

There Has Been an Erosion of Fairness in the American Justice System



There are over 5,000 federal criminal laws. There are hundreds of thousands of additional federal regulations that can be enforced criminally. Not to mention state criminal laws and regulations. Collectively, companies spend billions of dollars pursuing good faith efforts to comply with this complex web. But a single mistake can lead to ruin for your company and potential jail time for an executive, a hardworking middle manager, or corporate counsel. Unfortunately, once your company's conduct is under investigation, our criminal legal system fails to provide you an even playing field if you want to respond to accusations, challenge a novel prosecutorial theory of the law, or defend your conduct. That means your investments in compliance are not being valued, legal fees keep rising, and your business is operating in a climate of fear versus innovation and growth.

A variety of legal trends and procedural inadequacies work together to deny corporate actors, in-house counsel, and employees their due process rights.

- ❖ The enactment of overly broad or vague criminal laws that fail to provide fair notice and which stymie well-intentioned compliance efforts;
- ❖ Efforts that erode the admission of valid scientific expert testimony or evidence in judicial proceedings;

- ❖ An enforcement climate where novel overreaching and salacious press releases seem to be valued over fairness and restraint;
- ❖ Instances of prosecutorial misconduct that go undiscovered or unaddressed;
- ❖ The erosion of meaningful criminal intent in laws, as well as the existence of numerous judicially-created doctrines that expand criminal blame to persons and entities whose conduct or knowledge do not justify it
- ❖ Frequent attempts to expand warrantless government intrusions (particularly in relation to electronic communications, smart technology, and banking/business records), which violate privacy and undermine Fourth Amendment guarantees
- ❖ The abuse of the "plea bargaining" system to extract guilty pleas and exorbitant fines from individuals and businesses in cases where there are legitimate factual/legal uncertainties
- ❖ Sentencing Guideline ranges, statutory sentencing laws, and judicial decisions that encourage overly punitive jail sentences not rationally connected to the conduct at issue, the harm that was caused, the loss at stake, or other relevant factors. These undermine a meaningful ability to challenge the government or exercise the Constitutional right to a trial; or evidence in judicial proceedings
- ❖ And numerous other concerning trends.

Corporations Help Shape Public Opinion, Lawmaker Priorities, and Court Decisions. You can make the difference.

As corporate citizens, you play a unique and valuable role in our society. You drive innovation. You create jobs that help keep American neighborhoods thriving. And your interactions with policy-makers play a crucial part in shaping the laws that impact not only your company and your industry, but also the lives of your personnel.

The fair enforcement of commonsense laws that keep businesses thriving and Americans safe are paramount. When that balance is upset, our system relies on advocates, lobbyists, and courts to help correct the system.

Leaders in the corporate community should engage in the following ways:

- ✓ Stay informed about the disturbing trends that erode due process rights.
- ✓ Alert lawmakers to your concerns.
- ✓ Ensure that your counsel are on the lookout for these issues as they respond to government inquiries.
- ✓ Ask your government affairs team to be sensitive to these issues when doing issue advocacy and lobbying in their specific industry portfolios.
- ✓ Participate in organized efforts and partner with other corporate leaders to work collectively towards a more rational and fair system.
- ✓ Support policy organizations and advocacy groups in their efforts to preserve and restore fairness in the justice system.
- ✓ Support *amicus* legal briefs that address key due process concerns—the courts need to hear more from a concerned corporate community.

In FY 2016, the Department of Justice collected almost \$3 billion from the resolution of criminal cases. However, that number belies the fact that the business community at large acts in good faith and takes great effort to appropriately prevent wrongdoing inside its offices and factories.

These issues not only impact businesses of all sizes, but your employees, your neighbors, and your friends. Bad criminal justice policies have led us to a place where fairness takes a backseat. Together, let's show the positive impact businesses can have on American lives.

