MARCH 17, 2010

SPECIAL REPORT: FEDERAL EROSION OF BUSINESS CIVIL LIBERTIES (SECOND EDITION, 2010)

EXECUTIVE SUMMARY

The Washington Legal Foundation (WLF) has released the second edition of its *SPECIAL REPORT*: FEDERAL EROSION OF BUSINESS CIVIL LIBERTIES, a 150-page, up-to-date critical analysis of the key legal, judicial, and regulatory developments over the years that chronicle the growing trend at the federal level to criminalize normal business activities. With a new Introduction by Former Attorney General Dick Thornburgh, WLF's report discusses in depth the topics presented in WLF's companion publication, TIMELINE: FEDERAL EROSION OF BUSINESS CIVIL LIBERTIES, a convenient, foldout, full-color chart that contains over 145 entries over the time period from 1900 to 2010. The report was revised and updated for the second edition with pro bono assistance from the global law firm White & Case LLP.

The report critically examines seven legal topics that have contributed to an increasing and unwarranted use by the Department of Justice (DOJ) and agencies such as the Environmental Protection Agency (EPA) of criminal prosecution of regulatory offenses when administrative or civil remedies would be more appropriate. The report discusses the erosion of business civil liberties, such as the attorney-client privilege and the necessity of showing criminal intent. The seven legal topics are:

Mens Rea, Public Welfare Offenses, and the Responsible Corporate Officer Doctrine. Chapter One traces the erosion or dilution of mens rea or criminal intent in the corporate context, starting in 1907 where the Supreme Court held that a corporation can be held vicariously liable for the criminal acts of its employees. In 1943, *U.S. v. Dotterweich* further held that under the Responsible Corporate Office Doctrine, individual corporate officers can be held criminally liable for acts of their employees. In 1971, *U.S. v. Int'l Minerals* held that mens rea can be dispensed with altogether for misdemeanor criminal offenses categorized as Public Welfare Offenses. This chapter discusses recent cases applying these troubling doctrines as well as more recent legislation, including the Sarbanes-Oxley Act, which further expands criminal liability for corporate officers.

EPA Criminal Enforcement Polices. Chapter Two traces the growth of EPA's criminal enforcement program from 1976 to the present. EPA's 1994 Devaney Memorandum instructed EPA enforcement personnel to target only those cases where there are both significant pollution *and* criminal culpability, and to use administrative or civil remedies for other regulatory infractions. Several shocking case studies are presented, however, showing how this policy is flagrantly ignored. In some cases, EPA/FBI "SWAT Teams" raided facilities for technical violations, only later to drop all charges where evidence was lacking or altered. The report cites EPA sources revealing that EPA has a quota for prosecutions. As one EPA agent candidly put it, "I'm a salesman. I sell jail time to people."

DOJ Criminal Prosecution Policies. Chapter Three discusses the major DOJ prosecution policies from 1980 to the Holder Memorandum in 1999, the Thompson Memorandum in 2003, the McNulty Memorandum in 2006, and the Filip Memo in 2008, which provide guidance for U.S. Attorneys when deciding whether to prosecute corporations. The chapter includes discussion of the prosecution of Arthur Andersen, LLP, whose conviction was overturned in 2005, and recent prosecutions in 2008 and early 2009 of pharmaceutical executives for promoting life-saving drugs for illnesses not approved by the FDA.

Parallel Civil and Criminal Prosecutions. Chapter Four discusses the increasing use of overlapping

civil and criminal prosecutions for the same offense. These parallel prosecutions can lead to abusive prosecutions when the civil investigation is a pretext to gather information for a criminal prosecution. Several cases are cited where federal judges have rebuked the DOJ for engaging in such tactics and even dismissed the indictments.

Attorney-Client and Work Product Privileges. Chapter Five chronicles DOJ's and SEC's policies that have spawned a "culture of waiver," whereby corporations were forced to waive their attorney-client and work product privileges to avoid criminal prosecution, and examines the Filip Memo's attempt to deal with the problem. This chapter includes a discussion of *U.S. v. Stein*, where the district court ruled that KPMG employees' rights were violated by DOJ's pressure on KPMG to cut off paying
their attorney defense fees. The chapter notes recent remedial legislative proposals, including the re-introduction of the Attorney-Client Privilege Protection Act in the United States Senate in early 2009.

Deferred Prosecution and Non-Prosecution Agreements. Chapter Six traces the growing trend by DOJ since 1992 to enter into controversial deferred prosecution agreements (DPAs) and nonprosecution agreements (NPAs) with corporations to resolve criminal charges without an indictment or prosecution. DPAs and NPAs are one-sided and vary widely, but generally require the payment of large penalties and internal corporate compliance reforms, often under the watchful eye of an expensive independent monitor. This chapter also describes the *Stolt-Nielsen* case and ends with a discussion of legislation proposed in 2009 in the House of Representatives that would require the Attorney General to issue guidelines with respect to DPAs and NPAs.

U.S. Sentencing Guidelines. Chapter Seven traces the development of the harsh U.S. Sentencing Guidelines since 1987, including the Commission's controversial corporate compliance program initiated in 1991. The chapter explains how the Guidelines are impermissibly flawed and produce draconian sentences. The chapter features the case of *U.S. v. Thurston* to illustrate the flaws of the Guidelines and ends with a discussion of the major Supreme Court cases striking down the mandatory features of the Guidelines, from *U.S. v. Booker* in 2005 to *Spears v. U.S.* in 2009.