



## Judges Push Back Against Prosecutorial Abuses

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Prosecutorial overreaching is still occurring in courts across the nation, but judges are beginning to push back.

In the Ted Stevens case, the former senator was prosecuted on charges that he failed to properly report gifts from a lobbyist—only for the government to later drop all charges against him, saying that his jury conviction should be dismissed because government prosecutors and investigators improperly withheld evidence from the defense team, and possibly even fabricated evidence.

It continued with [cases previously discussed on this blog](#), such as former Agriprocessors, Inc. executive Sholom Rubashkin's acquittal, when a state prosecutor tried to piggyback off the high-profile federal fraud case against Rubashkin by bringing unsubstantiated child labor claims. There was also the dismissal of a case against Las Vegas attorney Noel Gage, when the district judge found that prosecutors selectively granted witness immunity to gain a tactical advantage.

It thus appears that federal judges are no longer willing to rubber stamp prosecutorial actions in white collar cases. On November 10, a unanimous three-judge panel of the Ninth Circuit reversed the conviction of a Silicon Valley corporate financial officer, ruling that “no reasonable juror” could find him guilty of securities fraud beyond a reasonable doubt.

Prabhat Goyal, the former CFO of Network Associates, Inc. (now McAfee) was accused of responsibility for accounting procedures that misstated the software security company's revenue and misleading its auditors between 1998 and 2000. In 2007, prosecutors alleged that Goyal recognized the company's profits prematurely and charged him with disguising \$330 million in losses. Goyal was found guilty of these alleged crimes and sentenced to a year in prison.

On appeal, however, the Ninth Circuit could find no evidence of wrongdoing. All of the securities counts against Goyal—one for fraud and seven for making false filings with the SEC—required the government to prove that NAI materially misrepresented the revenue it earned. However, the prosecution presented no figures showing how much less revenue NAI would have shown had it not reported revenue prematurely. Without presenting evidence of this monetary



difference, the jury could not determine whether any accounting irregularities materially affected the revenue that the company reported.

In order to prove beyond a reasonable doubt that Goyal made certain accounting violations, the prosecution had to show that NAI had insufficient reserves to cover future contingencies. The government, however, did not present evidence of whether the reserves were in fact sufficient, and therefore no reasonable juror could have found Goyal guilty of that accounting violation. Similarly, the counts regarding lying to auditors required that Goyal knowingly made materially false or misleading statements, but the prosecution did not offer any evidence regarding whether any alleged deception was willful or knowing.

In a broad denunciation of this type of prosecution, Chief Judge Alex Kozinski stated in his concurring opinion, “The government shouldn’t have brought charges [against Mr. Goyal] unless it had clear evidence of wrongdoing, and the trial judge should have dismissed the case when the prosecution rested and it was clear the evidence could not support a conviction.”

In his strongly-worded concurrence, Chief Judge Kozinski emphasized, “This is just one of a string of recent cases in which courts have found that federal prosecutors overreached by trying to stretch criminal law beyond its proper bounds.” He condemned prosecutors who “stretch the law or the evidence to secure a conviction,” and said, “This is not the way criminal law is supposed to work. Civil law often covers conduct that falls in a gray area of arguable legality. But criminal law should clearly separate conduct that is criminal from conduct that is legal.”

This type of prosecutorial overreaching has no place in the American judicial system. The wrongfully accused are paying the price for the unrestrained ambition of government prosecutors. We can only hope that other courts will take action similar to the Ninth Circuit in the Goyal case, and prosecutors will learn that they must play by the rules.

*Crime in the Suites is authored by the [Ifrah Law Firm](#), a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.*

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