

# THE “GOOD FAITH” DODGE: MOVING FROM TORTURE TO BUSINESS?

One short phrase in an article bmaz alerted me to yesterday set my blood to boiling. I fumed about it off and on through the rest of the day and even found myself going back to thinking about it when I should have been drifting off to sleep.

The phrase? “Good faith”

Here’s the phrase in the context of the article:

The U.S. Justice Department’s stepped up enforcement in the pharmaceutical industry has struck “the fear of God” in executives, a top lawyer at GlaxoSmithKline said today, addressing whether prosecutors have gone too far in building cases rooted in business conduct.

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The panel’s moderator, Jonathan Rosen, a white-collar defense partner in the Washington office of Shook, Hardy & Bacon, described what he called a “highly aggressive” enforcement environment.

Rosen posed questions to the panel members to explore the extent to which the government is criminalizing good-faith business decisions.

So, why would the longer phrase “criminalizing good-faith business decisions” set me off so? When I read that phrase, my mind flashed back to April, 2009 and the release of the torture memos. Here is Eric Holder, as quoted by ABC News:

“Those intelligence community officials

who acted reasonably and in good faith and in reliance on Department of Justice opinions are not going to be prosecuted," he told members of a House Appropriations Subcommittee, reaffirming the White House sentiment. "It would not be fair, in my view, to bring such prosecutions."

But Holder left open the door to some legal action, saying that though he "will not permit the criminalization of policy differences," he is responsible as attorney general to enforce the law.

Uh-oh. Now it's even worse. See the additional parallel? Holder decried the "criminalization of policy differences" at the same time he said he wouldn't prosecute those who acted in "good faith" on the torture memos. The "good faith" in the business article above was smack in the middle of "criminalizing" "business decisions".

Holder didn't just pull "good faith" and "criminalizing policy differences" out of thin air. Bush administration officials, led primarily by Dick Cheney, had been trumpeting that defense since before the end of the George W. Bush administration. In fact, John Perr, at Crooks and Liars, traces the "criminalizing policy differences" defense back to George H.W. Bush when he announced the Iran-Contra pardons.

It was one thing for Eric Holder and Barack Obama to cave on the question of prosecutions for the torturers, but to adopt the convoluted language and reasoning of the Republicans in doing so makes it even worse. Especially in the case of torture, "good faith" and "criminalizing policy differences" are total garbage. Holder agreed, in testimony before Congress both during his confirmation and later as the torture memos were being released, that waterboarding is torture. The UN Convention Against Torture, which has been approved as a treaty by Congress and has the force of law, states categorically:

No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Furthermore:

An order from a superior officer or a public authority may not be invoked as a justification of torture.

So, the fact that the Bush administration chose to implement a policy of torture means that they chose a criminal policy. Prosecuting those guilty of torture and ordering torture is not criminalizing the policy, it is prosecuting the crime. In adopting the twisted language and logic of the Republicans on this issue, Holder and Obama demonstrated the same depraved moral weakness that allowed torture to become official US policy in the first place.

What will be the consequence of this depraved morality and logic moving to the defense of crimes committed by businesses? The Occupy Wall Street movement that is sweeping the country now is doing a fantastic job of pointing out the collateral damage of "business decisions" run amok. The continued upward transfer of wealth in our country has moved into outright criminal activity as the greed at the top has grown beyond legal and moral grounds. Especially in the housing crisis, multiple crimes have been committed as mortgages were pushed onto consumers who had no chance of repaying them and then the mortgages were bundled and sold multiple times into speculative investment vehicles that in the end nearly brought the entire world economy down.

And yet, we now see testing of the admonishment not to "criminalize good faith business decisions". No. Just no. The current economic crisis that has seen millions of Americans reduced from a healthy middle class existence to

mere subsistence came about because there is only one component to “business decisions” and that component is to maximize profit no matter what. Profit is to be maximized, regulations are to be ignored and the law is for sissies has become the operating mantra of Wall Street.

Inadvertently, Barack Obama himself has admitted that there was no “good faith” in the mortgage securities heist. Here is David Dayen describing an exchange in an Obama press conference on October 6:

For perhaps the first time, President Barack Obama was forced to explain why there have been no prosecutions of Wall Street executives for their fraudulent actions during the run-up to the financial crisis. Asked by Jake Tapper to explain this behavior, Obama basically suggested that most of the actions on Wall Street weren't illegal but just immoral, and that his Administration worked to re-regulate the financial sector with the Dodd-Frank reform legislation.

“Banks are in the business of making money, and they find loopholes,” the President said. Apparently forging and fabricating documents to prove ownership of homes that are subsequently stolen from borrowers is now a loophole.

If those responsible for the financial crisis acted immorally and relied on “loopholes” to carry out the looting of the economy, then there is no way that such behavior was in “good faith”. Never mind that Obama was simply lying when he said no crimes were committed. However, in his lame attempt to justify why there have been no prosecutions, his admission that good faith was not involved exposed, if only for a moment, the moral depravity of both those who carried out the crimes and those who choose not to prosecute them.

Yes, it is the Obama administration and its Justice Department that has chosen not to prosecute these crimes. Going back to the original article that set me off:

Deborah Connor, chief of the fraud and public corruption section of the U.S. Attorney's Office for the District of Columbia, said prosecutors take into account a corporation's cooperation when it comes time to decide whether to bring charges.

"We decline to prosecute cases every day," said Connor, the only current assistant U.S. attorney on the panel today. "We have that choice, and we make that choice all the time."

So, yes, coming soon to a financial criminal near you, more criminals will adopt the claim that they merely acted in "good faith" to carry out "business decisions" and therefore should not be prosecuted. Obama's prosecutors then will fall in line and choose, yet again, not to prosecute.

Crime is still crime, but the Holder Justice Department chooses those crimes it wishes to prosecute. Those choices are informed by a moral depravity dictated by the very criminals who have driven our country's descent into torture and financial ruin.

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