

OTHER VOICES

VIEWS FROM BEYOND THE BARRON'S STAFF

Pre-emptive Wrong

New regulatory act assumes CEOs to be guilty by virtue of their profession

BY GARY HULL • Casual moviegoers may have enjoyed the summer science-fiction movie "Minority Report" and left the theater without any worries. But for America's CEOs, the theme was all too real: In a near future, the government's "Pre-crime Division" uses hi-tech clairvoyance to punish individuals before there is actual evidence of a crime. The

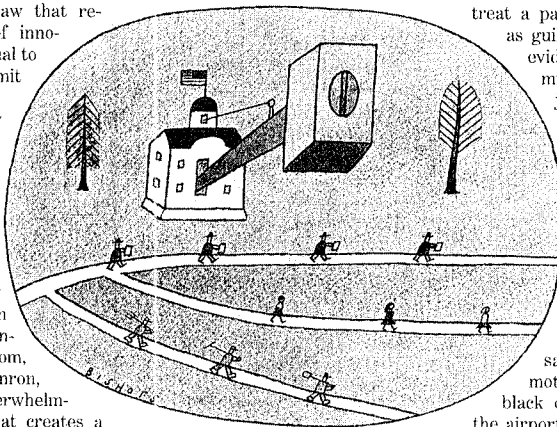
movie dramatizes the injustice of pre-emptive, preventive law—law that reverses the presumption of innocence and forces an individual to prove that he will not commit a crime.

Based on a novel by Philip K. Dick, the movie is a paranoid's nightmare. But the nightmare exists in contemporary daylight. The theory of preventive law is behind the Accounting Industry Reform Act, signed into law by President Bush in July. In light of the collapse of Enron, Adelphia, and WorldCom, and the improprieties at Enron, for example, Congress overwhelmingly passed legislation that creates a new regulatory board to oversee accountants. It severely restricts accounting firms from offering both consulting and auditing services to the same company, and bans companies from loaning money to their executives. Proponents argue that these new regulations will prevent future financial crimes and ensure corporate responsibility.

Let us ignore the fact that, according to the SEC's own records, of the approximately 400,000 financial statements filed by publicly traded companies in the past decade, fewer than 0.1% were proven to be fraudulent—and that there are currently laws that prohibit and punish fraud. And let us ignore that a de facto government takeover of the accounting industry injects force into a free market transaction—and that such a takeover will cause financial statements to be as accurate as Amtrak's train schedule.

The important moral and legal point is that these government regulations, as with all controls, are unjust. They are based on the premise that all executives are potential criminals because some businessmen are dishonest. By this reasoning, the government bars perfectly innocent executives from acting until they prove that they are not criminals.

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Suppose it is proven in a court of law that every company in the headlines committed fraud. Suppose, if you like, that 50% of the S&P 500 are guilty of cooking their books. This would prove nothing about the other 250 companies, and certainly would not justify the government's using its police power to regulate them.

Imagine if the government set up, not an accounting oversight board, but a parental oversight agency, complete with the legal requirement that all parents submit a certified nutritional and educational plan to the government, to be followed up by quarterly reports. After all, good children are as important to the country's future as healthy financial records. And it is undoubtedly true that some parents abuse and neglect their children. So to prevent such abuses from happening, should the government treat all parents as potentially guilty?

Consider the howls of protest from the media if that same specious reasoning were applied to newspapers, magazines, television and radio stations. There have been many cases of manipulating stories and of committing libel. Should the government preempt such crimes by creating an independent board of editors empowered to oversee the entire industry?

If it is unjust for the government to treat a particular parent or journalist as guilty—in absence of any actual evidence that the individual committed a crime—then why is it just, in the words of Jefferson, to "erect a multitude of new offices, and send swarms of Officers to harass" CEOs?

The American Civil Liberties Union and other organizations constantly campaign against the unjust and supposedly widespread practice of racial profiling. It is wrong, civil libertarians say, for the police to stop a motorist just because he is black or to search a passenger at the airport just because he is an Arab. It is barbaric, they argue, to substitute "skin color for evidence as a grounds for suspicion by law-enforcement officials." We should be outraged that "today skin color makes you a suspect in America."

Very well. Then the same standard and moral indignation should apply to "corporate profiling." The Accounting Industry Reform Act makes it legal for SEC bureaucrats to use one's profession instead of actual evidence as grounds for suspecting a crime. If it is unjust for law enforcement to stop a motorist because of his race ("driving while black"), then why is it okay to target a person because of his career ("working while a CEO")? The ugly, unstated fact is that today being an accountant or a CEO "makes you a suspect in America."

Government, by its nature, is an institution of force. Behind every law and bureaucratic decree—from the local zoning board through the FTC—is the government's ability to use its police power to fine and to imprison. The fundamentally important question is, when should government use that police power?

Laws should be passed under the cool light of reason, not in the pack frenzy that gripped Washington last summer. "In the environment we are in," said Sen. Phil Gramm of Texas, "virtually anything can pass," including, Rep. Michael Oxley of Ohio added only

half-facetiously, "summary executions."

To protect individual liberty and prevent dictatorship, objective laws must restrain a government. The purpose of objective law is to protect the individual's life and property from the initiation of physical force, whether by other men or by the government—and to prescribe the punishment for those who do initiate force. A government restrained by law uses force against its citizens only in retaliation.

If we are to have a government of laws—as opposed to one of controlling bureaucrats—then every law must be clear, precisely defined, and predictable. This principle forbids the government from taking action against an individual until there is specific evidence that that person committed or is conspiring to commit a crime. People must be able to know in advance exactly which existential acts are forbidden, and the law must apply to all citizens in that country. For example, the laws against kidnapping and burglary are perfectly objective.

But a law that is imprecise, and applies only to a select group is nonobjective and is a tool of oppression. Such is the nature of the 19th century laws that denied blacks the right to vote, and such is the status of the Accounting Industry Reform Act. It should be repealed on the grounds that it allows the government to use its police power pre-emptively against businessmen, though they have not initiated force or conspired to commit a crime, and on the grounds that it grants government an unlimited power to oversee and inspect the business practices of innocent CEOs.

Preventive, infinitely malleable laws create uncertainty and fear, and give bureaucrats unchecked power to control and wreck the lives of America's productive executives. If you ask a CEO for a frank opinion of the law and its accompanying regulations, you may hear what one S&P 500 CEO said recently: They are so elastic, undefined, and contradictory that government enforcers "can put any CEO in jail anytime they want to." Let no one be surprised if our most able and honest chief executives refuse to work under such conditions. ■

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