

Protecting the Innocent

Even white collar defendants have rights.

BY IRWIN M. STELZER

“INNOCENT UNTIL PROVEN guilty” is one of the few positions that everyone supports, irrespective of his place on the political spectrum. Well, almost everyone. Some liberals don’t need a trial to decide that Scooter Libby should be given an orange jump suit, and some conservatives think it absurd that anyone accused of conspiring to commit a terrorist act should waste our money and time by being given a day in court.

Still, those would-be hanging judges are few and far between. Unfortunately, the massive support for “innocent until proven guilty” no longer guarantees anyone accused of what we call a white-collar crime of a fair shake in terms of procedure, and an ability to resume a normal life if acquitted.

Fortunately, lawmakers have begun to notice. Arlen Specter, chairman of the Senate Judiciary Committee, plans to hold hearings in September to focus on the Justice Department’s so-called Thompson Memorandum (named for former deputy attorney general Larry Thompson), which, among other things, directs prosecutors to consider whether a corporation is willing to waive attorney-client privilege when deciding whether to bring criminal charges. Cling to your rights, the memo warns, and we are more likely to bring charges that will bankrupt your company.

Let’s hope that Specter’s review

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doesn’t confine itself to the obvious problems created by the Thompson memo, and takes a look at the entire set of incentives faced by prosecutors when they’re deciding whom to go after.

Start with the earliest step in the procedure—the grand jury that the prosecutor must persuade to indict the person he has in his sights. The potential accused is not allowed to have his lawyer at his side, even though the game is to persuade the grand jury either that the accused did what the prosecutor says he did, or, failing that, to trip him up on some detail so that a perjury indictment will be available as a fall-back position. Little wonder that the saying in the business is that any prosecutor can persuade a grand jury to indict a ham sandwich if he sets his mind to it.

Then there is the famous “perp walk,” defined by writer Richard Reeves as “a little conspiracy between police and reporters to produce photos for morning papers and film for evening news.” The accused is handcuffed and paraded before the press, who have been tipped off, as he is led into court to be charged with whatever crime the grand jury decides has been committed. Remember, this embarrassed wretch is innocent until proven guilty. Fat lot of good it does him. Add to the embarrassment he and his family suffer the fact that the pool of potential jurors gets its introduction to the person during this fabricated perp walk.

Indeed, there are reported instances of prosecutors being upset when they have paraded the accused into court before the paparazzi had an opportunity to uncap their lenses. So they

haul their cuffed charge back out of court for take two.

Rudy Giuliani, the deservedly now-sainted “America’s Mayor,” made his reputation using this technique. The then-young and unheralded federal prosecutor stormed into the offices of the Kidder Peabody brokerage firm during business hours in February 1987, cuffed two brokers, and, in Reeves’s words, “walk[ed] them down Wall Street in an explosion of camera lights.”

Never mind that Giuliani didn’t have enough evidence to charge these men with a crime. Or that he timed the arrests so that it was too late in the day to arrange bail, forcing at least one of them to spend the night in jail. He was on his way to becoming the mayor of New York, and a highly successful one at that. It might even be that his success as an administrator of a city many thought ungovernable was due to his, er, impatience with procedures, some of which merit a tad more patience than Giuliani was prepared to accord them. In any event, “Innocent until proven guilty” hardly provided the mistreated brokers the sort of protection to which the innocent are entitled.

So clause number one of my Preservation of the Assumption of Innocence Act would outlaw the perp walk. That staged event offends the sense of fairness that is essential to long-term popular support for our system of justice.

Then there is the trial. The complexity of the evidence and the lack of overwhelming incentives for the prosecution to move smartly along suggest that it would be useful to take a hard look at the effectiveness of the Speedy Trial Act of 1974, which states, in part, that “Trial must commence within 70 days from the date . . . [the] indictment was filed, or from the date the defendant appears before an officer of the court.” Long pretrial delays and long trials are expensive, very expensive.

Prosecutors, with virtually unlimited taxpayer funding on which to call, know that. In some cases, the accused—not having been proved guilty—know that they have a choice: fight a long battle, the outcome of

