# Are Prosecutors Pushing the Envelope Too Far?

My perspective may reflect my age. Prosecutors are pushing the envelope, bringing cases which are not carefully thought out, built on novel (and sometimes unfair) theories, and reflect poorly on prosecutorial discretion. I am not talking about claims of "prosecutorial misconduct," but I am referring to the type and quality of cases prosecutors are bringing.

Prosecutors' set priorities within a political framework. No one can dispute that. Resources are allocated and priorities are spelled out. The 9-11 attack caused federal prosecutors to divert resources from the war on drugs and gang violence to terrorism cases. Whether they are the right kind of cases or are effective in protecting our country is another matter which can be debated. After 9-11, the financial crisis in 2008 and the importance of health care, has lead the Justice Department to allocate more resources to financial and health care fraud. The increase in FCPA prosecutions reflects a mix of these trends – one the one hand, 9-11 underscored the importance of stable foreign governments and corruption is antithetical to stable foreign governments; and on the other hand, foreign bribery is closely linked to "fraud" in the marketplace for foreign business.

In the last four years, prosecutors' have appeared to push their mandates and priorities with a unique level of aggression – frequently employing novel theories or charging decisions. What do I mean by that?

First, in the FCPA context, prosecutors have used aggressive theories to assert extra-territorial jurisdiction over conduct which has very little contact or effect in the United States. For example, a company settled an FCPA case with the Justice Department for conduct which consisted of an overseas bribe which resulted in the money being sent through two US correspondent banks. Even though no one at the company knew that the US correspondent banks were being used, the company agreed that the conduct had sufficient contact with the US for the US to assert jurisdiction over the transaction.

Second, the Justice Department has used the Travel Act in the FCPA context to prosecute commercial bribery which is not covered under the FCPA, and argued successfully that the Travel Act has extraterritorial application.

Third, the Justice Department has employed aiding and abetting concepts to charge companies which are not US issuers and not covered by the FCPA, and which committed no acts inside the US or using a US instrumentality.

In the health care context, prosecutors have employed the Parke doctrine to hold responsible officers liable for criminal misdemeanors for conduct which they were unaware but "could" have prevented or corrected." It is one thing to say someone failed to act, but it is another to hold someone criminally liable for what they "could" have done without requiring some proof of state of mind – be it deliberate indifference or some other failure to act standard. The Parke doctrine already has been in use in the environmental crime context but stretching it into health care and the amorphous enforcement of off-label marketing is an aggressive step for prosecutors to take. Compounding the health care enforcement initiative, is the related efforts by HHS to "exclude" officials and companies from participating in federal health care programs

based on claims of misconduct – such a "penalty" is a death knell for companies and executives and leads to an inevitable "settlement."

Even aside from the novel and aggressive prosecution theories and initiatives, the question arises on whether the facts of a case are sufficiently strong to warrant criminal prosecution. Do prosecutors ever ask whether the conduct really deserves to be prosecuted?

In prosecuting the GlaxoSmithKline criminal case again its in-house counsel, Laura Stevens, the Justice Department improperly charged her as a supposed gatekeeper who wwas involved in failing to disclose information re quest by the government. The judge who dismissed the case made a blistering statement agsinst the prosecutors chiding them for bringing the case at all.

In addition, the Ninth Circuit's decision in ***US v. Goyal*** is a another example of poor case selection and failure to exercise discretion carefully. In reversing a criminal conviction, Judge Kozinski took the prosecution to task for what he described as consuming an inordinate amount of taxpayer resources and devastating Goyal's personal and professional life without proving that he engaged in any criminal conduct. (See my article on the case -- http://www.wlf.org/publishing/publication_detail.asp?id=2234). Judge Kozinski admonished the government, stating that the role of criminal law is to punish those acts that communities decide warrant moral condemnation. But when the prosecutors have to stretch the law or the evidence to secure a conviction, he notes such moral judgment is hardly warranted.

Let us all hope that prosecutors take these ideas to heart when exercising their discretion. Right now, prosecutors need to re-examine how they are carrying out their responsibilities to ensure that "justice" really is done.