

FROM THE PRESIDENT

JOHN WESLEY HALL

Rescinding the Ashcroft Memo So That 'Justice Shall Be Done'

Should we punish a bad bet like we punish a bad act? What distinguishes a miscalculation of risk from the occurrence of a crime? Should a questionable business decision that hurt a lot of people automatically lead to prison time?

These are some of the difficult questions that federal prosecutors will face in the months and years to come as they consider the public pressure to seek retribution as part of the government response to some of the causes of the meltdown of our economy. The investigations will be huge and take forever. Some cases will likely not even come to trial until the end of President Obama's first term in 2013.

It is understandable that people who have witnessed the loss of their jobs or their savings or retirement accounts, sometimes losing everything, will desperately yearn to place blame on somebody's shoulders. The challenge for prosecutors and law enforcement, however, is to focus on determining whether and where criminal prosecutions or civil remedies are warranted, and in which cases they will achieve their greatest deterrent effect to future misconduct. I am not talking about Bernie Madoff here. I am talking about the other institutional failures where people made rich on risky investments bet the bank on more of them, potentially oblivious to the risks involved.

How the Department of Justice deals with these people, and the institutions they allegedly served, will tell us a lot about prosecutorial policy under the Obama administration and his Department of Justice.

The integrity of our justice system suffers when the criminal law is used chiefly to satisfy the clamor for high-profile prosecutions. The legal system is not [supposed to be] theater,¹

designed to yield a kind of catharsis in the narrative of a trial in this, or any other, crisis.² It was not designed to feed the insatiable short attention span of the 24/7 cable news cycle, despite the shrill and completely annoying bleating of Nancy Grace calling for convictions before the evidence is known. But, regretfully, it sells. People want to know why their retirement funds are gone. And who will pay? Will jailing a thousand bankers and other investment fund risk takers get us the money back? Never. Will the vengeance of putting a thousand bankers in the joint make us collectively feel better? On a personal level, maybe slightly. On a political level, every prosecutor with a political bone in his or her body definitely will feel better because his or her political stock will rise. On a professional level, the white collar criminal defense bar will do well.

But at what cost to "justice"? What about "justice" in the headlong rush to jail half of Wall Street?

Our legal system is our nation's pact with ourselves to resolve legal disputes in a way that brings justice to victims, defendants, and society. Our principles of fair prosecution and desire for true justice came long before the driving influence of cable news and talking heads.

Responsible and fair prosecutors, executing their duty to seek justice in the public interest, must exercise discretion divorced from the public cry for vengeance.³ The opposing pressures of dwindling resources and rising public outrage over the current economic condition mean that we, as a society, through our prosecutors, have to exercise restraint in order to maximize the effectiveness of our law enforcement efforts.

State legal ethics rules, binding on federal prosecutors,⁴ express a basic tenet of the American criminal justice system: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."⁵ As Chief Justice Jackson, a decade later a Nuremburg prosecutor, said:

The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.⁶

This ideal is also incorporated into the American Bar Association's Standards for Criminal Justice, the Prosecution Function.⁷

These standards also set forth how prosecutors should consider whether the actions in question are best dealt with under the criminal law or some other way, such as through civil fines or victim restitution. The standards explain that just because charges can be brought does not mean that they always should or must. This is also the premise of "Principles of Prosecution" developed under

John Wesley Hall is the 50th president of NACDL. A former assistant prosecutor, he has been in private practice concentrating in criminal defense since 1979. He is the author of *SEARCH AND SEIZURE* (3d ed. 2000; 4th ed. forthcoming) published by Lexis Law Publishing. Hall is listed in Best Lawyers in America in criminal defense. He writes daily on the law of search and seizure at www.FourthAmendment.com. He is also



the author of *PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE* (3d ed. 2005) published by Thomson West.

JOHN WESLEY HALL

1311 Broadway
Little Rock, AR 72202
501-371-9131
Fax 501-378-0888

E-MAIL forhall@aol.com

Attorney General Benjamin R. Civiletti in 1980.⁸

But in September 2003, former U.S. Attorney General John Ashcroft issued an edict that required federal prosecutors to pursue the most serious offenses that can be proved, with few exceptions.⁹ Federal prosecutors were thus stripped of an essential and fundamental personal discretion to seek justice according to the needs of the case and the accused. Adherence to the Ashcroft Memorandum has led, in some districts, to abusive charging decisions and unnecessarily long, not to mention expensive, sentences. It has also led to long and expensive trials, because the government's charging decision made it impossible for the defendant to plead guilty.

Unfortunately, the next two attorneys general, Alberto Gonzales and Michael B. Mukasey, neither revised nor rescinded the Ashcroft Memorandum, and his policy lives on in the Department of Justice operating manual, curtailing prosecutorial discretion. In Gonzales's case, we can readily see why: He ran the Department of Justice in name only.¹⁰

Attorney General Eric Holder should promptly repeal the Ashcroft Memorandum and give each of the U.S. attorneys back their autonomy to seek justice first and scalps second. Holder, as both a former U.S. attorney and former D.C. Superior Court judge, should see this policy for what it is — a prosecutorial

scorecard rather than sound public policy for the federal department with "Justice" in its name.

Limiting prosecutorial discretion under the Ashcroft Memorandum does not serve justice, and it never did. It promotes a false notion of what is fair and true to our ideals as a nation. U.S. attorneys are not elected, so their constituency is not voters, but a higher calling. Overzealous use of criminal sanctions is not even close to "justice"; it is a blatant perversion of justice. If there is adherence to the Ashcroft Memorandum, plea bargaining becomes impossible without bureaucratic approval in Washington, and, thus, more trials occur.

Overcharging crime is offensive to the American notion of fair play, which truly is an integral part of our national concept of justice, or what should be justice. We must avoid committing and promoting injustice by overcharging for crimes that cannot readily be proved. Justice by the numbers, measured merely by counts of conviction and months on the Sentencing Table,¹¹ a name that itself supports it being a numbers game, simply is not justice.

As inscribed at the Department of Justice: "The government wins its case when justice is done."¹² This sentence should be written on the cornerstone of the building, and this sentence should be its reason for existing. It was back when it was installed.

The Ashcroft Memorandum does not serve justice. It is a throwback to prosecution for vengeance against the wrongdoer. An independent "minister of justice" would dispatch the Ashcroft Memorandum to where it belongs: A place where bad ideas go to die.¹³

Justice has nothing to do with what goes on in a courtroom; justice is what comes out of a courtroom. — Clarence Darrow

Notes

1. Despite the fascination with trials carried on TruTV, formerly Court TV.

2. Consider the federal prosecutions of Timothy McVeigh, Terry Nichols, and Zacarias Moussaoui. None of these trials were televised because they were in federal court.

3. This is slightly off point, but Mike Nifong promoted the public clamor for vengeance in the infamous "Duke Lacrosse case" by instigating false news stories about the evidence. He was, as we all recall, disbarred for it.

4. 28 U.S.C. § 530B.

5. MODEL RULES OF PROF'L CONDUCT R.3.8, Comment ¶ 1: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."

6. *Berger v. United States*, 295 U.S. 78, 88 (1935), reaffirmed in *Kyles v. Whitley*, 514 U.S. 419, 439 (1995), and *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

7. ABA Stds., *The Prosecution Function* Std. 3-1.2 (3d ed. 1992):

(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict.

8. U.S. Attorney's Manual § 9-27.000. As to the 1980 source, see *id.* § 9-27.001, Preface.

9. *Id.* § 9-27.300, adopted September 2003.

10. Don't get me started on the utterly disgraceful Alberto Gonzales. He so disgraced the Department of Justice in his actions and appearances before Congress that its vaunted reputation as the home of "ministers of justice" and guardians of constitutional rights became but a rudderless ship, sailing on the trade winds of politics and political influence directly into the rocks. See John Wesley Hall, *We Are Enforcers of the Constitution*, THE CHAMPION 5 (Aug. 2008):

The Department of Justice had a tradition of having backbone, prior to 2001. Then, its leadership became populated with sycophants. Alberto Gonzales did more damage to the "rule of law" in two and a half years as attorney general than any predecessor.

2. In December 2006, seven U.S. attorneys were fired for completely political reasons.

3. When Congress asked about it, we saw the stunning, pathetic, and even comical performance of Alberto Gonzales testifying before Congress to his lack of memory about the firings.

11. U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A, Sentencing Table (2008).

12. This obviously is an Americanization of the English phrase "Numquam Rex Lucratur, Numquam Rex Spoliatur": "The Crown never wins, the Crown never loses."

13. President Obama, before the election, referred to Washington as a place "Where good ideas go to die." It should also be a place where bad ideas can go to die. ■