

# Timeline: Federal Erosion of Business Civil Liberties

Third Edition 2015

Washington Legal Foundation's  
*Timeline* presents, in summary form,  
the key legal, judicial, and agency  
developments in the growing trend to  
criminalize normal business activities.

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	1900 -1979	1980 -1989	1990 -1999	2000 - 2015
<b>Mens Rea, Public Welfare Offenses, and Responsible Corporate Officer Doctrine</b>	<p>1909: <i>N.Y. Central &amp; Hudson River R.R. Co. v. US</i>, 212 US 481. Intent of employees can be imputed to corporations, making a corp. criminally liable for the first time.</p> <p>1943: <i>US v. Dotterweich</i>, 320 US 277. Lack of mens rea does not bar misdemeanor prosecutions of "Responsible Corporate Officers" for safety violations.</p> <p>1971: <i>US v. Int'l Minerals</i>, 402 US 558. Mens rea is presumed for violating health &amp; safety misdemeanor laws, i.e., "Public Welfare Offenses."</p> <p>1975: <i>US v. Park</i>, 421 US 658. Sup. Ct. reaffirms <i>US v. Dotterweich</i>.</p>	<p>1981: <i>US v. Turkette</i>, 452 US 576, Sup. Ct. holds that Racketeer Influenced &amp; Corrupt Organizations Act (RICO) applies to legitimate businesses too.</p> <p>1985: <i>Liparota v. US</i>, 471 US 419. "Knowing" regulatory offense requires specific intent; mens rea not presumed.</p> <p>1987: <i>US v. Bank of New England</i>, 821 F.2d 844 (1st Cir.). Corporation liable for "collective knowledge" of employees and "willful blindness" to their wrongdoing.</p>	<p>1991: <i>Cheek v. US</i>, 498 US 192. No "willful" violation of IRS law if subjective good faith confusion with complex laws, even if belief is irrational.</p> <p>1993: <i>US v. Weitzenhoff</i>, 35 F.3d 1275 (9th Cir.). "Knowing" violation of Clean Water Act requires general intent rather than actual knowledge of permit regulation.</p> <p>1994: <i>Staples v. US</i>, 511 US 600. "Knowing" violation of gun laws requires proof of specific intent or actual knowledge of regulation.</p> <p>1998: <i>US v. Ladish Malting Co.</i>, 135 F.3d 484 (7th Cir.). "Knowledge" for OSHA violation requires actual knowledge, not willful blindness or negligence. Circuits split on issue.</p> <p>1999: <i>US v. Hanousek</i>, 176 F.3d 1116 (9th Cir.). Off-duty manager held criminally negligent for accidental oil pipe break. Dissent from cert. denial criticizes Public Welfare Offense doctrine. 528 US 1102 (2000).</p>	<p>2001: <i>US v. Hansen</i>, 262 F.3d 1217 (11th Cir.). Convictions and multi-year prison sentences upheld for Responsible Corp. Officers for "knowing endangerment" despite lack of actual knowledge.</p> <p>July 2002: Sarbanes-Oxley Act (SOX), enacted in response to Enron, imposes up to 25 yrs in prison for fraud. "Signature liability" for execs certifying SEC reports; "knowing" violations subject to 10 yrs prison; 20 yrs for "willful" violations.</p> <p>Nov. 2002: GC of US Treas. Dep't boasts his "invention" of an unprecedented strict liability bank regulation against money laundering in order to eliminate mens rea and scienter.</p> <p>2003: <i>US v. Svoboda</i>, 347 F.3d 471 (2d Cir.). "Conscious avoidance" jury instruction sufficient to prove "knowing" violation.</p> <p>2005: <i>US v. Wasserson</i>, 418 F.3d 225 (3d Cir.). Owner of company liable for RCRA violation by employee despite lack of actual knowledge of offense.</p>
<b>EPA Criminal Enforcement Policies</b>	<p>1970: EPA established by President Nixon to administer and enforce enviro laws. By 2007, EPA has 10 regional offices and 17,000 employees.</p> <p>1976: EPA develops criminal enforcement guidelines.</p>	<p>1985: EPA increases criminal enforcement staff from 22 to 34; assisted by FBI agents.</p> <p>1987: Congress amends Clean Water Act to add felony penalties ranging from 2 to 15 years in prison.</p> <p>1988: Congress confers police powers on EPA criminal agents, including authority to carry firearms.</p>	<p>1990: Congress enacts Pollution Prosecution Act; EPA directed to hire 200 criminal agents; Clean Air Act amendments add felony provisions.</p> <p>1991: EPA and OSHA issue Joint Memorandum on enforcing OSHA violations with EPA laws.</p> <p>1994: Devaney Memo instructs EPA agents to target only cases of significant pollution and culpability and to use civil and admin. remedies for minor offenses; non-criminal option often ignored.</p> <p>Dec. 1995: EPA issues Self-Audit Policy providing leniency to companies that self-report violations.</p> <p>1997: <i>US v. Knott</i>, 106 F.Supp.2d 174 (D. Mass.). EPA/FBI "SWAT Team" raids plant for technical CWA infraction; charges dropped in 1999 after discovering EPA agents altered evidence.</p>	<p>2003: EPA coordinates with SEC to ensure accurate reporting of environmental liabilities under SOX.</p> <p>Sept. 2003: EPA, DOT, and DOJ launch HAZMAT criminal initiative; DOJ prosecutes domestic airline for regulatory infraction.</p> <p>Nov. 2003: EPA completes enforcement management review; criticizes basing performance metrics on prosecutions and prison terms rather than pollution abatement.</p> <p>May 2005: EPA, OSHA, and DOJ announce initiative to prosecute OSHA violations with tougher environmental statutes.</p> <p>July 2005: EPA begins to physically co-locate all civil and criminal offices.</p>
<b>DOJ Criminal Prosecution Policies</b>		<p>July 1980: Atty Gen. Civiletti issues <i>Principles of Federal Prosecution</i> for US Attys; encourages civil and admin. alternatives for regulatory offenses.</p> <p>1982: DOJ begins to greatly expand use of Title 18 false statement, mail and wire fraud, and conspiracy laws for regulatory and reporting offenses.</p> <p>1985: DOJ establishes Enviro Crimes Section. Prosecutors begin filing pre-trial motions to prevent defendants from showing jury no environmental harm occurred.</p> <p>1987: DOJ Env't Div. issues Parallel Prosecution Memorandum; urges criminal prosecution before civil proceedings.</p>	<p>1991: DOJ Env't Div. issues <i>Crim. Enforcement Policy</i> Memo on Voluntary Compliance and Disclosure, a precursor to 1999 Holder Memo.</p> <p>1992: DOJ &amp; US Attorneys begin establishing Environmental Crime Task Forces of federal, state, local agencies nationwide.</p> <p>1994: Atty Gen. Reno Memorandum expands authority of US Attys to prosecute enviro cases in response to congressional pressure.</p> <p>1999: DOJ issues two Directives: <i>Global Settlement Policy</i> on settling civil and criminal charges and <i>Integrated Enforcement Policy</i> on joint civil and criminal enforcement.</p> <p>June 1999: Holder Memorandum lists eight non-binding criteria to consider when deciding whether to prosecute corps., e.g., voluntary disclosure, cooperation, and remedial actions.</p>	<p>Mar. 2002: Arthur Andersen indicted and convicted for obstruction in Enron probe; "corporate death sentence" with 28,000 jobs lost; conviction overturned by Sup. Ct. in 2005.</p> <p>July 2002: President Bush establishes Corporate Fraud Task Force in response to Enron-related cases; criticized for overly aggressive tactics; several key convictions later overturned.</p> <p>Jan. 2003: Thompson Memorandum revises Holder Memo; requires company's "authentic cooperation" by disclosing conduct and culpable employees.</p> <p>Sept. 2003: Atty Gen. Ashcroft Memo directs US Attys to charge "the most serious" charge and seek toughest sentence; policy greatly increases pressure to plead guilty.</p> <p>2004: <i>US v. Kumar</i> (E.D.N.Y.). DOJ prosecutes employees of Computer Assocs. on novel theory of obstruction for false statements made to outside counsel who later shared them with prosecutors.</p> <p>2004-2005: DOJ prosecutes Warner-Lambert and Eli Lilly for off-label promotion of lifesaving drugs; infringes on First Amend. commercial free speech rights.</p> <p>Mar. 2005: <i>US v. Rapanos</i> (D. Mich.). Court rebukes US Atty for prosecuting developer for putting sand on wetland and demanding long prison sentence. Sup. Ct. later overrules fed jurisdiction. 547 U.S. 715 (2006).</p> <p>May 2005: <i>Arthur Andersen, LLP v. US</i>, 544 US 696. Conviction reversed by a unanimous Supreme Court.</p> <p>2005: <i>US v. Scrusby</i>, 366 F.Supp.2d 1134 (N.D. Ala.). Court rebukes DOJ for manipulating SEC civil investigation to obtain evidence against defendant for criminal case.</p> <p>2006: <i>US v. Stringer</i>, 408 F.Supp.2d 1083 (D.Or.). Indictments dismissed for using SEC civil investigation as pretext for criminal case.</p>
<b>Attorney-Client Privilege and Work-Product Doctrine</b>	<p>1906: <i>Hale v. Henkel</i>, 201 US 43. Corporations have no Fifth Amend. right against self-incrimination.</p> <p>1947: <i>Hickman v. Taylor</i>, 329 US 495. Court extends work-product privilege to corporations.</p>	<p>1981: <i>Upjohn v. US</i>, 449 US 383. Sup. Ct. expands corp. atty-client privilege to include communications from lower-level employees.</p> <p>1988: Threatened with RICO charges on respondeat superior theory, Drexel Burnham Lambert has to waive atty-client privilege, plead nolo to securities law violations, and pay \$650 million fine.</p> <p>1989: <i>Duttler v. Bandler &amp; Kass</i>, 127 FRD 46 (S.D.N.Y.). Atty-client privilege lost under crime-fraud exception when corp. innocently acted as intermediary for others engaging in fraud.</p>	<p>1996: <i>In re: Kidder Peabody</i>, 168 FRD 459 (S.D.N.Y.). Atty-client and work product privileges waived for info from corp. internal report given to SEC, even if no intent to waive for third parties.</p> <p>1999: WLF-Atty Gen. Thornburgh Report criticizes judicial expansion of crime-fraud exception that broadens the def. of "crime" to include "wrongful conduct," which can extend to regulatory infractions.</p> <p>June 1999: Holder Memo criteria include corp. waiver of atty-client and work-product privileges as only one factor to assess "cooperation" with DOJ.</p>	<p>2001: SEC issues "Seaboard Report" encouraging waiver of atty-client privilege.</p> <p>Jan. 2003: Thompson Memo encourages US Attys to force corps. to waive privileges and deny payment of atty fees to targeted employees.</p> <p>Nov. 2004: Revised Corp. Compliance Program Guidelines include waiver of privileges and ethics training for all employees.</p> <p>Mar. 2005: Business coalition urges Sentencing Comm'n to eliminate privilege waiver as one criteria for co-operation to receive reduced punishment after conviction.</p> <p>Apr. 2005: Ass'n of Corp Counsel (ACC) and Nat'l Ass'n of Crim. Defense Lawyers (NACDL) publish surveys showing widespread "culture of waiver" spawned by prosecutors.</p> <p>Aug. 2005: ABA adopts Resolution 111 against DOJ waiver policy.</p> <p>Mar. 2006: ACC/NACDL updates 2005 survey showing 75% of their members agree "culture of waiver" widespread.</p>
<b>Deferred Prosecution and Non-Prosecution Agreements</b>		<p>1986: DOD begins making Corporate Integrity Agreements (CIAs) with gov't contractors to settle billing disputes; requires fines and internal management reforms.</p>	<p>1992: DOJ enters into first Non-Prosecution Agreement (NPA) with a corporation (Salomon Brothers).</p> <p>1993: DOJ enters into first Deferred Prosecution Agreement (DPA) with a corporation (Armour of America); company does not admit liability.</p> <p>1994: HHS begins making CIAs with healthcare companies to resolve Medicare billing and other disputes; four CIAs used in 1994; 232 CIAs in 1998.</p> <p>1997: DOJ establishes guidelines for allowing pre-trial diversion, but terms of NPAs and DPAs vary widely, e.g., waive privileges, appoint monitor, admit guilt, pay fines, sanction employees, make internal reforms.</p>	<p>1993-2002: 18 DPAs and NPAs, an average of two per year.</p> <p>Jan. 2003: Thompson Memo also announces DOJ policy shift from prosecutions toward greater use of DPAs and NPAs; pre-2003 saw 18 total DPAs or NPAs ever; under new policy DOJ has averaged more than 17 DPAs and/or NPAs per year.</p> <p>2004: Computer Associates DPA includes large \$225 million penalty and waiver of atty-client privilege.</p> <p>June 2005: Bristol-Myers Squibb DPA imposes large penalties and unusual conditions, including appt. of US Atty-approved Director and large donation to US Atty's alma mater.</p> <p>Aug. 2005: KPMG DPA requires \$456 million penalty, termination of tax practice, and cooperation after charges dropped.</p> <p>Feb. 2006: Operations Mgmt Int'l DPA for enviro violations requires \$1 million donation to Coast Guard Academy.</p>
<b>Proliferation of Criminal Laws/Sentencing Developments</b>	<p>1900: Only approx. 165 federal criminal laws on the books.</p> <p>1970: Approx. 2,000 federal criminal laws in force, a more than ten-fold increase since 1900.</p>	<p>1982: DOJ Office of Legal Policy estimates 3,000 federal criminal offenses.</p> <p>1984: Sentencing Reform Act abolishes parole after serving 1/3 of sentence; hence, 1-year prison term imposed per new Sent. Comm'n Guidelines equals a 3-year pre-Guidelines term. Corp. fines raised to \$500K or 2x gain or loss.</p> <p>1989: <i>US v. Halper</i>, 490 US 435. Civil fines imposed after criminal case could violate Double Jeopardy Clause.</p>	<p>Nov. 1991: Corp. Guidelines issued; Corp. Compliance Program lists eight criteria for lenient punishment, e.g., full cooperation with gov't, voluntary disclosure, and mgmt. reform.</p> <p>1992: Prof. John Coffee estimates over 300,000 regulations that are criminally enforceable.</p> <p>1994: <i>US v. Lucas Aerospace</i> (E.D.N.Y.). Corp. Compliance Program criteria used as probation conditions.</p> <p>1996: <i>In re: Caremark, Int'l Inc.</i>, 698 A.2d 959 (Del.). Directors may be liable for not following Corp. Compliance Program.</p> <p>1997: <i>Hudson v. US</i>, 522 US 93. Civil fines, if not punitive, do not bar subsequent criminal case; effectively overrules <i>US v. Halper</i>.</p> <p>1998: ABA-Atty Gen. Meese Task Force estimates over 3,300 federal criminal offenses.</p>	<p>Sept. 2001: Sent. Comm'n Advisory Group on Corp. Guidelines assesses effectiveness of Corp. Compliance Program.</p> <p>Oct. 2003: Sent. Comm'n Advisory Group on Corp. Guidelines issues Final Report recommending tougher corp. compliance programs.</p> <p>2004: Prof. John Baker-Federalist Soc'y Report estimates over 4,000 federal criminal statutory offenses, a 33% increase from 1982.</p> <p>2004: <i>US v. McNab</i>, 331 F.3d 1228 (11th Cir.). Record eight-year prison terms for importing frozen seafood in wrong packaging.</p> <p>June 2004: Antitrust law amended; increases prison terms from 3 to 10 yrs and corp. fines from \$10 million to \$100 million.</p> <p>Jan. 2005: <i>US v. Booker</i>, 543 US 220. Mandatory Sentencing Guidelines struck down; Guidelines to be only advisory in selecting proper sentence.</p>

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# Federal Erosion of Business Civil Liberties 1900-2015

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2000 - 2015					
<p><b>Mens Rea, Public Welfare Offenses, and Responsible Corporate Officer Doctrine</b></p> <p><b>Mar. 2006:</b> Senate Judiciary Comm., led by Sen. Specter, holds hearings on whether to criminalize civil product liability law for "defective" consumer products.</p> <p><b>May 2007:</b> Purdue Frederick execs held strictly liable as Responsible Corp. Officers for sales reps' marketing of OxyContin even though execs had no actual knowledge or involvement in the offense.</p> <p><b>Jan. 2009: US v. Ionis Management, S.A.,</b> 555 F.3d 303 (2d Cir.). Upholds corporate defendant's conviction, affirming criminal responsibility for single low-level employee who violated corporate policy despite robust corporate compliance program.</p> <p><b>2009:</b> Fraud Enforcement and Recovery Act of 2009 (FERA) amends False Claims Act to eliminate "intent to defraud" requirement, thus permitting criminal liability even if defendant has no knowledge claim will be presented to govt.</p> <p><b>July 2009: US v. Kozeny,</b> 664 F. Supp. 2d 369 (S.D.N.Y. 2009). Frederic Bourke convicted of conspiring to violate FCPA, even though never accused of bribing government officials; conviction based on his "general knowledge" of corruption in the region and a "conscious avoidance" jury instruction to satisfy criminal mens rea.</p> <p><b>Mar. 2010:</b> FDA Cmr. Margaret Hamburg publicly calls for increase in number of misdemeanor prosecutions of responsible corporate officers under FDCA.</p> <p><b>2010:</b> US Supreme Court limits scope of honest-services fraud statute to real crimes of bribery and kickbacks in <b>Skilling v. US,</b> 561 US 358 (2010).</p> <p><b>2010:</b> Dodd-Frank Wall Street Reform and Consumer Protection Act vastly expands SEC discretion to try wrongdoers administratively, without a jury, and for merely "reckless" conduct.</p> <p><b>2010:</b> Patient Protection and Affordable Care Act of 2010, 18 U.S.C. § 1347, reduces criminal mens rea for healthcare fraud and increases penalties under Federal Sentencing Guidelines.</p> <p><b>Oct. 2011: US v. Harkonen,</b> Nos. 11-10209 &amp; 11-10242 (9th Cir.). Ct. of Appeals affirms former InterMune CEO Dr. Scott Harkonen's conviction on wire-fraud charges for promoting off-label use of Actimmune in a press release.</p> <p><b>Nov. 2012:</b> DOJ/SEC issue non-binding joint guidance on FCPA enforcement providing that while defendant must act willfully to be criminally liable, awareness that act violated FCPA is not required.</p> <p><b>May 2013:</b> ALJ permits Consumer Product Safety Commission to invoke the responsible corporate officer doctrine in non-criminal context to name former CEO of bankrupt Maxfield &amp; Oberton as a respondent in Buckyballs magnets recall.</p> <p><b>Sept. 2014:</b> Ct. of Appeals en banc decision greatly expanding sole corporate shareholders' and officers' liability for US customs violations in <b>Trek Leather v. US,</b> 767 F.3d 1288 (Fed. Cir.).</p> <p><b>Dec. 2014: US v. Sen,</b> No. 2:13-CR-56 (E.D. Tenn.), DOJ successfully moves to vacate convictions of Dr. Anindya K. Sen and his wife for causing introduction into interstate commerce of misbranded drugs administered in his TN oncology practice.</p> <p><b>Apr. 2015: US v. Quality Egg, LLC</b> (N.D. Ia.), egg company owner and COO (Jack and Peter DeCoster) plead guilty to crimes related to salmonella-contaminated eggs shipped in commerce. DOJ obtains three-month prison sentence, relying on responsible corporate officer doctrine in lieu of any proof of mens rea.</p>	<p><b>EPA Criminal Enforcement Policies</b></p> <p><b>Jan. 2006:</b> EPA announces increased emphasis on criminal enforcement over civil remedies, contrary to 1994 Devaney Memo.</p> <p><b>Oct. 2006: US v. Chief Ethanol Fuels,</b> (D. Neb.). Criminal prosecution for underreporting wastewater temperature by only four degrees; EPA later modified permit, raising allowed discharge by 10 degrees.</p> <p><b>May 2007:</b> EPA issues revised procedures for criminal agents to obtain US Atty assistance.</p> <p><b>July 2007: Vidrine v. US,</b> (W.D. La.). Plant manager sues EPA for malicious prosecution for charges dropped in 2003 for lack of evidence.</p> <p><b>2007: US v. Evertson,</b> 320 Fed. Appx. 509 (9th Cir. 2009), Krister Evertson receives 21-month prison sentence for two counts of storing hazardous waste in violation of RCRA, even though materials at issue were valuable chemicals being stored safely.</p> <p><b>2010:</b> The EPA's criminal enforcement program is expected to complete a three-year strategy of hiring more Civil Investigative Demand agents to raise the number to 200.</p> <p><b>2010:</b> EPA criminally charges 289 defendants for alleged environmental crimes and obtains 198 convictions and over \$14 million in assessed fines and restitution.</p> <p><b>2012:</b> Unanimous Supreme Court holds Clean Water Act does not allow EPA to strong arm regulated parties into "voluntary compliance" without opportunity for judicial review in <b>Sackett v. EPA,</b> 132 S. Ct. 1367 (2012).</p> <p><b>Feb. 2012:</b> EPA curtails funding for successful Self-Audit Policy begun in 1995, plans to rely more on "traditional enforcement".</p> <p><b>Nov. 2012:</b> BP agrees to pay record \$4 billion in criminal fines and penalties after pleading guilty to felony manslaughter, environmental crimes under CWA, and obstruction of Congress for Deepwater Horizon oil spill.</p> <p><b>2013:</b> Wal-Mart Stores pleads guilty and is sentenced to pay \$40 million criminal fine and \$20 million to state and local enviro programs for allegedly violating CWA at former CT manufacturing site.</p> <p><b>2014:</b> Unilever sentenced to 3 years' probation, fined \$1 million, and pledges \$3.5 million to state and local enviro programs for allegedly violating CWA at former CT manufacturing site.</p>	<p><b>DOJ Criminal Prosecution Policies</b></p> <p><b>Dec. 2006:</b> McNulty Memo establishes uniform procedures for requesting waiver, but falls short of needed reform. After <b>US v. Stein,</b> a corp.'s payment of targeted employees' atty fees is no longer considered to be a sign of non-cooperation.</p> <p><b>July 2007:</b> Corporate Fraud Task Force Five-Year Report: 1,236 fraud convictions (includes 214 CEOs and Presidents, 53 CFOs, 23 corporate counsel, and 129 VPs).</p> <p><b>Sept. 2007:</b> DOJ files False Claims Act suit against former GC of Tenet Healthcare based on 1997 internal report the company released to settle 2006 charges.</p> <p><b>Aug. 2008: US v. Posada Carriles,</b> 541 F.3d 344 (5th Cir.). Fifth Circuit holds that absent affirmative misrepresentation, the government is under no obligation to reveal that information obtained in a routine civil investigation can be used in a criminal case.</p> <p><b>Oct. 2008:</b> After strong rebukes from district courts, the SEC issues an Enforcement Manual prohibiting civil investigations from being used as a pretext for criminal actions, but also instructing SEC employees not to answer when asked whether a parallel criminal investigation exists.</p> <p><b>Dec. 2008:</b> DOJ Env't Div. revises 1999 Integrated Enforcement Policy, with Directive 08-02, Parallel Proceedings Policy, which continues to provide for joint civil and criminal investigations and permits sharing of jointly developed information after the grand jury convenes in certain circumstances.</p> <p><b>Nov. 2009:</b> Armed federal agents raid Gibson guitar factory in TN alleging it violated Lacey Act by failing to ensure exotic wood it purchased from supplier had been legally harvested and exported.</p> <p><b>Dec. 2011:</b> Citing rampant prosecutorial misconduct, Judge Howard Matz (C.D. Cal.) dismisses multiple FCPA indictments against Lindsey Mfg. Co. in <b>US v. Noriega,</b> even after jury convicts. DOJ declines to appeal.</p> <p><b>Jan. 2012:</b> Agreeing to 3 years' probation and \$5,000 fines, Steven and Cornelia Cal.) vacates defendant pharmaceutical sales rep.'s conviction for off-label drug promotion on the ground that it impermissibly criminalizes protected First Amendment speech.</p> <p><b>Mar. 2013:</b> DOJ launches "Operation Choke Point," an initiative pressuring banks to terminate accounts of perfectly legal, but disfavored, businesses (i.e., payday lenders, firearms dealers, etc.).</p> <p><b>Mar. 2014: Natale v. US,</b> 134 S.Ct.1875 (2014), DOJ brief concedes govt. must show beyond reasonable doubt that defendant knew statement was unlawful, not just false, to garner false statement prosecution under 18 USC § 1001.</p> <p><b>June 2014: Bond v. US,</b> 134 S.Ct. 2077, unanimously holds § 229 of Chemical Weapons Convention Implementation Act does not reach conviction for spreading chemical on victim's doorknob.</p> <p><b>July 2014:</b> DOJ indicts FedEx for allegedly laundering money and conspiring to traffic in controlled substances for delivering prescription drugs to internet pharmacy customers.</p> <p><b>Aug. 2014:</b> Judicial Conference's Cmte. on Rules proposes amendment to Fed. R. Crim. P. 41 to authorize a federal court to issue warrant to use remote access to search electronic storage media and seize ESI located outside court's geographic jurisdiction.</p> <p><b>May 2014: US v. Esquenazi,</b> 752 F.3d 912 (11th Cir.), broadly construes "instrumentality" under FCPA to include any "entity controlled by the government of a foreign country that performs a function the controlling government treats as its own."</p> <p><b>Feb. 2015: Yates v. US,</b> 135 S.Ct. 1074, overturns conviction of commercial fisherman charged with destruction of "tangible object" under SOX for throwing undersized fish overboard.</p>	<p><b>Attorney-Client Privilege and Work-Product Doctrine</b></p> <p><b>Apr. 2006:</b> Sentencing Comm'n agrees to remove privilege waiver as one factor for receiving credit for cooperation.</p> <p><b>June 2006: US v. Stein,</b> 435 F.Supp.2d 330 (S.D.N.Y.). Employees' right to counsel violated because DOJ forced KPMG to withhold their atty fees; indictments dismissed in 2007. 495 F.Supp.2d 390.</p> <p><b>Mar. 2007:</b> Outside Director of Chiquita Brands Int'l (a former SEC Chair) threatened with prosecution after voluntarily disclosing to DOJ his company's unlawful foreign payments.</p> <p><b>Aug. 2008:</b> The Filip Memo issues guidelines providing that corporations need not disclose and prosecutors may not request the disclosure of attorney-client communications or attorney work product as a condition for the corporation's eligibility to receive cooperation credit.</p> <p><b>2010:</b> Supreme Court denies cert in <b>Textron v. US,</b> 130 S. Ct. 3320 (2010), in which en banc Fifth Circuit denied work product protection to tax accrual work papers prepared by Textron's in-house lawyers and accountants.</p> <p><b>2010: In re Grand Jury Subpoenas,</b> 627 F.3d 1143 (9th Cir.). Relying on sweeping per se rule, Ninth Circuit enforces DOJ grand jury subpoena served on private class-action defendant's law firm, demanding production of foreign discovery materials despite protective order.</p> <p><b>2011:</b> In <b>US v. Norris,</b> 419 Fed. Appx. 190 (3d Cir.), CEO's conversations with corporate counsel during internal probe held not privileged for purposes of CEO's criminal trial.</p> <p><b>2012: In US ex rel. Bakliid-Kunz v. Halifax Hosp. Med. Ctr.</b> (M.D. Fla. Nov. 6, 2012), the court denied a privilege claim for a hospital's compliance-related documents on the basis that the documents were simultaneously emailed to an outside lawyer and a non-lawyer hospital employee.</p> <p><b>2013: Gruss v. Zwirn,</b> 296 F.R.D. 224 (S.D.N.Y. 2013), holds corporate counsel's signed confidentiality agreement with SEC enforcement division did not shield voluntarily produced interview notes and summaries from private plaintiff.</p> <p><b>2014: In re Kellogg Brown &amp; Root, Inc.</b> 756 F.3d 754 (D.C. Cir.), holds if obtaining or providing legal advice is a significant purpose of a company's internal investigation, attorney-client privilege applies, even if non-attorneys conduct investigation.</p> <p><b>2014: NACDL v. Exec. Office for US Attorneys,</b> No. 14-cv-269 (D.D.C.), holds DOJ's Federal Criminal Discovery Manual (the "Blue Book") protected from disclosure as attorney work product.</p> <p><b>2015: Schaeffer v. Gregory Village Partners L.P.,</b> No. 13-cv-4358 (N.D. Cal.), holds public relations consultant "functional equivalent" of employee and covered by attorney-client privilege.</p>	<p><b>Deferred Prosecution and Non-Prosecution Agreements</b></p> <p><b>Feb. 2006:</b> FirstEnergy DPA requires \$1 million donation to Habitat for Humanity.</p> <p><b>2006: Stolt-Nielsen v. US,</b> 442 F.3d 177 (3d Cir.). Breach of NPA by DOJ is not subject to pre-indictment review.</p> <p><b>Sept. 2007:</b> DPAs with five medical supply companies allow US Atty to appt. monitors, including his former boss, Atty Gen. Ashcroft, who will be paid \$52 million in fees.</p> <p><b>Nov. 2007: US v. Stolt-Nielsen,</b> 2007 US Dist. LEXIS 83936 (S.D.N.Y.). Court dismisses indictments because DOJ not justified in terminating NPA. DOJ declines to appeal.</p> <p><b>May 2008:</b> Deputy Attorney General Mark Filip modifies the US Attorney's Manual to prohibit the inclusion of terms in DPAs and NPAs that require the payment of funds to parties who were not victims of the criminal activity in question.</p> <p><b>Aug. 2008:</b> Deputy Attorney General Mark Filip published revisions to the Principles of Federal Prosecution of Business Organizations, directing prosecutors to not ask for waiver of attorney-client or work-product privilege in the context of DPAs and NPAs.</p> <p><b>Nov. 2008:</b> DOJ revokes DPA with Aibel Group Ltd. after Aibel Group Ltd. self-reports its noncompliance with a DPA; Aibel Group Ltd. pleads guilty to the underlying FCPA charges.</p> <p><b>Apr. 2009:</b> US Representative Bill Pascrell (D-NJ) introduces legislation (H.R. 1947) that would require the Attorney General to issue guidelines with respect to DPAs and NPAs and appointment of monitors.</p> <p><b>2009-2013:</b> Corporate DPAs and NPAs total 163, an average of more than 32 per year, with fines and forfeitures totaling \$25 billion.</p> <p><b>May 2010:</b> SEC announces it will increase use of proffer agreements, DPAs, and NPAs to garner and resolve cases.</p> <p><b>2010:</b> Wachovia enters into DPA requiring \$160 million penalty for alleged money laundering.</p> <p><b>2011:</b> JP Morgan Chase enters into DPA requiring \$228 million penalty for alleged antitrust violations.</p> <p><b>Sept. 2012:</b> AAG Lanny Breuer touts DOJ's use of NPAs and DPAs as "unequivocally" resulting in "far greater accountability for corporate wrongdoing—and a sea change in corporate compliance efforts."</p> <p><b>Dec. 2012:</b> HSBC Bank agrees to forfeit \$1.256 billion, pay a \$665 million fine, and enter into DPA for allegedly "laundering" approximately \$881 million in illegal-drug proceeds.</p> <p><b>Feb. 2013:</b> DOJ's Antitrust Division enters into its first DPA, requiring \$150 million penalty from the Royal Bank of Scotland.</p> <p><b>Mar. 2013:</b> UPS agrees to forfeit \$40 million to settle probe into its shipments on behalf of online pharmacies in exchange for an NPA.</p> <p><b>Apr. 2013:</b> Ralph Lauren Corp. enters into unprecedented dual NPA with DOJ and SEC and agrees to pay \$1.6 million in combined penalties after admitting Argentina subsidiary paid bribes to government and customs officials.</p> <p><b>2014:</b> JP Morgan Chase enters into DPA requiring \$1.7 billion penalty and unlimited cooperation with DOJ for 3 years.</p>	<p><b>Proliferation of Criminal Laws/Sentencing Developments</b></p> <p><b>2004-2006:</b> Record prison sentences under flawed fraud Sent. Guidelines of 8-25 years for first-time offenders in fraud cases, e.g., Jamie O'lis (24 yrs); exceed sentences for murder and rape.</p> <p><b>Mar. 2006:</b> USA PATRIOT Act amended to make suspected antitrust crime to allow wiretapping of boardrooms and executive phone conversations.</p> <p><b>June 2007: Rita v. US,</b> 127 S.Ct. 2456. Guideline sentences do not warrant presumption of reasonableness.</p> <p><b>Dec. 2007: Gall v. US,</b> 128 S. Ct. 586, gives district courts greater leeway to impose non-Guideline sentences; review for abuse of discretion.</p> <p><b>Aug. 2010:</b> Mills Plating Company employees Christopher Mills and Rodney Hoffman sentenced to 18 and 30 months respectively for storing hazardous materials w/o permit for 5 months.</p> <p><b>2010: US v. Kumar,</b> 617 F.3d 612 (2d Cir.), holds judges can sentence defendants under US Sentencing Guidelines in effect at time of sentencing, rather than manual in effect when offense committed—even if substantially longer sentence results. (superseded by <b>Peugh v. US</b> in 2013)</p> <p><b>2011:</b> US Supreme Court denies cert in <b>Rubashkin v. US,</b> 133 S. Ct. 106 (2012), in which owner of Kosher meat processing plant in Postville, Iowa received 27-year sentence as a non-violent, first-time offender.</p> <p><b>Nov. 2011:</b> USSC releases 645-page report concluding most federal mandatory min. sentences are excessively severe, not narrowly tailored to appropriate offenders, and not applied consistently.</p> <p><b>May 2013:</b> House Judiciary Committee authorizes bipartisan Over-Criminalization Task Force to assess current federal criminal statutes and make recommendations for improvements.</p> <p><b>2013: Peugh v. US,</b> 133 S. Ct. 2072 (2013), holds Ex Post Facto Clause violated when defendant sentenced under guidelines promulgated after crime committed, where new version of guidelines provides for higher sentence.</p> <p><b>June 2014:</b> Congressional Research Service reports that 439 new criminal offenses were added to the US Code between 2008-2013.</p> <p><b>2014: US v. Tovivave,</b> 761 F.3d 623 (6th Cir.), reverses federal forced labor conviction, clarifying that forcing children to do household chores not appropriate target of federal forced labor statutes.</p> <p><b>Jan. 2015:</b> House of Representatives approves internal rules change giving House Judiciary Committee concurrent jurisdiction over any bill proposing or modifying new or existing criminal law or penalty.</p>
<p><b>Mens Rea, Public Welfare Offenses, and Responsible Corporate Officer Doctrine</b></p>	<p><b>EPA Criminal Enforcement Policies</b></p>	<p><b>DOJ Criminal Prosecution Policies</b></p>	<p><b>Attorney-Client Privilege and Work-Product Doctrine</b></p>	<p><b>Deferred Prosecution and Non-Prosecution Agreements</b></p>	<p><b>Proliferation of Criminal Laws/Sentencing Developments</b></p>