
David Ogden Calls for DOJ to Return to a Punishment-Fits-the-Crime Settlement Approach

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[David Ogden](#), former US Deputy Attorney General, warned in a recent and important speech that the Department of Justice's (DOJ) current tendency to use its vast power to extract disproportionate monetary penalties from many companies that fall under its prosecutorial glare is as counterproductive for the Department as it is unjust.

The rule of law is vital, Ogden said in a keynote speech during the US Chamber of Commerce Institute for Legal Reform and National Association of Criminal Defense Lawyers Symposium. But it is undermined when the Justice Department insists on outsized monetary penalties in instances where the government is prosecuting with weak evidence of wrongdoing and dubious legal theories. With the power equation overwhelmingly favoring the government, and the potentially devastating risks that could result from a losing a court fight, companies often choose to settle.

Ogden said this shift toward a more heavy-handed approach, which coincides with the size and volume of penalties becoming an important metric of DOJ success, is having unintended consequences. It "damages the reputation of law enforcement, drives a wedge between good businesses and the government, and sets back the cause of justice."

Ogden called it "a feature on the landscape that—as a former DOJ official and a long-time admirer of that institution—deeply concerns me: my perception that the Department and perhaps other enforcement agencies have moved away from traditional notions of prosecutorial discretion, founded in self-discipline about the facts and the law, a search for proportionality and acknowledgment of the need for restraint in negotiating pleas and settlements, and moved toward a greater willingness to use leverage to negotiate maximum fines and penalties."

Law enforcement is discredited, Ogden explains, because DOJ cannot obtain convictions of individuals based on the weak facts and legal bases underlying the settlements, and this creates a false impression that the Department is soft on corporate crime. Further, when businesses conclude that the government will exploit all conceivable leverage to maximize the size of pleas without regard to the facts and law, businesses are dis-incentivized from cooperating with the government in discovering and self-reporting possible violations. Ogden advocates changing this "miserable state of affairs" by "emphasizing our core values of justice and proportionality and finding

creative new paths that enhance prevention, appropriate compensation of the victims of crime, and individual accountability.”

[Read Ogden's keynote speech](#)