line prosecutors, we are not about to table our efforts. Now is the time to consolidate this victory with legislation addressing the same problems in all federal agencies so that we do not have to fight these battles again.

'GENERALLY LAUDABLE'

First adopted in 1999, the Justice Department's harmful enforcement policies have evolved into a de facto requirement that a company waive the confidentiality of its employees' conversations with its lawyers in order to avoid its own indictment. The policies have also encouraged and sanctioned demands by prosecutors that businesses refuse to pay employees' legal fees and fire employees who assert their constitutional rights, and that they decline to share information with employees that might be vital to the employees' defense—all of this while the businesses' private lawyers perform what should be the government's investigation.

In recent months, the Justice Department has responded to widespread concerns about its arguably unconstitutional practices. The win to which Laufman referred in his commentary was first summarized in a July 9 letter that Filip sent to Sen. Patrick Leahy (D-Vt.), chairman of the Senate Judiciary Committee, and was more formally announced by Filip at an Aug. 28 press conference.

Filip withdrew the McNulty memo, which had been the most recent iteration of Justice Department policy and which was an inadequate attempt to address the substantial grounds for widespread complaint. In reformulating that policy, Justice officials had met several times with leaders of the bars of outside and in-house counsel, as well as with business leaders and other legal policy experts, to make sure that the department got it right. The result is generally laudable.

The new policy states, for instance, that companies will no longer be denied credit for cooperation if they choose to assert the protections of the attorney-client privilege and work-product doctrine. Similarly, the Justice Department will stop punishing companies for sharing information necessary to their employees' defense or fulfilling agreements to provide legal counsel to their employees.

Moreover, Filip said that the new principles would not merely be set forth in a memo from his office, but would be incorporated in the United States Attorneys' Manual, "effective immediately."

So why aren't we critics satisfied now? Why are we still insisting on passage of legislation like the proposed Attorney-Client Privilege Protection Act?

WHY LEGISLATION

We will continue to pursue legislation because, in the words of American Bar Association president H. Thomas Wells Jr. last week, such bedrock legal rights as the attorney-client privilege "must not be dependent on the personal leanings of each new deputy attorney general." A more permanent, less changeable solution than the U.S. Attorneys' Manual is needed.

We will continue to push for legislation because the overweening policies from which the Justice Department is now retreating began with but has not ended with that department. Similar policies and practices have seeped into numerous other federal agencies, including the Securities and Exchange Commission and the Environmental Protection Agency, and regrettably the addition to the U.S. Attorneys' Manual appears to condone such policies. No other federal agency with similar policies announced its own change of heart last week.

We will continue to push for legislation because it was the very real threat of legislation that captured the Justice Department's attention. The Attorney-Client Privilege Protection Act, having passed the House in November with overwhelming bipartisan support, is pending in Leahy's committee. Before passage began to look probable, Justice resisted our reform efforts tooth and nail. If we back off now, how soon before prosecutors start seeking ways around the restrictions of the new policy?

Laufman rewrote a little history when he suggested that the Attorney-Client Privilege Protection Act was a hard-headed, knee-jerk response to the department's good-faith efforts to draft and revise its policies in late 2006. He stated with bare technical accuracy that the bill, S. 186, was not introduced until Jan. 4, 2007, one month after the McNulty memo was released. What he failed to note is that the same legislation, numbered as S. 30, was first introduced by Sen. Arlen Specter (R-Pa.) on Dec. 8, 2006. The Justice Department's long-promised McNulty memo showed up four days later.

The coalition that developed to oppose Justice's enforcement policies spans the political spectrum from the American Civil Liberties Union to the American Bar Association to the U.S. Chamber of Commerce. A coalition this broad and with this much sustained commitment over a period of years could only be motivated by problems as troubling and widespread as those caused by the Justice Department's corporate enforcement policies.

Laufman closed his commentary by arguing: "There will be plenty of time for accountability and—with the arrival of a new administration in January—the potential for even further policy refinements." That's exactly *our* point. After witnessing the effects of the policies the Justice Department first said were necessary nine years ago, the last thing anyone should want is more years of policy "refinements" by a new administration.

Today, well-regarded law institutes provide continuing legal education courses advising lawyers on how to handle federal "requests" for waiver of attorney-client privilege and work-product protections. When the Justice Department first adopted its objectionable policies, no one would have thought that waiver "requests" by federal agencies would become so commonplace that such courses would now be necessary. We intend to continue our efforts until they no longer are.

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