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Remember the Memo

By Harvey Silverglate | *Special to the National Law Journal* | December 8, 2008

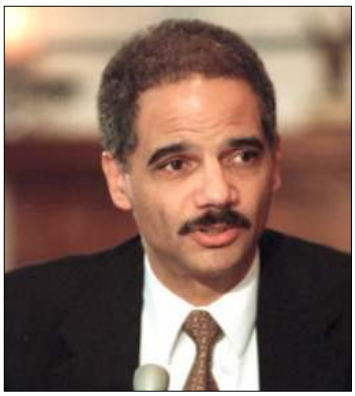
Our nation, hooked on the 24-hour news cycle, has an insatiable appetite for scandal. But as the distinction between news and entertainment continues to blur, the legal profession must keep in mind that the juiciest tidbits are rarely the most important.

Enter former Deputy Attorney General Eric Holder, President-elect Barack Obama's announced choice for U.S. attorney general. There has been an overwhelming focus on Holder's apparent complicity with Bill Clinton's questionable 11th hour pardon of fugitive-indictee Marc Rich. Nearly equal attention has been paid to the possibility of Holder being the nation's first black attorney general. Both threaten to divert the Senate Judiciary Committee from delving into an area far more important in determining the fitness of the next Department of Justice head. Serious students of DOJ will recognize the overriding importance of the "Holder Memorandum." The seemingly esoteric memo, issued by Holder in 1999, has seen relatively little discussion. But it has likely had more impact on the liberty of Americans and on respect for constitutional values than anything else Holder did during his stint at DOJ, and it may tell us much about his direction, if confirmed.

In his controversial directive to line prosecutors, Holder strongly suggested that, when deciding whether to indict a corporation — and indictment can be a death sentence for companies in certain businesses — they consider whether the company has "cooperated" in the investigation. "Cooperation" was partially defined by whether the corporation agreed to waive the legally protected attorney-client and work-product privileges that otherwise would protect the company from having to turn over confidential information gathered in its own internal investigations, including corporate counsel's discussions with employees. Another factor, suggested Holder, would be "whether the corporation appears to be protecting its culpable employees and agents" by advancing or paying those individuals' attorney fees. A further sign of possible noncooperation would be whether the corporation kept the employees on the payroll or entered into a joint defense agreement with any of them. Put simply, the Holder Memo suggested that by facilitating the ability of employees to continue working and to vigorously defend themselves, the company was demonstrating a noncooperative attitude that could get it indicted. It was a serious affront to the basic adversarial and rights-driven structure of the American legal system.

As the dot-com bubble burst and corporate scandals made headlines, DOJ responded by ratcheting up the pressure on white-collar defendants. The 2003 "Thompson Memorandum," successor to the Holder version, stated far more explicitly that "cooperation" would be a major factor in a prosecutors' decision to indict a corporation. And as the language grew more threatening with each passing iteration, corporations under federal investigation became adversaries not of the government, but of their own employees.

This attack on the individual defendants' Sixth Amendment right to counsel caused Judge Lewis A. Kaplan of the Southern District of New York to dismiss, in June 2006, the massive federal fraud indictment brought against a group of former employees of KPMG in U.S. v. Stein, a ground-breaking ruling affirmed by the 2d U.S. Circuit Court of Appeals this past August. Kaplan denounced the government's pressure on KPMG to show "cooperation" through both advising employees against seeking legal counsel and not paying the defendants' legal bills. The government, Kaplan wrote, "let its zeal get in the way of its judgment. It has violated the constitution it is sworn to defend."



This powerful vindication of constitutional rights came after considerable amicus curiae protest by an ideologically diverse coalition of lawyers, industry, and civil liberties groups. With this pressure for DOJ reform, the Thompson Memo was followed by the McNulty Memo in 2006 — scaling back the tone, and some of the substance, of the earlier iterations. This year, Deputy AG Mark Filip moderated the more Draconian aspects of the DOJ policy. It remains to be seen whether the Senate Judiciary Committee will proceed with long-simmering legislation to override Holder's policy and its progeny.

Holder was part of an increasingly unhealthy culture when he served in DOJ. It seems reasonable to request that the senators on the Judiciary Committee ask him whether he, like the president-elect, will be a change agent, or will simply preserve the status quo. Based on recent history, it is far more important that the next AG respect the Constitution, rather than launch some new scorched-earth crusade against the evil-doer du jour.

Harvey Silverglate is a Boston-based criminal defense and civil liberties lawyer. His next book, Three Felonies a Day: How the Feds Target the Innocent*, will be published next year. Kyle Smeallie, Silverglate's paralegal, assisted in the preparation of this piece.*