

CORPORATE CRIMINAL LIABILITY AND THE THREAT TO CIVIL LIBERTY

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The federal government's power to prosecute corporations poses one of the most serious threats to civil liberties in the twenty-first century. Such authority has been used to transform corporations into government proxies—proxies with powers greater than those possessed by federal agents; proxies that can destroy the lives of innocent employees denied the constitutional protections otherwise guaranteed by the Bill of Rights.¹

The decision to charge an alleged corporate wrongdoer with a crime is based upon principles of prosecution found in what is informally referred to as the Filip Memorandum.² This memorandum lists various factors to consider when deciding whether to prosecute a corporation, one of which is “the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.”³

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1. See John F. Lauro, *Commentary: Protecting Corporate Employees with a New Bill of Rights*, 235 N.Y. L.J. 4 (Apr. 17, 2006) (available at <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=900005451612&slreturn=1&hblogin=1>) (arguing that corporations have an incentive to turn over their employees in order to save themselves, which denies basic constitutional protections to their employees).

2. *U.S. Attorneys' Manual* § 9-28.000 (2008) (available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.100).

3. *Id.* at § 9-28.300. The entire list of factors includes:

- (1) the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
- (2) the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- (3) the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
- (4) the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;

What can a corporation do to minimize its chances of being indicted? It can do virtually anything that could uncover evidence of illegal conduct by one of its employees. For instance, the company could listen in on its employees' phone calls.⁴ The company could search an employee's desk or locker.⁵ The company could compel an employee to answer questions by investigators on pain of discharge if refused.⁶ As the Supreme Court stated in *Colorado v. Connelly*,⁷ "The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause."⁸

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- (5) the existence and effectiveness of the corporation's pre-existing compliance program;
 - (6) the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
 - (7) collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
 - (8) the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
 - (9) the adequacy of remedies such as civil or regulatory enforcement actions.

Id. (internal citations omitted).

4. See *Briggs v. Am. Air Filter Co.*, 630 F.2d 414, 420 (5th Cir. 1980) (holding that an employer listening in on an employee's phone conversation on a company extension line was legal). While Title III of the Omnibus Crime Control and Safe Streets Act of 1968 prohibits the interception and disclosure of wire communications, it contains two exceptions that permit employers to monitor employees' conversations. 18 U.S.C. §§ 2510–2522 (2006). The first of these exceptions is consent, which requires that the company notify employees that their phone calls are subject to monitoring. *Id.* at § 2511(2)(d). The second of these is monitoring done in the ordinary course of business. *Id.* at § 2510(4)–(5). While a company cannot intentionally record the contents of purely personal conversations, it is permitted to intercept personal conversations to determine whether the employee is using the telephone in violation of company policy. *Ali v. Douglas Cable Comm'n*, 929 F. Supp. 1362, 1377–1380 (D. Kan. 1996).

5. See *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921) (holding that no constitutional violation existed when the corporation searched a former employee's office and safe, turning over incriminating evidence it discovered to government agents); see also *United States v. Jacobsen*, 466 U.S. 109, 126 (1984) (explaining that the Fourth Amendment was not implicated when the FBI took possession of white powder discovered during the search of a package by a courier service).

6. Samuel C. Damren, *A Proposal to Amend the Rules of Professional Conduct: Prohibiting Thompson-Styled Waiver Requests*, 85 Mich. B.J. 44, 45 (Oct. 2006).

7. 479 U.S. 157 (1986).

8. *Id.* at 166.

By contrast, a federal agent could not intercept a suspect's telephone conversations absent a court order.⁹ To do so would violate both the Fourth Amendment and federal law.¹⁰ Similarly, a search of the employee's desk or locker would require a search warrant.¹¹ To conduct such a search without a warrant would violate the Fourth Amendment and subject any evidence found to suppression.¹² Suspects cannot be threatened with loss of their jobs in order to induce them to speak to law enforcement.¹³ To do so would violate the Fifth Amendment, and any statements obtained would likely be subject to suppression.¹⁴ No threat of exclusion exists when such evidence is obtained by a private party and turned over to the government.¹⁵

Of course, if government agents ask the company to conduct a search, seizure, or interrogation, then the company will be deemed a government agent, and any evidence obtained in violation of the Constitution could be suppressed.¹⁶ In such cases, the courts have held that the company stands in the shoes of the government.¹⁷ But this narrow exception counts for little in a universe in which companies know exactly what is expected of them, and, as we will see, the failure to live up to the government's expectations can have devastating consequences.¹⁸

While the federal government has had the ability to profit from corporate cooperation since the 1921 Supreme Court decision in *Burdeau v. McDowell*,¹⁹ it only actively began to encourage

9. 18 U.S.C. § 2518.

10. *Id.* at § 2511; U.S. Const. amend. IV.

11. *United States v. Blok*, 188 F.2d 1019, 1021 (D.C. Cir. 1951).

12. 18 U.S.C. § 2518; U.S. Const. amend. IV.

13. *Cf. Lynumn v. Ill.*, 372 U.S. 528, 534 (1963) (setting aside a judgment when the defendant confessed after being told that if she failed to cooperate she would lose state financial aid for her dependent child).

14. *Id.*

15. *United States v. Nasser*, 476 F.2d 1111, 1123 (7th Cir. 1973) (holding that "work-related" search and seizures are reasonable under the Fourth Amendment).

16. Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment*, vol. 1, § 1.8(b), 261–263 (4th ed., West 2004) (discussing cases that held the government's use of private individuals to effect a search violated the Fourth Amendment).

17. *Id.* at 262 n. 41. "[A] search is not private in nature if it has been ordered or requested by a government official." *Id.* at 261.

18. See Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 Am. Crim. L. Rev. 107, 109 (2006) (describing the consequences of failing to live up to the government's expectations and arguing that the prosecution of Arthur Andersen was misguided).

19. 256 U.S. 465.

such cooperation during the Clinton Administration when then Deputy Attorney General Eric Holder authored a memo that made active assistance by companies a key component in the government's battle against corporate crime.²⁰ The threat of adverse consequences resulting from a company's failure to cooperate became reality when the government's prosecution of Arthur Andersen led to the company's bankruptcy and dissolution.²¹

Much has happened in the years since Eric Holder was a Deputy Attorney General. The Holder Memorandum begat the Thompson Memorandum,²² which begat the McNulty Memorandum,²³ which begat the Filip Memorandum. Prosecutors can no longer demand that a company waive its attorney-client privilege and turn over privileged material.²⁴ Prosecutors can demand, however, that a company disclose the facts it has uncovered in its own investigation of its employee's conduct.²⁵ In other words, any fact obtained from an employee interview can be disclosed to the government so long as it is not attributed to the employee. Failure to provide such information will be counted against the company.²⁶ Moreover, while the company cannot be compelled to waive the attorney-client and work-product privileges, it is free to do so—so long as the decision is the company's alone.²⁷ That a company really has a choice is the very definition of a legal fiction.

20. Memo. from Eric Holder, Jr., Dep. Att'y Gen., U.S. Dep't of Just., to All Component Heads & U.S. Att'ys, *Bringing Criminal Charges against Corporations* 5–6 (June 16, 1999) (available at <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF>).

21. See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 698 (2005) (explaining that Arthur Anderson was prosecuted for instructing Enron Corporation to destroy documents in violation of federal law).

22. Memo. from Larry D. Thompson, Dep. Att'y Gen., U.S. Dep't of Just., to Heads of Dep't Components & U.S. Att'ys, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) (available at http://www.justice.gov/dag/cftf/corporate_guidelines.htm).

23. Memo. From Paul J. McNulty, Dep. Att'y Gen., U.S. Dep't of Just., to Heads of Dep't Components & U.S. Att'ys, *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006) (available at http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf).

24. *U.S. Attorneys' Manual* § 9-28.710.

25. *Id.* at § 9-28.720. “[A] corporation that does not disclose the relevant facts about the alleged misconduct—for whatever reason—typically should not be entitled to receive credit for cooperation.” *Id.*

26. *Id.*

27. *Id.* at § 9-28.710.

Typically, when a company learns that it is under suspicion, it will retain the services of outside counsel to conduct an internal investigation.²⁸ Outside counsel will speak with company counsel and sometimes counsel for the government, in an effort to determine what unlawful conduct is alleged.²⁹ Outside counsel will then proceed to interview employees who would be in a position to know relevant information.³⁰

When outside counsel begins its investigation, he or she may have a general idea about which employees are bad apples, but counsel will not know for sure how many others may be involved.³¹ So, counsel must try to convince as many employees as possible to be completely forthcoming. The problem is that outside counsel is not the employee's lawyer.³² He or she is the lawyer for the company.³³ This means that the employee cannot invoke the attorney-client privilege if the company decides to disclose what the employee said during the interview with the company's lawyers.³⁴

In the past, some lawyers failed to explain the employee's situation, leaving the employee with the wrong impression that counsel was the employee's lawyer as well.³⁵ Today, some lawyers try to keep the situation as ambiguous as possible, saying only that they are lawyers for the company and that the company holds the attorney-client privilege—whatever that means.³⁶ The

28. See David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 Am. Crim. L. Rev. 147, 156–158 (2000) (discussing outside counsel's role in an internal investigation).

29. See *id.* at 157–158 (examining the relationship between the government and a company's counsel).

30. See *id.* at 157 (noting that “the government reaps the fruits of interviews while minimizing the risk that the employees will seek to obtain separate counsel who might otherwise have advised them to assert the Fifth Amendment”).

31. See Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism, and the Employee Interview*, 2003 Colum. Bus. L. Rev. 859, 888–892 (discussing the mechanics and importance of the internal investigation and the employee interview).

32. See Model R. Prof. Conduct 1.13 cmt. 10 (ABA 2010) (clarifying the lawyer's role when the organization's interests become adverse to those of its constituents).

33. *Id.* at R. 1.13(a).

34. See 81 Am. Jur. 2d *Witnesses* § 357 (2004) (explaining that the attorney-client privilege only protects communications between the attorney and the actual client).

35. See Duggin, *supra* n. 31, at 910–912 (discussing that trust in corporate counsel gives employees a false sense of security).

36. John M. Burman, *Symposium on Ethics in Corporate Governance: Ethical Considerations When Representing Organizations*, 3 Wyo. L. Rev. 581, 598 (2003).

intent of these lawyers is to lead the employee to believe that what he or she tells counsel will be kept confidential.³⁷

Counsel should, and today most do, make clear that they are not the employee's lawyer; while the interview is protected by the attorney-client privilege, the company can waive the privilege without obtaining the employee's consent or even notifying the employee. While this puts employees on notice that anything they say can be turned over to government agents and prosecutors, in reality it does not give employees much protection since employees who refuse to be interviewed can be fired. Nor does it provide the employee an opportunity to consult with counsel before being interviewed since, unlike *Miranda* warnings, these *Upjohn* warnings do not tell the employee that he or she has the right to speak to an attorney before being interviewed.³⁸ Nor, as in a criminal investigation, is there even a requirement that a lawyer be provided at no cost to the employee.³⁹

Outside counsel is usually a former federal prosecutor with extensive investigative experience.⁴⁰ His or her job is to protect the company. Protecting the company depends upon uncovering the full extent of the crime and assisting the company in convincing the government that the company too was the victim of bad employees who were acting on their own and contrary to company policy.⁴¹ Words alone are not enough. The company must show that it has done everything to rid itself of the cancer by surgically removing it and instituting measures to keep it from coming back.⁴²

37. See *id.* (explaining that it is a dangerous practice for an attorney not to inform the employee that counsel represents the company because it can lead to counsel's disqualification if the employee is successful in convincing a court that he or she had reasonable grounds to believe that counsel was the employee's lawyer as well).

38. *Upjohn Co. v. United States*, 449 U.S. 383, 394–395 (1981).

39. See *Weir v. Potter*, 214 F. Supp. 2d 53, 54 (D. Mass. 2002) (explaining that “there is no constitutional right to counsel in civil cases”).

40. See Jonathan L. Kotler, *Options Backdating Investigations Offer Lessons for Future Government Probes*, *Lawyers Weekly* (July 2007) (available at <http://lawyersweekly.com/reprints/nmf2.htm>).

41. See Lauro, *supra* n. 1 (discussing how “corporations unleash their lawyers . . . to identify alleged ‘wrongdoers’ who can be served up to the government . . .”).

42. See Memo. from Eric Holder, *supra* n. 20, at § VIII (explaining that a factor in determining whether to charge a corporation is whether remedial measures have been taken by the corporation).

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In carrying out this mission, outside counsel has powers that government agents do not.⁴³ He or she can interrogate the employee for as long as necessary.⁴⁴ There is no need to bring the employee before a federal magistrate after six hours.⁴⁵ The employee can be threatened with loss of employment if he or she refuses to speak or says something that counsel believes is untrue.⁴⁶

Unlike government agents and prosecutors, counsel for the company has an incentive to portray the employee's conduct in the worst possible light while exculpating the company and its management from any responsibility.⁴⁷ As a result of this new government and company partnership, employees have no rights and face inquisition by lawyers motivated to protect another potentially guilty party.⁴⁸

The government's newfound ability to circumvent the Bill of Rights would not constitute a general threat to civil liberty but for the enactment of the Foreign Corrupt Practices Act (FCPA).⁴⁹ In the past, companies would not begin to investigate criminal conduct by employees unless some allegation of wrongdoing had first been brought to the company's attention.⁵⁰ This is no longer the case. In 1977, Congress enacted the FCPA, the first law of its kind anywhere to make bribery of foreign officials a crime.⁵¹ For the first twenty-five years of its existence, the FCPA was largely ignored by federal prosecutors who were much more concerned

43. See Lauro, *supra* n. 1 (proposing a corporate employees' Bill of Rights to limit the corporation's powers).

44. See *Chavez v. State*, 832 So. 2d 730, 748 (Fla. 2002) (providing that the length of interrogation by police officers was a significant factor to consider in deciding whether a defendant's statements were coerced).

45. See Fed. R. Crim. P. 5(a)(1)(A) (establishing that a defendant must be taken before a magistrate judge without unnecessary delay); 18 U.S.C. § 3501 (2006) (establishing that a voluntary admission is not inadmissible solely due to delay in arraignment if the confession was made within six hours).

46. Damren, *supra* n. 6, at 45.

47. See *U.S. Attorneys' Manual* § 9-28.700 (discussing the importance of corporate cooperation).

48. Lauro, *supra* n. 1.

49. 15 U.S.C. §§ 78dd-1 to 78dd-3 (2006).

50. See generally Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure*, 118 *Yale L.J.* 126, 134-142 (2008) (providing a detailed background of corporate criminal investigations in the United States).

51. 15 U.S.C. §§ 78dd-1 to 78dd-3.

with prosecuting drug trafficking, insider trading, and terrorism.⁵²

Today enforcement of the FCPA is a priority.⁵³ But there has been a sea change in how the government goes about obtaining adherence to the law.⁵⁴ Instead of just prosecuting wrongdoing when the government finds it—relying upon deterrence to ensure obedience to the law—the government expects companies to establish and maintain an ongoing compliance program that ensures that “issues and allegations are properly escalated and fully investigated.”⁵⁵ It is further expected that the company will self-disclose any violations of law uncovered, discipline anyone found to have violated the law, and provide the relevant documents and testimonial evidence to the appropriate government agencies.⁵⁶ The litmus test for corporate exposure to prosecution will be whether the existing compliance program was sufficiently robust that the company could in good faith claim that it did everything possible to prevent its employee’s misconduct.⁵⁷

What kinds of compliance regimes will arise from these policies? Most compliance today relies upon educating employees about the requirements of the law, the expectations of the company, accounting controls, and employee hotlines.⁵⁸ But increasingly companies are intercepting employee phone calls and emails.⁵⁹ Physical searches of an employee’s personal space (desks, file cab-

52. Shearman & Sterling LLP, *Recent Trends and Patterns in FCPA Enforcement* 4 (Feb. 13, 2008) (available at http://www.shearman.com/files/upload/FCPA_Trends.pdf).

53. *Id.* at 2.

54. *Id.*

55. Martin T. Biegelman & Daniel R. Biegelman, *Foreign Corrupt Practices Act Compliance Guidebook: Protecting Your Organization from Bribery and Corruption* 59 (John Wiley & Sons 2010).

56. *Id.*

57. SEC, *Report of Investigation Pursuant to Section 21(a) of the Securities and Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions* (Oct. 23, 2001) (available at <http://www.sec.gov/litigation/investreport/34-44969.htm>).

58. Thomas Fox, *Corporate Compliance Insights, FCPA Compliance and FCPA Enforcement: A Look Ahead to 2009 and beyond*, <http://www.corporatecomplianceinsights.com/2009/fcpa-compliance-fcpa-enforcement-obama-mcnulty-ashcroft-comments-on-foreign-corrupt-practices-act/> (May 15, 2009).

59. See John K. Villa, *Emails between Employees and Their Attorneys Using Company Computers: Are They Still Privileged?* 26 ACC Docket 102, 102 (Apr. 2008) (available at [http://www.wc.com/assets/attachments/EP_\(5\).pdf](http://www.wc.com/assets/attachments/EP_(5).pdf)) (noting that “[m]ost corporations have adopted policies prohibiting personal use of company computers and have warned that email traffic may be monitored and read by company officials”).

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inets, lockers, etc.) are limited only by the available manpower.⁶⁰ Currently federal law prohibits companies from requiring polygraphs as a condition of employment,⁶¹ but drug-free-workplace urine testing is now routine.⁶²

What we see is a confluence of events that presages the coming of Little Brother. First, the government was given the power to prosecute corporations as if they were individuals.⁶³ Then the government was given the authority to use evidence collected by corporations regardless of how that evidence was obtained.⁶⁴ Later corporations were given incentives to interrogate their employees and provide the results to criminal investigators.⁶⁵ Now corporations must police themselves if they are to avoid being charged with a crime they neither intended nor condoned.⁶⁶ But the police powers available to private employers are not limited by the Constitution.⁶⁷ With the government's knife to their throats, corporations have every reason to spy on their employees, and anything found can be handed over to the government on a silver platter. With the ever-increasing concentration of wealth and power in corporations—and the absence of constitutional protections for employees—the real threat to civil liberties in the coming years will not come from government agencies acting alone but from a new partnership between the government and corporate America.

60. *Nasser*, 476 F.2d at 1123.

61. 29 U.S.C. §§ 2001–2009 (2006).

62. Tyler D. Hartwell et al., *Prevalence of Drug Testing in the Workplace*, Vol. 119 Mthly. Lab. Rev. 35, 35 (Nov. 1996), <http://www.bls.gov/opub/mlr/1996/11/art4full.pdf>.

63. James R. Copland, *Regulation by Prosecution: The Problems with Treating Corporations as Criminals*, Civ. Just. Rpt. 13, 1–3 (Dec. 2000) (available at http://www.manhattan-institute.org/pdf/cjr_13.pdf).

64. *Burdeau*, 256 U.S. at 475.

65. Memo. from Eric Holder, *supra* n. 20, at 3–4.

66. *Id.* at 2.

67. See Lauro, *supra* n. 1 (discussing the idea that “the corporation must do everything possible to place its employees in jeopardy and deprive them of basic constitutional protections”).