

**Responses of Amy B. Jackson
Nominee to be United States District Judge for the District of Columbia
to the Written Questions of Senator Al Franken**

- 1. In March 2006, you gave a speech to the Federal Practice Institute where you described more aggressive government enforcement of corporate criminal law. In this speech, you implied that the government has crossed a line, that it is asking too much of corporate defendants. Specifically, you said:**

What we used to consider cooperation is considered nothing. And what we used to consider putting up a defense is now characterized as obstructing justice. [...] Why? Why can't federal prosecutors – with the awesome reach of their subpoena and grand jury power – why can't they do their own jobs anymore? [...] Instead of building cases for trial, [...] [they're] putting enormous pressure on you to put enormous pressure on your officers and employees to coerce pleas [and] cooperation. [I] can't understand why self respecting [sic] prosecutors want to take this route.

Only answer: because they can.

Is the Department of Justice really being too tough on corporations?

Response: No. As a former federal prosecutor, I appreciate the importance of vigorous criminal enforcement and corporate compliance.

The intent behind the comments described above was not to question the need for tough criminal prosecution of corporate crime, but to discuss a policy that was being used at the time to achieve those ends that affected individual employees. In particular, I was addressing a Department of Justice policy that was facing strong criticism at the time not only from the defense bar, but also the ABA, business leaders, the ACLU, and Members of Congress from both parties, including the bipartisan leadership of the Senate Judiciary Committee. In response to these concerns, the policy has since been rescinded.

At that time, Departmental policy governing whether prosecutors should seek criminal charges against the business entities themselves -- as opposed to just the individuals involved -- was set out in a 2003 memorandum issued by the then Deputy Attorney General, Larry D. Thompson, entitled: Principles of Federal Prosecution of Business Organizations. The "Thompson Memorandum," as it came to be known, listed a series of factors prosecutors should consider when making a charging determination including the company's "willingness to cooperate in an investigation of its agents." The Memorandum stated that the factors to be considered in assessing the "adequacy" of that cooperation should include: whether the company waived its attorney-client privilege and attorney work product protection, and whether it was advancing attorneys' fees for the individuals under investigation or providing them with information under a joint defense agreement.

After I described the Thompson Memorandum, I made the comments based on the notes that are excerpted from page 8 of my outline above. Speaking as a former federal prosecutor, I asked why prosecutors would need to call for attorney work product given the investigative tools and the skill they had at their disposal. The tone of the remarks reflected the serious concerns at that time that were animating many defense attorneys who represented individuals and employees at that time, as well as others. But I did not suggest at any point that corporations should not fully cooperate with criminal investigations, or that culpable individuals should not be punished.

In response to these widespread concerns, the Department of Justice revised the policy in the summer of 2008. See <http://www.justice.gov/opa/pr/2008/August/08-odag-757.html> (DOJ press release announcing the revision of the Thompson memo). The Principles of Federal Prosecution of Business Organizations adopted in 2008 under Attorney General Mukasey remain the policy today. See *U.S. Attorneys Manual*, 9-28.710, 720, and 730.

These revisions covered all of the concerns that I raised in my talk in March of 2006.

After everything we have seen in this most recent financial meltdown, would you say these same words today?

Response: No. The revision of the Department's policies concerning corporate cooperation has alleviated all of the concerns I was expressing at the time.

- 2. I'm concerned that our courts have become far too cozy with big business. The Roberts Court is an exemplar of this. This is a Court that has made it easier for corporations to discriminate against older Americans. It's made it easier for corporations to keep their employees out of court through secret, binding arbitrations. And it's made it harder for investors to recover money from the firms that have defrauded them.**

What do you think is the proper relationship between the federal courts and corporations?

Response: The role of the federal courts is to fairly apply all statutory and Constitutional provisions and to adhere to the law, including the law governing corporations as it is set forth by Congress. District Court judges are bound to follow the precedents of the Supreme Court and the Courts of Appeals in performing that function. It is not the role of District Judges to accord special rights not found in law to corporations who appear before them. It is the role of Congress to expand or restrict the rights and obligations of corporations or their employees.