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Enter The Senators: The Howard Root Saga Continues!

The Senate Judiciary Committee has sought information from DOJ about both the government's prosecution of and potential retaliation against Mr. Root.

By Justin Dillon

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Howard Root is the gift that keeps on giving.

By now, anyone who reads this column even intermittently has run across one of the four pieces I've written on the government's ill-fated prosecution of former medical device CEO Howard Root. He scored an unlikely and complete victory against the government back in 2016, and the government has never forgiven him for it.

Unlike most people who beat the federal government, however, Howard Root was not content to simply take his victory, put it in his pocket, and not risk pissing them off again. Instead, he decided to be as mouthy once the prosecution was over as he was before it began.

As I detailed in my last column on this, he was scheduled to speak at not one conference, but two different conferences — and the government, according to a fantastic post by Scott Johnson at Powerline, put the Kibosh of the Sovereign on that both times.

And this is the best part: it's not over yet. Now, the Senate Judiciary Committee has sought information from DOJ about both the government's prosecution of and potential retaliation against Mr. Root.

I take that back, in what I will absolutely confess in a moment of unseemly self-aggrandizement: The best part is actually that they cited my column.

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It's true! In their March 26 letter to Rod Rosenstein, Senators Chuck Grassley and Mike Lee asked for an update about the government's OPR inquiry into both the case itself and the alleged retaliation. And as part of that inquiry, they cited my column in two footnotes:

According to recent reports, the Department has similarly sought to exclude Mr. Root from various health care industry conferences to which he was an invited panelist or keynote speaker by threatening to withhold Department participation in the conferences unless Mr. Root's invitations were revoked.^[5] These conferences included the American Bar Association's 27th Annual National Institute on Health Care Fraud, scheduled for May 2017, and the American Conference Institute's Advanced Forum on False Claims and Qui Tam Enforcement, scheduled for January 2017. In both cases, it appears that the Department's ultimatums succeeded in blocking Mr. Root from participation.^[6]

Now, to be fair, as happy as I am to get cited in a letter sent by two senators to DOJ, they really should have cited Scott Johnson's Powerline piece. He gets the credit here; I was just, as bloggers have done since

the early 2000s, piggybacking off his excellent work. Still, it's terrific to see that someone cares about this — that someone has taken the time to care about how the Department of Justice, on the rare occasions that it loses, handles those losses. Here, it appears to have been unbelievably petty and vindictive. The problem is, there aren't many people who can call out the DOJ on behavior like that.

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So I'll be very interested to see what happens as the case progresses. As the senators note:

Taken together, these reports suggest a pattern of threatened and actual retribution against former defendants and witnesses borne out of the Department's disappointment with the outcome of a particular case. This not only casts doubt on the Department's ability to accept the results of judicial proceedings in a professional manner befitting the nation's preeminent law enforcement agency, but it significantly undermines our confidence in its commitment to hold government attorneys accountable for questionable actions that may have occurred in the course of this or other cases.

We are also concerned about a chilling effect that may impair critical Department functions outside the litigation context that support its law enforcement mission. Ironically, the brochure for the National Institute on Health Care Fraud states that, “[t]his National Institute draws panelists, facilitators, and participants from [the public and private sector] and offers unique opportunities to meet and share experiences and concerns in a non-adversarial setting.”^[7] It is possible that in seeking retribution against former adverse parties within the industry the Department may be undermining the public-private engagement that is essential to making progress on issues like health care fraud and whistleblower protections, which are of significant concern to American taxpayers.

And they ask very pointed questions that I look forward to seeing DOJ's responses to:

6. Did any Department employee pressure the organizers of any conference, including but not limited to those referenced above, to withhold, revoke, or in any way alter an invitation to Mr. Root? What steps has the Department taken, or plan to take, to investigate these reports?
7. Would conditioning Department involvement in a conference on the organizer's exclusion of a private citizen violate Department policies or ethical standards? Are you aware of any precedent in this regard?

Anyone who does criminal defense work will tell you that the government's capacity to be petty and awful knows few bounds. But the problem is, the people on the losing side of that equation usually go to jail, and the people on the winning side don't have the power to do anything about it.

Here's hoping that the senators will keep pulling this thread and that we will find out whether there was any misconduct in the prosecution of Mr. Root and whether, regardless of that, someone at the Department signed off on this vindictive campaign against him.