

## NO CHOICE

IT'S TIME TO REVERSE THE DOJ'S 'PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS'

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In the first blow to be struck against the Department of Justice's Thompson Memorandum, Judge Lewis Kaplan in *United States v. Stein* recently declared one of its provisions unconstitutional.

The provision requires prosecutors to consider whether a corporation has elected to pay its employees' attorneys' fees in determining whether to seek an indictment of a company that has criminal liability. Kaplan found that it violated the Fifth and Sixth amendments.

A separate provision of the Thompson Memorandum has now also come under attack. Although not directly spelled out in the memorandum, as applied it requires prosecutors, in deciding whether to seek a corporate indictment, to consider whether the company fired employees who do not cooperate with the government. "Cooperation," as the government defines it, routinely excludes employees who decline interviews with the government or refuse to testify in the grand jury based on the Fifth Amendment. "Cooperation" would logically also exclude employees who lied to the government, but in practice it rarely does, because prosecutors are reluctant to disclose what an employee told the government and why they believe the employee lied.

Across the U.S., employees who refuse to speak with the government

based on the Fifth Amendment risk losing their livelihood. This dilemma arises because many corporations have policies that call for firing employees who do not "cooperate" with the government so that the company can be in full compliance with the Thompson Memorandum. Due to the often draconian consequences of a criminal indictment on a corporate entity, the stakes are too great for a company to stray far from the DOJ memorandum. Corporations conforming their policies to this DOJ pronouncement is a fact of life emanating from the truism that an indictment can wreak havoc on a company's stock price and even lead to its demise.

The constitutional problem with a corporation's dismissing an employee as a result of the government's Thompson Memorandum arises because of a Supreme Court decision governing state actors firing employees for refusing to cooperate.

In *Garrity v. New Jersey*, the court considered whether statements are voluntary if the alternative to speaking is losing one's job. The defendants were police officers under investigation for "fixing" traffic tickets. A state statute provided for the dismissal of any public official who refused to answer questions relating to his employment on the basis of self-incrimination. The defendants thus decided to cooperate in the investigation and

made incriminating statements. At trial, the state introduced the statements, and the defendants were convicted.

The Supreme Court reversed, holding that the state could not condition the right to remain silent on the threat of removal from office. Although the police chose to cooperate rather than lose their jobs, that did not render their statements free of duress. The choice between self-incrimination or job loss was, in short, no choice at all. The court concluded that in the face of this impossible dilemma—between "the rock and the whirlpool"—the officers did not speak voluntarily.

Under *Garrity*, a state actor cannot exact a confession through threats of dismissal. Where the government uses a private company to threaten job loss to encourage an employee to speak with the government, the state runs afoul of *Garrity*. Thus, in *Stein*, Kaplan suppressed the statements of two defendants who claimed they were coerced into speaking to the government on pain of losing their jobs and having their attorney's fees cut off.

Because of *Garrity*, federal prosecutors often seek to tread gingerly around this issue. For instance, wary prosecutors raise the issue of whether a company fires employees who do not cooperate only after the government believes it has a prosecutable case

against the company and is considering indicting a company unless it has such a policy. Such prosecutors would seek to determine only what the company's pre-existing policy is, and not seek to cause an employee to be fired during the investigation, as happened in Stein. Such practices mitigate the peril of violating Garrity but do not address the fact that the Thompson Memorandum's very existence molds corporations' decisions about whether to implement a policy of firing uncooperative employees.

DOJ should not take a position with

respect to corporate practice regarding the termination of employees who assert the Fifth Amendment in a criminal investigation. Although a company can properly fire employees based on such an assertion, the government has no business weighing in on that determination. That is not because it places the employee in an untenable position—although it certainly has that effect. DOJ should focus on the government's own actions: Its decisions should not be based on whether a person asserts a right guaranteed by the Constitution and is punished for it

by her employer.

This policy issue should not turn on whether the government has in fact influenced a corporation to fire employees. Thus, regardless of the longevity of Kaplan's legal ruling, a revision of the Thompson Memorandum by DOJ is overdue. ■

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