§ 145 Indemnification of officers, directors, employees and agents; insurance.

(a) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that the person's conduct was unlawful.

(b) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by the person in
connection with the defense or settlement of such action or suit if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

(c) To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.

(d) Any indemnification under subsections (a) and (b) of this section (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the present or former director, officer, employee or agent is proper in the circumstances because the person has met the applicable standard of conduct set forth in subsections (a) and (b) of this section. Such determination shall be made, with respect to a person who is a director or officer of the corporation at the time of such determination:

(1) By a majority vote of the directors who are not parties to such action, suit or proceeding, even though less than a quorum; or

(2) By a committee of such directors designated by majority vote of such directors, even though less than a quorum; or

(3) If there are no such directors, or if such directors so direct, by independent legal counsel in a written opinion; or
(4) By the stockholders.

(e) Expenses (including attorneys' fees) incurred by an officer or director of the corporation in defending any civil, criminal, administrative or investigative action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents of the corporation or by persons serving at the request of the corporation as directors, officers, employees or agents of another corporation, partnership, joint venture, trust or other enterprise may be so paid upon such terms and conditions, if any, as the corporation deems appropriate.

(f) The indemnification and advancement of expenses provided by, or granted pursuant to, the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office. A right to indemnification or to advancement of expenses arising under a provision of the certificate of incorporation or a bylaw shall not be eliminated or impaired by an amendment to the certificate of incorporation or the bylaws after the occurrence of the act or omission that is the subject of the civil, criminal, administrative or investigative action, suit or proceeding for which indemnification or advancement of expenses is sought, unless the provision in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such action or omission has occurred.

(g) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture,
trust or other enterprise against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the corporation would have the power to indemnify such person against such liability under this section.

(h) For purposes of this section, references to "the corporation" shall include, in addition to the resulting corporation, any constituent corporation (including any constituent of a constituent) absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its directors, officers, and employees or agents, so that any person who is or was a director, officer, employee or agent of such constituent corporation, or is or was serving at the request of such constituent corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, shall stand in the same position under this section with respect to the resulting or surviving corporation as such person would have with respect to such constituent corporation if its separate existence had continued.

(i) For purposes of this section, references to "other enterprises" shall include employee benefit plans; references to "fines" shall include any excise taxes assessed on a person with respect to any employee benefit plan; and references to "serving at the request of the corporation" shall include any service as a director, officer, employee or agent of the corporation which imposes duties on, or involves services by, such director, officer, employee or agent with respect to an employee benefit plan, its participants or beneficiaries; and a person who acted in good faith and in a manner such person reasonably believed to be in the interest of the participants and beneficiaries of an employee benefit plan shall be deemed to have acted in a manner "not opposed to the best interests of the corporation" as referred to in this section.

(j) The indemnification and advancement of expenses provided by, or granted pursuant to, this section shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer,
employee or agent and shall inure to the benefit of the heirs, executors and
administrators of such a person.

(k) The Court of Chancery is hereby vested with exclusive jurisdiction to hear
and determine all actions for advancement of expenses or indemnification
brought under this section or under any bylaw, agreement, vote of stockholders
or disinterested directors, or otherwise. The Court of Chancery may summarily
determine a corporation's obligation to advance expenses (including attorneys'
fees).
**Rule 1.1: Competence**
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

**Rule 1.3: Diligence**
A lawyer shall act with reasonable diligence and promptness in representing a client.

**Rule 1.13: Organization as Client**
(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

1. despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

2. the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer
reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 2.1: Advisor
In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 2.3: Evaluation for Use by Third Persons
(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.
(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6 [Confidentiality of Information].

**Rule 4.3: Dealing with Unrepresented Person**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.
§ 16 A Lawyer's Duties to a Client—In General
To the extent consistent with the lawyer's other legal duties and subject to the other provisions of this Restatement, a lawyer must, in matters within the scope of the representation:

1. proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation;
2. act with reasonable competence and diligence;
3. comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and
4. fulfill valid contractual obligations to the client.

§ 51 Duty of Care to Certain Nonclients
For purposes of liability under § 48, a lawyer owes a duty to use care within the meaning of § 52 in each of the following circumstances:

1. to a prospective client, as stated in § 15;
2. to a nonclient when and to the extent that:
   a. the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and
   b. the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection;
3. to a nonclient when and to the extent that:
   a. the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;
   b. such a duty would not significantly impair the lawyer's performance of obligations to the client; and
   c. the absence of such a duty would make enforcement of those obligations to the client unlikely; and
(4) to a nonclient when and to the extent that:
   (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
   (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
   (c) the nonclient is not reasonably able to protect its rights; and
   (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

§ 95 An Evaluation Undertaken for a Third Person
(1) In furtherance of the objectives of a client in a representation, a lawyer may provide to a nonclient the results of the lawyer's investigation and analysis of facts or the lawyer's professional evaluation or opinion on the matter.
(2) When providing the information, evaluation, or opinion under Subsection (1) is reasonably likely to affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client is adequately informed concerning important possible effects on the client's interests.
(3) In providing the information, evaluation, or opinion under Subsection (1), the lawyer must exercise care with respect to the nonclient to the extent stated in § 51(2) [see above] and not make false statements prohibited under § 98 [Statements to a Nonclient].

§ 96 Representing an Organization as Client
(1) When a lawyer is employed or retained to represent an organization:
   (a) the lawyer represents the interests of the organization as defined by its responsible agents acting pursuant to the organization's decision-making procedures; and
   (b) subject to Subsection (2), the lawyer must follow instructions in the representation, as stated in § 21(2) [Allocating the Authority to Decide Between a Client and a Lawyer - instructions during representation], given by persons authorized so to act on behalf of the organization.
(2) If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to
be imputable to the organization and likely to result in substantial injury to it, the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization.  

(3) In the circumstances described in Subsection (2), the lawyer may, in circumstances warranting such steps, ask the constituent to reconsider the matter, recommend that a second legal opinion be sought, and seek review by appropriate supervisory authority within the organization, including referring the matter to the highest authority that can act in behalf of the organization.

§ 98 Statements to a Nonclient  
A lawyer communicating on behalf of a client with a nonclient may not:  
(1) knowingly make a false statement of material fact or law to the nonclient,  
(2) make other statements prohibited by law; or  
(3) fail to make a disclosure of information required by law.

§ 103 Dealings with an Unrepresented Nonclient  
In the course of representing a client and dealing with a nonclient who is not represented by a lawyer:  
(1) the lawyer may not mislead the nonclient, to the prejudice of the nonclient, concerning the identity and interests of the person the lawyer represents; and  
(2) when the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the nonclient.
SARAH HELENE DUGGIN
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LEGAL EXPERIENCE

The Catholic University of America, Columbus School of Law, Wash., D.C. (1999 to present)
Professor of Law; Director, Compliance, Investigations & Corporate Responsibility Program
Current Courses: Constitutional Law, Corporations, Conducting Internal Investigations, American Business Law (CUA-Jagiellonian University American Law Program in Krakow)
Courses Taught in Prior Years: Professional Responsibility, Advanced Issues in Corporate Law-Corporate Responsibility; Brown v. Board of Education, Litigation & Civil Rights
Current Committee & Advising Roles: Law School Committee on Appointments and Promotions, Law School Outcomes & Assessments Committee; Faculty advisor, American Constitution Society & CUA-Newseum Seigenthaler-Sutherland National First Amendment Moot Court Competition
Prior Appointments: Director, Law and Public Policy Program (2006-2014); Associate Professor (2006-2008); Assistant Professor (2002-2005); Visiting Associate Professor (2001-2002); Lawyering Skills Instructor (1999-2001)
Prior Committee & Advising Roles: Chair, Law School Strategic Planning Committee (developed 2015-2018 strategic plan); University Academic Senate; University Committee on Appointments and Promotions; Faculty Handbook Committee; Chair, Student Affairs Committee; Academic Affairs Committee; Law School Honor Board advisor & co-advisor; faculty co-advisor to Journal of Contemporary Health Law and Policy; faculty advisor to Health Law Society, and Delta Theta Phi Service Fraternity

Vice President & General Counsel: Head of 170-person department including Law, Claims, Equal Employment Opportunity, and Labor Adjudication; responsible for all legal issues pertaining to corporation and its 30,000 employees; adviser to CEO and Board of Directors; Member Station Foundation Board & Captive Insurance Company Board; managed multi-billion dollar transactions and complex litigation; presented briefings on Capitol Hill; worked with White House, U.S.D.O.T. and U.S.D.O.J. personnel on significant transportation policy issues; participated in national labor negotiations and dispute resolution proceedings

Children’s National Medical Center, Wash., D.C. (1996 to1997)
General Counsel: Head of legal department; advisor to CEO and Board of Trustees

Chief Legal Officer: Head of legal department and risk management function for multi-facility academic health system; advisor to CEO and Board; Special Counsel: returned to spearhead internal investigations, initiation of compliance programs, and resolution of federal investigation

Partner (1988-1993); Associate (1981-1987): Extensive litigation and advice work in areas of criminal defense, internal investigations, complex civil cases, health care and corporate law for individuals, businesses, health care entities, universities and other entities; pro bono representation including criminal defense, veterans’ benefits, SSI benefits, catastrophic illness and other areas
**Summer Associate Positions & Internships:**
- Morgan, Lewis & Bockius, Phila., PA (1979)
- Penn Legal Assistance Office, Phila, PA (1977)

**JUDICIAL CLERKSHP**


**CHURCH EXPERIENCE**

St. John’s Episcopal Church – Georgetown Parish, Wash., D.C. (2006 to present)

**Associate Rector (part-time):** Serve parish community part-time in liturgies and pastoral care;

**Prior appointments:** Assistant Rector (part-time)

Member, Episcopal Diocese of Washington Committee on the Constitution & Canons (2012-present)

Member, Ecclesiastical Trial Court & President, Clergy Disciplinary Panel (2012-2014)

**EDUCATION**


Smith College – A.B. *magna cum laude with Highest Honors in Government & High Honors in Economics* (1976): Phi Beta Kappa; Bowles Prize for Best Thesis in Economics; Alumni Scholarship for Graduate Study; News Editor of *The Sophian*; Academic Tutor; Music Groups

Wesley Theological Seminary – M.Div. with Honors (2008): Completed course of study for master of divinity including field work at two Episcopal parishes and immersion experience in worship & culture in a Spanish-speaking congregation

Virginia Theological Seminary – Coursework in subjects including theology, biblical studies and pastoral care; seminary choir

**PUBLICATIONS**


*From the New Deal to the New Healthcare: A New Deal Perspective on King v. Burwell and the Crusade Against the Affordable Care Act*, 23 University of Miami Business Law Review, 317 (Spring 2015)
Is Ted Cruz a Natural-born Citizen Eligible to Serve as President, National Constitution Center
CONSTITUTION DAILY blog (October 28, 2013) [republished by Yahoo News]

The American Presidency, the 2008 Election, and the U.S. Constitution’s Natural Born Citizenship
Proviso, 3 KRAKOW STUDIA MIEDZYNARODOWE 9 (2008)

The McNulty Memorandum, the KPMG Decision and Corporate Cooperation: Individual Rights
and Legal Ethics 21 GEORGETOWN JOURNAL OF LEGAL ETHICS 341 (2008)

The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional
Responsibility, 52 ST. LOUIS UNIVERSITY LAW REVIEW 989 (2007)

Restoring Trust in Corporate Directors, 56 AMERICAN UNIVERSITY LAW REVIEW 211(2006)
(co-authored with Stephen M. Goldman)


The Impact of the War Over the Attorney-Client Privilege on the Business of American Health
Care, 22 JOURNAL OF CONTEMPORARY HEALTH LAW & POLICY 301 (2006)

The Ongoing Battle over Weingarten Rights for Nonunion Employees: What Do Terrorism,
Corporate Fraud and Workplace Violence Have To Do with It?, 20 NOTRE DAME JOURNAL OF
LAW, ETHICS & POLICY 655 (2006)

Natural Born in the U.S.A.: The Striking Unfairness and Dangerous Ambiguity of the constitution’s
Presidential Qualifications Clause and Why We Need to Fix It, 85 BOSTON UNIVERSITY LAW
REVIEW 53 (2005) (co-authored with Mary Beth Collins)

Historical Antecedents of Brown v. Board of Education: The Struggle for America’s Soul, XXI CUA
LAWYER 16 (Summer 2004)

Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview,
2003 COLUMBIA UNIVERSITY BUSINESS LAW REVIEW 859.

Negligence Under Section 1983 and the Eighth Amendment, 127 UNIVERSITY OF PENNSYLVANIA
LAW REVIEW 533 (1978).

PRESENTATIONS & PANELS

Lawyer-Investigator Panel, The Ethics of Internal Investigations, ABA National Conference on
Professional Responsibility (Philadelphia, PA, June 2016)

Christianity & Business Ethics, The Henry Kaufman Conference on Business and Religion, Robert
H. Smith School of Business, (University of Maryland, College Park, MD, September 2012,
November 2012 & October 2013)

Faith and Business: The Possibilities and Perils of a Complex Relationship in a Diverse World (University of Maryland, Robert H. Smith School of Business Global Fellows Program, March 2013)

Convocation Speaker, A Sense of Your Own Story (The Catholic University of America, September 2012)

Moderator, Panel on Corporate Social Responsibility (Federalist Society, The Catholic University of America, November 2011)

Moderator, Panel on Fracking and the Law (Democratic Law Students Society, The Catholic University of America, September 2011)

Moderator, Panel on School Choice and the Law (Republican Law Students, The Catholic University of America, Spring 2011)

Business, Law and Religion, American Association of Law Schools Annual Meeting, Section of Socioeconomics, Presenter and Panelist (New Orleans, LA, January 2011)

DC Area Legal History Roundtable Convener (The Catholic University of America, Washington, D.C., November 2007)

Symposium on Corporate Compliance: The Role of Company Counsel, co-sponsored by Georgetown Center for the Study of the Legal Profession, Georgetown Journal of Legal Ethics and the Corporate Law Association (Georgetown University, Washington, D.C., October 2007)

Pro Bono and Community Service Experiences, CSL Legal Services Society luncheon speaker (Washington, D.C., April 2007)


Las Hermanas de Dorcas: The Evolution of a Women’s Sewing Cooperative, Conference on Honduras (Copán, Honduras, October 2006) (with Reina de Madrid & Rosalinda Ulloa).


Comments to the United States Sentencing Commission in response to request for public comment on the application to waive language compromising attorney-client privilege (March 2006).

Interviewed for and quoted in *Sentencing Panel Rethinks Waiver Policy*, *Compliance Week* (March 28, 2006).


CSPAN Supreme Court Watch Commentator on nomination of Justice Samuel Alito to the United States Supreme Court, C-Span and CNN (November 22, 2005).

Panel member, Perspectives on Women in Law by CUA Faculty, CUA Women’s Law Caucus (November 2005).


*State Action and Internal Investigations*, CSL Faculty Scholarship Luncheon (September 2005).


*Medical Malpractice Liability in the United States*, Rotary Club program for visiting Russian physicians (Alexandria, VA., 2004) (with Dean William Fox, Professor Helen Alvaré and Adjunct Professor Irving Cohen).


*Christianity and the Study of Business Corporations: Should Faith Impact the Teaching of Secular Subjects?*, Baylor University Conference on Christianity and the Soul of the University: Faith as a Foundation for Intellectual Community (Waco, TX, March 2004).


*Admission Open House Mock Class*, CSL (Spring 2003).

Corporate Practice Panel, CUA Women’s Law Caucus (November 2002).

Career Day presentations on careers in law, Westland Middle School and Bethesda-Chevy Chase High School (Bethesda, MD., 1998-2003).


Complex Civil Litigation: Case Management Orders; Deposition of Expert Witnesses, ALI-ABA Conference on Complex Litigation (Breckenridge, Co. 1991).

**SAMPLE MEDIA**


MSNBC’s The Last Word with Lawrence O’Donnell and two other programs: on-air interviews on Senator Ted Cruz’s natural born citizenship credentials (2016)

NPR’s All Things Considered and radio stations in Washington, D.C. Philadelphia, and other major metropolitan areas: on-air interviews pertaining to the natural born citizenship credentials of Senators John McCain and Ted Cruz (2008 and 2016).


Quoted in articles on professional ethics and Bridgegate (2015).

Quoted in article on Alito nomination to U.S. Supreme Court (2005).

API: interviewed for and quoted in API story reprinted in major newspapers in the U.S. and Europe on demonstration before Supreme Court arguments in University of Michigan affirmative action cases (April 2003).
ABSTRACT

Judge Kaplan’s sharp criticism of the government’s tactics in the July 2006 KPMG decision, United States v. Stein, highlighted the federal prosecutorial policy, embodied in the so-called Thompson Memorandum, of pressuring corporations to cooperate with investigations against their employees. While this decision has been hailed as placing overdue checks on runaway prosecutorial power, this Article suggests that such views misdiagnose the problem. The source of prosecutorial leverage stems not from abuse of power, but from a century of expansion of corporate criminal liability. Corporations are exposed to almost certain conviction for the misconduct of even one rogue employee under the doctrine of criminal respondeat superior. Discussion of the problem to date focuses narrowly on either perceived prosecutorial excesses or the proper scope of corporate criminal liability. This Article fills the gap in the literature and joins these two debates by suggesting that it is precisely court-created liability rules that embolden the prosecutor and cow the corporation. There is little sustained and serious examination of the likelihood and desirability of reining in prosecutorial power through a tightening of the standards for corporate criminal liability.

This Article traces the development of the broad rule of vicarious corporate liability; outlines features of current prosecutorial guidelines that exploit the broad liability rule; and argues that the best way to rein in prosecutorial power is through tightening the standards for corporate criminal liability. The Article concludes with a look at various liability-narrowing alternatives that should be analyzed further for their potential impact on the prosecutor-corporation negotiation dynamic.

* Chief Counsel and Staff Director, Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary, United States Senate. © 2007 Preet Bharara. Assistant United States Attorney, Southern District of New York, 2000-2005. Harvard College, A.B., 1990; Columbia Law School, J.D., 1993. For their helpful comments, I am indebted to Viet Dinh, Rebecca Kelly, and Michael Gottlieb. Most importantly, I thank my wife Dalya for her patience, support, legal insight, and keen eye. The views expressed herein, and any errors, are solely my own.
INTRODUCTION

In the recent and much-heralded corporate crime case, United States v. Stein, a federal judge sharply rebuked the government for, among other things, coercing accounting giant KPMG into interfering with its employees’ Sixth Amendment right to counsel and Fifth Amendment right against self-incrimination. In a June 2006 opinion, the court wrote that the government, by virtue of the threat of prosecution, had “held the proverbial gun to [KPMG’s] head.”

The focus of Judge Kaplan’s ire was a set of written prosecutorial guidelines promulgated by the Department of Justice, known as the Thompson Memorandum. In the view of the Stein court—and that of many recent critics—those (now superseded) guidelines encouraged prosecutors to employ indiscriminate and unjustifiably heavy-handed tactics in compelling corporations to cooperate in criminal investigations. Such tactics included conditioning lenient treatment on a corporation’s willingness to eschew joint defense agreements, waive attorney-client and work product privileges, fire uncooperative employees, and discontinue the payment of legal fees of employees with criminal exposure. Critics have attacked such policies as extortionate, arrogant, exploitative, and more. Debate over these tactics reached a crescendo in the Stein case.

This Article attempts to place the current debate in better jurisprudential perspective and proposes that, notwithstanding the KPMG case, efforts to reduce the risk of prosecutorial excess are, in the long run, better directed at the source of prosecutors’ leverage rather than at their conduct. Thus, this Article explains that the “proverbial gun”—though wielded by prosecutors—was licensed and loaded by a century of Supreme Court jurisprudence that has encouraged prosecutors to...

6. See Jack King, KPMG is a Victory Over the Thompson Memo, CHAMPION MAGAZINE, August 2006, at 6.
take dead aim, not just at the individual miscreants responsible for corporate crime, but at the business organizations that employed and arguably enabled them. The courts have obligingly stocked the federal prosecutor's arsenal with legal doctrines whose effect has been to expose business organizations to maximum criminal liability. During the same period, courts have depleted the corporation's available defenses, so that today a business entity faces indictment and almost certain conviction if there is so much as one low-level criminal actor in the organization. This legal state of affairs has been decried by virtually every commentator who has thought to study it.\(^8\)

The literature to date, therefore, reflects two separate but related ongoing debates. One, gaining steam for the better part of only the last decade and culminating in *Stein*, focuses narrowly on perceived prosecutorial excesses in obtaining cooperation from corporations as allegedly encouraged by coercive Justice Department guidelines. The other debate, raging for the better part of the last century, centers more generally on the proper scope of corporate criminal liability.\(^9\)

Participants in the first debate direct virtually all of their attention to the use (and perceived misuse) of prosecutorial discretion, with little discussion of the salutary effect a narrower liability rule might have on the exercise of that discretion.\(^10\) It is, one supposes, easier to lament today's overreaching prosecutors than yesterday's rule-expanding judges. Meanwhile, participants in the second debate seldom consider how their proposals for change might affect the exercise of prosecutorial discretion and whether that effect further militates in favor of the particular proposal. Thus, while many scholars have suggested that the corporate criminal liability rules should be narrowed (or eliminated altogether),\(^11\) none of these proposals is grounded on the premise that a narrower rule would serve as a more reasonable check on the risks of prosecutorial overreaching against corporations and interference with individual defendants' rights and privileges. Indeed, there is little sustained and serious examination of the likelihood and desirability of reining in prosecutorial power through a tightening of the standards for corporate criminal liability rules.

This Article aims to join these two debates, for arguments about the proper scope of liability and the proper scope of prosecutorial power are, in the corporate crime context, inextricably intertwined. It is, after all, the court-created liability

\(^8\) See infra notes 15-30 and accompanying text.


\(^10\) Indeed, at a recent hearing in the Senate Judiciary Committee, five witnesses criticized the government's use of privilege waivers and other tactics; only one, however, suggested that Congress or the courts should pay attention to the breadth of the corporate criminal liability rule. See *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations Before the S. Comm. on the Judiciary*, 109th Cong. 5-7 (2006) (written testimony of Andrew Weissman, Partner, Jenner & Block).

\(^11\) See Part IV, infra.
rules that embolden the prosecutor and cow the corporation.

Part of this disconnect in the literature is perhaps due to the defeatist view that because the courts and Congress will do little to rein in prosecutorial discretion, efforts are best aimed at the prosecutors themselves. This Article disputes that view. It contends that courts, commentators, and practitioners should more seriously consider the connection between the overbroad corporate criminal liability rule and the risk of overreaching by prosecutors who use their legally-confferred blank check to ferret out corporate crime.

Directing efforts only towards prosecutorial conduct is inadequate. Without fixing the underlying rule, any reform, even if effective, risks being temporary, insecure, and limited to the particular excess to which it is directed, and others may spring up in the place of the eliminated abuse. Changes to prosecutorial guidelines, which do not have the force of law, are always subject to the changing priorities, sensibilities, and political considerations of the next Administration. Thus, commentators, courts, and Congress should spend more time thinking about reforming the source of the potential problem (overbroad rules) than attacking one of its possible symptoms (overreaching prosecutors).

Whether Stein assumes watershed status or that of a lonely bulwark against perceived governmental excess remains to be seen. Meanwhile, whether or not one believes that federal prosecutors in fact abused their discretion in dealing with KPMG or are doing so in other cases under the auspices of the DOJ guidelines, it is beyond dispute that the potential for excess will continue to loom large so long as prosecutors may persuasively (and legally) threaten to indict, and thus potentially destroy, any company, no matter how blameless, for the misdeeds of a single, low-level rogue employee.

This Article proceeds as follows. Part I traces the development of the broad rule of vicarious corporate liability. In particular, it notes the decidedly utilitarian streak in a series of Court decisions, which repeatedly sided with the government over corporations and individual defendants in disputes over claims of liability and

12. These sentiments are expressed in an essay by Gerard Lynch: "[T]he likelihood that courts or legislatures will be moved to show restraint in the expansion of criminal law is more or less nil . . . . Whether it is wise or just to rely on prosecutorial discretion to compensate for overly expansive criminal laws, that is in fact what we do in the United States today." Gerard E. Lynch, The Role of Criminal Law in Policing Corporate Misconduct, 60 LAW & CONTEMP. PROBS. 23, 25-26 (1997).

13. It is not suggested that reforms or revisions to prosecutorial guidelines are necessarily ill-advised, nor are such changes incompatible with the narrowing of corporate criminal liability. Indeed, many of the changes made in the new McNulty Memorandum are clearly improvements, though they do not address the underlying problems with the current corporate criminal law regime.

14. In fact, the Thompson Memorandum, issued by the Bush Administration, replaced a similar document issued by the Clinton Administration in order to place greater emphasis on assessments of cooperation by business entities. See Christopher A. Wray & Robert K. Hur, Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memorandum in Theory and Practice, 43 AM. CRIM. L. REV. 1095, 1096 (2006) (discussing the purposes of the memorandum). More recently, of course, the Thompson Memorandum was itself replaced after only three years by the McNulty Memorandum.
privilege. Part II outlines the features of the most recent DOJ prosecution guidelines, with special attention to those documents' conscious, though seldom-mentioned, reliance on the legal authorities that render prosecutorial discretion so vast. This emphasis underscores that in the minds of prosecutors themselves, their bargaining power derives unmistakably and primarily from a series of deferential court decisions, suggesting that such leverage would naturally shrink to more reasonable proportions in the wake of Congressional or judicial narrowing of those same decisions. Part III describes the most persistent attacks on the practices condoned by the DOJ guidelines, in particular the charge that cooperation is unfairly extorted from corporations, to the detriment of individual defendants. This part also assesses the critique of the corporate cooperation model by comparing it to the traditional cooperation model in the non-white collar context. Part III ends with a discussion of the extent to which the KPMG case in fact vindicates the criticisms of the harshest Thompson Memorandum critics, concluding that those critics have no reason to be sanguine, as the scope, reach, and influence of that case may not be as sweeping as they hope. Part III's conclusion further supports the thesis that the risk of governmental overreach is best curbed, not by challenging particular practices, but more fundamentally by reforming the underlying legal rules that have created outsized prosecutorial discretion. The Article concludes, finally, with a look at alternative liability standards that should be considered for their implications for the curtailment of limitless discretion, as well as their likely impact on the prosecutor-corporation negotiation dynamic.

I. JUDICIAL CREATION OF OVERBROAD STANDARDS OF CORPORATE CRIMINAL LIABILITY

One need not delve too deeply into the literature to discover that the basic rule of corporate criminal liability has few friends. That rule—a vicarious liability principle borrowed wholesale from tort law—states that a business organization is criminally liable for the illegal acts of any of its agents so long as those actions were within the scope of his duties and were intended, even only in part, to benefit the corporation. One writer famously derided the principle of corporate criminal liability with resort to a horticultural metaphor: “Many weeds have grown on the acre of jurisprudence which has been allotted to the criminal law. Among these weeds is ... corporate criminal liability. ... Nobody bred it, nobody cultivated it, nobody planted it. It just grew.” Another appears to have borrowed from astrophysics, calling the jumbled jurisprudence relating to corporate criminal


liability "the blackest hole in the theory of corporate criminal law."\textsuperscript{17}

Commentators have engaged in spirited debate about the rule's reach, its soundness, and even the need for any criminal rule. The basis for corporate criminal liability has been attacked variously as unprincipled,\textsuperscript{18} pointless,\textsuperscript{19} counterproductive,\textsuperscript{20} indiscriminate,\textsuperscript{21} incoherent,\textsuperscript{22} illogical,\textsuperscript{23} puzzling,\textsuperscript{24} and extreme.\textsuperscript{25} Writers have argued that the rule has neither a legally principled underpinning,\textsuperscript{26} nor an empirically justifiable foundation.\textsuperscript{27} Proposals for reform,
thus, range from the incremental\textsuperscript{28} to the sensational\textsuperscript{29} to the radical.\textsuperscript{30}

On one point, however, there is virtually unanimous agreement: corporate criminal liability is extremely broad.\textsuperscript{31} The implications for that breadth are profound, as it vests prosecutors with extraordinary discretion to threaten not just individual malefactors, but the corporations that employ them. On one hand, that discretion gives prosecutors unparalleled ability to identify and prevent corporate crime, whose effects can be devastating to large numbers of people.\textsuperscript{32} On the other hand, such vast discretion can threaten the functioning of entire industries and subject work forces the size of cities to unemployment as a collateral consequence of a prosecutor's choice simply to do what the law permits.

At various moments, the Supreme Court has had opportunities to restrain the expansion of corporate criminal liability, or at least uphold checks on the discretion and tools used by prosecutors. Those moments have mostly gone unseized. At most of those junctures of judicial lawmakers over the last century, the courts—often explicitly relying on the need to facilitate the identification and punishment of elusive corporate wrongdoers—have elected not to regulate the expansion of liability or the contraction of available defenses.\textsuperscript{33}

William J. Stuntz has written of the institutional bias in favor of ever broader liability rules, observing that "the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones."\textsuperscript{34} In the white collar context, however, courts are a party to that pact, as judges have not typically

\begin{itemize}
\item \textsuperscript{28} See, e.g., Susanna M. Kim, Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations, 2000 U. ILL. L. Rev. 763 (2000) (proposing that the prohibition against character evidence set forth in Fed. R. Evid. 404 should not apply to corporations).
\item \textsuperscript{29} See, e.g., Mary Kreiner Ramirez, The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty, 47 ARIZ. L. Rev. 933 (2005) (proposing a corporate "death penalty" for recidivist corporations, akin to the many "three-strikes-you're-out" laws on the books).
\item \textsuperscript{30} See, e.g., Maria S. Boss & Barbara Crutchfield George, Challenging Conventional Views of White-Collar Crime, 28 CRIM. L. Bull. 32, 57-58 (1992) (arguing that legislators should consider starting over with respect to corporate crime and develop standards without reference to the common law); Khanna, supra note 19 (proposing that criminal liability be eliminated).
\item \textsuperscript{31} See, e.g., Patricia S. Abril & Ann Morales Olazábal, The Locus of Corporate Scienter, 2006 COLUM. BUS. L. Rev. 81, 113 (2006) ("Respondeat superior may in certain cases lead to unfairly broad liability."); Bierschbach & Stein, supra note 20, at 1772 ("The scope of corporate criminal liability under American law is very broad."); Buell, supra note 24, at 526 ("[R]espondeat superior is grossly overbroad since it has almost nothing to do with the social practice of institutional blame"); Michael A. Simons, Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship", 76 ST. JOHN'S L. Rev. 979, 983-84 (2002) [hereinafter Simons, Vicarious Snitching] ("This vicarious corporate guilt is extraordinarily broad.").
\item \textsuperscript{32} The financial scandals of the past decade, which caused untold economic misery for shareholders, pension holders, and others, suggest that increased governmental vigilance is necessary and welcome. Many corporations are clearly worthy of punishment and may deserve their demise. The question addressed in this Article, however, is whether so much authority should be vested in prosecutors.
\item \textsuperscript{33} See, e.g., infra notes 89-99 and accompanying text.
\item \textsuperscript{34} William J. Stuntz, The Pathological Politics of Criminal Law, 100 MICH. L. Rev. 505, 510 (2001).
\end{itemize}
opted for "narrower liability rules." If, however, Stuntz is correct generally, he may have identified—in support of the thesis of this Article—the correct audience for reforms to the current legal paradigm: the courts.

The ways in which the courts and Congress have expanded corporate criminal liability, and concomitantly expanded prosecutorial power, are manifold. For our purposes, however, this Article begins with a brief discussion of several particularly significant legal rules articulated by the courts, which bear on the present discussion. The focus of this section falls first on the fundamental rule of vicarious corporate liability, borrowed from tort law and first established in New York Central. In doing so, it also addresses a related legal doctrine of more recent vintage, known as the collective knowledge doctrine, which further rendered corporations vulnerable to prosecution by holding that business organizations could be liable criminally even where no identifiable agent had the requisite knowledge to establish a violation of law. Next, it turns to the collective entity doctrine, with its origin in the 1906 case, Hale v. Henkel, which rejected the possibility of a Fifth Amendment privilege against self-incrimination for business organizations. Finally, this section concludes with some observations about the relevance of these strands of legal reasoning for the current debate over prosecutorial pressure on corporate defendants.

A review of these doctrines reveals that while the language of many of the cases addressing corporate criminal liability often presume to apply logic, precedent, and legal principle, the jurisprudence of the last century in this area has in fact been driven by an unmistakably pragmatic impulse. Courts have repeatedly concluded that the scourge of corporate crime requires rules that are different, tough, and effective in ferreting out wrongdoing. As one writer has concluded, "[g]iven the ubiquitous nature of corporations in our society, economic and social considerations have preempted the importance of anachronistic theories and conceptual consistency."


36. New York Central v. United States, 212 U.S. 481 (1909); see infra Part I.A.

37. 201 U.S. 43 (1906).

38. See infra Part I.B.

39. See Michael Viano & Jenny R. Arnold, Corporate Criminal Liability, 43 Am. Crim. L. Rev. 311, 312 (2006) ("Corporate criminal liability developed as courts struggled to overcome the problem of assigning criminal blame to fictional entities in a legal system based on the moral accountability of individuals.").

40. Geis & Dimento, supra note 27, at 343 (quoting Glenn A. Clark, Corporate Homicide: A New Assault on Corporate Decision-Making, 54 Notre Dame L. Rev. 911, 917 (1979)); see also Peter J. Henning, Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?, 54 U. Pitt. L. Rev. 405, 413 (1993) [hereinafter Henning, Testing the Limits] (arguing that so long as the Court retains a utilitarian impulse, or as he calls it, "the white collar rationale," courts will avoid adopting bright-line rules in favor of defendants, and will only "rarely invalidate the particular use of an investigative tactic").
A. The Doctrine of Vicarious Criminal Liability

The story of the dawn of corporate criminal liability in American law is well-trod territory. In 1909, the oft-written story goes, the Supreme Court decided *New York Central*, a legal earthquake whose tremors are still being felt today. The holding of *New York Central* forever changed the complexion of business crime prosecution and ushered in an age when government prosecutors would assume the role of regulators of commerce, manufacturing, and markets.

In *New York Central*, federal prosecutors indicted a railroad company based on the conduct of an assistant traffic manager, who paid rebates to the American Sugar Refining Company for shipments of sugar, in violation of the Elkins Act. Before *New York Central*, there was no criminal liability for corporations, which, as artificial creatures of the state, could not be prosecuted. The only litigation to which a business organization was vulnerable was civil. As the Supreme Court acknowledged, citing Blackstone, early common law rules provided that a corporation was not *indictable*. Nonetheless, noting that modern authority was tilting the other way, the Court borrowed wholesale from the law of torts to take its sharp turn towards criminal liability, with a full and unapologetic embrace of the concepts of vicarious liability and respondeat superior:

Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.

Thus was decided the case that has spawned decades of criticism and debate. That small "step" for the Court has been viewed by almost everyone since as a giant leap for the law.

The corporate defendant in *New York Central* fashioned an emphatic legal argument out of the collateral consequences that would befall innocent shareholders. It contended, among other things, that these harmful effects visited upon innocents rendered the prosecution unlawful. As the Court put it, the defendant

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41. See Cole, *Corporate Criminal Liability*, supra note 35, at 148 ("The Court's decision in the New York Central case opened the floodgates for a century of judicial decisions and legislative actions that transformed the legal rules of corporate criminal liability."). Arguably, though, as set forth infra, a decision three years earlier, *Hale v. Henkel*, contributed significantly to the opening of those floodgates.

42. The Elkins Act made it an offense to "give or receive a rebate whereby goods are transported in interstate commerce at less than the published rate." *New York Central v. United States*, 212 U.S. 481, 498 (1909).

43. *Id.* at 492.

44. For one discussion of how the doctrine of respondeat superior is well suited to torts, but not criminal law, see Bucy, *supra* note 21, at 1114-18.


46. See DiMento, Geis & Gelfand, *supra* note 9.

47. See *supra* note 31 (collecting authorities reciting the breadth of the corporate criminal liability rule).
corporation's "argument is that to thus punish the corporation is in reality to punish the innocent stockholders, and to deprive them of their property without opportunity to be heard, consequently without due process of law." That defense argument, aimed at the pragmatic instincts of the Court, drew no sympathy.

In rejecting it, the Court responded with a powerful and countervailing pragmatic argument of its own. Throughout the opinion, presaging the continuing debate over utilitarian justifications for arguably over-strict liability and heavy-handed prosecutorial tactics, the Court focused repeatedly on the practical considerations involved in curbing corporate crime:

[W]e see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. If it were not so, many offenses might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy.

The Court went on to describe the importance of effective enforcement of the law, discussing the public debate over the meaningful enforcement of laws against unfair rebates: "It is part of the public history of the times that statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law." Therefore, although the offensive conduct was accomplished through the acts of individuals themselves subject to criminal punishment, such individual malfeasance could not, in the view of the Court, be effectively prevented without the availability of criminal sanction against the corporation too.

Thus, as the Court announced the dawn of corporate criminal liability in America with an embrace of tort law, it simultaneously signaled to generations of prosecutors that arguments of necessity and public policy would, in the realm of corporate crime at least, carry great sway. Before too long, the expansion augured by New York Central swelled further. The influence of public policy

48. New York Central, 212 U.S. 481, 492 (1909). This, of course, was an early formulation of an argument heard frequently in recent times by critics of corporate prosecutions. Though rejected as a legal basis for holding corporations immune from prosecution, modern federal prosecution guidelines do take into account the effect of an indictment on "innocent stockholders." See Thompson Memorandum, supra note 3, at 12.

49. New York Central, 212 U.S. at 494-95 (citation omitted). Four years after this case was decided, in 1914, Woodrow Wilson said the following: "Every act of business is done at the command or upon the initiative of some ascertainable person or group of persons. These should be held individually responsible, and the punishment should fall upon them, not upon business organization of which they make illegal use." William Breit & Kenneth G. Elzinga, Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis, 86 Harv. L. Rev. 693, 709 n. 39 (1973) (quoting 51 Cong. Rec. 1963 (1914)).

50. New York Central, 212 U.S. at 495. The Court also held that to grant corporations immunity from punishment "would virtually take away the only means of effectually controlling [them]." Id. at 496.

51. See Laufer, Corporate Liability, supra note 23, at 1359 ("[C]orporate criminal liability in American law is nothing more than an historical artifact of a non-bureaucratic legal system reacting to an industrializing economy.") (footnote omitted).
arguments is evident in a series of later cases whose facts compelled prosecutors to argue for ever further expansions of liability and constrictions of defenses. While, for example, the *New York Central* decision suggested that criminal liability was appropriate when the misconduct “inured to the benefit of the corporations,” later decisions held that no such actual benefit was necessary to find criminal liability. Similarly, there became no limit to how low-ranking an employee could subject the employer to criminal sanction, as courts found that “the corporation may be criminally bound by the acts of subordinate, even menial, employees.”

In one influential appellate case, the court frankly articulated the pragmatic nature of the rules relating to corporate criminal liability, rooting its considerations firmly in the holding of *New York Central*:

> These results are certainly not startling. They are part of the law of respondeat superior and accepted as established principles in civil tort situations. They are a recognition that law as a useful tool must accommodate pure theoretical logic to the demands of common sense. . . . It is a logical paradox that this creature of the law – the corporate entity – is created by law with the power to violate law."

Thus, there has been even some judicial recognition that corporate criminal law wears the garment of vicarious liability somewhat like an ill-fitting hand-me-down, but significantly, courts have accepted the tradeoffs between legal coherence and crime prevention.

Other cases further expanded the prosecutor’s ability to charge corporations, while simultaneously constricting such defendants’ ability to mount certain arguably legitimate defenses, often explicitly on policy grounds. One legal consequence of vicarious liability was the development of the “collective knowledge” doctrine, largely ushered into existence by a federal appellate case, *United States v. Bank of New England.* In that case, the Bank of New England was tried and convicted of a number of violations of the Currency Transaction Reporting Act, while the individual bank employees were acquitted of the charges. In charging the jury, the trial court instructed them that the bank could be found to have had the requisite guilty knowledge either through one of its agents, or through the “aggregate knowledge of its employees.” Because the bank was a collective institution, its “knowledge [was] the sum of the knowledge of all of the employ-

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52. *New York Central,* 212 U.S. at 495.
54. *Standard Oil Co. of Tex. v. United States,* 307 F.2d 120, 127 (5th Cir. 1962).
55. *Id.* at 127.
56. 821 F.2d 844, 856 (1987); *see Lederman, supra note 25,* at 305-06 & nn.89-94 (citing cases following *Bank of New England*); *see also Thomas A. Hagemann & Joseph Grinstein,* *The Mythology of Aggregate Corporate Knowledge: A Deconstruction,* 65 GEO. WASH. L. REV. 210, 211 (1997) (arguing that the doctrine sprung up from dicta in *Bank of New England,* which legal commentators soon considered a “fixture in the legal firmament”).
Thus, the doctrine "aggregates the states of mind of several agents within a corporation" to be attributed to the corporation itself. Consequently, "there is no question that [the collective knowledge doctrine] subjects corporations to criminal liability where there is literally no one in the organization that ever intended to commit a crime." The collective knowledge doctrine has also received significant attention in the literature, much of it negative. Like the doctrine of vicarious liability for corporations, it arms prosecutors with yet another powerful tool to pressure hesitant companies into cooperation, as it is "an ideal mechanism to threaten corporations with criminal liability in a quick, easy, and virtually indefensible fashion.

Thus, in the present day, the basic rule of respondeat superior announced in New York Central, combined with the doctrine of collective knowledge, has come to mean the following: A corporation is criminally liable even if the criminal conduct is undertaken without the knowledge of top management; the criminal activity was performed by a low level employee; the primary purpose was to benefit only the miscreant employee; there was no actual benefit to the corporation; the criminal acts were performed in direct violation of instructions from the company; there is a rigorous compliance program in place; no single individual had

58. Id. at 855.
59. Abril & Olazabal, supra note 31, at 86.
60. See Jones, supra note 5, at 1061 (noting that overbroad legal rules mean that too much rests on prosecutors exercising their discretion).
61. See Abril & Olazabal, supra note 31, at n.133 (citing authorities addressing Bank of New England); Hagemann & Grinstein, supra note 56, at 211 (criticizing the doctrine of "collective knowledge" as a "myth without substance"). Indeed, some courts have refused to apply the doctrine. See Viano & Arnold, supra note 39, at n.64 (citing cases that have so refused).
62. Hagemann & Grinstein, supra note 56, at 218. The authors argue, however, that in practice courts have not employed the doctrine nearly so loosely as its critics suggest. See id.
63. See United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1973) (holding corporate criminal "liability may attach without proof that the conduct was within the agent's actual authority, and even though it may have been contrary to express instructions").
64. See Standard Oil Co. of Tex. v. United States, 307 F.2d 120, 127 (5th Cir. 1962) ("[T]he corporation may be criminally bound by the acts of subordinate, even menial, employees.").
67. See Hilton Hotels, 467 F.2d at 1004 (upholding the corporation's conviction for antitrust violations based on acts of the purchasing agent, even though he was specifically told by the manager and assistant manager not to threaten suppliers); see also Viano & Arnold, supra note 39, at 314-15 (noting corporations may be liable even where they have a contrary policy).
68. See United States v. Basic Constr., 711 F.2d 570 (4th Cir. 1983); see also United States v. Gen. Motors Corp., 226 F.2d 745, 749 & n.5 (3d Cir. 1955); C.I.T. Corp. v. United States, 150 F.2d 85, 90 (9th Cir. 1945) (excluding evidence of a compliance program from the jury); Kevin B. Huff, Note, The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach, 96 COLUM. L. REV. 1252, 1253 & n.11 (1996) (citing United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989)).
the requisite intent or knowledge sufficient to violate the law;\textsuperscript{69} it is never possible to identify the actual employee or agent responsible for the crime;\textsuperscript{70} or the offending employees are all acquitted of the same offense.\textsuperscript{71}

Accordingly, under these longstanding rules, a multinational corporation may theoretically be indicted, convicted, and perhaps put out of business based on the alleged criminal activity of a single, low-level, rogue employee who was acting without the knowledge of any executive or director, in violation of well-publicized procedures, practices, and instructions of the company. And the corporation’s conviction will stand even if the rogue worker is himself acquitted of wrongdoing. Although in practice, as discussed \textit{infra} in Section II.B, prosecutors rarely indict corporations, the risk of overreaching is real.

Against this backdrop of extraordinarily broad liability, a corporation, though deemed a “person” for most purposes, does not have the same ability as a natural person to challenge various information-gathering techniques by the government. As discussed in the next section, the rise of the “collective entity” doctrine at the start of the 20th Century even further strengthened the ability of prosecutors to apply pressure on the corporation.

\textit{B. The Collective Entity Doctrine}

As evidenced in \textit{New York Central}, law enforcement pragmatism has been one of the principal animating features of corporate criminal law. The line of cases developing the “collective entity” doctrine perhaps even more starkly demonstrates judicial embrace of an ends-justify-the-means legal philosophy, in this case with respect to whether the Fifth Amendment right against self-incrimination applies to corporations.\textsuperscript{72}

The first Supreme Court case to squarely address the self-incrimination clause of the Fifth Amendment was \textit{Boyd v. United States}, in 1886.\textsuperscript{73} In that case, in which the government attempted to compel Boyd to produce incriminating documents, the Court established a broad right against self-incrimination, holding that “any compulsory discovery . . . to convict [a party] of a crime, or to forfeit his property, is contrary to the principles of free government.”\textsuperscript{74} Relying on both the Fifth Amendment and the Fourth Amendment’s protection against unreasonable search and seizure, the \textit{Boyd} Court set a profoundly rights-protecting precedent. As myriad commentators have observed, however, it was not long before the Court

\textsuperscript{69} See United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir. 1987).

\textsuperscript{70} See United States v. Hilton Hotels Corp., 467 F.2d 1000, 1008 (9th Cir. 1972) (holding it irrelevant that no individual employee was convicted of a crime).

\textsuperscript{71} See id.

\textsuperscript{72} For a more detailed discussion of \textit{Hale} and its progeny in the development of the collective entity doctrine, see Cole, \textit{Collective Entity Doctrine, supra} note 18, at 13-25, and Henning, \textit{Testing the Limits, supra} note 40, at 413-49.


\textsuperscript{74} Id. at 631-32.
reverted to a curtailment of such broad protection.  

Twenty years after *Boyd* and three years before *New York Central*, the Supreme Court decided *Hale v. Henkel*. *Hale* dramatically cut back the protective ruling the Court had issued in *Boyd*, having seemingly awakened to the practical realities of corporate crime prosecutions. In *Hale*, prosecutors issued a grand jury subpoena to the custodian of the MacAndrews & Forbes Company for the production of testimony and corporate documents in connection with a criminal investigation. Hale, the secretary and treasurer of the company, appeared before the grand jury but declined to answer any substantive questions or produce any documents, instead asserting on behalf of the company the Fifth Amendment privilege against self-incrimination. Hale was promptly held in contempt.

In upholding the contempt finding, the Supreme Court reasoned that corporations could not assert a Fifth Amendment privilege against self-incrimination, in part on the ground that a corporation, being a legal creature of the state, must be subject to inquiry from the state that created it, by virtue of its “visitatorial” rights. The Court in *Hale* also emphasized that the right against self-incrimination was a personal right, which could not therefore be asserted to protect third parties, including even corporations of which the demurring witness was an employee. The Court noted that “there is a clear distinction... between an individual and a corporation, and the latter has no right to refuse” to respond to a subpoena.

While giving voice to the distinction between a natural and corporate person, the collective entity rule nonetheless sprung largely from practical law enforcement considerations. If, reasoned the Court, an officer or employee of a corporation “could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the

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77. 201 U.S. at 75. “Visitatorial” rights was a reference to the state’s retention of the power to investigate the corporate creatures that it created. See Cole, Collective Entity Doctrine, supra note 18, at 21.

78. 201 U.S. at 74.

79. Of course, at this point, there was still no clear criminal liability for a corporation, so in the absence of exposure to prosecution, there was in any event no way for a corporation to incriminate itself. In an indication of some incoherence in the law, however, the Supreme Court never returned to the issue after *New York Central* established that a corporation could be criminally charged. See Hasnas, supra note 19, at 600 (noting that after *New York Central*, the Court “never revisited the issue with this in mind, but simply continued to cite *Hale* for what became known as the collective entity rule”).
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failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers."80 Thus, in Hale, the end was held to justify the means.81 While the rule announced in New York Central dramatically expanded corporate criminal liability, the rule of Hale and its progeny equally dramatically choked off protection under the Fifth Amendment—one of the most important protections for natural persons in defending against criminal prosecution.82

Therefore, the Court, having first shorn the corporation of any Fifth Amendment self-incrimination privilege, began to endorse the enlistment of corporations as institutions through which individual culpability could be identified and punished, without particular regard for the privilege of those individual agents. For the next several decades, the Supreme Court was continually presented with variations of the same vexatious legal question—even if the business organization itself had no self-incrimination privilege, to what extent could an individual representative of that business decline to testify on the ground that her testimony or testimonial production of documents would tend to incriminate the individual? The Court’s answer was almost always the same. It “time and again allowed subpoenas against the custodian of corporate documents... over claims that the documents will incriminate the custodian.”83 Indeed, the Court has repeatedly found that subpoenas were not only permissible but that incriminating information provided by the custodian could be used against him at a criminal trial.84 Each time, moreover, the Court emphasized the importance of law enforcement considerations. As Peter Henning has observed, “Since [Hale], the Court has rejected corporate claims to the privilege against self-incrimination... mainly because permitting the assertion of the right would have a deleterious effect on the enforcement of regulatory

80. Hale, 201 U.S. at 74.
81. Numerous commentators have noted the Hale Court’s blithely pragmatic mode of reasoning. See, e.g., Cole, Collective Entity Doctrine, supra note 18, at 19-20 (contending that the “real reason” the Hale court resolved to deprive corporations of a self-incrimination privilege was that “holding otherwise would have made it difficult for prosecutors to obtain evidence to support criminal cases against corporations”); Henning, Conundrum, supra note 22, at 821 (“Hale v. Henkel endeavored to reconcile two competing concerns. Corporate assertions of constitutional rights could negate the possibility of policing the actions of business organizations through the criminal mechanism.”). The purely utilitarian basis for the decision is arguably further evidenced by the “weak and shallow nature” of the rationale given—that corporations were to be distinguished from natural persons because the former, as artificial creations of the state, had subjected themselves to a reserved “visitatorial power” of the state over the corporation. Cole, Collective Entity Doctrine, supra note 18, at 21-22. The abandonment of the “visitatorial power” rationale has since been recognized by the Court itself. See Braswell v. United States, 487 U.S. 99, 106 (1988).
82. Though in 2006, Judge Kaplan stated that the “Fifth Amendment is a bulwark against government coercion,” United States v. Stein (Stein II), 440 F. Supp. 2d 315, 328 (S.D.N.Y. 2006), that bulwark was deliberately dismantled for corporations on pragmatic grounds exactly a century before.
84. Id. at 413.
provisions, which were designed to curb corporate misconduct." 85

The record since *Hale* bears out this characterization. In *Wilson v. United States*, decided just five years after *Hale*, the Court ruled that a corporate officer could not quash a subpoena to a corporation by invoking his personal privilege because the state's power "would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation." 86 Later, in *United States v. White*, the Court wholly abandoned its reliance on the "visitatorial" right theory and upheld a rejection of the privilege asserted by a labor union, again emphasizing law enforcement concerns:

The greater portion of evidence of wrongdoing by an organization or its representatives is usually found in the official records and documents of that organization. Were the cloak of privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. 87

The Court further removed the possibility of an individual assertion of the Fifth Amendment right in connection with a subpoena issued to an organization in *United States v. Bellis*. 88 This time the Court held that the privilege could not be asserted regardless of the size of the business entity—a three person law firm in the case of *Bellis*. Law enforcement considerations were again at the forefront, as the Court reasoned that recognizing such a privilege would "largely frustrated legitimate governmental regulation of such organizations." 89

Some 80 years after *Hale*, the Supreme Court—having in the meantime dramatically fortified the collective entity doctrine 90—was called upon to resolve a circuit split involving a particularly troublesome application of the doctrine. In *Braswell v. United States*, 91 Randy Braswell, who was the sole shareholder of a corporation, received a federal grand jury subpoena addressed to him. Braswell moved to quash on the ground that, as the sole shareholder of the corporation, the

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85. Henning, *Conundrum*, supra note 22, at 801; see also Cole, *Collective Entity Doctrine*, supra note 18, at 82 (postulating that, given the unsatisfactory rationale for withholding the self-incrimination privilege from corporations, the "real reason for clinging to the collective entity doctrine" was utilitarian, namely, the "detrimental impact on the government's efforts to prosecute 'white-collar' crime").
86. 221 U.S. 361, 384-85 (1911) (emphasis added).
89. Id. at 90.
90. One notable exception to this expansion was *United States v. Doe*, in which the Court held that in the limited situation in which a corporation was a sole proprietorship, the act of production by that sole proprietor in response to a grand jury subpoena necessarily had a testimonial aspect as it would provide the government with valuable information, namely, that the records were authentic and in his possession. 465 U.S. 605, 611 (1984). Thus, only in circumstances where the individual was completely indistinguishable from the entity did the Court feel compelled to respect the privilege. *Id.* Even that principle, however, as detailed below, seemed to fall in *Braswell*.
act of production of documents on behalf of the corporation of which he was the only official would necessarily incarcerate him in violation of his personal Fifth Amendment privilege. 92

The Court, in a 5-4 vote breaking down on non-traditional lines, upheld the collective entity doctrine’s application to Braswell. 93 Writing for the majority, Chief Justice Rehnquist reiterated the Court’s longstanding adherence to the collective entity doctrine and held that, even where the custodian was the sole shareholder, “a corporate custodian such as petitioner may not resist a subpoena for corporate records on Fifth Amendment grounds.” 94

Despite recitation of the principles of the collective entity doctrine, which were claimed to have a “lengthy and distinguished” pedigree, the Court again made plain its adherence to a practical principle of equally lengthy and arguably distinguished pedigree: it should not hinder the government’s ability to prosecute, punish, and prevent white collar crime. In unapologetic, results-oriented language reminiscent of Hale and its intervening progeny, Justice Rehnquist noted that “recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government’s efforts to prosecute ‘white-collar crime,’ one of the most serious problems confronting law enforcement authorities.” 95 To buttress its argument, the Court relied on an eight-year old House Subcommittee report, which asserted that white collar crime is “the most serious and all-pervasive crime problem in America today.” 96

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92. 487 U.S. at 101. The Court had earlier held, in Fisher v. United States, that the mere act of production of documents could implicate the right against self-incrimination. 425 U.S. 391 (1976).

93. While noted liberals on issues of criminal defense, Marshall and Brennan, sided with the dissent in support of the defendant, Justice Stevens joined Rehnquist’s majority opinion; Justice Scalia, meanwhile, joined the dissent, along with Justices Brennan, Marshall, and Kennedy. See Cole, Collective Entity Doctrine, supra note 18, at 59 n.218 (noting that the “unusual ideological bedfellows in those two groups may be an indicator of the difficulty of the issues before the Court”). Indeed, the case might have been decided the other way. Justice Rehnquist cited a number of circuits that had resolved the privilege question in favor of the witness, rather than the government, including the Second, Third, Fourth, and Eleventh Circuits. Braswell, 487 U.S. at 102 n.2 (citing cases on both sides of the circuit split).


95. Id. at 104. Various writers have taken strong issue with this characterization of the pedigree of the collective entity doctrine. See, e.g., Cole, Collective Entity Doctrine, supra note 18, at 43 (“[T]he history of the collective entity doctrine may be long, but it is hardly distinguished”).

96. Braswell, 487 U.S. at 115. Thus, notwithstanding the Court’s previous ruling in Doe, which protected the privilege of a sole proprietor, the Braswell majority could not countenance the possibility that a similar rule for a sole shareholder of a corporation might harm the law enforcement function. Id.

97. Id. at 116 n.9 (citing Conyers, Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime, 17 AM. CRIM. L. REV. 287, 288 (1980)). Eight years later, this conclusion was endorsed—without any evidence—by Justice Rehnquist, who merely noted, “Although this statement was made in 1980, there is no reason to think the problem has diminished in the meantime.” Id. Reports indicate that a number of other serious crime problems were plaguing the nation, including a crack cocaine epidemic and a rise in the murder rate. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES (November 2004), available at http://www.ojp.usdoj.gov/bjs/pub/ascii/hus02.txt (noting the “sharp increases in the late 1980s” in the homicide rate); Bernard E. Harcourt & Jens Ludwig, Broken Windows: New Evidence from New York City and a Five-City Social Experiment, 73 U. CHI. L. REV. 271, 276 (2006) (noting New
these statements, the public policy rationale—as in previous cases—appears clearly to have been the rationale animating the Court’s decision. For our purposes, the most interesting aspect of Braswell is the vociferousness with which the four-member dissent took the majority to task for its blatantly utilitarian reasoning. It brings into sharp relief the longtime and persistent tension between the need for a free hand against corporate entities, which enjoy limited rights and privileges, in order to attack economic crime, and the need to avoid collateral harm to individuals, whose rights and privileges are ordinarily more expansive. Writing for the dissent, Justice Kennedy criticized the majority for denigrating the Fifth Amendment in order to vindicate a rule that was perverse under the facts at bar:

[T]he Court rules that a natural person forfeits the [Fifth Amendment] privilege in a criminal investigation directed against him and that the Government may use compulsion to elicit testimonial assertions from a person who faces the threat of criminal proceedings . . . . The Court today denies an individual his Fifth Amendment privilege against self-incrimination in order to vindicate the rule that a collective entity which employs him has no such privilege itself.

Moreover, the dissent harshly criticized the majority for sacrificing fundamental privileges of Constitutional dimension to crime-fighting considerations: “[T]he privilege against self-incrimination does not permit balancing the convenience of the Government against the rights of a witness.” As discussed infra, this terse admonition presaged Judge Kaplan’s opinions in the Stein cases, in which government conduct towards a corporate entity (KPMG) was held to have collaterally harmed the rights and privileges of individuals employed by the firm.

C. Conclusions

As the foregoing discussion demonstrates, the corporation is particularly ill-
equipped to defend itself, and certainly less well equipped than the traditional individual defendant, against the power of prosecutors to prove virtually any corporate entity guilty upon showing criminal conduct on the part of at least one employee. Nor can its employees, due to the collective entity doctrine, resist subpoenas seeking information from the corporation on the ground that they might be personally incriminated. Moreover, courts are powerfully predisposed to dismissing any argument that might restrict the government’s ability to obtain the kinds of documentary evidence that would tend to prove guilt in white collar cases, even where it might impinge on individuals’ rights and privileges.

Significantly, the tensions inherent in the lines of cases discussed above mirror, and to a large degree predict, the competing considerations that have been exposed in the current debate over alleged prosecutorial excess in the pursuit of white collar criminals. The aggressive approach of today’s federal prosecutors to corporate crime, much maligned by defense lawyers and commentators for the better part of the past decade, is not—if a proper historical perspective is employed—such a dramatic shift, as some have suggested. Rather, skirmishes over the appropriate scope and availability of sacrosanct privileges, arguments over the proper limits on aggressive information-gathering tactics by prosecutors, and anxiety over the easy manipulability of rules relating to artificial corporate persons, all have figured prominently in the clashes between prosecutors and corporate defendants in the past. These are, albeit with some variations, the same debates raging today.

The pointed disagreement between the majority and dissent in Braswell, for example, was fundamentally a debate between two sets of Justices. On one side were Justices who believed, like Rehnquist, that in light of the broad criminal liability rules for corporations and the exigencies of rooting out white collar crime, steadfast adherence to a longstanding, prosecution-friendly legal rule (i.e., no self-incrimination privilege for custodians of collective entities) must trump concerns about negative consequences that might befall such custodians, even if they might also be personally incriminated. Arrayed on the other side were Justices who believed, like Kennedy, that the Court must be sensitive to, and even vindicate, the rights and privileges of individual defendants who are put in jeopardy by virtue of their dual status as corporate custodians. Whereas the Braswell majority showed little concern for the collateral consequences visited upon individual employees and officers who face criminal exposure as a result of aggressive and compulsory government information gathering from corporations, the minority was incensed by it.

That, in a nutshell, also roughly describes important features of the two camps in the current debate. In these older and settled debates, moreover, may lie clues as to the ultimate outcome of the current imbroglio.

101. See United States v. Stein (Stein II), 440 F. Supp. 2d 315, 337-38 (S.D.N.Y. 2006) (commenting that, through the Thompson Memorandum, prosecutors have “alter[ed] the manner in which suspected corporate crime has been investigated, prosecuted, and, when proven, punished”); Zornow & Krakauer, supra note 7, at 160-61.
102. See infra Part III.C.
II. THE GOVERNMENT’S EXPLOITATION OF CORPORATE CRIMINAL LAW

As noted at the outset, commentators and practitioners have been uncommonly vehement, vociferous, and united in their condemnation of recent Department of Justice practices in connection with corporate crime prosecutions. These critics view recently issued guidelines as the driving force behind prosecutorial overreach and interference with, among other things, sacrosanct privileges, Constitutional rights, intra-business harmony, and corporate prerogatives. As described in Part I, however, the sources of authority for the use of such allegedly hardball techniques find their origins in a century of pragmatic jurisprudence that doggedly increased the scope of corporate criminal liability with each passing decade. Any alleged government overreaching, it could therefore be argued, has been judicially empowered and premised on the widespread—and largely legitimate—view that white collar crime is singularly difficult to detect, investigate, and prosecute.

Indeed, the much-derided Thompson Memorandum can be viewed as consistent with, and following directly in the tradition of, that pragmatic jurisprudence. Recent government conduct—to the extent it is flawed—is merely a symptom of a deeper legal malady.

Before directly weighing the recent criticisms leveled at the government’s tactics in prosecuting corporate crime, this part first examines the nature and scope of the government’s power in this area and describes the ways in which it chooses to exercise the admittedly vast discretion granted by the courts. It reviews the enduring source of prosecutors’ power and then examines the infamous DOJ prosecution guidelines, which set down the principles governing the exercise of

103. See infra Part III.A.

104. See, e.g., Abril & Olazabal, supra note 31, at 106 ("[C]orporate wrongdoing is by its nature easily concealed and often highly sophisticated and technical."); Bierschbach & Stein, supra note 20, at 1776 ("[I]n the case of corporate crime, law enforcement already faces substantial informal barriers and constraints"); Henning, Conundrum, supra note 22, at 816 (noting that the “best, and often only, source of information” in a white collar case is the documents and the government’s ability to prosecute economic crimes is severely impaired without access to those documents); see also John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": An Un scandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386, 390 (1981) ("Although there are exceptions, most corporate crimes seem highly concealable.").

105. While both the Thompson Memorandum and the broad rules of corporate liability have been much derided, there is a significant and interesting division among critics. The overbroad legal rules are criticized largely by legal commentators and academics, who have for decades urged greater coherence in the jurisprudence of corporate criminal law. The alleged overreaching by prosecutors in applying those overbroad principles, on the other hand, largely occupies the attention of practitioners. To be sure, there are scholars who address the issue of prosecutorial discretion. See, e.g., Henning, Testing the Limits, supra note 40, at 410; Simons, Vicarious Snitching, supra note 31, at 987-88. There have also been practitioners who have discussed the overbroad legal rules. See, e.g., Jed S. Rakoff, Coerced Waiver of Corporate Privilege, N.Y. L. J., July 13, 1995, at 3. On the whole, however, the two groups are dedicated to different aspects of the issue. If one accepts the thesis of this Article, that in the longer term the best prophylactic against prosecutorial overreaching is a reasonable narrowing of the criminal rules that enable them, it behooves each of these two groups to develop views and strategies in the other area. In particular, practitioners might find opportunities in current live cases and controversies for redress of the underlying liability rules.
discretion in the investigation and prosecution of business organizations.

A. Prosecutorial Power and Eggshell Defendants

Legal rules do not operate in a vacuum. They are applied in a specific social, cultural, political, and economic context. As those external circumstances shift, so do prosecutorial priorities, public perception, and political will. That is true of any government’s anti-crime agenda, and naturally affects the prosecution of white collar crime, just as it affects the prosecution of street crime.

While all criminal prosecution dynamics are shaped by external influences, corporations and the prosecutions of them are perhaps especially susceptible to such externalities. This is due to, among other things, their peculiar, and often confounding, status as legal “persons”; the inscrutability of the corporate form; their central importance to the economy; their relationships with shareholders and employees; and their special vulnerability in the marketplace. Although the rule of vicarious liability is relatively simple, these other factors dramatically complicate the exercise of discretion relating to corporate prosecutions, as well as the evaluation of that exercise.106

Given all these intersecting and overlapping features, from what source does the prosecutors’ power spring? One might argue, for example, that the real source of his bargaining power is not the breathtakingly broad liability rule, but rather the inherent vulnerability of corporations, who are in a manner of speaking “eggshell defendants,” akin to so-called exceedingly vulnerable eggshell plaintiffs in tort law. Indeed, corporate defendants, subject as they are to market pressures, may not be able to survive indictment, much less conviction and sentencing.107 In a recent article, Dale Oesterle describes the overwhelming pressure felt by a company facing the prospect of prosecution, quipping that “[s]ince an indicted firm is a dead firm, a decision to defend an indictment is suicide.”108 The corporate corpses of Arthur Andersen, E.F. Hutton, Drexel Burnham Lambert, and others, lend force to these observations.109 Recent statements from the heads of business organizations

106. The existence of many of these factors feeds the considerable body of literature questioning the wisdom and efficacy of any criminal penalties for business organizations. See, e.g., Posner, supra note 19; Baker, supra note 19; Khanna, supra note 19, at 1497-1510; accord Dale A. Oesterle, Early Observations on the Prosecutions of the Business Scandals of 2002-03: On Sideshow Prosecutions, Spitzer’s Clash with Donaldson over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation, 1 Ohio St. J. Crim. L. 443, 471-78 (2004).

107. See, e.g., Oesterle, supra note 106, at 471 (noting that especially in the financial services industry “[s]ome operating businesses that need constant access to the capital markets to survive also live or die on their reputation for financial integrity”); see also Jonathan M. Karoff & John R. Lott, Jr., The Reputation-Related Penalty Firms Bear from Committing Criminal Fraud, 36 J.L. & Econ. 757,758 (1993) (“[T]he reputational cost of corporate fraud is large and constitutes most of the cost incurred by firms accused or convicted of fraud.”).

108. Oesterle, supra note 106, at 476; see also Cole, Corporate Criminal Liability, supra note 35, at 150 (“[A] criminal prosecution may literally be a life or death crisis for a company.”).

109. See Oesterle, supra note 106, at 473 (noting that a “barely successful criminal prosecution for obstruction of justice sealed the fate of Arthur Andersen”).
with criminal exposure further reinforce the conclusion that in order to survive, corporations must do everything possible to avoid indictment.\textsuperscript{110}

It is too facile and ultimately not especially productive, however, merely to blame the market-based vulnerability of corporations for the bargaining power of prosecutors. It is the doctrine of criminal respondeat superior and the near certainty of conviction that gives comfort to the prosecutor that a decision to indict will not end in failure; it strikes fear in the corporation's lawyer for the same reason. Thus, both a broad rule that allows prosecutors to be fearless in threatening prosecution, along with the market-driven fearfulness of the rational corporation, combine to provide singular bargaining power in the hands of the prosecutor.\textsuperscript{111} In any event, insofar as market forces give prosecutors their outsized bargaining power over vulnerable corporations, there is little that lawyers and legal commentators can do or say to alter the economic dynamic. Our attention is clearly better spent on the legal dynamic, i.e., the jurisprudential bases for prosecutorial power in this area.

Commentators often also point to the United States Sentencing Guidelines as the source of prosecutorial power in compelling cooperation from corporations.\textsuperscript{112} The Organizational Guidelines, promulgated in 1991, provide that convicted business entities are entitled to lenience if they, "prior to an imminent threat of

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\textsuperscript{110} As corporate counsel at General Electric said, in order to avoid indictment "[y]ou want to convince the government that this is aberrant behavior by a very small number of people and that the company doesn't tolerate this type of behavior." William S. Lauder, \textit{Corporate Prosecution, Cooperation, and the Trading of Favors}, 87 IOWA L. REV. 643, 657 & n.64 (2002) (quoting E. Scott Gilbert, \textit{Keeping Your Nose Clean: Compliance Has to Be Thorough and Immediate}, CORP. LEGAL TIMES, Sept. 1995, at 13); see also United States v. Stein (Stein II), 440 F. Supp. 2d 315, 319 (S.D.N.Y. 2006) ("In the words of its chief legal officer, KPMG did everything it could 'to be able to say at the right time and with the right audience, we're in full compliance with the Thompson Memorandum.'").
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Even though such indictments are not routine, the power to indict, combined with collateral consequences and market forces, enhances the power of prosecutors to investigate corporate crime. The mere threat of a criminal charge motivates firms to conduct in-house investigations, cooperate fully with prosecutors, distance themselves from the conduct of their agent, and jettison employees involved in the transaction.
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\textsuperscript{112} See, e.g., Lance Cole, \textit{Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why it is Misguided)}, 48 VILL. L. REV. 469, 538 (2003) [hereinafter Cole, \textit{Revoking Our Privileges}] ("These provisions of the Guidelines obviously exert substantial pressure on a corporation to cooperate with a government investigation of possible criminal wrongdoing."); Eileen S. Podgor, \textit{White-Collar Cooperators: The Government in Employer-Employee Relationships}, 23 CARDOZO L. REV. 795, 796 (2002) (explaining that the Guidelines "may influence a corporation to cooperate with the government despite its negative effect on employees of the organization"); Richard S. Gruner, \textit{Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform}, 36 ARIZ. L. REV. 407, 463-71 (1994) (suggesting that the sentencing guidelines create incentives for corporate agents to act as public agents and to cooperate with law enforcement efforts); Zornow & Krakauer, \textit{supra} note 7, at 154 (suggesting that with the leverage of being able to influence the severity of sentences under the Guidelines regime, "federal prosecutors can demand that companies disclose privileged information at the outset of an investigation, and the client is often left with no rational choice but to accede").
\end{quote}
disclosure or government investigation” and “within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct.”

Although the government has often looked to the Sentencing Guidelines to support its actions in the corporate criminal context, the tremendous emphasis on the Organizational Guidelines—over the broad, underlying liability standards—is undoubtedly overstated as the source of prosecutorial power and pressure. First, any significance accorded to the impact of the Sentencing Guidelines is severely diminished after the Supreme Court held in 2005 that the Guidelines are merely advisory.

Second, due to the nature of the market forces discussed above, the influence of the Organizational Guidelines—which by definition become directly relevant to the punishment of a corporation only after conviction—is minimal for the large number of business entities for whom mere indictment is death. For certain businesses, “[t]rial is unnecessary; the damage is done with the indictment. Vindication, if gained at trial, comes far too late for many in this community.”

By the time the Guidelines come into play, then, a corporation will have already suffered two significant events that generally have a greater impact on their ability to survive than the level of fine applicable by virtue of the Guidelines, namely, indictment and conviction. Thus, the power of the prosecutor derives largely from the threat of indictment (and the certainty of conviction), not the ability to recommend a higher or lower sentence after verdict.

Finally, to the extent that commentators suggest that prosecutors have used the Organizational Guidelines as a kind of template for their own considerations of

114. See, e.g., Mary Beth Buchanan, Effective Cooperation by Business Organizations and the Impact of Privilege Waivers, 39 WAKE FOREST L. REV. 587, 601 (2004) (sitting United States Attorney invoking Organizational Guidelines to justify focus on cooperation with respect to corporations, noting that the government’s policy “is entirely consistent with the ‘carrot and stick’ approach taken by the Sentencing Commission”); Thompson Memorandum, supra note 3, at 5 (invoking the Guidelines’ description of “pervasiveness”); id. at 7 (invoking the Guidelines’ rewarding of voluntary disclosure and cooperation).
116. See supra note 106.
117. Oesterle, supra note 106, at 472; see also United States v. Stein (Stein II), 440 F. Supp. 2d 315, 318 (S.D.N.Y. 2006) (“An indictment, regardless of whether KPMG was guilty of anything, almost certainly would have meant the demise of the firm.”); Simons, Vicarious Snitching, supra note 31, at 981, 1015-16 (noting that Arthur Anderson’s “fate was largely sealed when, after not fully cooperating, it was indicted for obstruction of justice” and that even “[b]efore it was convicted, Andersen had all but ceased to exist”).
118. Of course, even publicity about the fact of an investigation, prior to indictment, may significantly harm a business organization.
cooperativeness, that observation is not particularly relevant or telling.\footnote{119} Some appear to blame prosecutors for using the Guidelines as a “blueprint” for decisions evaluating cooperation by a corporation.\footnote{120} This criticism is odd because it takes prosecutors to task for considering, \textit{pre-indictment}, cooperative conduct that the Organizational Guidelines clearly contemplate will not preclude criminal prosecution.

\section*{B. The Prosecution Guidelines}

As set forth in Part I, the criminal case against a corporation, once there is evidence that even a single low-level employee engaged in criminal activity on the job, is virtually bulletproof. Prosecutors, however, rarely pull the trigger.\footnote{121} Thus, at first blush a peculiarity in the application of the broad liability rule—often overlooked by commentators—is the infrequency with which prosecutors actually indict corporations. Judge Lynch made the following observation a decade ago:

The law may countenance imposition of criminal liability on a corporation based on the acts of relatively low-level corporate agents, and dismiss as irrelevant arguments that the agents’ acts were not approved by high-level officers. If this is the legal standard, one would expect vast numbers of convictions of corporations; virtually every case in which a corporate executive is convicted for actions in the course of his employment should have the corporation as a co-defendant. Yet prosecutions of corporations are in fact rather infrequent.\footnote{122}

Writing before the issuance of the Department of Justice memoranda setting forth the guidelines for determining when to indict a corporation, Judge Lynch postulated that the relatively scarce use of prosecutorial power to indict business organizations evidenced an unwritten body of “separate de facto substantive

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\item[119.] See, \textit{e.g.}, Lawrence D. Finder, \textit{Internal Investigations: Consequences of the Federal Deputation of Corporate America}, 45 S. Tex. L. Rev. 111, 114 (2003) (“The Organizational Guidelines, with their attention to corporate cooperation, also operated as a type of paradigm for federal prosecutors who saw in them some direction in making corporate charging decisions caused by the void in DOJ policy.”). The author goes on to suggest that the Guidelines emboldened prosecutors to ask for waivers in connection with internal investigations. \textit{Id.}
\item[120.] See Zornow & Krakauer, \textit{supra} note 7, at 154 (“By virtue of the incentives embodied in the Guidelines, federal prosecutors have a blueprint for determining whether a corporation should be indicted based in part on the quality of the corporation’s cooperation with a government investigation.”).
\item[121.] See Abril & Olazabal, \textit{supra} note 31, at 109 (observing that “very few corporations are ever convicted of crimes” and suggesting that “[t]his reality is likely due to the difficulty of establishing corporate guilt”); Viano & Arnold, \textit{supra} note 39, at 323 & n.86 (noting a recent decline in the number of indicted corporations). Indeed, the Thompson Memorandum recognizes that prosecution in the rogue employee scenario is likely not appropriate. Thompson Memorandum, \textit{supra} note 3, at 5 (“[I]t may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict respondeat superior theory for the single isolated act of a rogue employee.”).
\item[122.] Lynch, \textit{supra} note 12, at 61.
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criminal law” that informed the use of discretion in making charging decisions. To the extent that prosecutors often seem to serve the role of guardian against excessive use of overbroad criminal laws, because the courts and Congress have largely abdicated responsibility, Judge Lynch credits them. On the other hand, because such de facto rules governing discretion are likely to be known only to prosecutors (and likely to be understood differently from office to office, or “even individual prosecutor to individual prosecutor”), he faults them for operating in a way that makes “prosecutorial decisionmaking appear a kind of black hole.” Accordingly, Judge Lynch advocates that, particularly in the corporate criminal context, such standards be laid out for public review and scrutiny.

In 1999, the Department of Justice did in fact publish the first set of written guidelines relating to the exercise of discretion in the prosecution of business organizations, under the signature of then-Deputy Attorney General Eric Holder; they were updated in 2003, under the signature of then-Deputy Attorney General Larry Thompson. Rather than quell concerns about “black hole” decisionmaking—as Judge Lynch might have hoped—their issuance instead set off a firestorm in the legal community, resulting on December 12, 2006, in the revision and

123. Id.
124. See Simons, Vicarious Snitching, supra note 31, at 985-86 (“[V]icarious organizational guilt has survived nearly unchanged since 1909 – at least in theory. In practice, though, vicarious organizational guilt is not nearly so broad. It has been limited not by statute or by case law, but rather by the exercise of prosecutorial discretion.”).
125. See Lynch, supra note 12, at 62 (“In my experience, the substantive standards applied by prosecutors in many cases parallel the canons of a more humane criminal law than appears in our statutes and appellate decisions. Moral blameworthiness, for example, tends to be important to prosecutors . . . .”); accord Frank O. Bowman, III & Michael Heise, Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences, 86 IOWA L. REV. 1043, 1047 (2001) (describing how declining sentences for drug defendants in the 1990s resulted from, among other things, discretionary decisions made by prosecutors); see also Michael A. Simons, Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences, 47 VILL. L. REV. 921, 939 (2002) [hereinafter Simons, Departing Ways] (discussing Bowman and Heise study).
126. Lynch, supra note 12, at 61.
127. See id. at 61-63 (discussing the lack of public understanding of prosecutorial decision making).
128. Other federal departments and agencies have promulgated their own guidelines for the pursuit of sanctions against business entities, such as the Securities and Exchange Commission’s version of the enforcement guidelines, known as the Seaboard Report. See Report of Investigations Pursuant to Section 21(a) of the Securities and Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Release No. 34-44969 (Oct. 23, 2001); see also Baker, supra note 19, at 313-37 (discussing corporate “self-policing”).
129. The Thompson Memorandum is a revision of the 1999 Holder Memorandum. Thompson Memorandum, supra note 3, at preface. They are largely similar, except that the Thompson Memorandum includes an additional factor for consideration, id. at 3 (“adequacy of the prosecution of individuals responsible for the corporate malfeasance”), shifts the focus further onto cooperation, id. at preface, and requires that prosecutors consider the listed factors in every case, id. At least one writer has also suggested that the deletion of the word “only” from the text of the Thompson revision signals that waiver is a “moderately more important consideration under the Thompson Memorandum.” Lonnie T. Brown, Jr., Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox, 34 Hofstra L. Rev. 897, 937 (2006) [hereinafter Brown, Reconsidering].
replacement of the Thompson Memorandum with the McNulty Memorandum. Before addressing the firestorm, we turn to the principal document that ignited it, for the most recent incarnations of written DOJ guidance tell us much about how the government assesses the culpability of corporations, how it views its own role and limits, and where it locates the source of its own authority and leverage. In most of these important respects, the new guidelines are identical to the ones it replaced.


The Thompson Memorandum purported to provide (and the McNulty Memorandum continues to constitute) binding guidance on all federal prosecutors who are investigating, and contemplating the prosecution of, corporate crime.130 Both Memoranda begin with the “[g]eneral [p]rinciple” that “[c]orporations should not be treated leniently because of their artificial nature, nor should they be subject to harsher treatment.”131 They then go on, after listing the various deterrence and retributive rationales for corporate prosecutions, to enumerate nine factors to be considered beyond those ordinarily taken into account in prosecuting individuals, recognizing the special considerations of such prosecutions. Those factors are (1) “the nature and seriousness of the offense;” (2) “the pervasiveness of wrongdoing within the corporation;” (3) “the corporation’s history of similar conduct;” (4) “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents” by waiving the attorney-client and work product privileges; (5) the existence and adequacy of a compliance program; (6) “the corporation’s remedial actions;” (7) “collateral consequences,” such as harm to shareholders and employees and the public; (8) “the adequacy of prosecution of individuals for the corporation’s malfeasance;” and (9) the adequacy of civil and regulatory remedies.132

Other shared aspects of the Thompson and McNulty Memoranda show them to be a reflection of a century of permissive and pragmatic jurisprudence. They make clear that prosecutors draw their power, authority, and leverage from the law itself; that it is primarily concerned with proactive prevention of corporate crime, over any interest in punishing blameworthy wrongdoing by the entity; and that the combination of the broad rule and the focus on deterrence leads naturally to inattention to the adverse effects on third parties, such as a corporation’s employees. Several observations, discussed below, are in order.

First, the Thompson Memorandum studiously avoided (and to a slightly lesser extent, the McNulty Memorandum still avoids) bright line rules, leaving open

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130. The predecessor to the Thompson and McNulty Memoranda, the Holder Memorandum, was not written in compulsory language and only suggested factors for consideration.

131. McNulty Memorandum, supra note 3, at 2; Thompson Memorandum, supra note 3, at 1.

132. McNulty Memorandum, supra note 3, at 4; Thompson Memorandum, supra note 3, at 3.
maximum flexibility for prosecutors. Throughout, it cautions that the named factors are offered merely "to provide guidance rather than to mandate a particular result."\textsuperscript{133} What is mandated, however, is that every prosecutor consider charging the corporation in every case where it is possible: "[P]rosecutors and investigators in every matter involving business crimes must assess the merits of seeking the conviction of the business entity itself."\textsuperscript{134} To some, the flexibility of the DOJ Memoranda exacerbates the problem of lack of accountability by making it clear that prosecutors are not required to name which factors were relied upon.\textsuperscript{135}

Second, and what is often overlooked is that both Memoranda take great pains to ground the authority of prosecutors in the broad liability rules announced by the courts. In other words, in establishing public and written guidelines for prosecutors, the Justice Department repeatedly underscores the breadth of its discretion with specific reference to the breadth of the criminal liability rules: "In making a decision to charge a corporation, the prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law."\textsuperscript{136} At the same time, the Thompson Memorandum acknowledges straightforwardly—despite the breadth of the rule first laid down in \textit{New York Central}—that "it will be a minority of cases in which a corporation or partnership is itself subjected to criminal charges."\textsuperscript{137} This presents something of a paradox, given the attempt to outline appropriate limitations on the exercise of discretion, while simultaneously reserving the right to exercise the broadest possible discretion allowed under the law. It is therefore an expression of untrammeled power in theory, but also suggestive of reasonable restraint in practice.

The rest of the DOJ Memoranda are replete with conscious invocations of broad liability rules and favorable court decisions. It begins, for example, with a review of the broad liability rule, setting forth the doctrine of respondeat superior, as articulated in \textit{New York Central} and its progeny, asserting that the government need only establish that "the corporate agent's actions were within the scope of his duties and intended, at least in part, to benefit the corporation."\textsuperscript{138} The written guidelines do not, however, stop at a mere recitation of the basic rule of criminal liability. In often-overlooked sections, both Memoranda engage in legal analysis,
citing cases that support the broadest possible findings of criminal liability. They cite, for example, specific appellate cases for the proposition that a corporation may be convicted even where the agents acted almost exclusively for their own benefit. They quote at length from a case establishing that actual benefit to the corporation is not a "touchstone of criminal corporate liability" and is "less significant than whether the agent acted with the intent to benefit the corporation."

Particularly illustrative of the DOJ Memoranda’s studied and express reliance on judicially empowering authority is a section addressing the relevance of corporate compliance programs on the indictment decision. On the one hand, the guidelines reasonably counsel that the existence of a compliance program is a factor to be considered in the indictment decision. On the other hand, the Memoranda emphasize that the government reserves its right to exercise maximum discretion, because as its legal citations make clear, the courts have not been so magnanimous. The courts, the Memoranda make sure to remind prosecutors and the public, have made clear that a “corporate compliance program, even one specifically prohibiting the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of respondeat superior.”

Therefore, while in the exercise of appropriate prosecutorial discretion the existence and adequacy of a compliance program may be taken into account, the prosecutor may indict anyway—because the law allows it. Similarly, as both Memoranda underscore, even a subordinate’s acts committed “directly against express instructions from [the agent’s] superiors” will not necessarily save the corporation.

It is of more than passing importance, though seldom mentioned, that the Department chose to emphasize repeatedly the breadth of the legal rulings that support nearly limitless discretion, even while setting forth various reasonable grounds for showing lenience towards corporations. In the realm of corporate criminal law, the Memoranda in effect say, the prosecutor’s fearsomeness derives not from her badge, but from what repeatedly favorable court rulings have over time vested in that badge. Because this lends the prosecutor her leverage in negotiations with corporate counsel, even modest changes to the standard of


140. Thompson Memorandum, supra note 3, at 2 (citing Automated Med. Labs., 770 F.2d at 407); see also McNulty Memorandum, supra note 3, at 2. Indeed, the McNulty Memorandum adds additional case citations in support of its theory of broad discretion.

141. See McNulty Memorandum, supra note 3, at 12-15; Thompson Memorandum, supra note 3, at 8-11.

142. See McNulty Memorandum, supra note 3, at 13; Thompson Memorandum, supra note 3, at 9.

143. Thompson Memorandum, supra note 3, at 9 (citing United States v. Basic Construction Co., 711 F.2d 570 (4th Cir. 1983); see also McNulty Memorandum, supra note 3, at 13.

144. Thompson Memorandum, supra note 3, at 9 (discussing United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972)); see also McNulty Memorandum, supra note 3, at 13.
liability will necessarily affect that leverage and reshape the prosecutor-corporation bargaining dynamic. This is especially so, as “[c]orporations are perhaps the most rational targets in the criminal justice system and adjust their behavior accordingly.”\footnote{145}

Third, there is surprisingly little attention paid to the blameworthiness of the conduct of the corporation, and a concomitant lack of emphasis on the retributive worth of organizational prosecution. Indeed, of the nine enumerated factors, only four arguably bear on the blameworthiness of the underlying conduct (for example, the nature and seriousness of the offense, the pervasiveness of the wrongdoing, its history of prior transgressions, and institution of compliance program). The other factors relate either to the conduct of the corporation after the discovery of wrongdoing (for example, timely disclosure, remedial actions), the adequacy of other remedies, or potential collateral consequences on the innocent.\footnote{146} Perhaps in part because these notions of blameworthiness are absent from the law of corporate criminal liability, the main focus of the written guidelines is “increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation.”\footnote{147} Indeed, as recently articulated by a former Justice Department Official, “in most cases—especially those resolved since the Thompson Memorandum was issued—cooperation is perhaps the most important factor in a prosecutor’s assessment of whether to bring criminal charges against the company itself.”\footnote{148}

Thus, the DOJ Memoranda were conceived largely as blueprints for a pragmatic approach to white collar crime. The considerations are deliberately crafted to create incentives for corporations to reduce crime and to help identify individual miscreants. As one United States Attorney has written, in the Thompson Memorandum’s defense, “The primary concern of the prosecutor is learning the facts related to the underlying conduct.”\footnote{149} Moreover, the incentives created are “for the corporation to be proactive in detecting crime within its ranks, cooperating with the Department’s investigation, and taking steps to prevent future criminal conduct.”\footnote{150} Prevention, above all, is the thrust of these guidelines, for “an indictment often provides a unique opportunity for deterrence on a massive scale.”\footnote{151}

2. \textit{The Revised Prosecution Guidelines: Response to Criticism}

Because of the heavy emphasis on pragmatic considerations, chief among them

\footnote{145. Wray & Hur, supra note 14, at 1187.} \footnote{146. See Simons, \textit{Vicarious Snitching}, supra note 31, at 994 (noting that Department of Justice guidelines place “great weight on the corporate response to the wrongdoing”).} \footnote{147. Thompson Memorandum, supra note 3, at preface.} \footnote{148. Wray & Hur, supra note 14, at 1135.} \footnote{149. Buchanan, supra note 114, at 603.} \footnote{150. Id. at 601.} \footnote{151. Thompson Memorandum, supra note 3, at 1.}
the enlistment of the corporation as a crime-fighting "partner" of the government, parts of the Thompson Memorandum read in part like a prosecutorial factfinding playbook. Here is where, arguably, the government overplayed the admittedly strong hand it was dealt by the courts. The Thompson Memorandum called on prosecutors to evaluate the quality and sincerity of corporate cooperation by reference to, among other things, a decision to waive the attorney-client and work product privileges:

In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection.

The Thompson Memorandum also encouraged prosecutors to evaluate cooperativeness with reference to its decision, unless required by statute, to stop paying legal fees for potential miscreants; to terminate uncooperative employees who refuse to speak with the government; and not to enter a joint defense agreement. These factors are at the center of the debate over whether federal prosecutors are abusing their discretion in following the Thompson Memorandum's directives. That debate, and the recent judicial participation in it, is taken up in more detail in Part III, infra.

As noted, the combination of the source of broad discretion and the focus on deterrence and truth discovery leaves individual defendants at risk. A critical potential failing of the Thompson Memorandum was that, while many of the enumerated considerations directly affect the rights, privileges, and defense strategies of individual white collar targets, in its focus on the corporation and information-gathering, the Thompson Memorandum did not satisfactorily address the effect on those third parties.

The clash between the rights, privileges, and interests of the corporation versus those of its employees is not only natural to expect in the ordinary course of white collar investigations, but effectively guaranteed by other provisions in the Thompson Memorandum itself, which recognized that "[p]rosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or

152. See Zornow & Krakaur, supra note 7, at 148 (stating that the Organizational Sentencing chapter of the United States Sentencing Guidelines has created an "enforced partnership between corporations and prosecutors") (quoting Otto G. Obermaier, Drafting Companies to Fight Crime, N.Y. Times, May 24, 1992, §3, at 11).
153. Thompson Memorandum, supra note 3, at 6 (making clear that such waivers are not mandatory).
154. See Simons, Vicarious Snitching, supra note 31, at 994 (suggesting that prosecutors view a corporation's cooperativeness as "a proxy for the corporation's character - a window, if you will, into the corporation's soul").
155. Thompson Memorandum, supra note 3, at 7-8.
without the corporation." Moreover, it went on to state that "[o]nly rarely should
provable individual culpability not be pursued, even in the face of offers of
corporate guilty pleas." Thus, the Thompson Memorandum, by its terms,
ensured recurring battles between corporations and their employees, while setting
forth little guidance on what limits, if any, are called for. Thus, a commentator
notes the fact of prosecutorial power:

Truth be told, there are probably very few companies that are absolutely free
from any threatened criminal prosecution when one considers the standard for
criminal vicarious liability. But does that make it appropriate for prosecutors to
essentially extort cooperation from those corporations in the form of an
attorney-client privilege waiver? Clearly not. But the Thompson Memo
provides for no means to prevent such practices.

Significantly, then, the Thompson Memorandum provided that corporations were
not to be treated "leniently because of their artificial nature," nor more
"harsh[ly]." It gave no consideration, however, to whether employees and
officers of those corporations are appropriately subject to "harsher" treatment by
virtue of their affiliation with (and beholden status to) an artificial entity.

These widely criticized aspects of the Thompson Memorandum helped to forge
an unprecedented coalition who combined to make an impassioned case against
the principles contained therein. The Chamber of Commerce, the American Civil
Liberties Union, the National Association of Criminal Defense Lawyers, and
former Justice Officials as diverse as former Attorney General Edwin Meese and
former Acting Solicitor General Walter Dellinger III, all attacked the Thompson
Memorandum's sanction of routine waiver requests, among other
things. In agitating for reform, members of the coalition wrote joint letters, launched a

156. Id. at 1.
157. Id.
158. Jones, supra note 5, at 1062.
159. Thompson Memorandum, supra note 3, at 1.
160. The Thompson Memorandum does, however, encourage the evaluation of a corporation's response to
wrongdoing with reference to its treatment of culpable employees, telling prosecutors that they "may evaluate the
willingness of the corporation to discipline culpable employees of all ranks and the adequacy of the discipline
imposed." Id. at 11.
161. See The Thompson Memorandum's Effect on the Right to Counsel in Corporation Investigations: Hearing
Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of Edwin Meese, former United States
Attorney General), available at http://judiciary.senate.gov/print_testimony.cfm?id=2054&wit_id=5741; The
Thompson Memorandum's Effect on the Right to Counsel in Corporation Investigations: Hearing Before the S.
Comm. on the Judiciary, 109th Cong. (2006) (submission by the Coalition to Preserve the Attorney-Client
former Department of Justice officials to Attorney General Alberto Gonzales (Sept. 5, 2006), available at
http://www.abanet.org/media/docs/ag_sept52006.pdf; see also Jason McLure, Ex-DOJ Officials Blast Current
Policy, LEGAL TIMES, Sept. 11, 2006, at 18 (discussing the opposition of former Department of Justice officials to
the Thompson Memo).
publicity campaign, and testified before Congress. 162

Congress, for its part, responded with its own shot across the bow. Then-Chairman of the Senate Judiciary Committee, Arlen Specter, introduced legislation designed to enforce a blanket bar on all requests for privileged information from businesses and the consideration by prosecutors of certain Thompson factors in making indictment decisions—including the termination of payment of attorneys' fees, the refusal to waive privilege protections, the use of joint defense agreements, the reluctance to terminate or sanction uncooperative employees, and the sharing of certain information with corporate employees. 163

In the face of this multi-front assault, the Department of Justice finally retreated from some of its positions and made limited concessions. These changes were incorporated into the so-called McNulty Memorandum, which, on December 12, 2006, replaced the much-maligned Thompson Memorandum. 164

The revisions of the McNulty Memorandum accomplished primarily two changes. First, it provided that, except in extraordinary circumstances, the payment or suspension of attorneys' fees on behalf of employees facing exposure is not to be considered in the indictment decision. 165

Second, in addition to paying homage to the attorney-client privilege as "one of the oldest and most sacrosanct privileges under U.S. law," the new guidelines changed the way in which waivers of that sacrosanct privilege may be obtained and considered. 166 As a preliminary matter, the McNulty Memorandum made clear the continuing central importance of the voluntary disclosure of privileged information by corporations:

Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation. However, a company's disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure. 167

Moreover, while there are new limitations on the adverse consideration of a refusal to turn over privileged information, its voluntary disclosure is always a valid factor that may lead to nonprosecution: "Prosecutors may always favorably

162. See McNulty Memorandum, supra note 3, at 1 (containing a notable new passage reflecting business community pressure brought to bear on the Administration: "In carrying out this mission with the diligence and resolve necessary to vindicate the important public interest . . ., prosecutors should be mindful of the common cause we share with responsible corporate leaders").
165. McNulty Memorandum, supra note 3, at 11.
166. Id. at 8.
167. Id.
consider a corporation's acquiescence to the government's waiver request in determining whether a corporation has cooperated in the government's investigation.\textsuperscript{168}

The new guidelines, moreover, established a somewhat cumbersome, tiered procedure for the request of potentially privileged information. As an initial matter, prosecutors must consider a four-part test for determining whether there is a legitimate need for a waiver.\textsuperscript{169} After such an analysis, with respect to so-called "Category I" information, deemed to be "purely factual information, which may or may not be privileged, relating to the underlying misconduct," prosecutors may affirmatively seek such material, so long as they receive approval of the supervising U.S. Attorney, in conjunction with a top Justice official.\textsuperscript{170} Refusal to waive any applicable privilege regarding this material—which the guidelines acknowledge may well be privileged—"may be considered in determining whether a corporation has cooperated in the government's investigation."\textsuperscript{171}

If and when prosecutors determine that purely factual Category I information "provides an incomplete basis to conduct a thorough investigation," they may then request so-called "Category II" information, characterized as "legal advice given to the corporation before, during, and after the underlying misconduct occurred."\textsuperscript{172} There is an admonition that Category II information should "only be sought in rare circumstances."\textsuperscript{173} Moreover, with respect to this more protected class of potentially privileged information, a refusal to waive an applicable privilege may not be considered against the business entity in making a charging decision, and approvals must be obtained in writing from the Deputy Attorney General.

Thus, under the McNulty Memorandum, with certain limitations, privilege waivers may still be sought; refusals may still militate in favor of indictment; and purportedly voluntary waivers may always be considered favorably in the indictment decision.

Separate and apart from the new waiver guidelines, as already noted, much remains the same. The new Memorandum is as notable for what it does not do as

\textsuperscript{168} Id. at 10.

\textsuperscript{169} See id. at 9 (noting that the factors to be considered are (1) the likelihood and degree to which the privileged information will benefit the government's investigation; (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver; (3) the completeness of the voluntary disclosure already provided; and (4) the collateral consequences to a corporation of a waiver).

\textsuperscript{170} Id. (listing examples of Category I material including, among other things, witness statements, purely factual interview memoranda, and reports of "investigative facts documented by counsel").

\textsuperscript{171} Id.

\textsuperscript{172} Id. (noting that examples of such material include "attorney notes, memoranda or reports ... containing counsel's mental impressions and conclusions ... or legal advice given to the corporation").

\textsuperscript{173} Id.
for what it does. The McNulty Memorandum, for example, did not revamp or reorder the nine factors prosecutors must consider in determining whether to indict a business entity; it did not change the mandatory nature of the consideration of these factors; it did not alter the fundamental emphasis on corporate cooperation. And, of course, it did not touch DOJ’s view of the broad corporate criminal liability standard.

More relevant from the perspective of the staunchest critics, various forms of cooperation, which implicate the rights of individual employees, may still be considered. While prosecutors “generally should not take into account” consideration of advancement of fees, they may still consider whether the corporation has entered into a joint defense agreement, whether it has shared information with its employees, and whether it has terminated employees who have not cooperated with the Government.

C. Conclusions

Much of the frustration of corporations and their counsel stems from the paradigmatic bargaining position in which the business entity necessarily finds itself, a position that feeds perceptions of coercion. Consider how a rational corporate counsel, after having conducted at least some internal investigation evidencing factors that reasonably mitigate the guilt or blameworthiness of the entity, might in her mind hope to approach negotiations with the prosecutor.

“The criminal conduct was performed by a recently-hired employee who acted alone,” she might offer. “That is of no consequence,” the prosecutor will inevitably retort, because under the broad rules of vicarious liability, it is not. “But management had no involvement and strictly forbade the alleged criminal activity,” the lawyer might try. “Again, that is of no moment,” the prosecutor will reply, because it is not. The corporate lawyer might describe its wide-ranging and strict compliance program and its daily publication to all firm employees. The prosecutor will merely shake his head: “None of this matters. I can indict and almost certainly convict your firm anyway.” And the law lets the government say this, complete with case citations listed in the McNulty Memorandum itself, for easy reference. So, whether or not the government has the facts on its side, it always has the law on its side.

No amount of supplication, therefore, can overcome the mercilessness of the applicable legal doctrines; so long as there is a hint of criminality by even a single lowly employee, the corporation’s counsel has no leverage and no bargaining power. Only the prosecutor can be merciful, and for his mercy the corporation

174. Id. at 11.
175. Id.
176. Id.
177. Id. at 15.
rationally chooses to cooperate in any way demanded.

This reality has led Judge Lynch to make the following observation:

To the extent that the legal landscape permits conviction in a wider variety of circumstances, or on a lesser showing, or with more drastic sentencing consequences than is just, resort to judicial resolution becomes a much less attractive option for defendants. If the defendant is guilty simply because a provable harm occurred, without inquiry into mental culpability, there will be many cases in which guilt under the legal standard is a forgone conclusion. If a corporation is criminally liable for the unauthorized acts of mid-level managers, the corporation will often not have a viable defense, despite legitimate questions about the justice of punishing it.178

Thus, the key to achieving a change is to alter this dynamic. Properly understood, corporate criticisms are fundamentally less about the explicit demands of prosecutors than about the necessity of capitulation. If the liability rule were narrowed, this would necessarily affect the calculus of the corporate counsel, because currently there is no middle ground between rolling over and hunkering down.179 With a more reasonable and better-fitting liability rule or a more reasonable defense option, less blameworthy corporations would on occasion challenge the prosecutor's hand, reducing the likelihood of overreaching in those cases. The next section examines the claims of coercion in greater detail.

III. ASSESSING GOVERNMENT COERCION AND CORPORATE COOPERATION

The principal attack on current corporate criminal practice is the allegedly indiscriminate use of the "proverbial gun to [the] head."180 As the metaphor suggests, the criticism arises in part from both frustration over the corporation's lack of options and the perceived unfairness of the loaded gun. Corporate counsel

178. Lynch, supra note 12, at 59. Other commentators have noted additional risks facing corporations in this quandary. See, e.g., Oesterle, supra note 106, at 473-74 ("Firms faced with such threats [of prosecution] have very little bargaining power in resisting deals. Those that attempt to take bargaining positions that bluff for trial ('we are innocent') risk prosecutorial 'leaks' that are extremely damaging.").

179. See Cole, Corporate Criminal Liability, supra note 35, at 169 ("Overall, the position of companies who are at risk of being charged with criminal conduct has been substantially weakened and the role of outside counsel significantly complicated by the need to assess the benefits of cooperating against the risks of aggressively defending against a criminal investigation.").

180. See United States v. Stein (Stein I), 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006). A recurring complaint is the perception of limitless prosecutorial discretion. See, e.g., Moohr, supra note 111, at 168 ("[T]he term 'prosecutorial discretion' is something of a euphemism, and that 'prosecutorial power' more accurately describes the authority of the federal prosecutor in white collar cases"). This concern is compounded because, as one writer has lamented, the "manner in which that prosecutorial discretion is exercised is not subject to legal challenges or judicial review." See Cole, Revoking Our Privileges, supra note 112, at 543. These are, of course, age-old worries, but they have seized recent critics of corporate criminal prosecutions with particular urgency. "Accountability," however, may not be any kind of panacea. As suggested by the analysis above, to the extent critics would like courts to review prosecutorial practices, it is worth remembering that—notwithstanding Stein—it was the courts, in a long series of deliberate and clear-eyed decisions, that vested such discretion in prosecutors in the first place.
are paid to engage in rational risk assessment and, given the broad liability rule and the typical corporation's vulnerability, no reasonable evaluation of risk can lead to a decision other than to cooperate.\textsuperscript{181}

One cannot, however, assess claims of coercion without reviewing the nature of criminal cooperation generally,\textsuperscript{182} which, for right or wrong, is a permanent (and some would say necessary) utilitarian\textsuperscript{183} feature of the current system for the investigation, prosecution, and adjudication of criminal cases.\textsuperscript{184} After all, criminal targets are routinely put under pressure to cooperate in order to help law enforcement identify other wrongdoers. A central question, therefore, is whether government pressures placed on target corporations unduly exceed in kind or degree those which it routinely places on other putative criminal defendants.\textsuperscript{185} In other words, corporations may be crying uncle, but are they also crying wolf?

This part first recounts the key claims of undue government coercion and their supposedly unjust and inefficient effects, including the damage allegedly caused by pressured waivers of the attorney-client and work product privileges. Next, it compares the corporate cooperation model as currently practiced (and criticized) to the traditional individual cooperation model. It concludes that, when viewed in this context, some of the concerns raised about corporate cooperation are overstated. A substantial risk of prosecutorial excess does arise, however, from at least one unique aspect of the corporate model—adverse consequences that government pressure on corporations can have on the rights and privileges of their employees, what could be termed a "transitive effect." Next, this part analyzes and contextualizes the Stein case, in which Judge Kaplan rebuked the government for engaging in conduct emblematic of this transitive effect. It concludes by reiterating the argument that the risk of prosecutorial excess is best reduced through attention to the underlying criminal liability rules, rather than particular prosecutor conduct.

\textsuperscript{181} See Zornow & Krakauer, supra note 7, at 154 (arguing that due to prosecutorial leverage the corporation "is often left with no rational choice but to accede" to demands of cooperation).

\textsuperscript{182} Writers have noted the relative paucity of scholarship relating to the criminal cooperation process. See, e.g., Ellen Yaroshefsky, Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment, 68 Fordham L. Rev. 917, 919-20 (1999) (noting that there has been little study of the cooperation process due to, among other reasons, the difficulty of applying "traditional methods of scholarly study" to the issue).

\textsuperscript{183} See Michael A. Simons, Retribution for Rats: Cooperation, Punishment, and Atonement, 56 Vand. L. Rev. 1, 3 (2003) [hereinafter Simons, Retribution for Rats] (describing cooperation as "usually discussed in terms that are starkly utilitarian"); see also Ian Weinstein, Regulating the Market for Snitches, 47 Buff. L. Rev. 563, 563 (1999) (discussing the problems with the new large numbers of defendants willing to cooperate).

\textsuperscript{184} Michael Simons has written several articles on the nature of criminal cooperation, which provide useful insight on these matters. See Simons, Vicarious Snitching, supra note 31; Simons, Departing Ways, supra note 125; Simons, Retribution for Rats, supra note 183.

\textsuperscript{185} See Darryl K. Brown, The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement, 1 Ohio St. J. Crim. L. 521, 521 (2004) (discussing the notion that the greater difficulty of investigating corporate crime compared with street crime necessitates corporate cooperation); cf. Podgor, supra note 112, at 795-96 (discussing distinctive problems associated with corporate cooperation, in light of the generally legitimate business setting in which such cooperation must take place).
A. Recurrent Claims of Coercion

While corporate counsel have long chafed at the power of prosecutors over them, commentators have been writing about aspects of the Thompson Memorandum and the practices pursued in its name in increasingly ominous and foreboding tones.\textsuperscript{186} That foreboding has been only mildly assuaged by the McNulty revisions. Critics argue that the alleged coercion by prosecutors has profound and adverse consequences for the corporation, the adversarial system, the law of privilege, the individual targets, and, some say, ultimately the government itself, as “[t]he mere threat of a criminal charge motivates firms to conduct in-house investigations, cooperate fully with prosecutors, distance themselves from the conduct of their agent, and jettison employees involved in the transaction.”\textsuperscript{187} Thus, an overarching concern is the alleged disparity in power between prosecutors and corporate defendants. Claims that the Thompson Memorandum or recent policies have “skewed”\textsuperscript{188} the balance of power between prosecutors and white collar targets fail to appreciate that this skewing occurred over the course of a century, beginning with \textit{New York Central} and \textit{Hale v. Henkel}.\textsuperscript{189} Indeed, the DOJ guidelines constrain prosecutorial discretion in important ways that the law does not require.

No particular issue in the current debate has drawn as much criticism as demands for corporate waivers of the attorney-client and work product privileges,\textsuperscript{190} an issue widely considered the most pressing concern of the white collar defense bar today.\textsuperscript{191} While prosecutors, with the sanction of the DOJ guidelines, believe that certain circumstances justify their seeking such waivers because corporate criminals are exceedingly difficult to identify and prosecute,\textsuperscript{192} others retort stridently that privileged information “is more than prosecutors need to do

\begin{itemize}
  \item \textsuperscript{186} See, e.g., Cole, \textit{Revoking Our Privileges}, supra note 112, at 534 (“[T]here can be little doubt that the attorney-client privilege and the work product doctrine are the targets of a multi-front assault by the Justice Department.”); Finder, supra note 119, at 116-17 (“The DOJ’s corporate cooperation policy is a two-edged sword that may bloody its user.”); John Gebeaut, \textit{Junior G-Men}, A.B.A. J., Jun. 2003, at 46, 48 (stating that the Thompson Memorandum “sent shivers down spines in law offices from coast to coast”); Zornow & Krakauer, supra note 7, at 147 (“The sound you hear coming from the corridors of the Department of Justice is a requiem marking the death of privilege in corporate criminal investigations.”).
  \item \textsuperscript{187} Moohr, supra note 111, at 174-75.
  \item \textsuperscript{188} See, e.g., N. Richard Janis, \textit{Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice is Being Destroyed}, \textit{WASHINGTON LAW.}, March 2005, at 34 (arguing that Thompson Memorandum procedures have created a “seemingly inexorable concentration of power that has skewed the system”).
  \item \textsuperscript{189} See supra Part I.
  \item \textsuperscript{190} See Wray & Hur, supra note 14, at 1172 (former DOJ officials note the controversial nature of requests to waive attorney-client and work product privileges).
  \item \textsuperscript{191} See, e.g., Brown, \textit{Reconsidering}, supra note 129, at 957 (“Compelled-voluntary waiver of the corporate attorney-client privilege by the government is perhaps the most significant concern presently facing corporations and their attorneys.”).
  \item \textsuperscript{192} See supra Part I.C.; see also Buchanan, supra note 114, at 597 (“[C]laims that the sanctity of the attorney-client privilege is being undermined by the Department’s assessment of cooperation by organizational
Accordingly, practitioners and commentators have been advocating the rejection of a policy that sacrifices privilege on the altar of "investigative expediency." The McNulty Memorandum’s attempted amelioration of this specific problem has not necessarily altered the dynamic much. Because the gravamen of the criticism is the inherent coerciveness of the corporation’s predicament, rather than that of any particular demand, the solution suggested is not merely a reconsideration of today’s waiver policy, but more fundamentally a reexamination of yesterday’s outmoded corporate liability rules. This is so because the supposed voluntariness of such waivers is questionable in light of "the ease with which a corporation can be proven guilty under the principle of respondeat superior." Given the law, then, "the line between crediting cooperation and coercing waiver of privilege is practically invisible." Because of this underlying dynamic, the McNulty revisions should leave critics less than sanguine in light of the continued explicit benefit to corporations brought by waiving privilege.

Critics also make several other arguments about the adverse effects of the Justice Department’s waiver policy. First, the consequences of the alleged dilution of the privilege are reflected, in their view, in the undermining of the vital purpose served by the privilege, as recognized in Upjohn Co. v. United States. The Upjohn Court, which definitively established a corporate attorney-client privilege, referred explicitly to its compliance-enhancing function in the corporate context, stating that curbing the privilege could "limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law." Second, as far as the corporation is concerned, the most adverse consequence of the waiver policy is the defendants are greatly overstated. In any case, the decision to waive the privilege must be made by the corporation.

194. See Zornow & Krakauer, supra note 7, at 161 ("[T]he time has come to reconsider the merits of a policy that encourages the exploitation of privilege in the interest of investigative expediency . . . ").
196. Rakoff, supra note 105, at 3.
198. Id. at 392; see also Cole, Revoking Our Privileges, supra note 112, at 484-87 (discussing the public policy importance of the attorney-client privilege in the corporate context). This rationale, interestingly, pits one utilitarian public policy consideration against another. Compare then-Associate Justice Rehnquist’s opinion in Upjohn, 449 U.S. at 392, in which he endorses the attorney-client privilege because it "serves public ends" and its undue constriction could "limit valuable efforts of corporate counsel to ensure their client's compliance with the law," with his later opinion in Braswell v. United States, 487 U.S. 98, 115 (1988) in which he states that "recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime.'" As such, the competing arguments cannot be satisfactorily resolved without the aid of empirical research into the actual compliance-enhancing effects of the privilege contrasted with the compliance-reducing effects of compelled waivers of the privilege. At least one scholar has recently questioned, with some force, the supposedly exalted status of the attorney-client privilege in the corporate context. See Brown, Reconsidering, supra note 129.
extension of that waiver to future civil plaintiffs,199 as most courts have held that such waivers in the course of an investigation will also extend to third parties who launch civil litigation against the corporation.200 This, too, has not changed in the McNulty Memorandum.

Beyond the waiver issue, of course, critics also assailed prosecutorial pressure on the corporation to terminate attorney’s fees for potentially “culpable” employees and agents and to terminate employees themselves if they refuse to cooperate with the government.201 Peter Henning, for example, argued even before the issue was presented in the Stein case, that a corporation’s decision to pay employees’ legal fees or enter a joint defense agreement are “completely legal and reasonable decisions by the lawyer” and are hardly “a sign that a corporation is not cooperating with an investigation.”202 Foreshadowing the Stein decisions, he pointed out that the policy “denigrates legal advice and moves beyond mere lawyer misconduct to seeking improperly the elimination of lawyers to further the government’s own interests, at a significant cost to the targets of corporate crime investigations.”203 Other criticisms alleged that the Thompson Memorandum improperly inserted a wedge between the employer and its employees in what is—for the most part—a legitimate business environment.204

The most recent revisions to the prosecutorial guidelines understandably have not quieted the critics who have been making arguments along these lines. Indeed, notwithstanding the Justice Department’s retreat, Senator Specter reintroduced his discretion-limiting legislation at the start of the 110th Congress.205 Moreover,

199. See Gregory J. Wallace, Holder Memorandum Revisited: DOJ Offers Clarification of Corporate Waiver, BUS. CRIMES BULL., Jan. 2003, at 8 (“Most significantly, the DOJ clarification fails to address the concern of cooperating corporations that disclosure of attorney-client privilege or protected work product will be a waiver of such protections as to third parties and expose the corporation to civil lawsuits.”).


201. Henning, Targeting, supra note 195, at 673 (“While most commentary about the Thompson Memorandum focused on the waiver issue, there is another aspect that discloses an even more disturbing view regarding legal advice,” namely, the advancing of legal fees and creation of a joint defense agreement). These are the issues taken up in Stein, discussed in Part III.C, infra.

202. Henning, Targeting, supra note 195, at 674. Henning, moreover, associates this aspect of the Thompson Memorandum with a wide-ranging governmental “push against lawyers.” Id.

203. Id. at 675.

204. See, e.g., Finder, supra note 119, at 128 (noting risks of cooperation include “conflict between the entity and its employees” and “creating hostile feelings among employees,” among others); Podgor, supra note 112, at 803 (“Placing the employer and employee in an adversarial position, in an attempt to secure the benefits of cooperation, interferes with the overriding fiduciary employment relationship.”). These arguments may be undercut somewhat by the fact that there is criminality lurking in this “legitimate environment.”

although the additional mandated supervisory scrutiny has been welcome,\textsuperscript{206} as of this writing the immediate reaction has been far from positive.\textsuperscript{207} In many significant ways, though the new guidelines purport to eliminate the greatest risks of prosecutorial abuse, in reality most of the same failings of the system remain, albeit in some cases to an arguably lesser degree.

One strongly suspects, for example, that prosecutors will continue to seek or otherwise obtain the controversial privilege waivers in many cases. For the material designated in Category I, which may clearly include privileged material, prosecutors may—and likely will—continue to seek waivers. Even for material falling in Category II, prosecutors may seek waivers after making an internal decision that the four-factor test is satisfied and on the utilitarian ground that it would provide a fuller “basis to conduct a thorough investigation.”\textsuperscript{208} This is a far cry from the blanket bar on the consideration of privilege waivers that critics had been seeking and that Senator Specter’s proposed legislation would accomplish.

More importantly, however, the revisions do little to undo the “culture of waiver” that many commentators have described.\textsuperscript{209} Such a culture will no doubt persist, as prosecutors may still offer cooperation credit for privilege waivers. Indeed, as one writer has noted, the research indicates that “more often than not, requests for waiver are not asked for outright, but are coercively inferred.”\textsuperscript{210} Removing the compulsion of waiver without eliminating the culture of waiver cannot adequately reform the prosecutor-corporation dynamic. Thus, “if corporations often elect to waive, even absent a request, in order to gain more credit, the policy’s stated purpose will be undermined.”\textsuperscript{211}

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206. See Revised DOJ Policy Limits Consideration of Privilege Waivers in Criminal Matters, 80 CRIM. L. REP. 310 (Dec. 20, 2006) [hereinafter Privilege Waivers] (stating that the mandatory “supervisory scrutiny ‘will have an important prophylactic effect’ and ‘is long overdue’”)
207. See, e.g., Marcia Coyle, Flaws Seen in New Guidelines for Corporate Probes, N.Y. L. J., Dec. 21, 2006, at 5 (“The fact is [the McNulty Memorandum] continues to embrace the notion that under certain circumstances the Justice Department can consider waiver of the privilege in making its charging determinations. I think that’s wrong.”) (quoting William McGuiness, chairman of the litigation department of Fried, Frank’s New York Office); Martha Neill, Thompson Memo Changes Not Enough, ABA Says, ABA JOURNAL EREPORT, Dec. 15, 2006, available at http://www.abanet.org/journal/redesign/d18spector.html (“We are still going to need legislation” unless DOJ recognizes that prosecutors “are not entitled to waiver, period, under any circumstances.”) (quoting former ABA President R. William Ide III); id. at 311 (“While it is a positive step for the Department of Justice to move toward better self-regulation, this memo is a day late and a dollar short.”) (quoting Frederick J. Krebs, president of the Association of Corporate Counsel).
208. McNulty Memorandum, supra note 3, at 10.
209. Id.
210. Privilege Waivers, supra note 206, at 311 (quoting Frederick J. Krebs).
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In addition, notwithstanding the incremental changes to the Justice Department's waiver policy, the McNulty Memorandum, by maintaining the focus on cooperation consideration, apparently continues to allow a reward for the sanction or termination of uncooperative employees (so long as the sanction is not the termination of legal fee payments) and the eschewal of joint defense agreements. Indeed, prosecutors may still credit corporations who persuade their employees to cooperate, by whatever method.

Finally, the revised guidelines do not provide a mechanism for judicial oversight, nor do they establish any clearer definition of what constitutes cooperation sufficient to avoid indictment and prosecution. In the end, the continued criticism over the revamped guidelines only supports the argument that, ultimately, the underlying criminal liability rules are the most appropriate target of reform. Pervasive criticism of particular prosecutorial guidelines may force a revision of those guidelines; but those revisions will inevitably beget further criticism. Constantly shifting advisory rules codifying different categories of privileged information to be accorded different levels of protection, distinct procedures for approval, and varied requirements of reporting are unlikely to prove satisfactory to a majority of the relevant constituencies—prosecutors, defense lawyers, corporations, corporate defendants, civil libertarians, corporate crime victims, legislators, or judges. The initial reaction to the McNulty Memorandum, at least, bears out this prediction.

More importantly, such incremental, scattershot, and ephemeral tweaking cannot satisfy the long term goal of creating harmony between what is indictable and what seems morally culpable where corporations are concerned.

B. The Corporate Cooperation Model

As noted, critiques of cooperation should be assessed with reference to the traditional cooperation model. As set forth below, the effects of governmental pressure on a corporation to cooperate unquestionably places pressure on third parties that may create unique risks of prosecutorial excess. Notably, even government officials have not engaged in robust defense of several of the prosecutorial tactics that have come under fire, preferring to explain that waivers are not so common as is perceived, \(^212\) or that the incentives created are necessary in the current climate of scandal. \(^213\) Even those defenders, moreover, are prepared to concede that "the tensions and risks that critics identify are real ones." \(^214\)

Before addressing the unique risks that are inherent in the corporate cooperation model, however, it is worth noting that many of the familiar concerns about

\(^212\) See, e.g., Buchanan, supra note 114, at 598 (providing results of a survey of U.S. Attorneys' Offices' employment of waiver requests).

\(^213\) See Wray & Hur, supra note 14, at 1183 (discussing why the results of the Thompson Memo are beneficial).

\(^214\) Id.
cooperation are either non-existent, significantly mitigated, or no worse in the corporate crime context, although “[t]here can be unique ramifications when cooperation occurs in a white collar setting.” In many circumstances and for many purposes, governmental pressure on a corporation to cooperate does not produce any more unsavory, unfair, or unreliable results than the established and widely accepted non-white collar model.

First, traditional concerns about the unsavory nature of the cooperator, long associated with terms such as “snitch” and “rat,” are significantly less pronounced in the corporate context. Traditional cooperators, as Michael Simons has written, are most commonly viewed in society with great opprobrium, indeed with “aversion and nauseous disdain.” Much of that “antipathy for the cooperator is rooted in his disloyalty.” Business organizations, however, are not likely to draw the same quality of aversion for choosing to cooperate for at least two reasons. Because corporations are artificial rather than natural persons, they are not capable of suffering psychic harm from the type of disdain normally heaped upon garden variety “snitches” in street crime cases. Indeed, any reputational harm—arguably, a rough analogue for human emotional injury—that might arise from a corporation’s decision to cooperate is likely trumped by the potentially enormous “reputational cost of corporate fraud,” which “constitutes most of the cost incurred by firms accused or convicted of fraud.”

More importantly, corporations are seldom, if ever, viewed by the general public as worthy of “nauseous disdain” for assisting, and providing confidential information to, the government to implicate employees. That is so because business entities are perceived as having a legal and fiduciary duty to root out wrongdoing, cooperate with the authorities, and provide them with helpful information. Indeed, a “zero tolerance approach to employee crime,” which would presumably include cooperating with the government’s efforts to identify miscreants, might in fact be “integral to the organizational culture of a good corporate citizen.”

215. See Podgor, supra note 112, at 802 (“Deficiencies of individual cooperation in the abstract may not be as pronounced when the cooperation occurs in white collar crime cases . . . .”).
216. Id. at 796.
217. Id. at 802-03 (“It is unlikely that cooperation in a white-collar crime case will involve a jail-house ‘snitch.’
218. See Simons, Retribution for Rats, supra note 183, at 26-27 (quoting Richard C. Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 Yale L.J. 1091, 1093 (1951)).
219. Id. at 27.
221. See Buchanan, supra note 114, at 605 (“Unlike an individual defendant who may want to ‘hide the ball’ to avoid punishment, organizational defendants have an interest and responsibility to uncover fraud by their own employees, not just after regulators or law enforcement have initiated an investigation.”); Podgor, supra note 112, at 805 (“A corporation may also have an increased duty to monitor and disclose misconduct.”); cf. Baker, supra note 19, at 328 (quoting the Inspector General of the Department of Health and Human Services remarking that written guidelines for pharmaceutical manufacturers note that self-reporting is “an ethical and legal duty”).
222. Buchanan, supra note 114, at 599.
Second, concerns about the unfairness of the cooperation system, with its uncertain benefits and absence of guarantees of leniency, are also substantially mitigated in the corporate context. While individuals often do not have relevant and helpful information even if they want to be cooperative, virtually every corporation can plausibly cooperate. Because not all crimes are conspiracies, individual malefactors may not have anyone to cooperate against; corporations, by contrast, can commit crimes only through the actions of one or more of their agents and therefore by definition always have persons against whom cooperation is theoretically valuable. This is a benefit unavailable to large swaths of criminal defendants. Moreover, while this cooperation (under the Thompson Memorandum, at least) will not necessarily result in leniency, the DOJ Memoranda offset that risk somewhat by making clear that "substantial assistance" (the *sine qua non* of traditional cooperation benefit) is not necessary and that leniency can be forthcoming even if the individual culprits are unable to be identified.

Third, the common concern that cooperators will provide false and unreliable information, though serious, is no worse and perhaps even less acute in the corporate context. Because the incriminating material provided by a corporation about its employees will be in documentary form, it arguably has less ability to provide false information. Doctored documents about financial transactions, in any event, are no more worrisome than perjurious testimony in street crime cases about events to which the government may not have access to any other eyewitnesses. Moreover, while traditional human cooperating witnesses can find myriad methods to lie, omit, and shade the truth in ways both large and small, business organizations may be less nimble in this regard, given the likely existence of many corporate agents who may be able to corroborate or refute official claims made by the corporation. Further, the disincentives present for a corporation against providing misinformation are extremely significant, including certain indictment and conviction for such deliberate obstruction.

Finally, the common corporate complaint of pressure to waive rights in order to win cooperation credit at first seems unpersuasive when compared to the common predicament of the average individual defendant. Individual defendants against whom the government has strong evidence and presses into cooperation must, in order to obtain the fruits of cooperation (i.e., leniency), waive their right against

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223. *See Simons, Retribution for Rats, supra note 183.*
224. *Defendants, in order to secure the benefit of their cooperation, must provide "substantial assistance" to the government, and the determination of whether such assistance has been rendered is in the sole prerogative of the government. See 18 U.S.C. § 3553(e); Wade v. United States, 504 U.S. 181, 185-86 (1992).*
225. *Thompson Memorandum, supra note 3, at 6.*
226. *For a lengthy and detailed analysis of the perils of false information from cooperating witnesses, see Graham Hughes, Agreements for Cooperation in Criminal Cases, 45 VAND. L. REV. 1, 23-33 (1992), and Yaroshefsky, supra note 182.*
227. *See Hasnas, supra note 19, at 594 ("[E]vidence upon which conviction for a white collar offense must rest will be almost entirely documentary in nature.").*
self-incrimination and confess their participation in the crime and, in some jurisdictions, must “tell the government about all of their criminal conduct throughout their lifetime as a precondition to a cooperation agreement.”

Business entities, on the other hand, because of the collective entity doctrine, do not even enjoy the privilege against self-incrimination. In addition, the pressure brought to bear on corporations to cooperate against employees is, in some ways, “merely the outgrowth of similar leverage strategies used by prosecutors for years to ‘flip’ individual targets or defendants on each other.”

Here, however, is the defining difference between individual and entity cooperation. In the traditional model, individual defendants do not hold sway over third parties in the way that corporations do over their employees. Individual defendants cannot, generally, exert coercive economic pressure at the behest of the government on third party targets to cooperate or confess. The uniqueness of the corporate cooperation context is that corporations are special actors, as the DOJ guidelines recognize. Thus, it is chiefly the existence of these third-party employees, and the risk of undue negative effects of prosecutorial pressure on them, that renders the corporate cooperation context distinguishable. Such risks, which go beyond those present in the traditional context, are necessarily implicated in the practice of giving credit for the waiver of privileges and the firing of uncooperative employees, both of which survive in the new DOJ guidelines.

The onerous pressure upon a corporation to cooperate with a governmental investigation thus arguably imposes an unfair hardship on one set of third parties (its employees who are criminal targets) while conferring an unfair benefit on other third parties (future civil litigants). Therefore, consistent with the analysis above, the most meritorious criticisms of the corporate cooperation dynamic are the features that depart most significantly from the traditional cooperation model that exists in garden variety criminal cases.

The arguably unfair hardship falls upon employees and officers of the target corporation who succumbs to the pressure to cooperate and waive privilege,

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228. See Yaroshefsky, supra note 182, at 928. In certain districts, such as the Southern District of New York, cooperators are also “required, as part of their cooperation agreement, to plead guilty to serious conduct that they reveal to the government.” Id.

229. See Barry W. Rashkover, Reforming Corporations Through Prosecution: Perspectives from an SEC Enforcement Lawyer, 89 Cornell L. Rev. 535, 551 (2004) (noting that complaints about government practices encouraging corporations to self-report misconduct are inapt given that corporations have no Fifth Amendment right against self-incrimination). The contrary view is that because of the unavailability of a self-incrimination privilege for business entities, these other privileges are of crucial importance, and their compelled waiver is thus particularly unfair and onerous.

230. Wray & Hur, supra note 14, at 1182 (refuting criticisms that recent government tactics improperly strain the relationship between companies and their managers).

231. See Thompson Memorandum, supra note 3, at 3 (“[D]ue to the nature of the corporate ‘person,’ some additional factors are present” beyond those present when considering whether to charge an individual).

232. Thus, a corporation’s pursuit of lenience changes the relationship between corporations and culpable employees to “one between adversaries, not confederates.” Gruner, supra note 112, at 435.
resulting in a diminution of the individuals' rights and the ability to defend themselves, in the form of potential job termination for not speaking with the government individually. Moreover, individual employees in later trials will also have been found, to their considerable detriment, to have waived the confidentiality of that material.\textsuperscript{233} This dynamic is largely unchanged by the McNulty Memorandum, for corporations will still feel considerable pressure to waive privilege (even without being asked explicitly), will still have incentives to push their employees to cooperate, and will still consider terminating or otherwise sanctioning uncooperative employees, in order to win favor with the prosecutor.

The arguably unfair benefit inures to potential civil litigants by virtue of the likelihood that any waiver of the attorney-client or work product privileges to the prosecutor will also be found to be a waiver as to those litigants.\textsuperscript{234} This also works a disadvantage upon corporations because many courts have held that such waivers will extend to third parties in later civil suits.\textsuperscript{235} This collateral issue has come to the attention of commentators and Congress, where proposals have been considered.\textsuperscript{236}

The critical distinguishing feature of cooperation in the corporate crime context is the one that raises the most genuine concerns. The foregoing analysis suggests that the greatest risk of excessive and undue coercion arises from those conditions and peculiarities of the corporate cooperation context that are qualitatively different from the traditional street crime cooperation context. The next section, which describes the Stein court's attempts to deal with precisely these concerns, suggests that it is fundamentally better to address the underlying rules that give prosecutors unfettered discretion than to curb particular prosecutorial practices directly.

\section*{C. Judicial Rebuke of Coercive Government Conduct}

Two former federal prosecutors and critics of recent Department of Justice
policies have inveighed against the Thompson Memorandum on the ground that it "reflects the view that the ends justify the means in corporate investigations." That criticism was vindicated to some degree in United States v. Stein, the first case in which a court ruled on the lawfulness of aggressive government conduct authorized by the Thompson Memorandum. In the second of two rulings rebuking the government, Judge Kaplan wrote: "It is no answer for the government to say that these aspects of the Thompson Memorandum are needed to fight corporate crime. Those responsible should be prosecuted and, if convicted, punished. But the end does not justify the means."

The Stein decisions arose in the context of a federal investigation of one of the world's largest accounting firms, KPMG, in connection with its development and marketing of certain tax shelters. KPMG made the immediate decision to cooperate as fully as possible by, among other things, agreeing to cut off attorneys' fees for potentially culpable KPMG employees and threatening to terminate those who refused to speak to the government without invoking their rights against self-incrimination. Presumably based on its aggressive cooperation with the investigation, and after intense negotiations, KPMG avoided indictment, and instead entered into a deferred prosecution agreement with the government on August 29, 2005. While the business entity itself escaped indictment, a number of its individual partners and employees (the "KPMG Defendants") were indicted in 2005.

At the time of this writing, two main opinions have been issued in the Stein case critical of the government's actions. In the first ("Stein I"), the court held that the Thompson Memorandum's suggestion—followed by prosecutors in the case—that cooperation could be judged by the corporation's decision whether to pay the attorneys' fees of its potentially culpable officers and employees improperly interfered with those targets' Fifth Amendment right to due process and Sixth Amendment right to counsel.

In the second opinion ("Stein II"), the court held that two of the proffering employees who had been threatened with termination of their jobs and payment of their legal fees if they did not make a statement to the government, made their statements under coercion attributable to the government, and their Fifth Amend-

237. Zornow & Krakauer, supra note 7, at 155.
238. United States v. Stein (Stein I), 435 F. Supp. 2d 330, 381 (S.D.N.Y. 2006) (noting that the "propriety" of the policies set forth in the Thompson Memorandum "had not previously been addressed by any court").
240. The KPMG investigation was commenced by the Internal Revenue Service and also occupied the attention of the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs before the IRS made a criminal referral to the Department of Justice. Prosecutors in the Southern District of New York then assumed control of the investigation. See Stein I, 435 F. Supp. 2d at 338-39.
241. For a chronology of the various negotiations, see id. at 340-50 and Stein II, 440 F. Supp. 2d at 320-25.
243. Id. at 336.
244. See id. at 356-373.
ment rights against self-incrimination were violated.\textsuperscript{245} The court found that “the government quite deliberately precipitated KPMG’s use of economic threats to coerce the proffer statements in question” because “[t]he Thompson Memorandum ... made it clear that the company’s failure to ensure that its employees disclose whatever they knew, regardless of their individual rights and concerns, might weigh in favor of indicting the company.”\textsuperscript{246} That economic coercion consisted of both threats to cut off payment of attorneys’ fees as well as outright dismissal.\textsuperscript{247}

Thus, the court found that the government had engaged in undue and unconstitutional coercion: “In cases involving vulnerable companies, the pressure exerted by [the Thompson Memorandum] and by the prosecutors who apply it inevitably sets in motion precisely what occurred here—the exertion of enormous economic power by the employer upon its employees to sacrifice their constitutional rights.”\textsuperscript{248}

The \textit{Stein} decisions have been a cause for celebration in certain quarters, but that euphoria may be premature. While it is true that the \textit{Stein} decisions were undoubtedly a factor impelling the Justice Department to revise its corporate prosecution guidelines, as discussed above, those relatively modest changes do not augur anything like a revolution in the way business entities are pressured and prosecuted.

Moreover, when one considers the full history of corporate criminal jurisprudence, the KPMG case may not be, as it has been hailed, a watershed case signaling a trend towards significant curtailment of prosecutorial discretion \textit{by the courts} (as distinct from action by the legislature or self-regulation by prosecutors themselves). Although Judge Kaplan intoned that the “end does not justify the means,” the Supreme Court in case after case has endorsed and adopted precisely that mode of utilitarian reasoning.\textsuperscript{249} Time and again, the courts have ruled in favor

\textsuperscript{245} \textit{Stein II}, 440 F. Supp. 2d at 326-37. One initially non-cooperating employee was told that his “continued non-cooperation” would be a “basis for disciplinary action, including expulsion from the Firm.” \textit{Id.} at 322. The other employee was told that continued refusal to cooperate could result in “additional actions, including Ms. Warley’s separation from the Firm.” \textit{Id.} at 323.

\textsuperscript{246} \textit{Id.} at 334-35. This aspect of the Thompson Memorandum remains materially unchanged by the McNulty Memorandum.

\textsuperscript{247} \textit{Id.} at 318, 322-23.

\textsuperscript{248} \textit{Id.} at 337. In so finding, Judge Kaplan gave somewhat short shrift to the inherent coerciveness of the government in criminal cases:

The Court recognizes that the criminal process often requires defendants and prospective defendants to make hard choices among unpalatable alternatives and that there often is nothing wrong with this. What distinguishes this case is that the government here coerced KPMG to apply pressure to Mr. Watson and other individual defendants in order to secure waivers of constitutional rights that the government itself could not obtain. That goes beyond the bounds of appropriate government action.

\textit{Id.} at 332-33.

\textsuperscript{249} Indeed, the case that started it all, \textit{New York Central}, endorsed an ends-justify-the-means approach, which has been criticized by many on precisely this ground. \textit{See}, \textit{e.g.}, Bucy, supra note 21, at 1121 (stating that \textit{New York
of aggressive prosecution methods, rather than privilege protection. As discussed above, in *Braswell* and the cases leading up to it, the Court has repeatedly favored the power of the prosecutor to compel the disclosure of potentially incriminating information from employees over the Fifth Amendment rights of those individual employees. As Henning, a tireless chronicler of the development of Fifth Amendment jurisprudence in the white collar area, has written, the Supreme Court has repeatedly taken comfort "in its stated conclusion that denying the Fifth Amendment privilege against self-incrimination to corporations would not seriously impair the rights of the individual, especially when compared with the perceived effect that affording the privilege to corporations would have on the government's ability to prosecute white collar crime." That history is the largely unrecognized groundwork for the current debate, and the KPMG case must be viewed against that backdrop.

Thus, while Judge Kaplan derogated the utilitarian notion that the ends justify the means, as set forth above, the legal landscape is littered with cases holding precisely the opposite, for the courts have been only too willing—in the area of corporate criminal liability, at least—to permit the ends to justify the means. In an almost unbroken line of cases from *Hale* to *Braswell*, where the rights and privileges of natural persons who worked for the target corporation were at risk, the Court sided with the prosecution.

Recall the *Wilson* Court's expansion of *Hale* in ruling that a corporate officer could not quash a subpoena to a corporation by invoking his personal privilege because the state's power "would seriously be embarrassed, if not wholly defeated" if the privilege were recognized. Similarly, in *Fisher*, "the custodian of corporate records may not interpose a Fifth Amendment objection to the compelled production of corporate records, even though the act of production may prove personally incriminating." Thus, courts have shown limited concern for the collateral consequences of broad liability and narrow defenses for corporations.

Central's "ends-justify-the-means approach was short-sighted and has created more problems than it solved"). The Supreme Court's precedents in this area are decidedly more Bentham than Kant. See Bierschbach & Stein, supra note 20, at 1780-81 (briefly discussing Jeremy Bentham's utilitarian principle); see also Cole, *Revoking Our Privileges*, supra note 112, at 477-78 (describing Wigmore's defense of the attorney-client privilege against Bentham's utilitarian opposition to same); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 *Harv. J.L. & Pub. Pol'y* 833, 834 (2000) (purporting to "sketch Kantian and expressive retributive theories of criminal liability" in response to economic and utilitarian critiques of corporate criminal liability).

250. Commentators have taken note that when the Supreme Court has drawn bright-line rules in settling debates over the scope of the Fifth Amendment privilege against self-incrimination, it has decided in favor of the prosecution. See, e.g., Henning, *Testing the Limits*, supra note 40, at 410-11.

251. Notably, these considerations have resonated with even the most rights-protective Justices. For example, Justice Brennan in his concurrence in *Fisher* agreed that a corporate custodian could not resist a subpoena on the Fifth Amendment ground that even the act of production would be incriminating. Id. at 429.


visited upon employees and officers—even when they implicate those employees’ Constitutional rights and privileges.

In Braswell, moreover, the end was permitted to justify the means in a manner roughly analogous to that which Judge Kaplan found constitutionally unacceptable. In Braswell, as in Stein II, the prosecution applied a form of compulsion against a corporate entity for the purpose of obtaining incriminating statements— for use at trial—of an individual officer of the business organization. Indeed, the reason the prosecution issued a subpoena to Braswell, the corporate custodian, was for the purpose of using the information gathered to prosecute Braswell, the individual. Thus, even though the government was taking intentional advantage of the collective entity doctrine and its application to the corporate form to build its case against the individual whom it knew would be producing the documents, the Court upheld the effort. As Chief Justice Rehnquist stated, “recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the government’s efforts to prosecute ‘white-collar crime,’ one of the most serious problems confronting law enforcement authorities.” This was the majority’s result-oriented holding, even though, as in Stein, the individual might be compelled to incriminate himself. One can imagine an appellate court holding in parallel fashion that recognizing a Fifth Amendment violation where an employer merely cuts off payment of legal fees to which the employee is not legally entitled would also have a detrimental impact on the prosecution of white collar crime.

Third-party claims of the privilege against self-incrimination have repeatedly fallen in the face of law enforcement aims. To be sure, the issues and legal questions raised in Stein II and the collective entity line of cases are not

255. See Henning, Testing the Limits, supra note 40, at 410 (“The Supreme Court recognized explicitly in Braswell v. United States that white collar crimes are more complex and harder to prosecute, and therefore refused to impose bright-line restrictions on the prosecution’s access to documents and ability to gather information from participants in the process of events under investigation. This ‘white collar rationale’ allows courts to find that the obstacles inherent in investigating complex economic crimes weigh in favor of avoiding further proscriptions on the government’s ability to discover information, because those proscriptions will give defendants additional tools to conceal their criminal activity.”).

256. See Henning, Conundrum, supra note 22, at 828 & n.153.


258. The Court did provide some measure of protection for the hapless corporate custodian, holding that the government may not, in a prosecution against the individual custodian, introduce into evidence the fact that the subpoenaed material was produced by “one particular individual.” Id. at 118. Nonetheless, the government may use the “corporation’s act of production against the custodian,” and the jury may reasonably infer not only that the records are authentic, but that the individual custodian once possessed them. Id. at 118. The dissent derided this concession as “a peculiar attempt to mitigate the force of its own holding” and one which “gives the corporate agent fiction a weight it simply cannot bear.” Id. at 128 (Kennedy, J., dissenting).

259. A number of commentators have argued that the reasoning of Braswell and its forbears was flawed, outmoded, and ripe for abandonment. See, e.g., Cole, Collective Entity Doctrine, supra note 18, at 75-76:

Prosecutors no longer need the help that the collective entity doctrine provides, if they ever truly did. It is also not acceptable to deprive the owners of business entities . . . of a constitutional right
coextensive. Among other things, implied testimonial admissions (such as those at issue in Braswell) are arguably different from traditional oral statements (such as those at issue in Stein II). Moreover, the alleged coercion in Stein II was economic and applied by the employer at the urging of the government, whereas in Braswell the coercion to incriminate oneself was the compulsory process of a grand jury subpoena. And whereas claims of economic coercion must be tested and assessed on a case by case basis, the coerciveness of a grand jury subpoena is always presumed. Thus, if, as the Stein court held, "[t]he Fifth Amendment is a bulwark against government coercion," that bulwark was consciously breached in Braswell and other cases. These distinctions, however, are largely matters of degree, rather than quality, and the right against self-incrimination was under attack in both situations.

Accordingly, one must at least consider the possibility that Stein II will not ultimately survive the well-developed deferential impulse of courts in the corporate criminal context and in the particular cases that have developed the collective entity doctrine. As Henning has written, in the context of an exhaustive examination of judicial rationales in the jurisprudence of the Fifth Amendment right against self-incrimination in the corporate context, the acceptance of the utilitarian "white collar rationale as a basis to permit the government to seek incriminating statements from participants, and to limit the privilege against self-incrimination, means that the cases will continue to be decided generally in favor of the government."

Moreover, because Judge Kaplan's legal analysis in Stein II draws almost

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260. Justice Kennedy, however, in his Braswell dissent, strenuously disputed the notion that "the Constitution treats oral testimony differently than it does other forms of assertion," writing that "[t]here is no basis in the text or history of the Fifth Amendment for such a distinction." 487 U.S. at 126 (Kennedy, J., dissenting).

261. For example, the court in Montanye found that claim of economic coercion was weak and thus a confession extracted by the employers of a transient employee, only two days on the job, was not sufficient to render the statements coerced. See United States ex rel Sanney v. Montanye, 500 F.2d 411, 415-16 (2d Cir. 1974).

262. Arguably, a grand jury subpoena is even more inherently and directly coercive than the threat of termination of legal fee payment or one's job. While the threatened witnesses in Stein II would have been subject only to firing, the custodian in Braswell was subject to imprisonment in connection with a contempt finding that would have accompaniedflowing the subpoena.


264. See supra Part I.B. Also of course, there is no question of state action in the issuance of a subpoena, though an additional inquiry is always necessary to determine whether economic pressure applied by a target's employer was "fairly attributable" to the government. On the other hand, the type of self-incrimination inherent in the act of production required by the subpoena in Braswell was arguably less worrisome than the full-blown statements compelled in Stein.

265. As the Court recognized in Braswell, forcing the custodian of records to produce corporate documents would have necessarily shown that the documents existed, were authentic, and likely produced by him. Braswell v. United States, 487 U.S. 99, 106, 118 (1988).

266. Henning, Testing the Limits, supra note 40, at 475.
exclusively from criminal cases outside of the white collar context, it may not resonate with courts looking specifically to those precedents for guidance. First, Judge Kaplan relied on *Garrity v. New Jersey* for the proposition that economic pressure to compel self-incriminating statements in the form of threatened dismissal and termination of payment of legal fees, if caused by the state, was constitutionally impermissible:

> It no longer may be doubted that economic coercion to secure a waiver of the privilege against self-incrimination, where it is attributable to the government, violates the Fifth Amendment if the pressure is sufficient to "deprive[] [the accused] of his 'free choice to admit, to deny, or to refuse to answer.'” The point is well illustrated by *Garrity v. New Jersey*...  

*Garrity*, however, did not arise from the investigation of corporate crime; rather, it involved a police corruption investigation of the fixing of traffic tickets, in which officers were given a choice to either incriminate themselves or forfeit their jobs. In addition, in *Garrity*, the coercive economic stick was summary dismissal, whereas in *Stein II* it was largely the threat of termination of the payment of legal fees, though there is also evidence of the threat of firing as well. Moreover, *Garrity*, decided in 1966, relied expressly on an 1886 case, *Boyd v. United States*, which held that offering a property "owner an election between producing a document or forfeiting the goods at issue in the proceeding" was "a form of compulsion" in violation of both the Fourth and Fifth Amendments. *Boyd*, of course, as discussed above in Part I, has been largely sidelined by a long line of Supreme Court cases, beginning in 1906 with *Hale v. Henkel*, which forged the collective entity doctrine. Thus, to the extent *Boyd* survived *Hale*, it certainly did not do so in the context of the issuance of subpoenas to corporate entities. Further, while Judge Kaplan's analysis suggests that *Garrity* has broad application, almost every case cited in *Stein II* involved allegedly coerced statements made by a law enforcement officer, and the scope of *Garrity* has

267. *Stein II*, 440 F. Supp. 2d at 326 (citing *Garrity v. New Jersey*, 385 U.S. 493, 496 (1967) (alterations in original)). The *Stein* court did rule that several complaining defendants were not helped by *Garrity*, as they had not made the requisite factual showing that they were coerced. *Id.*


269. *Id.* at 496-97 (citing *Boyd v. United States*, 116 U.S. 616, 634-35 (1886)).


271. *See* Bruce I. Shapiro, Comment, *From Boyd to Braswell: The Restriction of the Fifth Amendment Privilege Against Self-Incrimination Pertaining to Custodians of Corporate Records*, 11 WHITTIER L. REV. 295, 305 (1989) ("The Supreme Court has officially abandoned Boyd, at least to the extent that business documents have any protection under the notion of privacy."); *see also* United States v. Doe, 465 U.S. 605, 611 (1984) (noting that the "continued validity" of broad statements in *Boyd* and other early cases has been discredited) (quoting Andresen v. Maryland, 427 U.S. 463 (1976)).

been considered by many courts to be largely limited to Fifth Amendment protection for public employees.\textsuperscript{273} It remains to be seen how other courts will assess the \textit{Stein II} analysis in light of its reliance on non-corporate crime precedents dealing exclusively with public employees who were economically coerced through explicit threat of firing.\textsuperscript{274}

Of course, the \textit{Stein} court did not, nor was it in a position to, address the underlying broad vicarious liability rules. In fact, KPMG, having capitulated and entered into a deferred prosecution agreement, was not even a formal party to the \textit{Stein} litigation and therefore never challenged the legal basis of its liability.

\textbf{D. Conclusions}

Recent government tactics have led, in the view of critics, to a deplorable culture of cooperation in which corporate counsel, in knee-jerk fashion, are prepared to give prosecutors whatever they seek in order to avoid the economic death sentence that indictment may bring. While some of the criticisms about the corporate cooperation model are overstated, a substantial risk of undue harm to third party employees of business entities does arise from the uniqueness of the corporate criminal context.

Some might argue that the decisions in \textit{Stein} refute this Article’s thesis because, as a harbinger of judicial interest (and a catalyst for Congressional interest) in reining in prosecutorial discretion in the corporate arena, \textit{Stein} obviates the need to address the more fundamental issue of overbroad corporate criminal liability standards. As set forth earlier, however, the \textit{Stein} court’s rebuke of the government may portend little when viewed against the larger, well-developed legal landscape. Among other things, \textit{Stein} is in spirit at odds with a century of utilitarian Supreme police officer); United States v. Vangates, 287 F.3d 1315, 1316 (11th Cir. 2002) (involving a corrections officer); United States v. Friedman, 842 F.2d 382, 395 (D.C. Cir. 1988) (involving an FBI agent); McKinley, 404 F.3d at 436 & n.20 (involving a patrol officer); State v. Lacaille, 630 A.2d 328, 331 (N.J. Super. Ct. App. Div. 1993) (involving a police officer)).

273. \textit{See} Steven D. Clymer, \textit{Compelled Statements from Police Officers and Garrity Immunity}, 76 N.Y.U. L. Rev. 1309, 1318 n.32 (2001) (noting that various courts have narrowly construed \textit{Garrity} as a case addressing the Fifth Amendment rights of public employees and citing numerous opinions); \textit{see also} McKinley v. City of Mansfield, 404 F.3d 418, 427 (6th Cir. 2005) ("As a matter of Fifth Amendment right, \textit{Garrity} precludes use of public employees’ compelled incriminating statements in a later prosecution for the conduct under investigation.").

274. Notably, the principal case relied upon by the government, \textit{United States v. Solomon}, did involve the investigation of corporate crime, namely, the filing of false documents by a brokerage house. The court in \textit{Solomon} held that there was no state action when individuals, pursuant to stock market regulations, were required to speak with National Association of Securities Dealers, Inc. (NASD) investigators, or risk losing their jobs because even heavily regulated private entities are not state actors. \textit{See} Desiderio v. National Ass’n of Securities Dealers, 191 F.3d 198, 206 (2d Cir. 1999). There is an argument to be made that the scenario in \textit{Stein} more closely resembles that of quasi-regulatory self-policing entities like the NASD or New York Stock Exchange (which cooperate with the government in investigations of heavily regulated financial industries, often by providing authorities with inculpative evidence it obtains) than it resembles the economically coercive interviewing of police officers and federal agents outside of the corporate crime context.
Court decisions mostly deferential to law enforcement. Moreover, the *Stein* court did not have occasion to address directly the most controversial elements of the DOJ guidelines, relating to privilege waivers. Thus, *Stein* represents but one court’s reaction to a limited set of issues raised by the Thompson Memorandum, on a specific set of facts. It is not at all clear that other courts, or a reviewing court, or even Judge Kaplan himself (presented with different facts) would rebuke prosecutors for their conduct directed at gathering information about serious corporate malfeasance.

Perhaps most importantly, judicial efforts to check prosecutorial power in the white collar context suffer from critical limitations, as they can only redress governmental conduct that raises issues of Constitutional dimension with respect to third party defendants. Much of the risk of prosecutorial excess, however, may nonetheless be undesirable because of serious, though not constitutionally impermissible, problems, such as the dilution of privileges through either compelled waiver or a culture of waiver. Indeed, it is unclear, given that it is the corporation (as the client) that has the right to waive its privilege, how any injustice or adverse consequence to an employee might be redressed by a court by virtue of a compelled privilege waiver; these are policy matters, about which courts may have little to say.

Accordingly, the limited reach and uncertain impact of *Stein* further counsels that any attempt to circumscribe prosecutorial discretion should be addressed also to the underlying liability rules, including the collective entity doctrine, which have survived unmodified. Fundamentally, the criticism of prosecutorial discretion is a systemic one, which cannot be overcome either by pointing to discretion well-exercised in the past or by addressing prosecutors’ conduct only. As one writer has put it, even if prosecutorial discretion is “properly exercised for a while, and we are happy seeing some deserving CEOs go to jail . . . over time the lack of accountability and control on prosecutors in financial scandal cases may spell serious problems.” Moreover, such a system of “enforcement discretion . . . undermines, and maybe destroys, criminal law’s ability to send normatively attractive messages.”

The most important lesson of *Stein* may be that courts might be willing—

75. Indeed, many of the claims made by the individual defendants in that case were roundly rejected, including claims that the government had violated some pre-indictment Sixth Amendment right to counsel, see United States v. Stein (*Stein I*), 435 F. Supp. 2d 330, 373 (S.D.N.Y. 2006), and the claims by a number of individual defendants that their proffer statements to the government were coerced, see Stein *II*, 440 F. Supp. 2d at 326-31.

76. Judge Kaplan himself has described the circumstances triggering his opinions as a “perfect storm,” writing that “[n]either this ‘perfect storm,’ nor anything resembling it, is likely to recur with any frequency, if ever.” United States v. Stein, No. 06-4358-cv, slip op. at 6 (S.D.N.Y. Jan. 8, 2007).

77. See Oesterle, *supra* note 106, at 482.

78. See Stuntz, *supra* note 34, at 569. Stuntz goes on to observe that “[a] just pattern of prosecutions may be better than an unjust criminal statute, but it must be inferior, as a means of sending signals, to a just statute that is enforced as written.” *Id*. 
because of the detrimental effect on third party targets' privileges and rights—to curb prosecutors' discretion. If they are prepared to do so when asked to remedy infringements of individuals' process rights, they may finally be prepared to do so if presented squarely with corporations' challenges to the colossally broad liability rules and the collective entity doctrine.

IV. REFORMING THE LAW OF CORPORATE CRIMINAL LIABILITY: PRELIMINARY THOUGHTS

The foregoing analysis raises considerations that should be, but to date have not been, central to any proposed reworking of corporate criminal prosecution. This Part very briefly sketches out several of the most commonly suggested corporate liability-narrowing alternatives. Next, it explains how each proposal contemplates a limitation of liability that is already considered as part of a prosecutor's analysis under federal prosecution guidelines. Finally, this Part suggests that reformers should bear in mind the more comprehensive understanding of corporate prosecutorial discretion laid out in this Article and, when considering how best to meet both the interests of justice and the needs of the corporate market, ask the following questions.

To the extent some of the considerations contained in the DOJ Memoranda are common-sense, reasonable, or morally relevant factors, why should they remain exclusively the province of unaccountable prosecutors, with the concomitant risks of uneven, ill-advised, and inexpert application? Why should the de facto, discretionary system reflected in the DOJ Memoranda not be replaced, in whole or in part, with a codified, de jure system suggested by one or more liability-narrowing alternatives?

Given the variety of flaws in the current corporate liability regime, proposals to narrow or tighten the standard for criminal exposure are not in short supply. Some have called merely for the narrowing of the liability rules, while others have called for the recognition of privileges or other defense mechanisms to provide corporations with some measure of protection, fairness, and notice. While a close examination of all possible reforms and identification of the ideal change in the law is beyond the scope of this Article, some preliminary observations about possible alternatives and relevant considerations are appropriate.

279. See supra notes 15-30 and accompanying text.
280. See, e.g., Bierschbach & Stein, supra note 20, at 1774 (suggesting the possibility of "tinkering with the substantive liability rule" to eliminate the problem of creating imperfect incentives, which undermine the goal of deterrence); Bucy, supra note 21 (arguing for a narrower standard that would take into account intent through a theory of corporate "ethos"); Buell, supra note 24, at 478 (arguing "for a narrower standard of liability that would seek information about institutional effects on the individual, as revealed in the individual's mental state toward the entity at the time of the offense").
281. See, e.g., Bierschbach & Stein, supra note 20, at 1775-76 (advocating serious consideration of evidentiary and procedural barriers such as a broad attorney-client privilege, curtailment of the collective entity doctrine, and protection against self-incrimination, which could be overcome through the procurement of a judicial warrant).
Most importantly, to date, none of the alternative theories appears to have been developed or discussed with a substantial focus on accomplishing an optimal level of prosecutorial discretion. While some commentators appear to recognize, in passing, that their complaint is really with indulgent courts, the scant scholarly literature related to the Thompson Memorandum shows a general inattention to addressing the problem through challenges to the underlying corporate criminal liability rules themselves.

This inattention is, in the long run, costly. As Judge Lynch has observed, "prosecutorial discretion is not an adequate substitute for statutes carefully drawn to prohibit only conduct that deserves criminal punishment. 'Criminalize them all and let the prosecutors sort them out' is not a particularly inspiring slogan for a penal code." The goal should therefore be to reduce the risk of prosecutorial excess and build confidence in the system of corporate criminal justice, without unduly degrading the government's ability to ferret out and punish those responsible for corporate crime.

As an initial matter, one proposed reform, the elimination of all criminal liability for business entities, would completely eviscerate prosecutors' leverage against corporations to obtain incriminating information about individual miscreants. Such an extreme proposal fails to comport with the widespread view that corporations, as entities, can be blameworthy in at least certain circumstances, and a purely civil liability regime in which corporations will have less incentive to self-policing is not ideal, as many writers have argued. Accordingly, any proposal to eliminate all criminal liability for corporations, apart from other failings, gives corporations an unsatisfactorily free hand, merely transferring to business entities the leverage that prosecutors now enjoy. In any event, given overwhelming public, Congressional, and judicial support for the idea of corporate criminal liability, its elimination has little possibility of gaining acceptance in the foreseeable future.

Three other approaches—which can be loosely termed the corporate culture, Model Penal Code ("MPC"), and corporate compliance approaches—offer more promise for our purposes. First, the corporate culture approach to tightening the rules of liability is typified in an influential article by Pamela Bucy. Her approach builds on the substantial literature exposing the incoherence of a criminal

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282. See, e.g., Zornow & Krakaur, supra note 7, at 151 (noting that though at least two rationales for the constitutional privilege against self-incrimination “arguably apply to corporations” as well, “the Supreme Court has held firmly that the privilege against self-incrimination is not available to corporations”).

283. Lynch, supra note 12, at 60.

284. See Khanna, supra note 19, at 1532-34; see also Baker, supra note 19, at 353-55; cf. Posner, supra note 19, at 228.

285. See, e.g., Buell, supra note 24, at 491 (“[T]he criminal process can impose a unique form of reputational sanction, the effects of which can flow through to institutional members in ways that promise to deter individual wrongdoing and promote group endeavors toward compliance.”); see also Bucy, supra note 21, at 1096 (arguing that “to the extent the [corporation’s] action can victimize society, they too should be deterred”).

286. See Bucy, supra note 21, at 1099 (describing a proposal for holding corporations criminally liable only in circumstances where its “ethos” renders the corporation—as distinct from its agents—culpable).
liability system that renders artificial persons indictable without any proof that the entity—as distinct from any particular agent of the entity—had the requisite mens rea to be criminally culpable. Bucy overcomes the difficulties of attributing mens rea and assigning blame to a soulless, artificial entity by developing a corporate "ethos" theory, in which the "ethos" of the firm serves as a reasonable substitute for mental state, and by which prosecutors, juries, judges, and the public can identify the blameworthiness of the corporation.

Criticisms of this approach are manifold. Critics contend, among other things, that the inherent amorphousness of "corporate ethos" renders a clear liability standard unattainable. They also suggest that a corporate culture standard reins in prosecutorial discretion at too high a price by allowing the corporation ways to escape liability. Moreover, Bucy's proposal may unduly increase the government's burdens of litigation and discovery.

Notwithstanding these concerns, Bucy identifies several principal advantages to her approach; none of them, however, involves a diminution of prosecutorial power. She does recognize, in passing and without further explication, that the breadth of the current rule "offers little guidance to prosecutors" and that "[f]orcing prosecutors to select cases based on corporate criminal intent... would reign in this broad discretion and thus curtail the potential for abuse and arbitrariness." Further study is necessary to predict how the corporate culture approach would "reign in this broad discretion."

A second potential method of tightening the broad corporate criminal liability

287. See Martin Needleman & Carolyn Needleman, Organizational Crime: Two Models of Criminogenesis, 20 Soc. Q. 517 (1979) ("[A]t least some criminal behavior may be viewed not as personal deviance but rather as a predictable product of the individual's membership in, or contact with, certain organizational systems."); Anthony Ragozino, Comment, Replacing the Collective Knowledge Doctrine with a Better Theory for Establishing Mens Rea: The Duty Stratification Approach, 24 Sw. U. L. Rev. 423, 428 (1995). The Australian Model Penal Code in fact incorporates features of the corporate culture approach, providing that corporate criminal intent may be demonstrated through corporate culture. See Abril & Olazabal, supra note 31, at 127-29; cf. Buell, supra note 24, at 530 (criticizing current law and various proposals "[b]ecause they do not accord with the social practice of blaming institutions," but proposing to "thicken["] the "prevailing law of entity criminal liability" rather than through requiring proof of elements of corporate culture).

288. See Bucy, supra note 21, at 1099:

[The standard proposed herein imposes criminal liability on a corporation only if the corporation encouraged the criminal conduct at issue. If it did, the criminal conduct is not an accident or the unpredictable act of a maverick employee. Instead, the criminal conduct is predictable and consistent with corporate goals, policies, and ethos. In the context of a fictional entity, this translates into intention.

289. See, e.g., Buell, supra note 24, at 530-31.

290. See, e.g., Bierschbach & Stein, supra note 20, at 1774 (warning generally that tinkering with liability standards might be wholly unsatisfactory, giving rise to incentives for corporations to comply only "cosmetically" with their obligations to prevent malfeasance within the business).

291. See Bucy, supra note 21, at 1167 ("The government... must essentially show the existence of customs and standards within the corporation.").

292. Bucy, supra note 21, at 1108-09.

293. Id. at 1109.
rule—which would require Congressional action—is reflected in the American Law Institute’s approach in the Model Penal Code (“MPC”), codified in 1962.\textsuperscript{294} The MPC approach sprang in part from concern over the rash of inconsistent verdicts in which juries convicted the corporation while acquitting individual defendants under the vicarious liability rule.\textsuperscript{295} It purports to limit the breadth of the vicarious liability rule largely by calling for criminal liability only where felony crimes requiring intent were “authorized, requested, commanded, [or] performed . . . by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.”\textsuperscript{296} In addition, the corporation may establish an affirmative defense in certain circumstances by demonstrating that the supervisory agent “employed due diligence to prevent its commission.”\textsuperscript{297}

Criticisms of the MPC approach also abound. Some commentators find that the MPC approach retains much of the flawed nature of the vicarious liability rule without offering much improvement.\textsuperscript{298} Moreover, it is suggested that the MPC approach, where followed, has had the undesirable effect of “afford[ing] organizations protection from criminal liability for acts of deliberate indifference by high managerial agents.”\textsuperscript{299} Thus, such a form of liability acts to shield top managers, who are able to delegate responsibility downward in the corporate hierarchy, beyond the MPC’s reach.\textsuperscript{300}

Finally, a number of proposals, which might be grouped under the rubric of corporate compliance, contain some of the attributes of both the corporate ethos and MPC approaches. The central feature of the compliance policy approach is the availability to an indicted corporation of some consideration at trial for the existence of a corporate compliance program designed to police misconduct and prevent wrongdoing. Such consideration is, in most circumstances, unavailable

\textsuperscript{294} See Brickey, supra note 15, at § 3:03, at 46-48; see generally Kathleen F. Brickey, Rethinking Corporate Liability Under the Model Penal Code, 19 RUTGERS L.J. 593 (1988).
\textsuperscript{295} See Abril & Olazabal, supra note 31, at 126.
\textsuperscript{296} MODEL PENAL CODE § 2.07(1)(c).
\textsuperscript{297} MODEL PENAL CODE § 2.07(5).
\textsuperscript{298} See, e.g., Bucy, supra note 21, at 1104-05 (arguing that the Model Penal Code (“MPC”) approach is problematic because it “uses the same conceptual paradigm as does respondeat superior – that is, the MPC automatically imputes the intent of individual corporate agents (albeit only the higher echelon agents) to the corporation”). Moreover, as Bucy points out, the MPC standard encourages upper-level employees to insulate themselves (and the corporation) by studiously remaining unaware of the criminal activities of their underlings. Id. at 1105.
\textsuperscript{299} Laufer, Corporate Liability, supra note 23, at 1374.
\textsuperscript{300} See, e.g., Reinier H. Kraakman, Corporate Liability Strategies and the Costs of Legal Controls, 93 YALE L.J. 857, 860 & n.9 (1984). The MPC approach does, however, have the advantage of having been passed into law in whole or in part in 37 states, see Abril & Olazabal, supra note 31, at 166, which provides a starting point for inquiry into what kind of prosecutorial dynamic is engendered by such a system. Accordingly, further study into the behavior of prosecutors in state prosecutions against business entities should provide useful insight into whether some form of limiting criminal liability to top management desirably reduces the risk of governmental overreaching.
under current law and often identified as one of the most egregious excesses of the current liability standard. Thus, although common sense principles of entity liability would suggest that an organizationally-created compliance program should bear on the issue of the entity’s guilt (separate and apart from any individuals’ guilt), many courts have excluded as irrelevant any evidence of a compliance program from the jury.

Typifying the strong version of the corporate compliance approach is that proposed by practitioners Walsh and Pyrich, who contend that proof of a diligent compliance program should entitle the corporation to an acquittal at trial, a position that others have echoed. Of course, the very fact of criminal activity at a business entity with a compliance program in place, by definition, calls into question the efficacy of the program. Nonetheless, Walsh and Pyrich suggest a number of rationales in support of their proposal, including (1) consistency with traditional notions of criminal responsibility and blameworthiness; (2) encouragement of corporate self-regulation; (3) encouragement of good corporate citizenship; and (4) long-term cost effectiveness. A more moderate form of the compliance approach proposes that corporate defendants be permitted to offer evidence of a compliance program to show, among other things, that the individual malefactor was not acting to benefit the corporation.

These approaches, too, are no strangers to criticisms. Chief among them is the risk that the creation of a compliance program affirmative defense will allow companies to immunize themselves from liability by simply establishing such programs. While “[t]he purpose of the corporate compliance defense is not to


302. See, e.g., Bierschbach & Stein, supra note 20, at 1774 (describing “definitional spillover” resulting from overbreadth of strict vicarious liability, which fails “to distinguish between firms that self-policing and self-monitor and firms that do not”); see also Jennifer Arlen & Reinier Kraakman, Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 N.Y.U. L. Rev. 687, 707-09 (1997) (describing a “liability enhancement effect” because self policing conduct has the perverse effect of increasing expected liability).

303. See Huff, supra note 68, at 1253 & n.11 (citing United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989); United States v. General Motors Corp., 226 F.2d 745, 749 & n.5 (3d Cir. 1955); C.I.T. Corp. v. United States, 150 F.2d 85, 90 (9th Cir. 1945)).


305. Id. at 689.

306. See Baker, supra note 19, at 321 (“If a corporation does in fact implement an effective compliance program, the corporation is probably not even negligent, much less guilty of a crime.”).

307. Walsh & Pyrich, supra note 304, at 676 (“A corporation should be able to defend against vicarious liability by showing that it had a clear and effective policy for complying with the law . . . .”).

308. Id. at 678-80.

309. Id. at 680-81.

310. Id. at 681-84.

311. See, e.g., Huff, supra note 68, at 1254.

afford corporations complete insulation from liability for intent-based crimes,”

depending on the precise articulation of a compliance defense, corporations might be incentivized to do just enough to avoid liability rather than prevent wrongdoing. Recognizing that “the threat of liability under respondeat superior also provides an important deterrent,” institution of a compliance program defense risks creating a system of under-deterrence.

While some of the failings of these various alternatives have been addressed in the literature, largely lacking is a recognition that significant elements of each of these approaches—corporate culture, MPC, and corporate compliance—are considered now by federal prosecutors in their charging decisions. Indeed, as set forth in the Thompson and McNulty Memoranda, prosecutors are required to weigh the nature of a potential defendant company’s corporate culture and the involvement of management; the Thompson Memorandum notes that “a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged.”

Thus, when prosecutors assess whether prior conduct warrants indictment, they are counseled that “[a] history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs.”

Moreover, as set forth in the most lengthy and explicit section of the Thompson Memorandum, prosecutors are told to assess the existence and adequacy of the corporation’s compliance program. Specifically, prosecutors should consider, before indicting, “whether the [compliance] program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees

313. Walsh & Pyrich, supra note 304, at 689.

314. Thus, “[b]y capping liability at the level required to meet the defense, the due diligence defense also caps the deterrence incentives for the corporation created by respondeat superior, and would consequently tend to result in more corporate crime.” Huff, supra note 68, at 1276; see Buell, supra note 24, at 529 (suggesting that such an approach “may be mostly a boon to compliance professionals” because “[a] firm might formalize practices in part to mask that it does not really practice them”); see also Laufer, supra note 23, at 1372 (“[S]urvey research suggests that in some . . . corporations, the role of compliance has more to do with maintaining the appearance of a compliant reputation than that of a meaningful culture of ethical awareness and law abidance.”); id. at 1371 (“The ultimate goal, after all, is a compliance program that prevents crimes, not one that excuses the corporation in the event that one occurs.”) (quoting Gary R. Spratling, The Expertise and Views of the Enforcement Community, in PROCEEDINGS OF THE SECOND SYMPOSIUM ON CRIME AND PUNISHMENT IN THE UNITED STATES, CORPORATE CRIME IN AMERICA: STRENGTHENING THE “GOOD CITIZEN” CORPORATION 317, 319 (Sept. 7-8, 1995)).

315. Huff, supra note 68, at 1275 (arguing that complete affirmative defense is too inefficient and proposing more moderately that evidence of a compliance program be admissible at trial for its relevance to the state of mind of culpable employees). Of course, concerns about faux compliance programs may be overstated, because as the risk of conviction still looms large, the risk of indictment (and the demise of the firm) also looms large, and there is still a need to convince the prosecutor of the good faith of the program and the entity’s blamelessness in the actions of the miscreant employee.

316. Thompson Memorandum, supra note 3, at 5 (emphasis added).

317. Id. at 6 (emphasis added).

318. See id. at 8-11 (discussing corporate compliance programs when charging a corporation).
and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. In fact, the Thompson Memorandum is suffused with references to the proper way to evaluate corporate compliance programs in order to arrive at a fair charging decision.

Therefore, in light of the de facto consideration of liability-narrowing factors, the issue requiring additional attention is not what flaws inhere in various liability-narrowing proposals, but—given that prosecutors today are the sole evaluators of the factors suggested in such proposals—what if anything would be lost by shifting some (or all) of that discretion to a judge or jury by virtue of a codified rule, standard, or statute.

Thus, for example, a central question is what effect a clear and carefully calibrated compliance rule would have on prosecutors, who now—often with little or no experience in corporate governance matters—are solely charged with evaluating whether a company’s compliance program is adequate. One problem of overarching prosecutorial discretion in the specific context of corporate crime prosecutions is that “federal prosecutors are trained to be trial lawyers who can get convictions and may be entirely ignorant of the working of capital markets.”

Indeed, two former Justice officials have candidly acknowledged that it might strike people as “frightening” that individual line prosecutors in the current system make business assessments that “may determine whether to indict, and potentially destroy, the company,” when such matters are so specialized and complex that they “have generated tomes of literature and form the basis for an entire law practice specialty.”

The issue, therefore, is whether—given these risks and limitations—it would be better for Congress or the courts to develop clear and expert standards rather than continue a system in which corporations must rely on “well-meaning but unsophisticated advice from criminal prosecutors on how best to ensure legal compliance.”

Notwithstanding the foregoing concerns and the need for further analysis, the compliance approach may hold the most promise for a number of reasons. First, it suggests the possibility of articulation with sufficient clarity and calibration that it

319. Id. at 9-10.
320. The Memorandum suggests, for example, that the “fundamental questions any prosecutor should ask are: ‘Is the corporation’s compliance program well designed?’ and ‘Does the corporation’s compliance program work?’” Id. at 10. The Memorandum goes on to advocate that “prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct.” Id. The mandated evaluation of the compliance program is surprisingly specific in places, as the Memorandum exhorts prosecutors to “determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation’s compliance efforts.” Id.
321. See id. at 8-11.
323. Wray & Hur, supra note 14, at 1184-85.
324. Id. at 1185.
can meaningfully guide corporate behavior. It certainly provides more guidance than the corporate culture approach, as the concreteness of a compliance program seems more likely to influence the prosecutor-corporation dynamic than an amorphous corporate culture paradigm. Second, an additional benefit regarding the prosecutor-corporation dynamic is that it may transfer some of the power from “unaccountable” prosecutors to a judge and jury to determine questions relating to the relevance, aggressiveness, and efficacy of a corporate compliance program. Over time, moreover, courts can be expected to develop more detailed parameters regarding the necessary features of a compliance program. This will ultimately provide better notice and guidance to corporations attempting to develop such programs and to those corporations that become targets, which are trying to decide whether to cooperate and how much to give up in doing so. Of course, any liability-narrowing reform will undoubtedly have a salutary effect on the corporate criminal system, and we should be considering them in earnest.

CONCLUSION

As this Article recounts, a longstanding conundrum in criminal and Constitutional law is the tension between the rights and privileges of criminal defendants and the need for aggressive law enforcement tools to deter and punish wrongdoers. In the area of corporate crime, that age-old tension recently exploded into public consciousness with a federal judge’s rebuke of the government for pressuring a business entity into interfering with its employees’ constitutional rights to counsel and against self-incrimination. A single court case or even several, however, cannot resolve the risks inherent in the system. After-the-fact judicial regulation of prosecutorial power will inevitably be ad hoc, uneven, and ineffectual. It cannot stanch a century of judicial empowerment of aggressive tactics through the expansion of corporate criminal liability and diminution of corporate defenses. Only a narrower, better-fitting corporate liability rule will achieve preferred levels of discretion and respect for the rights and privileges of individual defendants. It is time that the underlying law of corporate criminal liability is brought in line with both common sense and common practice.
CORPORATE CONFESSIONS

Brandon L. Garrett*

ABSTRACT

In corporate crime investigations, when prosecutors pursue charges against both employees and corporations, confessions raise several novel questions without clear answers in constitutional criminal procedure. First, corporations confess. The firm, a target of a criminal investigation, may itself admit to crimes by employees as part of a settlement agreement with prosecutors. While useful to study in their impact and form, as a constitutional matter such confessions can not be coerced; the Supreme Court has adopted a “collective entity rule” that corporate persons may not invoke Fifth Amendment privilege. Second, before itself confessing, the firm may encourage employees to provide statements to law enforcement, placing some in the precarious position of deciding whether to speak and inculpate themselves or invoke Fifth Amendment privilege and be disciplined or fired. The question then arises whether the Fifth Amendment protects such employees. This Article develops how the Fifth Amendment, as interpreted by the Supreme Court in its line of “penalty cases,” offers scant protection absent substantial formal cooperation between prosecutors and the employer. Instead, cooperation with internal investigators and law enforcement will be structured by employment contracts and a firm’s interest in avoiding conflicts of interest and formation of unintended attorney-client relationships between employees and corporate counsel. Thus, not only may the corporation confess, but the environment in which employee confessions occur is largely defined by interests of the corporation.

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INTRODUCTION

Confessions during corporate crime investigations, unlike confessions made while under police custody, implicate relationships between corporations and employees far more than constitutional criminal procedure. In cases involving custodial interrogations, the Supreme Court adopted Fifth Amendment protections, including the Miranda warnings, intended to remedy the coercion inherent when police question an unrepresented suspect in an isolated room, and the voluntariness standard, that assesses police pressure ranging from psychological tactics, threats of violence, and torture. In corporate crime investigations, however, confessions arise in a far more genteel environment. Employees are interviewed at their workplace, by corporate counsel, or also by independent auditors, regulators or law enforcement.

Prior to any prosecution, the firm, a target of a criminal investigation, may itself admit to crimes by employees as part of a settlement agreement with prosecutors. Corporations confess, and this Article examines recent prosecution agreements in which they confess and briefly considers the implications of such confessions. Such confessions may increasingly be used to inculpate other entities and employees. As a constitutional matter, however, such confessions may not be considered coerced by the state. The Supreme Court has adopted a “collective entity rule” that corporate persons, which lack any state of mind, lack Fifth Amendment privilege.1

The same is not the case for employees, the second subject of this Article. Before itself confessing, the firm may encourage employees to provide statements to law enforcement, placing some in a precarious position of deciding whether to speak and incriminate themselves or invoke Fifth Amendment privilege and not incriminate themselves, but as a result face discipline or termination by their employer. The question then arises whether the Fifth Amendment protects such employees. This Article develops how criminal procedure offers scant protection, while instead employment relationships structure cooperation with law enforcement.

In response to a series of corporate governance scandals, the Department of Justice (DOJ) and federal prosecutors now investigate corporate conduct and pursue charges against corporations and their employees with far greater frequency than in the past.2 Following the

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2 See Stephen Labaton, Downturn and Shift in Population Feed Boom in White-Collar Crime, N.Y. TIMES, June 2, 2002, § 1, at 11; Brandon L. Garrett, Structural Reform Prosecution,
January, 2003 DOJ guidelines known as the Thompson Memorandum, updated in several revised Memoranda, federal prosecutors typically defer prosecution if a firm will agree to adopt compliance programs, admit its guilt, and more controversial, cooperate with any investigation or prosecution of current or former employees.³ Criminal defense attorneys, legislators and several legal scholars have complained that in doing so, prosecutors use their leverage over the corporation to “coerce” statements from vulnerable employees.⁴ Several scholars who have examined the issue in more depth have concluded the Fifth Amendment does not readily apply to such criminal investigations.⁵

The legal contention underlying the controversy, premised on the Supreme Court’s line of “penalty cases”⁶ beginning with Garrity v. New Jersey,⁷ is that the Fifth Amendment privilege against self-incrimination...
is violated when a corporation threatened with indictment pressures employees to provide statements to law enforcement. The pressure applied is economic. The firm threatens to terminate uncooperative employees or deny advancement of attorneys’ fees. Many critics cited to Judge Lewis A. Kaplan’s July 2006 opinion in United States v. Stein, finding that after the government “threatened KPMG with the corporate equivalent of capital punishment,” as a result, “KPMG took the only course open to it,” and “exerted substantial pressure on its employees to waive their constitutional rights.” Judge Kaplan suppressed inculpatory statements by two employees, decrying the use of the Thompson Memo by prosecutors to produce “the exertion of enormous economic power by the employer upon its employees to sacrifice their constitutional rights.” The president of the American Bar Association called the Thompson Memorandum approach “an affront to the Bill of Rights, particularly the Fifth Amendment.” In response to this outcry, Congress threatened legislation, and the DOJ has so far twice modified the Thompson Memo. Most recently, the Second Circuit affirmed Kaplan’s decision, holding that the factual findings that KPMG disciplined employees due to prosecutors’ conduct were not clearly erroneous.

This Article argues that despite widespread and justified concern regarding the unenviable position employees may be placed in during such criminal investigations, the legal contention that such a situation violates the Fifth Amendment remains equivocal and of limited application. Upon a closer examination, the penalty cases do not readily apply to the situation confronting many white-collar defendants facing potential criminal charges. The Court’s rulings extend only to situations in which the state statutes or orders directly threaten dire and career-ending consequences upon employees for failing to waive privilege. Second, the state action requirement cannot be satisfied if the state does not directly impose any penalty and does not collaborate in the firm’s efforts to penalize employees, but rather considers the firm a target. There may be state action, however, when a firm cooperates with prosecutors, particularly in the implementation of a deferred prosecution agreement. Third, private employee discipline may not satisfy the heightened standard required to show involuntary waiver of privilege in the non-custodial context.

9 Id. at 337.
11 See infra note 15.
12 U.S. v. Stein, 541 F.3d 130 (2d Cir. 2008).
This Article hopes to reorient the debate by emphasizing the primary role of employment relationships. Employees should receive guidance on their rights, but statutory, regulatory and contractual relationships inform employment relationships and primarily define employee cooperation with criminal investigations. This Article concludes examining protections non-constitutional in origin that better safeguard employee rights, including Upjohn warnings, warnings of possible conflicts of interest, and other related warnings. These warnings are provided by employers primarily because such warnings serve employer interests in avoiding uncertainty, waiver, and conflicts.

I. CONFESSIONS BY CORPORATIONS

Corporations not only confess, but they do so when facing substantial government pressure from a threat of an indictment that may have dire collateral consequences. Federal prosecutors appear to highly value confessions by the entity itself and have secured admissions in almost all deferred and non-prosecution agreements entered in recent years. These confessions have not previously been examined. However, not only do confessions by corporations receive no Fifth Amendment protection, but they may themselves have dramatic consequences for employees and for other corporations.

In the recent wave of corporate prosecutions, the DOJ, including for these purposes the various U.S. Attorneys offices, typically suspends prosecution of corporations before an indictment, much less a conviction, by entering detailed agreements. The agreements impose a series of compliance requirements, including admissions of wrongdoing, payment of fines and restitution, and full cooperation with prosecutors in ongoing investigations of individual current and former employees. Corporations can and do confess, through the statements they make in such agreements. In the past this rarely arose, but the DOJ has obtained increasingly detailed admissions as a matter of course when securing such agreements.

The Thompson Memo, promulgated in January 2003, details the

DOJ’s approach towards charging organizations. That Memo cited to factors that should inform charging decisions, and though “timely and voluntary” disclosure of wrongdoing is a factor, nowhere to be found is a reference to admissions of guilt. Instead, the Memo emphasized the importance of “the authenticity of a corporation’s cooperation” and reform efforts to create effective compliance programs. The Organizational Sentencing Guidelines, however, reward with a sentence reduction a firm’s “affirmative acceptance of responsibility” for its criminal conduct.

Despite no official guidance on the inclusion of admissions of guilt, prosecutors find such admissions to be important to obtaining lenient treatment. In reviewing all such agreements entered during the first five years after the promulgation of the Thompson Memo in 2003, almost all such deferred and non-prosecution agreements contained admissions of wrongdoing or acceptance of responsibility for the charged acts. Out of forty-two such agreements, only six did not include such admissions. Similarly, all but three of the 51 subsequent agreements entered in 2007 through Fall 2008 contained admissions of wrongdoing.

The KPMG agreement provides an example of a lengthy and quite detailed corporate confession. The agreement begins with a section titled “Acceptance of Responsibility for Violation of Law.” That section, stating that KPMG “[a]ssisted high net worth United States citizens to evade United States individual income taxes on billions of dollars in capital gain and ordinary income by developing, promoting and implementing unregistered and fraudulent tax shelters,” listed five patterns of fraudulent and illegal conduct. The agreement then, in an appended single-spaced, ten page statement of facts, describes the conduct in detail, stating that it was “deliberately approved and perpetrated at the highest levels of KPMG’s tax management, and involved dozens of KPMG partners and other personnel,” and recounting the development, marketing and the concealment of those tax shelters from the IRS, together with the “false and fraudulent”

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17 Those were the agreements with Adelphia Communications, Hitachi, NEC Corporation, M.C.I, Royal Ahold, Stryker Orthopedics, and Tommy Hilfiger. See Prosecution Agreements, supra note 14.

18 The Collins & Aikman, NetVersant and Omega Advisors agreements did not include an acceptance of responsibility. See id.

representations made concerning their legality.\textsuperscript{20} Notable among firms that did not sign such an agreement was Arthur Andersen LLP, which apparently objected to entering a deferred prosecution agreement in which it would admit wrongdoing and accept responsibility as a firm.\textsuperscript{21} Having failed to reach an agreement, Andersen was prosecuted and ultimately dissolved.\textsuperscript{22} That failed negotiation provides some evidence of the importance that prosecutors attach to the entity admission of guilt.

Why is that the case; what additional purpose does an admission of guilt from an artificial entity serve? Perhaps prosecutors need not ask any more of a corporation if it makes sufficient efforts to cooperate, discipline responsible employees, fashion effective compliance programs, and pay fines and restitution. Those acts could demonstrate the corporation’s “acceptance of responsibility” as an entity. There are good reasons not to require a confession, and instead secure something like a nolo contendere plea at the charging stage.\textsuperscript{23} A confession brings with it reputational costs to the corporation, though not to the degree that it would if the corporation pleaded guilty and had a conviction.

Additional terms in these agreements shed light on why the corporate confession may be so sought after. The agreements almost all state that should the corporate breach the agreement, the DOJ may unilaterally declare a breach and then prosecute.\textsuperscript{24} The agreements typically provide that as to its detailed admissions of wrongdoing, the entity “agrees it will not contest the admissibility into evidence of the Statement of Facts in any subsequent criminal proceedings occurring in the event of a breach of this Agreement.”\textsuperscript{25} Should prosecutors declare a breach and prosecute, they may rely fully on the admissions of criminality. Thus, the confession provides prosecutors with enormous leverage during the implementation of the agreement. As discussed

\textsuperscript{21} See Kathleen Brickey, Andersen’s Fall From Grace, 81 WASH. U. L. Q. 917, 945 n.48 (2003).
\textsuperscript{22} See generally id.
\textsuperscript{24} See Garrett, Structural Reform, supra note 2, at Part III.B. The SEC has similarly adopted a policy that parties may not deny, in subsequent proceedings, the factual allegations from complaints in prior SEC consent decrees. See also In re Marshall E. Melton and Asset Mgmt. & Research, Inc., Admin. Proc. File No. 3-9865 (July 25, 2003), available at http://www.sec.gov/litigation/opinions/ia-2151.htm.
\textsuperscript{25} See, e.g., Press Release, Dep’t of Justice, U.S. Attorney’s Office, S.D. Tex. (June 16, 2006), available at http://www.state.gov/m/ds/rls/67985.htm; see also Garrett, Structural Reform, supra note 2, at Part III, regarding legal questions that may arise should prosecutors unilaterally declare a breach of such an agreement.
further below, the confession may provide prosecutors and regulators with information they can use to exercise leverage over other individuals and firms as well.

While corporations entering into deferred prosecution agreements do so under government pressure, they can not be coerced into admitting criminal acts, at least as a constitutional matter. Under the “collective entity rule,” corporate persons can not claim Fifth Amendment privilege and thus lack any constitutional right to be free from coercion.26 Even if the “collective entity rule” did not exist, no privilege would likely apply regarding admissions made in a prosecution agreement. Such agreements are contractual and entered at arms-length during a bargaining process. This makes it all the more surprising that not only do deferred prosecution agreements universally contain admissions of guilt, but they also often state that the corporation “is entering into this Agreement voluntarily,” perhaps for public relations purposes, or perhaps lifting language from similar agreements involving individual defendants.27

Individual people must sign the confession on behalf of the corporation. The agreements are often signed by counsel and sometimes also by officers of the corporation who affirm that they entered into the agreement voluntarily, or they include documentation of a board resolution. For example, in the Ingersoll-Rand deferred prosecution agreement, the CEO signed a certificate stating that he was “duly authorized by Ingersoll to execute this Agreement on behalf of Ingersoll and all the subsidiaries named herein.”28 He then stated, “No promises or inducements have been made other than those contained in this Agreement. Furthermore, no one has threatened or forced me, or to my knowledge any person . . . in any way to enter into this agreement.”29 Similarly, counsel provided a certificate stating: “To my knowledge, Ingersoll’s decision to enter into this Agreement is an informed and voluntary one.”30

A separate set of questions arise regarding the impact of such admissions of wrongdoing in other prosecutions. The investigative material obtained during the process of obtaining such admissions may prove highly useful in prosecutions of individual defendants, and also other corporations. In a subsequent prosecution of employees, the entity admissions would be hearsay and would raise confrontation

29 Id.
30 Id., Certificate of Counsel.
clause problems, but could be used as impeachment to cross-examine the entity that confessed, presumably through an authorized representative.\footnote{See Pointer v. Texas, 380 U.S. 400 (1965); Paul Marcus, Re-evaluating Large Multiple-Defendant Criminal Prosecutions, 11 WM. & MARY BILL RTS. J. 67 (2002).} Questions of employee discipline may arise. Some of the agreements require cooperation and also that employees not contradict the entity admissions; doing so might place the corporation in breach of the agreement and then subject to prosecution.\footnote{See Richard B. Zabel & James J. Benjamin Jr., “Queen for a Day” or “Courtesan for a Day”: The Sixth Amendment Limits to Proffer Agreements, 15 No. 9 WHITE-COLLAR CRIME REP. 1 (2001), U.S. v. Duffy, 133 F. Supp. 2d 213 (E.D.N.Y. 2001); Leonard Post, Deferred Prosecution Deal Raises Objections, NAT’L L.J., Jan. 30, 2006, at 4, available at http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1138788312206; Brandon L. Garrett, Essay, United States v. Goliath, 93 VA. L. REV. IN BRIEF 105, 107-08 (2007), http://www.virginialawreview.org/inbrief/2007/06/18/garrett.pdf [hereinafter Garrett, Goliath] (describing cooperation requirements in deferred prosecution agreements).} For example, the Pfizer agreement states that not only does the entity “expressly and unequivocally admit . . . that it knowingly, intentionally and willfully committed the crime charged in the Information,” but that “Pfizer Inc. will not make any public statement contradicting anything set forth in” the Information.\footnote{See Side Letter Agreement with Pfizer (Mar. 27, 2007), available at http://www.law.virginia.edu/pdf/faculty/garrett/pfizer.pdf.} Employees may therefore be reluctant to assist the defense; as defense attorneys have pointed out, though enforcement of such terms might undermine the credibility of the prosecution case.\footnote{See Post, supra note 32 (quoting Stephanie Martz of the National Association of Criminal Defense Lawyers, while noting that “the threat to witnesses of being fired if they don’t adhere to a government-approved truth could backfire on prosecutors. ‘Not a single employee is going to be a credible witness.’”).}

Of far more use to prosecutors seeking to leverage their limited resources, may be the use of entity confessions to support prosecutions of other corporations.\footnote{On the lack of federal resources and resulting “radical underenforcement,” see Daniel C. Richman & William J. Stuntz, Essay, Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution, 105 COLUM. L. REV. 583, 613-14 (2005).} In cases involving industry collusion, one player after another might be targeted, or less culpable corporate partners might be targeted first, to go after the “big fish” among a number of corporations. Questions will arise whether and under what circumstances prosecutors may use the statements or information provided by the cooperating entity to support such entity prosecutions.\footnote{See Garrett, Structural Reform, supra note 2, at 867 (regarding possible use of these admissions by the IRS and the DOJ).} The admissions of the corporation may include information gleaned from internal and government investigations and quite detailed accounts of wrongdoing. Prosecutors could make powerful use of that information in subsequent prosecutions of another firm, or of another firm’s employees. In recent cases, prosecutors have begun to do just...
that.\textsuperscript{37} Again, no Fifth Amendment issues arise as to such detailed admissions of an entity’s wrongdoing, but such statements may prove highly valuable to the government in corporate prosecutions.

II. CONFESSIONS BY INDIVIDUALS AND THE PENALTY CASES

A. DOJ Guidelines and the KPMG Case

The confessions that have attracted controversy are not those of the corporation, but those of the individual current or former employees who provide statements during a criminal investigation. As to those sorts of inculpatory statements, the Fifth Amendment’s application remains murkier. The DOJ’s prosecution agreements not only place a focus on structural reform, but they also facilitate the prosecution of the individual employees deemed to have played the most serious role, who after all, may be punished with fewer collateral consequences to blameless employees and shareholders. Thus, the Thompson Memo emphasized that the “[p]rosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation” and that “[o]nly rarely should provable individual culpability not be pursued, even in the face of offers of corporate guilty pleas.”\textsuperscript{38}

Unlike in the typical criminal case, federal prosecutors provided advance guidance on what sorts of cooperation they value. The Thompson Memo listed as factors, “the adequacy of the prosecution of individuals responsible for the company’s malfeasance” and “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.”\textsuperscript{39} The Memo elaborated: “Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents.” The Memo added that:

\textit{[W]hile cases will differ depending on the circumstances, a corporation’s promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through

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\textsuperscript{37} See United States v. Stolt-Nielsen, 524 F. Supp. 2d 609, 627-28 (E.D. Pa. 2007) (“When Stolt-Nielsen approached the Division in November 2002 to report its antitrust violations, the Division did not have sufficient evidence to sustain a conviction of any company in the parcel tanker industry. Using highly incriminating evidence produced by Stolt-Nielsen and its employees, including the ‘combined lists’ provided by Wingfield, the Division obtained the benefit of its bargain—it successfully dismantled the cartel and secured guilty pleas from Stolt-Nielsen’s co-conspirators which included prison terms and fines totaling $62 million.”).

\textsuperscript{38} See Thompson Memo, supra note 15, at Part I.B.

\textsuperscript{39} Id. at Part II.A.
providing information to the employees about the government’s investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation’s cooperation.40

The Securities and Exchange Commission and other federal agencies similarly use such cooperation as an important consideration when they decide whether to impose civil penalties on a firm during regulatory action.41

Prosecution emphasis on corporate cooperation sparked a remarkable outcry amongst the bar, a few scholars, and in Congress, which has pending legislation that would forbid rewarding a corporation for its waiver of attorney-client privilege and securing employee cooperation by terminating wrongdoing employees.42 Most of the outcry centered on pressure to waive attorney-client privilege, sensibly so from a defense perspective, because the documents prepared by counsel may be central to the government’s case.43 While corporate crime prosecutions remain highly document dependent,44 employee or former employee testimony can provide a critical piece in the government’s case. Further, as George Cohen notes, “[t]he main motivation for employees to cooperate with corporate investigations has always been the threat of being fired or incurring other job-related consequences, not the corporate privilege.”45 This Article examines such pressures applied on employees.

Commentators argue that federal prosecutors coerce cooperation of firms, which in turn pressure employees to provide statements to prosecutors, or risk non-advancement or non-payment of legal fees, which can be substantial in complex white collar prosecutions. In

40 Id., at Part VI.B.
43 The outcry may not have been entirely justified, as DOJ practice was far from uniformly insistent on waiver; between the time the Thompson Memo was released in 2003 and 2007, “the DOJ did not seek privilege waiver in many of its agreements, though it did seek privilege waiver in the majority, or twenty agreements (fifty-seven percent).” Garrett, Structural Reform, supra note 2, at 900.
44 See Braswell v. United States, 487 U.S. 99, 115 (1988) (“The greater portion of evidence of wrongdoing by an organization or its representatives is usually found in the official records and documents of that organization.”) (internal quotation omitted).
response to the outcry, the DOJ revised its Thompson Memo guidelines; the 2006 McNulty Memo stated that prosecutors “generally should not take into account” payment of legal fees and must seek approval from the Deputy Attorney General to do so, though leaving unchanged considering failure to terminate non-cooperating employees and existence of a joint defense agreement. The latest iteration of the Principles of Federal Prosecution of Business Organizations, the 2008 Filip Memo, changed this language to make a far clearer statement forbidding consideration of employee compensation or discipline. The Memo states that “prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys’ fees or providing counsel to employees, officers or directors under indictment.” The Memo adds, “Likewise, prosecutors may not request that a corporation refrain from taking such action.” The Memo does not, however, address termination or other discipline of employees.

Few have asserted Fifth Amendment claims, where most employees, blameless or not, assist in an investigation voluntarily, and the overwhelming majority of employees who prosecutors do pursue, just as their employer does, plead guilty and then cooperate. Current regulations encourage “layering” of internal investigations, with simultaneous efforts that may include: audits conducted by audit committees; independent investigations by the board and board committees; internal investigations by the management employing in-house or outside counsel; and compliance with “real-time” investigations by regulators. Following such compliance efforts, preventative measures may be adopted and discipline may be imposed, including firing uncooperative employees and refusing to pay their legal

48 Id.
49 See Buell, supra note 5, at 1648-49.
50 See Kathleen F. Brickey, In Enron’s Wake: Corporate Executives On Trial, 96 J. CRIM. L. & CRIMINOLOGY 397 (2006) (developing data regarding prosecutions of corporate executives showing that ninety percent pleaded guilty, “virtually all” of whom became cooperating witnesses for the government, often in trials of “high-level executives”). A typical case is the recent guilty plea of three top members of Oxycotin-maker Purdue Pharma, along with the entity’s plea agreement and non-prosecution agreement involving adoption of compliance measures. See Barry Meier, In Guilty Plea, OxyContin Maker to Pay $600 million, N.Y. TIMES, May 10, 2007, at C2.
fees. Any Fifth Amendment claims would be litigated only in cases in which the employer makes efforts to secure employee cooperation after prosecutors become involved, and where employees do agree to provide statements, they are prosecuted, but they do not plead guilty but rather proceed to trial.

The KPMG prosecution provided the example that focused criticisms of these policies. Contributing to a revival of interest in the Supreme Court’s line of “penalty cases,” Judge Kaplan found that two KPMG employees, one a senior vice-chair and the other a junior partner, made statements based on pressure to cooperate or lose advancement of up to $400,000 in legal fees, and that this was coercion violating the Fifth Amendment protection against compelled self-incrimination.Both employees had made statements to prosecutors after signing proffer agreements, which receive a strong presumption of voluntariness. The vice-chair had initially refused to proffer, but according to Judge Kaplan, changed course “acting against the advice of his attorney and in order to keep his job” after the government reported his non-cooperation to KPMG, which in turn “implicitly but unmistakably threatened to fire him if he did not fall into line.” The junior partner had provided three separate statements under proffer agreements, according to the court, viewing himself as a whistleblower cooperating with the investigation, but also “because he could not afford to pay for what he regarded as an adequate defense.”

The court found that KPMG’s conduct was “fairly attributable” to the government, and that this pressure was applied on the two employees because the U.S. Attorney’s Office “threatened also to consider any failure by KPMG to cause its employees to make full disclosure to the government as favoring indictment.” Judge Kaplan later dismissed the indictments against those two employees and eleven others on other grounds, citing to the Sixth Amendment right to counsel, as affected by KPMG’s failure to advance employee legal fees so it is unclear whether the Second Circuit will take up the Fifth Amendment issue.


See Stein II, 440 F. Supp. 2d. at 321 n.20 (The agreements stated “the government may not use the statement in its case-in-chief, but it is free to use leads obtained from it and may use the statement on cross-examination and in a variety of other circumstances.”); Benjamin A. Naftalis, “Queen For A Day” Agreements And The Proper Scope Of Permissible Waiver Of The Federal Plea-Statement Rules, 37 COLUM. J.L. & SOC. PROBS. 1 (2003).


Id. at 323.

Stein I, 435 F. Supp. 2d at 334.

Stein II, 440 F. Supp. 2d at 318.

The Second Circuit did not take up the Fifth Amendment issue in its ruling. Largely because it found not clearly erroneous Judge Kaplan’s factual findings that “but for the Thompson Memorandum and the prosecutors’ conduct, KPMG would have advanced legal fees without condition or cap,” the Second Circuit affirmed the finding of a Sixth Amendment violation.59

B. Revisiting the Penalty Cases

In the Supreme Court’s line of penalty cases, the Court stated that “threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion” and that those goods can not in some circumstances be constitutionally conditioned on a waiver of the Fifth Amendment privilege.60 Some commentators have similarly argued in response to the KPGM decision and recent corporate prosecutions that the penalty cases should apply in corporate prosecutions.61 The penalty cases deserve closer examination.

The Supreme Court in Garrity v. New Jersey first held that the Fifth Amendment supported exclusion absent coercion during a custodial interrogation, where under a state statute, police officers would be have their employment terminated should they not cooperate with a criminal investigation.62 The Court then extended Garrity to other contexts, ranging from an attorney disbarred by a court order for failure to comply with a subpoena, in Spevach v. Klein63; independent contractors, threatened with statutory disqualification from government contracting for five years if the did not waive privilege and answer questions, in Lefkowitz v. Turley;64 and an unsalaried political party official, facing statutory disqualification from public office for five years absent refusal to waive Fifth Amendment privilege, in Lefkowitz v. Cunningham.65

In a further and not uncontroversial extension of the doctrine, appellate courts have given the penalty cases greater force by treating statements found to be coerced by such penalties to be subject not just to exclusion, but to a “Garrity immunity” such that, like immunized statements they are not just suppressed in their use at trial, but also in

59 U.S. v. Stein, 541 F.3d 130, 144 (2d Cir. 2008).
61 See supra notes 4-5.
63 385 U.S. 511 (1967).
their derivative use, along with any fruits of the affected testimony.\textsuperscript{66}

The penalty cases remain distinctive in a number of respects. They each involved state action; they each involved a penalty of severe economic harm threatening livelihood; they each involved action upon an individual and not a separate charged entity; none involved negotiated agreements like proffer agreements; and they all involved a context specific analysis of voluntariness.

1. State Action and Charging Decisions

State action was present in each of the penalty cases, because in each of those cases, the government itself sought to extract information by using the threat of a penalty, either through the direct operation of state statutes or, in \textit{Spevach}, a court order. In contrast, the typical corporate prosecution will not involve state action during the charging stage, where any “cooperation” is not the product of joint interests and participation in a common project. Prosecutors pursue cases as adversaries and not as allies. A firm in a corporate prosecution will typically remain a prosecution target, given broad respondeat superior standards.\textsuperscript{67} Prior to entering a deferred prosecution or plea agreement, the firm’s interests will typically not be aligned with but opposed to the government’s.

The Supreme Court admits that “[w]hat is fairly attributable” to the state “is a matter of normative judgment, and the criteria lack rigid simplicity.”\textsuperscript{68} Clear cases of state action include the situation where the state delegated a public function to private persons or controlled a private entity using explicit or implicit orders.\textsuperscript{69} In more muddled relationships between state and private actors, the Court has found state action if the government had “pervasive entwinement”\textsuperscript{70} with relevant operations of the private entity, or exercised “coercive power.”\textsuperscript{71} Though not uncontroversially so, decisions adopt a narrow view of circumstances required to find a private entity a joint participant with the state, in part to avoid undue extension of constitutional regulation to private entities.\textsuperscript{72} Based on these state action rulings, in the white collar


\textsuperscript{67} See N.Y. Central & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909).


\textsuperscript{69} Id.

\textsuperscript{70} Id.

\textsuperscript{71} Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

\textsuperscript{72} See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (requiring “close nexus between the State and the challenged action” such that seemingly private behavior “may be fairly treated as that of the State itself”).
crime context, lower courts have held that no Fifth Amendment issues arise as to interviews conducted even by heavily regulated private actors, such as the National Association of Securities Dealers.\(^{73}\)

During the charging stage, far from being a partner of the prosecution, the corporate employer not only remains a target, but risks committing the additional crime of obstruction of justice if it does not ensure that its employees do not hinder the investigation. Obstruction of justice charges led to the demise of Anderson; such charges may also be far easier to prove than the underlying fraud.\(^{74}\) The firm could also be responsible if employees do not remain silent, but make false statements to investigators—including the mere denial of the commission of a crime.\(^{75}\) While employees may be placed between a rock and a hard place, the entire firm shares that unenviable position.

Causation might be difficult to show, where employers have good reasons to themselves independently desire to discipline non-cooperative employees, even apart from any pending investigation and avoidance of secondary crimes. As discussed next, employer discipline may be permitted for any reason in an at-will state. The firm may also desire to avoid employee assertion of Fifth Amendment rights not just due to criminal but also civil consequences.\(^{76}\)

Finally, to the extent the government took any action at all in promulgating the Thompson, and McNulty and now Filip memos, it publicly announced not a penalty, but factors to be considered in its purely discretionary exercise as to charging, an area in which prosecutors traditionally have almost unlimited legal latitude.\(^{77}\)

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\(^{73}\) See, e.g., United States v. Solomon, 509 F.2d 863 (2d Cir. 1975); D.L. Cromwell Invests., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 161 (2d Cir. 2002); see also U.S. v. Stein (Stein II), 440 F. Supp. 2d 315, 335-37 (S.D.N.Y. 2006).

\(^{74}\) Arthur Anderson LLP v. United States, 544 U.S. 696 (2005) (found guilty of violating 18 U.S.C. §§ 1512(b)(2)(A)-(B) (2006)). “These sections make it a crime to knowingly use intimidation or physical force, threaten, or corruptly persuade another person with intent to cause that person to withhold documents from, or alter documents for use in, an official proceeding.” Id. at 698 (internal quotations omitted); see also John Hasnas, Ethics and the Problem of White Collar Crime, 54 Am. U.L. Rev. 579, 618-19 (2005).

\(^{75}\) Brogan v. United States, 522 U.S. 398, 400 (1998); 18 U.S.C. § 1001 (2006); Richman & Stuntz, supra note 35, at 637 (criticizing the Court’s broad interpretation of the false statement statute to include a mere denial of guilt).

\(^{76}\) In any civil litigation, Fifth Amendment invocations by employees may result in an adverse inference drawn against the corporation, even if the employees were terminated. See, e.g., FDIC v. Fidelity & Deposit Co., 45 F.3d 969 (5th Cir. 1995); Cerro Gordo Charity v. Fireman’s Fund Am. Life Ins. Co., 819 F.2d 1471 (8th Cir. 1987); Rad Servs. Inc. v. Aetna Cas. & Sur. Co., 808 F.2d 271 (3d Cir. 1986); Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509 (8th Cir. 1984); Brink’s Inc. v. City of New York, 717 F.2d 700 (2d Cir. 1983).

\(^{77}\) To the extent that the ruling in Stein II was based on any direct threats found to have been made, prosecutors can simply in the future avoid any reference during negotiations to employee discipline. After all, general statements of principle such as in the McNulty Memo send the desired message, but without using direct coercion. Judge Kaplan found that the U.S. Attorney’s Office “threatened also to consider any failure by KPMG to cause its employees to make full disclosure to the government as favoring indictment.” Stein II, 440 F. Supp. 2d at 318.
To find state action under such circumstances extends the concept of state action beyond its farthest limits: beyond the Supreme Court’s penalty cases, which applied only to state statutes and judicial orders; applying the notion to firms that are the targets of criminal prosecutions with adverse interests to the government; and finding action where the government exercised purely discretionary charging decisions. Supposing state action extended to such adversarial and ill-formed situations as fluid as the investigation and negotiation that leads to a charging decision, prosecutors could never be certain which employees a judge might later determine were coerced under the totality of the circumstances, thus tainting an entire prosecution.78

The Second Circuit did find state action in its Stein decision. However, it did so largely in deference to the factual findings of the lower court, which determined that “the government forced KPMG to adopt its constricted Fees Policy.”79 Withdrawal of attorneys’ fees more directly implicates a Sixth Amendment right to counsel than the Fifth Amendment right related to employee statements discussed here. The Second Circuit did, however, include broad language on state action suggesting that though a target of a prosecution is typically an adversary, “The government's threat of indictment was easily sufficient to convert its adversary into its agent.”80

In addition to the factual findings from the lower court, the Second Circuit relied upon language in the Thompson Memo stating that one factor to be considered in whether to prosecute a corporation is whether that corporation shields, or “appears to be protecting its culpable employees and agents.”81 That entire paragraph on “Shielding Culpable Employees and Agents” was eliminated in the section on cooperation in the new Filip Memo.82 The Thompson Memo discussed the issue of

Regardless, a threat to consider does not make for a direct showing of coercion. This is particularly so where indictment would be a legitimate course; prosecutors have no obligation to offer leniency to a target entity. Possible withdrawal of a discretionary benefit to an employer is very different from a penalty the state directed at an employee, for state action purposes at least.

78 As Sam Buell describes, further problems arise, where “(1) civil regulatory agencies, beyond the control and knowledge of criminal authorities, often investigate and take statements in a matter before it progresses to the criminal stage; and (2) a firm and its employees would have the ability and the motive to confer ‘Garrity immunity’ and cause that immunity to permeate the state’s enforcement efforts by disseminating immunized statements.” See Buell, supra note 5, at 1645. Garrity immunity, if extended to such ambiguous situations, might require prosecutors to adopt in all corporate prosecutions, the cumbersome technique adopted in police misconduct cases in which the trial team of prosecutors can only examine evidence vetted and approved by a separate “Garrity team” that first investigates any potentially coerced statements. For analysis of this problem in police misconduct prosecutions, see Clymer, supra note 66, at 1332 (“Without a clear warning, prosecutors and investigators may overlook the possibility that Garrity immunity has attached and thus neglect to avoid exposure or take other precautions.”).

79 U.S. v. Stein, 541 F.3d 130, 148 (2d Cir. 2008).
80 Id. at 151.
81 Id. at 148.
82 Filip Memo, supra note 47, at 7.
making employees available for interviews. It stated that prosecutors will consider whether the firm “engaged in conduct that impedes the investigation” for example by “inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed.”

In contrast, the Filip Memo now steers clear of any consideration whether employees participated in interviews. It instead states that examples of obstruction “could include: inappropriate directions to employees or their counsel, such as directions not to be truthful or to conceal relevant facts; making representations or submissions that contain misleading assertions or material omissions; and incomplete or delayed production of records.” Thus, DOJ has allayed potential Fifth Amendment concerns arising from language in the Thompson and McNulty Memos.

Further, the reason the Second Circuit found state action was that Judge Kaplan had found that KPMG did not have a clear policy on advancement of attorneys fees, and that the prosecutors themselves secured the KPMG decision to condition payment of fees on cooperation with the government. Even assuming prosecutors were to take such a heavy handed approach in a case after Stein (and doing so would be contrary to the Filip Memo), they could only impose policy where a corporation like KPMG had no existing policy on say, employee interviews, and instead merely followed the Government’s lead, or where the corporation changed pre-existing policies due to government pressure.

Now, if a corporation does change pre-existing corporate compliance policies regarding employee interviews to accede to prosecution demands, then perhaps state action exists. Such situations may be far more likely to occur where a corporation has deficient compliance programs, and is then subject to a deferred or non-prosecution agreement designed to overhaul such procedures. Thus, far more interesting state action questions, explored by Lisa Griffin, will arise during internal investigations supervised by monitors established by deferred prosecution agreements, non prosecution agreement, or plea agreements with prosecutors. Such agreements typically contain terms requiring the entity to hire monitors chosen by the prosecutors with sweeping powers to remedy any persistent criminality. Those

83 Thompson Memo, supra note 15, at VI(B).
85 Stein, 541 F.3d at 148-50.
86 Lisa Griffin develops how although otherwise state action might be “more attenuated” during an internal investigation, it is more readily observed when employer discipline is “according to the express requirements in a DPA.” Griffin, supra note 5, at 358, 368.
87 For a description of those agreements and the powers they provide to monitors, see Garrett, Structural Reform, supra note 2, at Parts I.A, II.A-B; regarding ongoing cooperation obligations,
monitors report to prosecutors but are paid by the corporation. So far, in the years since these agreements have been entered into, no individual prosecutions arose from inquiries conducted under such agreements.88 If new individual prosecutions were to result, however, such a contractual monitoring agreement may very well render the firm a state actor.

2. The Voluntariness Inquiry and Private Employer Discipline

The Fifth Amendment’s voluntariness test must also be satisfied. The court must find that the individual’s will was overborne based on an objective and subjective inquiry into the totality of the circumstances.89 In the KPMG case, all of the defendants but two, Judge Kaplan ruled, failed to satisfy that test.90 In the penalty cases, the Supreme Court did not clearly apply its modern voluntariness test, in part because those decisions mostly precede its modern jurisprudence. The Court did state, however, that mere economic pressure is not enough, but that it must rise to the level of coercion, and must therefore be “substantial,” tantamount to “economic catastrophe,” similar to the “end of their police careers” that the plaintiff’s in Garrity faced, or the disbarment faced in Spevack.91 More recently, the Court’s plurality took a narrower view in summarizing that “[t]hose cases . . . involved free citizens given the choice between invoking the Fifth Amendment privilege and sustaining their economic livelihood.”92 That formulation does expand the type of impermissible state penalty from loss of public employment to other severe economic harm, but the harm must be

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88 Indeed, in at least one case, the University of Medicine and Dentistry of New Jersey case, although the monitor uncovered substantial new criminality, the deferred prosecution agreement was permitted to expire with no new prosecution announced. Josh Margolin and Ted Sherman, UMDNJ Trustees Vote to Take Back the Reins, Christie to End Monitorship After Board Declines Offer to Continue, THE STAR-LEDGER, Dec. 14, 2007, at 31.

89 See Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (“In determining whether a defendant’s will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—the characteristics of the accused and the details of the interrogation.”); see also Mark A. Godsey, Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination, 93 CAL. L. REV. 465 (2005).


91 U.S. ex. rel. Sanney v. Montanye, 500 F.2d 411, 415 (2d Cir. 1974); see also Lefkowitz v. Turley, 414 U.S. 70, 82 (1973). Of course, in Turley, the Court did not require loss of livelihood. The independent contractors in Turley faced only five years of disqualification from state contracts, only one source of income, albeit a lucrative one. The Court noted, however, that the effects swept far more broadly where any firm that employed such a contractor under the New York statute at issue would itself be subject to disqualification. Id. at 84. Similarly, Cunningham involved a five year disqualification from public office combined with resulting severe effects on reputation. Lefkowitz v. Cunningham, 431 U.S. 801, 804 (1977).

severe.

Employer discipline short of such harm may not satisfy the Fifth Amendment standard. For example, denial of advance payment of attorneys fees is not “economic catastrophe” within the meaning of the penalty cases, though of course of critical importance to the employees facing prosecution. It is the private withdrawal of a discretionary benefit and not a state penalty. If it were to be provided based on a contractual obligation, the firm could not withdraw payment (without facing a likely meritorious breach of contract suit). While all criminal defendants would benefit from the ability to afford the attorney of their choice, most defendants lack the luxury of an employer that advances legal fees. A threat to fire, on the other hand, if it could be attributed to the government, could depending on the circumstances, satisfy the penalty cases definition of coercion given a substantial threat, tantamount to career-ending consequences.

A separate question remains whether the penalty cases, all decided decades ago, can be squared with the Court’s more recent voluntariness jurisprudence. The evidence KPMG had some kind of implied contract based on unwritten prior practice may also be quite thin. See Stein v. KPMG, LLP, 486 F.3d 753, 762 n.3 (2d Cir. 2007) (“KPMG’s alleged ‘uniform practice,’ . . . of paying the legal fees for indicted employees and partners—seemingly an indispensable element of an ‘implied-in-fact’ contract—appears to consist of a single instance in which KPMG paid the legal fees of two partners indicted and convicted in a 1974 criminal case. . . . What is more, when the appellants moved to dismiss the indictment on Sixth Amendment grounds, they took the position that the payment of legal fees was a matter of KPMG’s freedom of choice, stipulating with the government that ‘it had been the longstanding voluntary practice of KPMG to advance and pay legal fees.’”) (emphasis added and citations omitted). Judge Kaplan found “KPMG long had paid legal fees for any of its employees who were sued or charged with crimes as a result of doing their jobs . . . .” Stein II, 440 F. Supp.2d at 318.

Stein, 486 F.3d at 762 (“One aspect of that policy was to take into account whether the firm was voluntarily paying the legal expenses of members or employees who had been indicted, see Thompson Memo, supra note 15, at 7-8, a factor deemed to favor indictment under the Thompson Memorandum. Id. That document gave no such weight to payments required by contract.” (citations replaced with internal cross references); see also Nishchay H. Maskay, The Constitutionality of Federal Restrictions on the Indemnification of Attorneys’ Fees, 156 U. PA. L. REV. 491 (2007).

In the decision ultimately dismissing most of the indictments, Judge Kaplan explained:

This is not to say that attorneys appointed under the CJA inevitably could not provide the minimally effective defense that the Constitution requires. That is unclear, one way or the other. But it is to say that defendants would be wiped out financially as a result of the government’s actions before they became eligible for CJA representation and that the representation they would receive in that event would be constrained in ways that would not have obtained absent the government’s interference.

U.S. v. Stein, 495 F. Supp. 2d 390, 421 (S.D.N.Y. 2007). Kaplan argued that the constitution, based on a substantive due process theory of his innovation, “prevents the government from interfering if a criminal defendant is fortunate enough to have someone who is willing to give the defendant the money to pay for a defense, even a very expensive one.” Id. at 425.

For an excellent treatment of the issue, see Clymer, supra note 66, at 1344-46 (“Although some older decisions suggest that confessions that are not the result of free will should be suppressed regardless of the methods police used to obtain them, the Court repudiated that view
from doctrinally uniform, and the Supreme Court has not itself sorted out how the penalty cases fit in with the main body of its self-incrimination jurisprudence.\footnote{Ronald J. Allen & M. Kristin Mace, The Self-Incrimination Clause Explained and Its Future Predicted, 94 J. CRIM. L. \\& CRIMINOLOGY 243, 243-45 (2004); William J. Stuntz, Self-Incrimination and Excuse, 88 COLUM. L. REV. 1227, 1228 (1988). Justice O’Connor acknowledged the lack of coherent doctrine in this area in \textit{McKune}: Forcing defendants to accept such consequences seems to me very different from imposing penalties for the refusal to incriminate oneself that go beyond the criminal process and appear, starkly, as government attempts to compel testimony; in the latter context, any penalty that is capable of compelling a person to be a witness against himself is illegitimate. But even this explanation of the privilege is incomplete, as it does not fully account for all of the Court’s precedents in this area. 536 U.S. at 53 (O’Connor, J., concurring).} One possibility is that coercion is analyzed more generously where the threats are economic outside the custodial setting. That result would be highly perverse, given the core purpose of the Fifth Amendment to protect against physical and psychological torture.\footnote{However, such a divergence would fit in with a range of means by which our system treats white-collar crime differently than street crime. See Darryl K. Brown, Street Crime, Corporate Crime, and the Contingency of Criminal Liability, 149 U. PA. L. REV. 1295 (2001).} Indeed, in its only recent decision revisiting the penalty cases, the Court ruled that requiring inmates to self-inculpate as part of participation in a sex-offender program as a condition of parole did not implicate the Fifth Amendment, noting the two poles regarding “the physical torture against which the Constitution clearly protects” and “the \textit{de minimis} harms against which it does not.”\footnote{\textit{McKune}, 536 U.S. at 41.}

The Court is deferential to bargaining that occurs when employees decide whether to provide proffers and prosecutors decide whether to extend leniency or immunity.\footnote{United States v. Mezzanatto, 513 U.S. 196, 207 (1995).} The Court has also expressed the policy concern in \textit{Braswell v. United States}, with avoiding “a detrimental impact on the government’s efforts to prosecute ‘white-collar crime,’ one of the most serious problems confronting law enforcement authorities.”\footnote{For a careful discussion of these decisions, see Bharara, supra note 5, at 100.}

The Supreme Court also arguably ratcheted the standard for showing coercion and the causal nexus between state action and coercion in \textit{Colorado v. Connelly}, a case in which the defendant suffered from severe delusions and thought he was hearing the “voice of God” during his interrogation (after confessing, he was medicated for six months before found competent to stand trial for murder).\footnote{479 U.S. 157, 161 (1986); \textit{id.} at 175 (Brennan, J., dissenting).} Nevertheless, the Court found that where no pressure was applied to him, there was no “essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the
other.”103 The Court added that “[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.”104 Whether the Court’s decision was defensible as a matter of Fifth Amendment law, its reasoning, demanding a close link between state action, coercion and the confession produced, supports a view that the Court would not today extend the penalty cases.

To conclude, the state action doctrine does not support finding private employment decisions made during criminal investigations to be state action, absent a formal cooperation agreement with prosecutors or perhaps a change in corporation policy at the government’s behest. Nor would coercion be easily shown, at least as to denial of attorneys fees. Further, sound practical reasons counsel against such a regime. For exclusion to apply to mere implicit encouragement to target entities to discipline potentially culpable employees would extend the penalty cases to any number of routine employment decisions made under the shadow of criminal investigations.105 The consequences could hamper corporate crime prosecutions and disrupt corporate governance.106

103 Id. at 165.
104 Id. The Court found that exclusion serves no purpose under such circumstances, noting a lack of a concern with reliability (surprising, when assessing with statements by a delusional person), but also that exclusion would not in such circumstances “substantially deter future violations of the Constitution.” Id. at 166. The Court concluded that “[w]e hold that coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment.” Id. at 167.
105 As Sam Buell explains:
A rule turning on economic detriment, aside from being a severe departure from existing Garrity doctrine, would be unmanageable. An employee would be able to manipulate virtually any interaction with the employer over a questioning issue into a case of suppression, by forcing the employer to threaten some consequence to the employee. Such a rule would be overbroad in relation to the interests that might justify extending Garrity. And it would lead to spillover problems in other areas of Fifth Amendment doctrine turning on compulsion.
Buell, supra note 5, at 1642-43.
106 However, the Court ruled in Arizona v. Fulminante, 499 U.S. 279 (1991), that improper admission of concededly unconstitutionally admitted confession statements may be harmless error. In that case, the parties agreed that Fulminante made statements to an inmate who was acting as an agent for the government, and the Court accepted the state court’s conclusion that he faced a credible threat of physical violence from which the agent-inmate promised protection. Id. at 287 n.4. In document-intensive white collar prosecutions, particularly where the entity is cooperating and providing access to witnesses and documents, even improper admission employee statements and their fruits may be harmless error.
III. PRIVATE CONTRACT AND CRIMINAL PROSECUTIONS

A. Employment Relationships During Criminal Investigations

High-level employees face enormous pressure from all sides during an investigation, from supervisors within the corporate employer, corporate counsel, independent auditors, the Board, state and federal regulators, civil litigants, and finally from prosecutors. Any relationship formed with law enforcement, such as pursuant to a proffer agreement, adds only one final layer above a series of contractual obligations that govern employee status within the firm. Focusing on criminal procedure, specifically the Fifth Amendment, distracts from more important sources for employee protections. Employee relationships are primarily structured by employment contracts with agents together with employment law regulation of such contracts. Further, firms can and will contract around criminal procedure rules, perhaps in ways that undermine effectiveness of any criminal procedure rule.

The background norm against which relations between employees and firms are analyzed remains at-will employment in most states.107 For good reasons, employment contracts have not protected a norm of anti-retaliation for employee silence during investigations of potentially criminal malfeasance. In some cases, the ability to fire wrongdoing employees may be limited by union contracts, or by employment contracts negotiated by high-level officers. Employees also have a duty of loyalty, or a duty to cooperate with their employer, included in statutes in most states and interpreted as implicit in any employment relationship in other states.108 Unless the employer makes unreasonable demands (or uses statutorily prohibited techniques such as a polygraph),109 the employee must cooperate. A request to assist with an internal investigation is presumptively reasonable and failure to cooperate would be proper grounds for termination based on

107 Cynthia L. Estlund, Wrongful Discharge Protections in an At-Will World, 74 TEX. L. REV. 1655, 1674 (1996) ("The at-will rule presumptively concedes to the employer the power to fire at any time for any reason; unless and until the employee can overcome all the hurdles of delay, cost of litigation, and difficulties of proof in establishing a wrongful discharge, she remains out of a job and without relief."); see also Akhil Reed Amar & Renee B. Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 MICH. L. REV. 857, 868 (1995) ("A responsible private employer may draw sensible inferences from silence and fire the bank clerk who refuses to respond to accusations of pilfering.").


insubordination. Employment contracts may also require cooperation in any criminal investigations, as well as internal or external investigations.

Although some states have public policy exceptions to at-will employment, they do not protect employee silence during internal or government investigations, but the reverse—they protect employee speech that assists an investigation by whistle blowers.\textsuperscript{110} Civil whistleblower protections and retaliation claims together with Sarbanes-Oxley protections further encourage such employee speech; thus a situation where a corporation would have to tread carefully is that in which the whistleblower refuses to cooperate with an internal investigation but has spoken to outside investigators.\textsuperscript{111}

Corporations would be highly likely to contract around any regime in which they would be subject to prosecution for employee malfeasance and yet would be unable to avoid indictment by disciplining or terminating culpable employees. Employers can and do try to avert law enforcement pressure by conducting an internal investigation quickly, perhaps in conjunction with regulators (who increasingly emphasize “real-time” investigation), before prosecutors become involved.

Once law enforcement is involved, as George Cohen writes, inculpating responsible employees is crucial to any effort by the entity to secure an agreement to avoid prosecution: “[t]he ability to help the government nail suspected employee ‘bad guys,’ which includes the ability to waive the privilege, is precisely the ‘cooperation’ that the corporation has to ‘sell’ to the government.” Once employee conduct is the subject of a government investigation, the employer has great incentives to avoid the potentially dire consequences of an indictment by fully cooperating with prosecutors.

Nothing in this analysis supports any notion that firms should neglect to discipline culpable employees. Some practitioners recommend such a step; one states “[i]n short, in the current environment, we believe that the reasoning behind Judge Kaplan’s decision counsels the internal investigator to refrain from threatening an employee with termination if he does not cooperate with the government.”\textsuperscript{112} The \textit{Stein} decisions provide no reason to fail to discipline employees that do not cooperate with internal or government investigations—but they highlight that such decisions should be made

\textsuperscript{110} Estlund, \textit{supra} note 107, at 1661 n.26.


under clear and pre-existing policies, and not at the government’s behest.

Second, as to attorneys fees, corporations may revise their indemnification agreements to clarify their obligations in response to decisions like that in Stein, or as part of efforts to discourage malfeasance. Executives often secure indemnification provisions in contracts, often as required by state law, for legal costs and liability in civil cases and for advancement of legal costs in criminal matters. Where corporate codes in many states bar indemnification in criminal matters, unless the executives prevail on the merits, firms often include contracts that advance costs for legal defense and reserve a final decision whether to pay them after conviction, by which time employees may not recover. The Thompson Memo was clear that such required payment is not indicative of non-cooperation: “Some states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation’s compliance with governing law should not be considered a failure to cooperate.” Such contractual terms would not be altered during negotiations with the DOJ and a breach would result in successful suits by employees. Firms could benefit by clarifying to all employees whether under the contract, written or implied, the firm must advance legal fees in the event of a criminal investigation. Indeed, a firm could choose to routinely provide separate counsel to employees during an investigation. Further, as discussed next, retaining separate counsel may be the best protection for individual employees during a criminal investigation. However, it may tend to be only higher level employees with greater bargaining power that obtain contractual agreements entitling them to separate counsel.

B. Attorney Client Privilege, Not Fifth Amendment Privilege and the Provision of Warnings

The Miranda rule was adopted because “the coercion inherent in

114 For example, the Delaware Code provides that indemnification for criminal matters is permitted only if the executive meets certain conditions, including having “no reasonable cause to believe his conduct was unlawful.” DEL. CODE ANN. tit. 8, § 145(a) (1983 & Supp. 1988).
115 Pamela H. Bucy, Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal, 24 IND. L. REV. 279, 287, 325 (1991). State statutes governing mandatory indemnification often require that the executive have been successful “on the merits” and not simply secure dismissal of the charges or a favorable plea bargain, while statutes typically do not permit indemnification unless the executive “had no reasonable cause to believe that his conduct was unlawful.” See, e.g., tit. 8, § 145(a).
116 Thompson Memo, supra note 15, at n.4.
custodial interrogation blurs the line between voluntary and involuntary statements” requiring the adoption of “concrete constitutional guidelines for law enforcement agencies and courts to follow.”\textsuperscript{117} The penalty cases represent an additional means by which the Court crafted “‘extensions’ of the bare guarantee,”\textsuperscript{118} to protect the privilege, in a manner that does not seek to clarify the standards that govern an interrogation process, but rather prevents entirely the use of statements in the situation in which the state directly and severely penalizes the assertion of the Fifth Amendment privilege. During organizational confessions, the relevant statements are not typically made in a custodial setting, and \textit{Miranda} does not apply.\textsuperscript{119} As described, state coercion is also attenuated during organizational interviews and proffer sessions with the government. In contrast, employer pressure may be quite direct and may distort the investigative process. Certain warnings are sensibly provided, if not to avoid the dangers of physical and psychological torture and false confessions the Court was concerned with in \textit{Miranda}, then to secure reliable information, avoid conflicts of interest, and to inform employees of their rights.

A series of such internal “warnings” are typically given to employees during internal investigations by the organization.\textsuperscript{120} Employees who are the targets in corporate prosecutions will often be accompanied at proffer sessions by counsel to the firm and not by their own counsel. An emerging literature recommends various approaches towards warning employees, arising in part due to the unsettling of prior practices caused by the surge in recent prosecutions. Former United States District Judge Frederick Lacey coined the term “Adnarim” warnings for such cautionary instructions, that is, \textit{Miranda} spelled backwards.\textsuperscript{121} The warnings are in no way constitutionally required, but

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{117} Dickerson v. United States, 530 U.S. 428, 435 (2000) (internal quotations omitted).
\item \textsuperscript{118} Chavez v. Martinez, 538 U.S. 760, 777 (2003).
\item \textsuperscript{119} The custody requirement for triggering the requirement to provide \textit{Miranda} warnings is whether the suspect was “deprived of his freedom of action in any significant way.” Miranda v. Ariz., 384 U.S. 436, 445 (1966).
\item \textsuperscript{120} Sarah Helene Duggin, \textit{Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview}, 2003 COLUM. BUS. L. REV. 859, 944–46 (2003); Marks, \textit{supra} note 4.
\item \textsuperscript{121} Judge Lacey’s recommended warnings include:
\begin{quote} I am not your lawyer, I represent the corporation. It is the corporation’s interests I have been retained to serve. You are entitled to have your own lawyer. If you cannot afford a lawyer, the corporation may or may not pay his fee. You may wish to consult with him before you confer with me. Among other things, you may wish to claim the privilege against self-incrimination. You may wish not to talk to me at all. What you tell me, if it relates to the performance of your duties, and is confidential, will be privileged. The privilege, however, requires explanation. It is not your privilege to claim. It is the corporation’s privilege. Thus, not only can I tell, I must tell, others in the corporation what you have told me, if it is necessary to enable me to provide the legal services to the corporation it has retained me to provide.
Moreover, the corporation can waive its privilege and thus, the president, or I, or
\end{quote}
\end{itemize}
\end{footnotesize}
ethical and pragmatic reasons explain why they are often provided. A particularly robust set of warnings would proceed as follows.

First, corporate counsel should ensure that the employees have full information regarding any possible conflict so that they may seek outside counsel. Judge Lacey recommends that counsel for the corporation inform the employee that they represent the interests of the corporation and that the employee may wish to consult with separate counsel. The caveat that the interviewer is counsel for the organization and not the employee, together with an explanation of any possible conflict, is required by the Model Rules when it is apparent that “the organization’s interest are adverse to those of the constituents with whom the lawyer is dealing.” Whether interests have become adverse may not always be clear; the comment adds that “[w]hether such a warning should be given . . . may turn on the facts of each case.” Such warnings benefit the firm by avoiding possible conflicts and later disqualifications of counsel. However, the bare warning that the attorney represents the firm may also not have a significant effect on employee behavior.

Second, Upjohn warnings should be provided, stating that all communications may be disclosed to the government without employees consent should the corporation waive its attorney-client privilege. To provide context to such warnings, the interviewer may want to explain whether a government investigation is pending; whether the corporation has retained outside counsel concerning the investigation; and whether the government has expressed an intention to separately interview employees. However, additional explanation beyond the bare warning may often not be provided. The Upjohn warnings also may not provide employees with other useful

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122 Id.
123 MODEL RULES OF PROF’L CONDUCT R. 1.13(f) (2007) (requiring corporate lawyers only to “explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the” employees).
124 Id. at R. 1.13 cmt 11.
125 Upjohn Co. v. United States, 449 U.S. 383 (1981) (holding that attorney-client privilege extends to corporate employees acting within the scope of their duties).
126 See Bennett et al., supra note 51, at 70 (“[A]lthough it may cause the employee to be less forthcoming, it is prudent to advise the employee affirmatively that the substance of the interview is likely to be disclosed to company officials or the government.”); see also Laurie P. Cohen, In the Crossfire: Prosecutors’ Tough New Tactics Turn Firms Against Employees, WALL ST. J., June 4, 2004, at Al.
information, such as whether the firm intends to waive its privilege or has done so in the past.

Additional warnings could be provided. Employees should also be told not to share the contents of their statements with others, lest privilege be waived and the investigation otherwise contaminated.127 Last, but not least, employees should be told to tell the truth. Whether further statements are provided might depend on factors including whether the corporation wishes to provide separate counsel before interviewing employees; whether immediate discipline of wrongdoers is intended; whether a prosecution is truly imminent; and what rights to advance payment of attorneys fees are included in the employment contract.128

The delivery of such comments would make a record that the employee understands the implications of the conversation and would tend to show that the employee made an informed choice. Warnings regarding policy on advancement of fees and termination of non-cooperating employees would avoid potential misunderstandings.

Providing such warnings has costs. All of these warnings, particularly Upjohn warnings, may discourage employees from providing statements at all. The effectiveness of such warnings in protecting employees is also equivocal. Employees may face employer discipline should they not cooperate. As a result, reciting a litany of warnings may not affect their behavior. The warnings do not give employees a more informed sense of the particular risks they face. Suspects routinely waive Miranda rights during custodial interrogations; perhaps employees would similarly disregard the various “Adnarim” warnings provided.129

The conflict-prevention warnings that counsel for the firm does not represent the employee and that employees may wish to seek their own counsel would be most significant if as a result employees might retain their own counsel. Even given pressure to cooperate, employees with a contractual right to attorneys’ fees may be likely to postpone interviews in order to consult with counsel. Employees who lacked the bargaining power to obtain a right to attorneys’ fees might be less likely to heed those warnings and secure counsel.

The ubiquity of some version of these warnings can be explained not by constitutional criminal procedure but by ethical rules binding attorneys and also raising practical and reputational concerns for employers. The basic Upjohn and conflicts warnings avoid uncertainty

127 See Coyne & Barker, supra note 108, at 192.
128 See id. at 191 (noting reasons to approach warnings differently depending on the situation and noting that “a debate exists about the exact scope of these warnings.”)
regarding conflicts. The alternative would be for the firm to not comply with the ethical rules or provide vague information regarding who counsel represents and then “watered-down ‘Upjohn warnings’” vaguely adverting to the fact that the firm might waive its privilege.  

If as a result of unclear representations by corporate counsel, the employee had a subjective and reasonable belief that counsel represents the employee and not the firm, then a court may find that an attorney-client relationship existed and the employee can assert attorney-client privilege. Having formed such a relationship with the employees, corporate counsel would have a conflict that might make continued representation of the corporation not possible. The relevant statements might then be subject to derivative and use immunity; courts have cited to Kastigar as providing an analogy for the immunity conferred in this context. Uncertainty regarding possible conflicts would potentially harm the firm by raising possible disqualification of counsel, but would also undermine prosecution of employees and hamper the firm’s cooperation and disclosure to the government.

Thus, sound reasons relating to attorney client privilege and conflicts of interest support giving such warnings and explain their ubiquity. However, constitutional criminal procedure and the Fifth Amendment do not. A court might avoid a difficult inquiry into voluntariness by relying on the fact that warnings were properly provided to the employee who therefore might be presumed to have waived privilege rationally and absent coercive pressure. Even that benefit would only accrue in the situation where the Fifth Amendment potentially applies, which as discussed, would be the unusual case involving close corporate collaboration with the government or corporate policy change at the behest of the government. In most situations at the charging stage, the warnings serve to protect no criminal procedure rights. They instead serve employer interests in clarity of employee expectations and avoiding unintended formation of attorney-client relationships.

The question then arises whether the Miranda analogy should be extended farther so as to render such warnings not just advisable but

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131 See In re Grand Jury Subpoena, 415 F.3d at 339.

132 See id. at 340.

133 See id.; see also United States v. Schwimmer, 924 F.2d 443, 446 (2d Cir. 1991) (stating in affirming district court ruling that no privileged information was used by government, that “[t]he government must demonstrate that the evidence it uses to prosecute an individual was derived from legitimate, independent sources.”) (citing Kastigar v. United States, 406 U.S. 441, 461-62, (1972)).
joined with an exclusionary rule, or even more extreme, use-immunity for statements provided. For the warnings to have any other status, however, federal courts would have to take two radical and inadvisable steps: extending the reach of the penalty cases and then elevating such warnings to Miranda’s status as “a constitutional decision.”\textsuperscript{134}

Congress, in rethinking whether to regulate this area, could enact legislation requiring that the government proceed with non-custodial interviews only after providing such warnings. However, even such a rule would not apply to interviews conducted by employers. Prosecutors cannot control what information employers provide to employees during prior interviews, nor what pressure they apply. Not all targets of criminal investigations desire to secure cooperation. A firm seeking to conceal criminality might not wish to elicit inculpatory information, nor inform employees of adverse interests.

Absent rewards for uncovering criminality, some recalcitrant firms might have incentives not to pursue such interviews at all. A firm that does not wish to cooperate might then wish to pursue an internal investigation in a manner designed to produce little information of value, and indeed, to create conflicts that would hinder future litigation. The current regime which rewards cooperation therefore may to a greatly unappreciated extent bolster firm incentives to provide warnings to employees and ensure that they are informed of their rights. Any efforts to further encourage firms to provide such warnings and protections should be directed at firms and not through the route of criminal procedure protections.

Perhaps the best solution would be for DOJ to include as a factor in considering whether to grant leniency to a corporation, not just whether the firm secured the cooperation of employees, but whether the firm did so in a way that informed them of their rights under their employment contracts, whatever those may be, avoided potential conflicts of interest, and informed them of the possibility of entity waiver of privilege. In that way, federal prosecutors would reward not haphazard cooperation at all costs, but cooperation that sensibly elicits informed, sound, and conflict-free statements by employees.

CONCLUSION

Confessions by employees are routine and embedded in the management of any workplace, but the threat of a prosecution changes the dynamics surrounding such internal investigations into employee behavior. A firm’s compliance efforts will typically not raise issues

\textsuperscript{134} Dickerson v. United States, 530 U.S. 428, 438 (2000).
under the Supreme Court’s Fifth Amendment decisions. However, to safeguard the quality of the information they obtain and prevent conflicts, firms may increasingly provide warnings to inform employees before interviewing them. Rewarding such cooperation may help ensure that such information comes to light and that firms valuing compliance do not face the harsh consequences of an indictment.

Understanding that criminal procedure will not typically immunize incriminatory statements that employees deliver during criminal investigations makes it all the more crucial that firms take on the responsibility to ensure that internal interventions prevent conflicts, misunderstandings, litigation, and unreliable evidence. Firms benefit from clear written policies regarding cooperation during investigations. Employees, rather than face substantial pressure from firms, should try to negotiate in advance, contracts with explicit provisions regarding consequences of non-cooperation. Employees may most benefit from a clear entitlement to payment of attorneys’ fees, where retaining counsel may best protect their interests during an investigation. Prosecutors, corporations, regulators and attorneys can encourage the use of detailed internal warnings during interview sessions to secured reliable and informed statements. Just as employers have good reasons to avoid conflicts of interest and unintended formation of attorney-client relationships, prosecutors have every interest in avoiding such problems. DOJ Guidelines that reward provision of employer warnings would add useful incentives to clarify murky interview dynamics.

Finally, despite the focus on employee statements, admissions by a corporation may be far more powerful. They can summarize all that was learned during internal and external investigations and in detail acknowledge commission of a series of crimes. Prosecutors are only just beginning to put such statements to use, but they may usher in a new era of confessions by corporations. Self-incrimination by individuals due to pressure from corporations then comes full circle as artificial corporate persons themselves confess and inculpate other individuals and corporations. The Fifth Amendment has little to say about either problem, but these complex confession dynamics will help to define employment relationships at a time when prosecutors increasingly pursue charges against both employees and corporations.
FEDERALIZING CORPORATE INTERNAL INVESTIGATIONS AND THE EROSION OF EMPLOYEES’ FIFTH AMENDMENT RIGHTS

BY ABBE DAVID LOWELL AND CHRISTOPHER D. MAN*

Although it is understandable and even beneficial for society that corporations assist the United States government with its investigation of corporate crime, the manner in which that cooperation now occurs has eroded the Fifth Amendment rights of corporate employees. The tremendous pressure the United States government places on corporations to cooperate or face indictment—which in many cases is tantamount to a corporate death sentence1—has fostered a regime where the government has corporations conduct internal investigations and then turn the results of those investigations over to the government for it to use as road maps for its prosecutions.2 Corporations often complain that their internal investigators have been “deputized,” while the companies have been left paying the bills,3 but it is often the corporate employees who end up paying the greatest price. Too often, government


2. See, e.g., Benjamin E. Rosenberg, “Kozlowski”: Using Internal Probes Against Employees?, N.Y.L.J. at 4 (Oct. 27, 2008) (“The corporate internal investigation is a boon for the government because it does the government’s work for it: Not only is the wrongdoing stopped, but if the corporation provides the government with the results of its internal investigation, then the government has a road map for prosecution.”). The government makes no secret that this is its preferred means for conducting an investigation. As Deputy Attorney General McNulty told Congress: “[T]here are many ways for Government investigators to get the facts in a corporate fraud investigation, to find out who did what when. Some ways are faster and more productive than others. One of the most productive ways to get the facts is for a cooperating corporation to tell the Government what it knows. It is not the only way for the Government to learn the truth, but, generally speaking, disclosing the results of the company’s internal investigation is one of the best ways. Let’s face it. Searching for hot documents in rooms full of paper or on servers filled with computer files is much slower than looking through a three-ring binder or a CD-ROM identifying the most relevant evidence.” The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Criminal Investigations: Hearing Before the Comm. on the Judiciary, 109th Cong., S. Hrg. 109–835, at 3 (2007) [hereinafter Thompson Hearing]. See also DEP’T OF JUSTICE, UNITED STATES ATTORNEYS MANUAL § 9.28.700 (2009) (“[A] corporation’s cooperation may be critical in identifying potentially relevant actors and locating relevant evidence, among other things, and in doing so expeditiously.”).

pressure has forced companies to take action against its employees that the Constitution would prevent the government from taking directly, with the result being that the rights the Constitution was designed to secure have been eroded.

In various investigations, the government has glossed over this issue when it has been raised, arguing that there is no constitutional problem because the rights secured by the Constitution are protections against conduct by the government, not by employers or other third-parties, but this is too convenient an excuse when it may be a corporate car that is running over the corporate employee but it is the government at the steering wheel. The reality is that corporations are not mere volunteers in these exercises, they are being compelled, and the government often is giving the corporations direction or is otherwise intertwined in how the corporate internal investigation commences. In a literal sense and at least in spirit, the corporations are acting as agents of the government.

In highlighting the constitutional ramifications of this process to Congress, former Attorney General Meese explained: “When an individual’s constitutional rights are implicated, the government may not do indirectly—through others—what it is forbidden to do directly.” Courts only recently have begun to examine the constitutional ramifications of what often has been the government’s heavy-handed involvement in corporate internal investigations. Already courts have made clear that when the government coerces corporations to take actions against their employees that conduct will be viewed as state action in analyzing whether the employees’ constitutional rights have been violated. This is a significant development because a finding that

4. Thompson Hearing, supra note 2, at 45 (written response of Deputy General McNulty to questions from Sen. Leahy explaining that there are no constitutional problems because “[i]nternal corporate fraud investigations conducted by corporations are private in nature and thus do not involve state (government) action”).

5. Absent governmental compulsion or involvement, the collection of evidence by private parties typically does not implicate constitutional rights. See, e.g., Colorado v. Connelly, 479 U.S. 157, 166 (1986) (“The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.”); Burdeau v. McDowell, 256 U.S. 465, 475–76 (1921) (evidence stolen by private parties without government knowledge or encouragement did not violate the Fourth Amendment); see also Couch v. United States, 409 U.S. 322, 331 n. 14 (1973) (noting that Burdeau depended upon the “absence of any governmental compulsion”); United States v. Mekjian, 505 F.2d 1320, 1325 (5th Cir. 1975) (excluding stolen evidence under the Fourth Amendment when the government was aware the records were being stolen). The Constitution does not “discourage citizens from aiding to the utmost of their ability in the apprehension of criminals,” although constitutional rights are implicated if the private citizens are acting as agents of the state. See, e.g., Coolidge v. New Hampshire, 403 U.S. 443, 487–90 (1971). In Coolidge, for example, the police questioned a defendant’s wife what her husband was wearing on the night of the alleged offense, and she voluntarily gathered up the clothes and gave them to the police. The police did not ask her to produce the clothes or exert any coercion over her. Instead, she voluntarily produced the clothes, believing the evidence would help exonerate her husband. Id. The Court did not doubt that there always are pressures to cooperate, including the desire to be open and honest, and a fear that secretive behavior will invite increased suspicion, but the Court held that additional incentives must be offered to private parties to cooperate in evidence-gathering before the actions of private parties will be attributable to the government. Id. at 488. As in Coolidge, companies that gather evidence completely voluntarily through internal investigations would not implicate the constitutional rights of its employees. Internal investigations of that sort commonly occur when the company investigates wrongdoing by employees that victimizes the company, such as an employee stealing corporate property. This article focuses on corporate internal investigations where the company itself runs the risk of indictment, and where the government places substantial pressure on the company to cooperate in its investigation.

6. See Thompson Hearing, supra note 2, at 126.

7. Stein, 541 F.3d at 136 (affirming dismissal of an indictment against 13 corporate employees because the company’s deprivation of their constitutional rights “followed as a direct consequence of the government’s overwhelming influence, and that [the company’s] conduct therefore amounted to state action”); Rosen, 487 F. Supp. 2d at 731 (finding state action in DOJ persuading a corporation to cut-off its former employee’s attorneys’ fees).
corporate internal investigators are acting as agents of the government entitles employees to the full panoply of constitutional rights that they would enjoy if the government was conducting the investigation directly. Unfortunately, the government has yet to recognize the breadth of the problem and instead has reacted only on a case-by-case basis as particular conduct has been challenged and found unlawful in the courts. Consequently, more litigation is sure to follow, and the result may be inconsistent decisions, patchwork law and an uneven application of important rights.

Among the more likely problems courts will face is the government’s pressuring corporations to pressure their employees to waive their Fifth Amendment right to remain silent and not to make self-incriminatory statements. At the government’s urging, corporations often compel their employees to speak by overtly or covertly threatening to fire them if they do not. Fortunately, the solution to this constitutional problem is fairly simple. Rather than get drawn into thorny litigation over the degree of government involvement in corporate internal investigations that would trigger state action, the government should make clear that it expects corporations that conduct internal investigations to respect the constitutional rights of its employees. No government pressure should be placed on corporations to take actions that the government could not take itself, and the government should make clear that corporations who do transgress those boundaries—even voluntarily—will not be rewarded. Through such a process, the government would continue to enjoy all the synergies of coordinating its investigations with corporate internal investigations, but the process would be one that is much more respectful of constitutional values.


9. See, e.g., Preet Bharara, Corporations Cry Uncle and their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants, 44 AM. CRIM. L. REV. 53, 105 (2007) (noting that the government has only modified its policies in response to specific adverse court decisions, rather than modify its policy as a whole). See also O’Sullivan, supra note 8, at 1448 (explaining that DOJ’s policies have transformed corporate defense counsel from “zealous advocates to junior G-men,” and has “either ignored the implications of its ‘deputization’ of corporate counsel, or hopes that courts in [the] future will do so.”).

10. In Stein, the district court found the government’s coercion of a company forcing its employees to give statements to internal investigators of face termination compelled statements in violation of the Fifth Amendment. 440 F. Supp. 2d at 328. Because the Second Circuit affirmed the district court’s dismissal of the indictment due to the government’s interference with the defendants’ right to counsel, it found that the issues concerning the suppression of statements made in violation of the Fifth Amendment moot. Stein, 541 F.3d at 136 n.2. This problem remains substantial, notwithstanding government modifications to its enforcement policies post-Stein. See Bharara, supra note 9, at 96–97.

11. Some commentators have argued that the true source of the problem is in the substantive breadth of corporate criminal liability, which leaves corporations facing the prospect of an indictment virtually powerless to defend themselves and having to cooperate with the government in any way it can to avoid indictment. See Bharara, supra note 9, at 96–97. They have criticized reforms which target only prosecutorial conduct, rather than seeking to reform the corporate criminal liability rules, as “inadequate” and representing a “defeatist view” that the broader reforms are unlikely. Id. at 56. The authors agree with this criticism, but maintain that however inadequate the reform they advance admittedly would be, it still would be a step in the right direction and a step that would not be difficult to make. Moreover, it is a step that would be needed even if a broader reform of the corporate criminal liability rules were to occur. Even if corporate criminal liability doctrines were narrowed, some companies would face a substantial threat of indictment and conviction, and that would pose the same risk that the government could pressure those companies to “cooperate” by threatening to fire employees who do not waive their Fifth Amendment rights. Consequently, the authors believe that reform should proceed down both tracks—reform of both the substantive law and prosecutorial conduct—and that progress on one track would not alleviate the need for progress on the other.
I. THE UNITED STATES GOVERNMENT’S INVOLVEMENT IN INTERNAL INVESTIGATIONS IS EXTENSIVE

A. CORPORATIONS FACING THE PROSPECT OF INDICTMENT ARE UNDER TREMENDOUS PRESSURE TO COOPERATE WITH THE GOVERNMENT

Because the prospect of a criminal indictment is a threat to a company’s well-being and even survival, there is an inherent pressure upon every corporation to do all that it can to avoid indictment.12 The mere fact that a company is under investigation can itself be devastating. As Deputy Attorney General McNulty told Congress, “[t]he moment it becomes known that a corporation could be facing a criminal investigation and potential prosecution, the value of that company’s stock begins to plummet, [and] its shareholders lose money . . . .”13 The government also acknowledges that a company under investigation has a strong incentive to help the government wind down its investigation quickly because prolonged investigations “disrupt the corporation’s business operations or even depress its stock price.”14

As damaging as the disclosure that a company is under investigation is, the situation is far worse—and often fatal—if that investigation leads to an indictment.15 Even when not a corporate death sentence, “being named in a criminal indictment has many immediate and negative effects, including negative publicity and reputational harm, a drop in the corporation’s stock price, a negative effect on credit rating, debarment or exclusion from certain kinds of business, increased legal fees and expenses, pressure to remove certain employees before there has been any determination of guilt, and problems with regulators.”16

While it is true that a corporation, just like any natural person charged with a crime, has the right to challenge an indictment at trial, companies are well aware of the fact that it may face a fatal punishment in the process of litigating regardless of whether or not it prevails in those legal proceedings. The lesson of Arthur Andersen LLP’s demise while fighting the government and ultimately prevailing before a unanimous Supreme Court has been a powerful reminder to corporate America that it cannot afford to get cross-wise with the government.17 Corporations have little alternative but to cooperate.18 As one commentator noted, “[s]ince an indicted firm is

12. See supra note 1.
15. See supra note 1. Moreover, given the breadth of corporate criminal liability, the government’s “criminal case against a corporation, once there is evidence that even a single low-level employee engaged in criminal activity on the job, is virtually bulletproof.” Bharara, supra note 9, at 76. As the current U.S. Attorney for the Southern District of New York once explained: “[W]hether or not the government has the facts on its side, it always has the law on its side. No amount of supplication, therefore, can overcome the mercilessness of the applicable legal doctrines; so long as there is a hint of criminality by even a single lowly employee, the corporation’s counsel has no leverage and no bargaining power. Only the prosecutor can be merciful, and for his mercy the corporation rationally chooses to cooperate in any way demanded.” Id. at 86–87.
17. See, e.g., id. at 1229 (“Not even the reversal of Andersen’s conviction by a unanimous Supreme Court in 2005 could resurrect the once giant firm.”).
18. See, e.g., Bharara, supra note 9, at 88 (“[G]iven the broad liability rule and the typical corporation’s vulnerability, no reasonable evaluation of risk can lead to a decision other than to cooperate.”); O’Sullivan, supra note 8, at 1448 (explaining it is “virtually impossible for many or even most public companies” not to conduct an internal investigation and share its results with the government); Thompson Hearing, supra note 2, at 20 (statement of Thomas J. Donohue, President and CEO of the U.S. Chamber of Commerce) (“Being labeled ‘uncooperative’ also drastically increases the likelihood that a company will be indicted, and one need only look to the case of Arthur Andersen to see what happens to a business
a dead firm, a decision to defend an indictment is suicide.”19

B. OFFICIAL UNITED STATES GOVERNMENT CHARGING GUIDANCE PLACES ENORMOUS PRESSURE ON COMPANIES TO COOPERATE BY DOING THE GOVERNMENT’S BIDDING

The government often will often respond to criticism or actual motions by stating that it does not coerce companies to cooperate with its investigations because the inherent pressure to cooperate exists as a reality of the marketplace,20 but the fact is that the government exploits that leverage to cause corporations to do its bidding. The government has very specific ideas about what it means for a company to “cooperate,” and has been less than ambiguous in conveying to corporate America what it must do if it wants to better its chances for avoiding an indictment. The United States Department of Justice (“DOJ”) has made its position known on what “cooperation” means by issuing a memorandum containing guidance called the Principles of Federal Prosecution of Business Organizations and its requirements are reiterated in the United States Attorneys Manual.21

This guidance was first issued by then-Deputy Attorney General, now-Attorney General, Holder in 1999,22 but it has been revised somewhat by subsequent Deputy Attorneys General through what came to be known as the Thompson Memorandum in 2003,23 the McNulty Memorandum in 2006,24 and the now-current Filip Memorandum of 2008.25 To appreciate the current climate of “cooperation,” a brief understanding of the evolution of DOJ’s view of “cooperation” is needed.

The Holder Memorandum raised considerable concern that the government was seeking the results of corporate internal investigations because it emphasized that, in deciding whether to indict a company, prosecutors should consider “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate that faced the death blow—notwithstanding the fact that the Supreme Court found later on that it was all handled badly.”). The Serious Fraud Office in the United Kingdom recently emphasized this point to a court in the United Kingdom. It explained: “Any criminal investigation into a company has a damaging effect on its business affairs—typically the longer the investigation, the more damaging the effect.” Regina v. Innspec Limited, No. 20107157, Opening Note at ¶ 35 (Southwark Crown Court 2010). The Serious Fraud Office noted that it does not want to conduct its investigations in a manner that would “unnecessarily damage” a company’s business, but that “objective can only be fully discharged . . . where the Company fully co-operates with the investigating and prosecuting authority. Id. at ¶ 36.

22. Memorandum from Eric Holder, Jr. to All Heads of Department Components and United States Attorneys, Deputy Attorney Gen., U.S. DEP’T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS (June 16, 1999) [hereinafter “Holder Memorandum”].
25. See Filip Memorandum, supra note 21.
attorney-client and work product privileges." It also made clear that the government was seeking to coerce companies into leaving their employees vulnerable by also considering such factors as whether the company was indemnifying its employees’ legal fees or participating in joint defense agreements with them.27

Following the massive corporate scandals that brought down companies like Enron, WorldCom, Adelphia, Global Crossing, HealthSouth and Tyco International, the principles were revised by the Thompson Memorandum in 1999, where “the main focus of the revisions [was] increased emphasis on scrutiny of the authenticity of a corporation’s cooperation.”28 The Thompson Memorandum more clearly emphasized that what DOJ was seeking from companies that wished to “cooperate” were the results of internal investigations. The Thompson Memorandum kept the language that noted that cooperation may require, “if necessary, a waiver of the attorney-client and work product protections,” but added that this waiver applied “both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements.”29 Although the Thompson Memorandum added that this waiver was not “an absolute requirement,”30 the Thompson Memorandum “created an atmosphere where corporations believed that the only way they could avoid indictment—and, perhaps a corporate death sentence—would be for them to cooperate fully and waive the attorney-client privilege and work product protections.”31 And although the Thompson Memorandum’s language concerning cooperation and the advancement of legal fees remained the same,32 Deputy Attorney General Thompson’s statement that innocent employees “don’t need fancy legal representation” reflected the hostility with which DOJ viewed corporate assistance to its employees.33

Other developments in this time frame compounded the concern that the United States government expected a privilege waiver. In October of 2001, the Securities and Exchange Commission published its Seaboard Report, which tracked the Thompson Memorandum in noting that it would consider whether a company had waived its privilege in making charging decisions.34 Then, in 2004, the United States Sentencing

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27. See id. at § VI-B (Prosecutors should weigh “whether the corporation appears to be protecting its culpable employees . . . through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government’s investigation pursuant to a joint defense agreement.”) (footnote omitted).
28. See Thompson Memorandum, supra note 23; see also Carol Poindexter, Recent Developments in Corporate “Cooperation” Credit: Opening Pandora’s Box or Slamming the Privilege Waiver Lid Shut?, 22 HEALTH L. 48, 52 (2010) (explaining that the Thompson Memorandum “put greater emphasis on the need for voluntary cooperation by companies if they wished to avoid indictment”).
29. See Thompson Memorandum, supra note 23.
30. Id.
32. United States v. Stein, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006) (The Thompson Memorandum’s “language concerning cooperation and advancing of legal fees was carried forward without change” from the Holder Memorandum.).
33. Id. at 338 n.13 (quoting Laurie P. Cohen, In the Crossfire: Prosecutors’ Tough New Tactics Turn Firms Against Employees, WALL ST. J., June 4, 2004, at A1). Judge Kaplan made clear that this view “would be misguided, to say the least,” because “[t]he innocent need able legal representation in criminal matters perhaps even more than the guilty” and “even the innocent need substantial resources to minimize the chance of an unjust indictment and conviction.” Id.
Commission modified its Sentencing Guidelines to make clear that a corporation would not receive a sentence reduction for cooperation unless it waived its privilege claims if “such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”

The opposition to the government’s tactics grew steadily stronger in response to these developments, with opposition coming from virtually everyone outside DOJ—former Attorneys General, members of Congress, the American Bar Association, the American Civil Liberties Union, the United States Chamber of Commerce and the courts. It often was remarked that DOJ’s policies had fostered a “culture of waiver,” which had undermined the attorney-client privilege and work product protection, and damaged the relationship between companies and their employees.

In June 2006, Judge Kaplan issued his landmark decision in United States v. Stein, holding that the pressure the Thompson Memorandum and DOJ prosecutors placed on a company, KPMG, to cut off its employees attorneys’ fees violated the Fifth and Sixth Amendments. By July 25, 2006, Judge Kaplan also found that DOJ’s pressure on KPMG to require its employees to make statements or face termination resulted in compelled statements that required suppression under the Fifth Amendment. Eventually, Judge Kaplan would conclude that the only remedy for these constitutional violations would be to dismiss the indictment.

The Stein decisions—lengthy, well-thought out opinions from a highly respected judge—demonstrated that the Thompson Memorandum was untenable, and a Congress that appeared to lack confidence in DOJ appeared poised to intervene. The Senate Judiciary Committee held a hearing on September 12, 2006, in which Deputy Attorney General McNulty found himself under attack by Senators Specter and Leahy, and numerous other witnesses, including Former Attorneys General Meese and Thornburg. No witness or member of Congress came to his defense. Then, on December 7, 2006, Senator Specter introduced legislation—The Attorney-Client Privilege Protection Act—that would override the Thompson Memorandum by preventing DOJ or any other arm of the federal government from considering privilege waivers in making charging decisions.

In response to this fierce criticism and with the hope of preventing passage of the Privilege Act, DOJ revised the Thompson memorandum by issuing the McNulty Memorandum on December 12, 2006. The McNulty Memorandum addressed the attorneys’ fees issue in Stein by prohibiting prosecutors from considering whether a company had indemnified its employees in making charging decisions, unless it could be shown that this was done to thwart a criminal investigation. It created a process

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36. See, e.g., Thompson Hearing, supra note 2, passim. See also Bharara, supra note 9, at 83 (describing this as an “unprecedented coalition”).
37. See, e.g., Marcia Coyle, Lawyers Fear a DOJ “Culture of Waiver,” NAT’L L. J. (March 24, 2006). An impressive letter from three former Attorneys General, three former Deputy Attorneys General and four former Solicitors General noted that a survey of 1,200 in-house and outside counsel found that nearly 75% believed a “culture of waiver” had emerged where they believed DOJ thought it reasonable to expect companies under investigation to waive privilege. Thompson Hearing, supra note 2, at 107.
39. Id. at 382.
43. Id.
44. See, e.g., Poindexter, supra note 28, at 52.
45. See McNulty Memorandum, supra note 24.
for seeking high-level approval for seeking a privilege waiver, and created two categories of privileged information. Prosecutors were to seek Category I privileged materials, “purely factual information . . . relating to the underlying misconduct,” first, and only later and in “rare” situations, seek Category II privileged materials, which would include attorney-client communications and nonfactual work product.46

While the McNulty Memorandum was seen as progress, it was not clear how corporations could give DOJ what it wanted without waiving privilege, whether line-prosecutors would respect the new guidance, or whether the Administration really intended to make a change that was, in reality, forced upon it. Consequently, “corporations still felt compelled to waive privilege to gain prosecutors’ favor.”47

In May 2007, the government, which had appealed its loss in Stein to the Second Circuit, received another blow to its legal theory in United States v. Rosen.48 Judge Ellis heard a challenge brought by former employees of the American Israel Political Action Committee ("AIPAC") charged with espionage that DOJ had violated the defendants’ right to counsel by pressuring DOJ to cut off their right to attorneys’ fees.49 Although Judge Ellis concluded that their rights were not violated because they had suffered no prejudice because the defendants’ lawyers continued working without payment,50 he made clear that the defendants had a right to have AIPAC pay their legal fees, and that AIPAC’s termination of fees was attributable to the government. But Judge Ellis made clear that his opinion was “in no way an endorsement of the Thompson Memorandum policy directive with respect to an organization’s payment or advancement of attorney fees for employees who are targets or subjects of criminal investigation.”51 To the contrary, Judge Ellis concluded “that policy is unquestionably obnoxious in general and is fraught with the risk of constitutional harm in specific cases.”52

Senator Specter remained unimpressed by DOJ’s reforms, and reintroduced his Privilege Act in June 2008.53 Hoping to stave off that legislation yet again,54 the new Deputy Attorney General sent Senator Specter a letter in July 2008 identifying

46. Id.
47. Poindexter, supra note 28, at 53.
50. Id. at 734–36. The district court found that there was no prejudice because, despite AIPAC cutting-off the attorneys’ fees, the attorneys continued working and “defense counsel have fully and energetically engaged the complex issues in this case.” Id. at 735. The court noted that there was “a mountain of evidence testifying to the vigor of the defense being mounted on behalf of these defendants” in a case with more than 500 docket entries and “over two dozen substantive motions have been filed on defendants’ behalf.” Id. As counsel to Mr. Rosen in that case, the authors, of course, appreciate Judge Ellis’ compliment as to the quality of our work, but the court’s requirement that the defendant prove actual prejudice only highlights the chilling effect the Thompson Memorandum had on the right to counsel. After four years of extensive litigation and defense wins that would have made it difficult for the government to prevail at trial, the government did something that is virtually unprecedented: It chose to dismiss the indictment. From the clients’ perspective, that is a tremendous victory, and it would not have happened without some defense lawyers investing a great deal of time and resources into mounting the defense. In that case, defense counsel were fortunate to have been working for law firms that generously supported our work, even though payment of our legal fees had been terminated. Many law firms would not have been as understanding, and many in the defense bar simply could not afford to undertake such a representation. Rosen created genuine concern that future corporate employees who find themselves defendants would not be able to retain counsel for fear that a company could terminate their attorneys’ fees, leaving defense counsel with the difficult choice of attempting to withdraw from the representation mid-way through the case or having to work for free.
51. Id. at 737.
52. Id.
53. Poindexter, supra note 28, at 53.
several changes DOJ was preparing to make to the McNulty Memorandum. Those changes were made in the Filip Memorandum, issued on August 28, 2009—the same day the Second Circuit coincidentally affirmed Judge Kaplan’s decision to dismiss the indictment in Stein.

The Filip Memorandum, which remains in effect, represents progress in the protection of the rights of corporate employees. The attorneys’ fee issue the government was criticized for in Stein and Rosen is hopefully put to rest through much more explicit language: “In evaluating cooperation, however, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys’ fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action.”

This is a marked improvement from the McNulty Memorandum, which had left open the possibility that the payment of attorneys’ fees could be a relevant factor in some cases. The McNulty Memorandum did not tell prosecutors they “should not” take such matters into account, only that they “generally should not.” It also more explicitly stated that it was “a corporation’s compliance with governing state law and its contractual obligations [that] cannot be considered a failure to cooperate,” which seemed to leave open the possibility that companies could have issues with prosecutors as to whether they were going beyond what they were required to do in advancing fees. The Filip Memorandum appears to be a flat ban on the consideration of whether attorneys’ fees are being paid, regardless of whether the corporation was legally obligated to pay them or not.

The Filip Memorandum also is a step forward with respect to joint defense agreements between the corporation and its employees, but it does not seem to go as far as Deputy Attorney General Filip suggested it would go in his letter to Senator Specter. That letter provided that “[f]ederal prosecutors will not consider whether the corporation has entered into a joint defense agreement in evaluating coopera-

55. Letter from Deputy Attorney General Filip to Sen. Specter (July 9, 2008) [hereinafter Filip Letter].
56. See Thompson Hearing supra note 2. Unlike his predecessors, Deputy Attorney General Filip did not provide a memorandum which explained the nature of the changes that he was making, but merely issued a short memorandum attaching the revisions to the United States Attorneys’ Manual.
57. Stein, 541 F.3d 130 (2d Cir. 2008).
58. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.730 (2009); see Mark L. Rotert & Bradley E. Lerman, New Ethical Challenges in Internal Investigations, 1745 PLI/Corp 857, 859 (2009) (“In theory at least, the Sixth Amendment problems found in Stein should not recur.”). The McNulty Memorandum held out an exception in “extremely rare cases” where the payment of attorneys’ fees “was intended to impede a criminal investigation” in a manner in which the “corporation is acting improperly to shield itself and its culpable employees from government scrutiny.” McNulty Memorandum, supra note 24, at 11 n.3. The Filip Memorandum preserves this exception, but uses language that is more clear and which probably better reflects the intentions of the McNulty Memorandum. Instead of the more open-ended terms “impede” and “improperly,” the Filip Memorandum explains that this exception concerns conduct that would “constitute criminal obstruction of justice,” and offers an example of fees being paid in exchange for an employee adhering to a version of the facts the employee knew to be false. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.730 (2009).
59. McNulty Memorandum, supra note 24, at 11.
60. Id. In prior cases, evaluation was required into the nuances of the source of the duty to pay attorneys’ fees and under what circumstances that duty applied. Stein, 541 F.3d at 137 (describing pressure placed on corporate counsel to do no more than was legally required). See also Rosen, 487 F. Supp. 2d at 727–730 (addressing the complicated analysis as to the source and scope of the obligation).
61. Strauss, supra note 54, at 5. Perhaps the Filip Memorandum and the Filip letter reflect the same intention, but the letter’s direction that prosecutors “will not consider” such agreements more clearly directs that no consideration should be given than the Memorandum’s statement that the “mere existence” of such an agreement will not make a corporation “ineligible” for cooperation credit. Id.
tion,” 62 but the Filip Memorandum is more limited in saying that “mere participation” in a joint defense agreement will not preclude cooperation credit and that “prosecutors may not request that a corporation refrain from entering into such agreements.” 63 Some have questioned whether that means that the existence of a joint defense agreement can be a weight on the scale against a finding of cooperation, even though it cannot be a decisive factor by itself. 64 The Filip Memorandum also suggests that a “corporation may wish to avoid putting itself in the position of being disabled” from cooperating by entering into joint defense agreements, which may allow an employee to prevent disclosure to the government of facts that the employee had shared with the company pursuant to such an agreement. 65 In other words, the government’s focus is on the corporation sharing all the facts it is aware of with the government to obtain cooperation credit and joint defense agreements are fine, so long as they do not impair the corporation’s ability to do so.

It is doubtful this caveat does more than place a burden on the corporation and its employees in structuring their relationship. Joint defense agreements can be structured in any number of ways, and it may very well be that many companies and employees would prefer to structure agreements that would allow either party to later disclose what they learned from the other. As a practical matter, parties are more willing to share facts with one another pursuant to agreements where they can prevent such disclosures than they would under agreements that would allow unilateral disclosures by one party. Consequently, although the more flexible joint defense agreements the government favors would mean that the corporation would be free to share all it knows, that may not lead to the government obtaining more information because those sorts of agreements may prevent the corporation from learning more facts.

The Filip Memorandum also made substantial revisions addressing privilege waivers and, although the language of the new memorandum sounds much better, it is not entirely clear that anything has changed at all. The Filip Memorandum makes clear that corporations are free to waive privilege, but “prosecutors should not ask for such waivers and are directed not to do so.” 66 All that the corporation is required to disclose for the sake of “cooperation” are “the facts known to the corporation about the putative criminal misconduct under review.” 67 The government wants to know: “[H]ow and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it?” 68 The Filip Memorandum sounds good in theory, but it raises a practical question: “[H]ow does a corporation turn over just the ‘facts’ without waiving the very privileges and protections it needs to survive?” 69

The Filip Memorandum acknowledges that corporations typically learn the facts by conducting internal investigations conducted by lawyers and that many of the facts are uncovered through interviews with corporate personnel. 70 The government

64. Strauss, supra note 54, at 5.
66. Id. § 9-28.710.
67. Id. More than disclosure of facts is required, however, including “providing non-privileged documents and other evidence, making witnesses available for interviews, and assisting in the interpretation of complex business records.” Id. § 9-28.720 n.2.
68. Id. § 9-28.720.
70. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.720(a) (2009). The government offers a peculiar solution to this problem—having corporations conduct internal investigations without the benefit of counsel so that no privilege is created. Id. The fact that DOJ would even make this suggestion is disturbing. Although the government may view lawyers as the problem and the privileged nature of
states that “the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the lawyers’ interviews.” But “the corporation does need to produce, and prosecutors may request, relevant factual information—including factual information acquired through those interviews . . . .” The problem, as former Deputy Attorney General McNulty now acknowledges, is that “quite a bit of ‘relevant factual information’ is subject to privilege claims,” so “[t]he key problem is when you have factual information that can only be provided by waiving [privilege]—what happens then?” Consequently, he explains “there is still a pressure to waive attorney-client privilege if you have ‘relevant factual information’ covered by attorney-client privilege that the government wants to get.”

Interviews of company employees are likely to be an area where privilege waivers are required. These interviews are particularly valuable to prosecutors because “[e]mployees are often interviewed shortly after a situation ‘breaks,’ and these interviews are likely to provide unvarnished versions of events, as they occur closer in time to relevant events and frequently are conducted prior to the employee’s representation by individual counsel.” In addition, with “employees interviewed multiple times, inconsistencies in their statements provide useful fodder for prosecutors. Statements from interviews with putative defendants are particularly useful because the government is rarely able to interview defendants, and the interviews afford prosecutors the flexibility to call corporate counsel as witnesses to a defen-

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71. Dep’t of Justice, United States Attorneys’ Manual § 9-28.720(a) n.3 (2009). Requesting such notes and memoranda is “something prosecutors have frequently done in the past.” Stein & Levine, supra note 70, at 4.

72. Dep’t of Justice, United States Attorneys’ Manual § 9-28.720(a) n.3 (2009).


74. Id.

75. As a practical matter, companies “customarily” have outside counsel conduct interviews of its employees as part of an internal investigation. See, e.g., William R. McLucas, Howard M. Shapiro & Julie J. Song, The Decline of the Attorney-Client Privilege in the Corporate Setting, 1635 PLI/Corp. 287, 304–05 (2007); Zornow & Krakaur, supra note 3, at 152. Rather than negotiate immunity or plea agreements so that they can speak with corporate employees directly, the government often will defer its interviews of the witnesses until after the corporate internal investigators can conduct their own interviews. Given the employees’ fear of termination by their employer, the government knows that the corporation can be more effective in persuading its employees to speak than it could be, and the government knows all to well that it can then use its leverage over the company to compel the company to tell it what the employees say, even if that requires the waiver of the attorney-client privilege or work product doctrine. Id.

dant’s prior statements.” Consequently, “[c]ounsel will be hard-pressed to persuade government attorneys that they have produced the desired facts from other sources if they withhold witness interviews.” As former Deputy Attorney General McNulty explains, “Sure, you can tell the government what the person said, but the government is often interested in seeing the notes of the interview and other material memoranda that would be subject to privilege.” Even if corporations provide only detailed oral summaries of a witness’s statements, courts may very well hold this action to be a waiver of the privilege and make lawyer-prepared interview notes and memoranda discoverable. The consensus among the defense bar is that “[c]ounsel will . . . frequently find themselves where they did prior to the Filip memorandum: forced to decide whether to risk waiver in order to avoid an adverse governmental action.”

DOJ’s position toward privilege waivers embodied in the Filip Memorandum has been adopted by other federal agencies and commissions. In October 2008, the SEC created a new Enforcement Manual, which deviates from the Seaboard Report and tracks the approach of the Filip Memorandum, explaining that the SEC, like DOJ, will not ask for a privilege waiver but will ask companies who cooperate for all the facts known to it. Similarly, the United States Sentencing Commission abandoned its language concerning the need for a corporate waiver of the attorney-client privilege for a company to receive cooperation credit, but—like the Filip Memorandum—it continues to provide that cooperation credit requires “the disclosure of all pertinent information known to the organization.”

Senator Specter remained unimpressed with DOJ’s modifications under the Filip Memorandum and reintroduced his Attorney-Client Privilege Protection Act. One advantage he notes to his approach is that it would be binding on all federal agencies and commissions. In October 2008, the SEC created a new Enforcement Manual, which deviates from the Seaboard Report and tracks the approach of the Filip Memorandum, explaining that the SEC, like DOJ, will not ask for a privilege waiver but will ask companies who cooperate for all the facts known to it. Similarly, the United States Sentencing Commission abandoned its language concerning the need for a corporate waiver of the attorney-client privilege for a company to receive cooperation credit, but—like the Filip Memorandum—it continues to provide that cooperation credit requires “the disclosure of all pertinent information known to the organization.”

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77. Id. See Stein & Levine, supra note 77, at 4 (“The obvious problem is that the ‘facts’ uncovered in an internal investigation are actually an attorney’s distillation of numerous interviews and documents and therefore work product. Moreover, in many instances, such as where different witnesses have provided contradictory accounts, any discussion of the ‘facts’ will involve disclosing what the various witnesses said—i.e., revealing attorney-client communications. Thus, under the Filip Memo, in many instances corporations will still need to waive privilege in order to provide the facts and receive cooperation credit.”).

78. Nathanson, supra note 76, at S8.

79. Baxter, supra note 73.

80. See, e.g., United States v. Treacy, No. S2 08 CR 366, 2009 WL 812033, at *3 (S.D.N.Y. Mar. 24, 2009) (detailed oral summary results in waiver as to written summaries); SEC v. Roberts, 254 F.R.D. 371, 379 n.6 (finding it “irrelevant that the physical notes were never handed over if the attorneys’ mental impressions and conclusions were made known to third parties”); United States v. Reyes, 239 F.R.D. 591, 604 (N.D. Cal. 2006) (“[I]t makes no difference whether a privilege-holder copies a written text, reads from a written text, or describes a written text to an outside party. The purpose and effect is the same . . . .”); Nathanson, supra note 76.

81. Nathanson, supra note 76. See also Poindexter, supra note 28, at 55 (“Given the ‘relevant facts’ language, . . . one may speculate that ‘cooperation’ will still mean a voluntary waiver by the corporation of privileged communications.”)


83. United States Sentencing Comm’n, Amendments to the United States Sentencing Guidelines 45 (2006) (striking waiver language from Section 8C2.5, app. note 12 because it “could be misinterpreted to encourage waivers”).


enforcement agencies, not just DOJ.  

One thing that remains clear is that whether companies conduct an internal investigation and then waive the privilege or simply provide the facts learned to the government, companies remain under a great deal of pressure to gather information about the subject of the investigation and then provide that information to the government. In response to the pressure the government places on the company to get answers, the company is expected to exert great pressure on its employees to answer the questions the government wants answered. The disclosure of what employees tell corporate investigators to the government—whether through the disclosure of privileged interview notes or merely a recitation of facts—may very well put those employees in criminal jeopardy.  

C. GOVERNMENT POLICY ENCOURAGES COMPANIES TO ESTABLISH COMPLIANCE PLANS THAT WILL ENABLE THE GOVERNMENT TO HAVE LEVERAGE OVER COMPANY EMPLOYEES  

The government will consider as part of its charging decision “the existence and effectiveness of the corporation’s pre-existing compliance program,” and the existence of such a program will be considered a mitigating factor in any sentencing of the company as well. In considering the effectiveness of the compliance program, the government’s focus is on whether the program is “designed for maximum effectiveness in preventing and detecting wrongdoing by employees,” but—according to official policy—there are “no formulaic requirements” imposed by the government. Nevertheless, the government has made it clear that, to be considered effective, the company must be able to fire employees who refuse to cooperate with an investigation, even if that compels the employees to make self-incriminating statements. In the government’s view, “a corporation that does not fire an employee who refuses to be interviewed is not ‘acting in its shareholders’ interests.’”

87. See, e.g., Zornow & Krakaur, supra note 3, at 153 (“The Fifth Amendment privilege against self-incrimination is also implicated whenever criminal issues arise in a corporate investigation. The investigating attorney will often ask questions of a corporate employee which, if answered, might tend to incriminate the employee.”).
89. UNITED STATES SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL §§ 8B2.1, 8C2.5(f) (2009).
91. In reaching a civil settlement with AIG, for example, the government applauded AIG for its cooperation, because it “sent a clear message to its employees that they should cooperate in the staff’s investigation by terminating those employees, including members of AIG’s former senior management, who chose not to cooperate in the staff’s investigation.” SEC Release No 2371 at 2 (Feb. 9, 2006). Likewise, in the KPMG dispute at issue in Stein, if the government ever expressed concern to KPMG that one of its employees was not providing “prompt, complete and truthful cooperation,” KPMG threatened to terminate those employees. Stein, 440 F. Supp. 2d. at 323–24. “[M]aking witnesses available for interviews” is one of the factors DOJ considers in deciding whether a company has been “cooperative.” UNITED STATES ATTORNEYS’ MANUAL § 9-28.720 n.2 (2009). Even if the government does not expressly state that such employees must be threatened with termination, “the government allows companies to operate under the assumption that the threat of termination for any employee who declines to be interviewed or asserts their Fifth Amendment right is necessary in order for the company’s cooperation to be deemed ‘authentic.’” Silbert & Joannou, supra note 16, at 1233.
92. Silbert & Joannou, supra note 16, at 1228 (“The Department, completely disregarding an employee’s essential Fifth Amendment right when being interviewed by an ‘agent’ of the Government, explained that a corporation that does not fire an employee who refuses to be interviewed is not ‘acting in its shareholders’ interests.’”) (quoting Interview with United States Attorney James B. Comey Regarding Department of Justice’s Policy on Requesting Corporations Under Criminal Investigations To Waive The
As Deputy Attorney General McNulty told Congress, DOJ does consider the existence of an effective compliance plan as part of its charging decision, and “anyone responsible for drafting a compliance program that would pass the straight-face test includes a discipline procedure” that requires employees “to comply with an internal investigation.”93 In a memorandum following up on questions submitted at the Senate hearing, McNulty claimed that employees are still left a choice as to whether to make self-incriminating statements to corporate investigators, but acknowledged “they risk discipline or termination” if they do not do so.94 Nevertheless, McNulty stated, inexplicably, that “[t]hose adverse consequences are far from coercive.”95

The American Bar Association rightfully claims that this policy “violates employees’ legal rights” by allowing the government to withhold corporate cooperation credit for “declining to fire or sanction [the employees] for exercising their Fifth Amendment rights,”96 and the policy has come under criticism by former Attorney General Meese and others.97 For more than forty years, the United States government has been prohibited from threatening its employees with termination if they do not make self-incriminating statements in internal investigations.98 Many corporations would likely prefer to afford their employees the same rights as federal employees, and the government can hardly justify taking punitive action against a corporation for not taking disciplinary action against its employees if the government would not take disciplinary action against its own employees under the same circumstances.99

Attorney Client Privilege and Work Product Protection, UNITED STATES ATTORNEYS’ BULL. at 4 (Nov. 2003) (explaining that a corporation that does “not have a policy of firing an employee who won’t consent to be interviewed by the corporation about possible misconduct [is not] . . . acting in the shareholder’s interests.”)).

93. Thompson Hearings, supra note 2, at 9. McNulty also claimed that companies would impose such a requirement, regardless of whether the government required it. Id. at 16.

94. Id. at 46.

95. Id. He justified the remark by claiming that “rooting out misconduct is fundamental to the operation of our nation’s securities markets and to the operation of the corporation,” which is true but has no bearing on the fact that threatening to fire employees for refusing to make self-incriminating statements is a coercive way to root out misconduct. Id.

96. Id. at 23 (statement of Karen Mathis, President of the American Bar Association) (calling for DOJ to eliminate this consideration).

97. Id. at 30 (Senator Leahy, Former Attorney General Meese, the President of the U.S. Chamber of Commerce, and other witnesses voice same concerns).


99. While some companies may chose to adopt a termination policy for employees who do not cooperate with the government or who waive their Fifth Amendment rights, it was the Thompson Memorandum and DOJ’s emphasis on having such provisions that led corporations across the country to implement such policies. Robert G. Morvillo & Robert J. Anello, Preserving Your Job While Asserting The Fifth Amendment, N.Y. L.J., Dec. 5, 2006, at 3. Most companies, of course, do not want their employees to commit crimes or engage in misconduct, but they also want to be able to attract and retain talented employees and to preserve employee morale. Providing attorneys’ fees and respecting the rights of employees during internal investigations furthers these goals. See, e.g., Bharara, supra note 9, at 83 (noting that DOJ’s policies “ensured recurring battles between corporations and their employees”); McLucas et al., supra note 75, at 290 (“[T]hese internal investigations often turn companies against the very executives and employees who are paid to act in the company’s best interest . . . . Over time, this process may well drive a wedge between the corporate entity and the executives and employees the company relies upon for the shareholders’ benefit, even when these individuals have done nothing wrong.”); Zornow & Krakaur, supra note 3, at 160 (noting that “a wedge has been driven between senior management and other employees as corporations rush to meet the requests of federal prosecutors for ‘cooperation’”); N. Richard Janis, Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice Is Being Destroyed, WASH. LAW., Mar. 2005, at 36 (explaining that corporations “are extracting waivers of constitutional rights as a condition of employment” and “prejudicing the employees’ ability to defend themselves and to protect their families,” which leads to a “sense of abandonment felt by the employees of [the] organizations”). Historically, this was not a problem before
Nevertheless, the government has not modified its policy.100

D. IN PRACTICE, THE GOVERNMENT IS IMMERSED IN A CORPORATE INTERNAL INVESTIGATION

Although they are nominally labeled corporate “internal” investigations, the government often has a very large say in how those investigations are conducted.101 To be sure, every internal investigation is different and the dynamic between corporate investigators and the government varies, but—as a general rule—companies who express a desire to “cooperate” typically find the government looking for assurances that an internal investigation is being conducted in a manner that will serve its interests.

To some extent, the government’s involvement is warranted. Once the government is aware of potential wrongdoing, it has an obligation to see that the matter is investigated and that any wrongdoing is remedied. The government can conduct the investigation itself. It can obtain the documents and evidentiary materials it needs by executing search warrants, and it can invite corporate officers and employees in for questioning or have them subpoenaed to testify before a grand jury. Companies offer to “cooperate” because the government’s approach is disruptive to the business and can cause embarrassment. No company, for example, wants television crews broadcasting images of law enforcement officers hauling documents, computers and other materials out of their offices, particularly when the company needs such materials to operate effectively. Companies would rather make the government copies of the materials that it needs and interview its employees for itself, according to a schedule that serves the company’s needs. An internal investigation also allows the company to avoid a potentially dangerous situation in which the government understands what occurred within the company better than the company itself does. If the government is going to, in effect, defer some portion of its investigation to the corporation,102 it is

the emergence of the Thompson Memorandum because the internal interview “would typically remain a private inquiry among a corporate employer, its counsel, and its employees” and the disclosure of what was said to the government “would have been unusual.” Zornow & Krakaur, supra note 3, at 153.

100. See, e.g., Bharara, supra note 9, at 93 (noting that “the McNulty Memorandum, by maintaining the focus on cooperation considerations, apparently continues to allow a reward for the sanction or termination of uncooperative employees (so long as the sanction is not the termination of legal fee payments).”).

101. Internal investigations may be triggered by the government, a third-party’s notifying the company of a problem, or the company discovering a problem on its own. Rotert & Lerman, supra note 58, at 860–61. In any case, the government typically is approached by the company very quickly because the government and the Sentencing Guidelines place a premium upon prompt disclosure. Dep’t of Justice, United States Attorneys’ Manual § 9-28.300 (2009) (including among factors to consider in making a charging decision, “the corporation’s timely and voluntary disclosure of wrongdoing”); United States Sentencing Comm’n, U.S. Sentencing Guidelines Manual § 8C2.5(g)(1) (2009) (requiring “reasonably prompt” disclosure for full cooperation credit).

102. The government often does not halt its investigation, but when it does defer some portion of its investigation it will expect frequent updates on the progress of the internal investigation. See, e.g., Albert P. Lilienfield, SEC Enforcement Activities and Trends; What If Your Company Is Next?, 1747 PLI/Corp. 507, 514 (2009) (“If the SEC staff holds off on conducting its own investigation until the internal investigation is completed, more frequent reports may be necessary.”); Douglas R. Young, American College of Trial Lawyers: Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations, 1737 PLI/Corp. 459 (2009) (explaining that there is “a reasonable likelihood that any major internal investigation will be followed by, or conducted parallel to,” a government investigation). In many instances, the government may defer to the corporation in its investigation internally but continue to take the lead in investigating leads outside the company. The government, for example, may be in a better position than the company to investigate former employees, outside agents, customers, or competitors. For example, a relatively recent development is that the government is having to get more involved in obtaining emails that company employees may have sent or received through a web-based
only reasonable that the government receive some assurances that corporation’s internal investigation will be adequate.103

The government also is not going to just accept whatever conclusions are presented to it by corporate investigators upon completion of an internal investigation, and they should not be expected to do so.104 The government will justifiably want to understand the scope of the investigation and how thoroughly it was conducted so that it can gauge how much credibility it should afford the findings of the corporate investigators. And the government will want the corporate investigators to walk them through the evidence that supports their findings, including a review of the relevant documents and the statements made by knowledgeable persons.105

It is in the interest of the corporation, as well as the government, that they coordinate as to how the internal investigation will be conducted early in the process. The internal investigation could prove to be an expensive waste of time or at least highly inefficient if conducted in a manner that will not satisfy the government. For example, if the government concludes that the scope of the investigation was too narrow because it did not look at a particular subject, the company may need to go back and re-review virtually every document and re-interview countless employees to fill in the gap. Consequently, it is in everybody’s interest that corporate investigators and the government coordinate up front.

The government also typically wants to be updated on the progress being made in the investigation,106 often requesting “real time” updates,107 and “the government

email provider because the employer’s ability to do so may be more limited. Marjore J. Peerce & Daniel V. Shapiro, The Increasing privacy Expectations in Employees’ Email, 13 J. INTERNET L. 1, 14–15 (2010) (explaining that the government now is using subpoenas and search warrants to obtain such email).

103. Because “cooperation” includes “providing non-privileged documents and other evidence” and “assisting in the interpretation of complex business records,” DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.720 n.2 (2009), corporate investigators should expect the government to be interested in what areas are being searched for documents, the criteria being used to evaluate documents that are reviewed, and to assist the government in interpreting those documents. It is not uncommon for the government to see a work plan that identifies the schedule for collecting documents from various locations, and even negotiating with corporate investigators as to what search terms should be used in conducting searches of email and other electronic documents. Often, there will be a subpoena for the documents and agreement to search terms and production dates is made to satisfy the subpoena.

104. See, e.g., William M. Hannay & Patricia B. Holmes, The Nuts and Bolts of Conducting an FCPA Internal Investigation, 1665 PLI/Corp. 343, 351 (2008) (“Prosecutors and agency officials have made very clear that a purported internal ‘investigation’ that is slipshod or otherwise inadequate will not be viewed favorably and, in fact, might suggest that the company has something to hide, prompting the government to investigate even more thoroughly and to view with skepticism any representations made by the company or its counsel.”).

105. As noted above, see supra notes 67–69 and accompanying text, the basic questions the government will want answered are identified in its guidance documents. See DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.710 (2009).

106. See, e.g., Michael D. Trager et al., Handling Securities Problems and Responding to U.S. Regulatory Inquiries: The Use of Internal Investigations in the Current Regulatory Environment, 1737 PLI/Corp. 381, 398–99 (2009) (explaining that it is more likely that the government will request information from a company while the internal investigation is ongoing).

107. See, e.g., id. at 398 (“Self-reporting upon discovery of a potential problem and continued communication with the government throughout the internal investigation are essential. As an Assistant Director in the SEC’s Enforcement Division stated in May 2007, the staff will want to monitor an internal investigation, look at the work plan, and receive ‘real time’ briefings.”); Liesa L. Richter, The Power of Privilege and the Attorney-Client Privilege Protection Act: How Corporate America Has Everyone Excited About the Emperor’s New Clothes, 43 WAKE FORREST L. REV. 979, 1031 (2008) (Federal authorities “have asked companies to partner with the government by conducting internal investigations of corporate wrongdoing to be fed in a ‘real time’ manner to the government.”); Michael E. Horowitz & April Oliver, Foreword: The State of Federal Prosecution, 43 AM. CRIM. L. REV. 1033, 1038 (2006) (“Indeed, the SEC’s Enforcement Division has widely proclaimed that it expects ‘real time disclosures’ from counsel conducting internal investigations.”).
may threaten to take a more direct role in the investigation if they suspect it is not progressing well.”108 The government typically will want to know where the company will search for documents and other evidence, the search terms used in reviewing documents, which corporate employees, former employees or other persons the company will interview, and what the subjects of those interviews will be. And as the company’s internal investigation learns relevant facts or runs into any potential snags in gathering information, the government will want to be told.

It also is particularly noteworthy that the government seems to treat corporate internal investigators as its agents. 18 U.S.C. § 1512(c)(2) makes it a crime to obstruct justice by obstructing an “official proceeding,” which the government has interpreted to mean that a corporate employee who makes misstatements or omissions to corporate internal investigators may violate this statute.109 The basis for the charge is that the corporate internal investigators were working “as an arm of the investigating agencies.”110 As Judge Kaplan noted: “There is more than a little tension between [the government’s] assertion that the acts of companies cooperating with it are not state action when the cooperator is induced to coerce third parties for the government’s benefit but are sufficiently related to government action that obstruction of the cooperator obstructs the government.”111

II. THE GOVERNMENT’S INVOLVEMENT IN CORPORATE INTERNAL INVESTIGATIONS OFTEN WILL BE SUFFICIENT TO TRANSFORM THE INTERNAL INVESTIGATION INTO STATE ACTION

The Second Circuit’s decision in Stein makes clear that the government’s influence over the conduct of a corporate internal investigation is sufficient to transform the internal investigation into state action, subjecting it to constitutional limitations.112 Because state action triggers a host of constitutional limitations, a finding of state action will have ramifications beyond the particular facts of Stein, which involved government pressure for corporations to terminate attorneys fees for employees. The same type of concerns will be triggered if the government exerts the same sort of pressure to have employees fired or disciplined for exercising their Fifth Amendment rights not to incriminate themselves, which could lead to the suppression of any statements that are made.113

108. Rotert & Lerman, supra note 58, at 866.
112. Stein, 541 F.3d at 136 (“We hold that KPMG’s adoption and enforcement of a policy under which it conditioned, capped and ultimately ceased advancing legal fees to defendants followed as a direct consequence of the government’s overwhelming influence, and that KPMG’s conduct therefore amounted to state action.”).
113. Judge Kaplan, in fact, found that the statements made by two defendants were involuntary and ordered the statements suppressed. Stein, 440 F. Supp. 2d 315 (S.D.N.Y. 2006). Because the Second Circuit dismissed the entire indictment based on the Sixth Amendment right to counsel, it did not reach the Fifth Amendment suppression issue because it was moot. Stein, 541 F.3d at 136 n.2.
A. THE GOVERNMENT’S INVOLVEMENT IN CORPORATE INTERNAL INVESTIGATIONS OFTEN IS ADEQUATE TO CONSTITUTE STATE ACTION

The government’s involvement with corporate internal investigations often is sufficient to trigger a judicial finding that the actions by corporate internal investigators constitute state action. The Supreme Court has long recognized that the actions of private parties should be attributed to the government if “there is a sufficiently close nexus between the State and the challenged action of the . . . entity so that the action of that latter may be fairly treated as that of the State itself.”\(^{114}\) That nexus may be established in a variety of ways. As the Second Circuit explained in Stein:

A nexus of state action exists between a private entity and the state when the state exercises coercive power, is entwined in the management or control of the private actor or provides the private actor with significant encouragement, either overt or covert, or when the private actor operates as a willful participant in joint activity with the State or its agents, is controlled by an agency of the State, has been delegated a public function by the state, or is entwined with governmental policies.\(^{115}\)

Moreover, a finding of state action is particularly appropriate where the government has “made plain not only its strong preference for [the private conduct], but also its desire to share the fruits of such intrusions.”\(^{116}\)

In Stein, the Second Circuit noted that “KPMG faced ruin by indictment and reasonably believed that it must do everything in its power to avoid it. The government’s threat of indictment was easily sufficient to convert its adversary into its agent.”\(^{117}\) That threat of indictment and a corporation’s perceived need to do everything in its power to avoid routinely comes into play when companies conduct internal investigations. Consequently, the Stein court’s finding of state action will apply to virtually every corporate internal investigation that is conducted in the shadow of a potential indictment of the company.\(^{118}\)

There also is typically much more than this threat: the government provides “significant encouragement” for companies under investigation to cooperate by conducting an internal investigation, and to then “share the fruits” of its investigations with the government.\(^{119}\) In addition, the coordination between the government and the corporate internal investigators often is so entwined that it would not be


\(^{115}\) Stein, 541 F.3d at 147 (quoting Flagg v. Yonkers Sav. & Loan Ass’n, 396 F.3d 178, 187 (2d Cir. 2005) (emphasis in Stein); see Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (State action is found where the government “has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”)). In deciding whether a private party has acted as an agent of the state, courts sometimes ask “1) whether the government knew of and acquiesced in the intrusive conduct, and 2) whether the party performing the search intended to assist law enforcement efforts or to further its own ends.” Pleasant v. Lovell, 876 F.2d 787, 797 (10th Cir. 1989) (quoting United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982)).

\(^{116}\) Stein, 541 F.3d at 147 (quoting Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 615 (1989)).

\(^{117}\) 541 F.3d at 151 (citing Lisa Kern Griffin, Compelled Cooperation and the New Corporate Criminal Procedure, 82 N.Y.U. L. REV. 311, 367 (2007) (“The threat of [ruinous indictment] brings significant pressure to bear on corporations, and that threat ‘provides a sufficient nexus’ between a private entity’s employment decision at the government’s behest and the government itself.”)).

\(^{118}\) The Second Circuit explained in Stein that “[t]he government brought home to KPMG that its survival depended on its role in a joint project with the government to advance government prosecutions.” Stein, 541 F.3d at 147. Even without an explicit threat, it will be abundantly clear to companies and their counsel that an indictment may constitute the death of a company and, based on the government’s guidance documents alone, they will know that “cooperation” may be the company’s best chance for survival.

\(^{119}\) See, e.g., id. at 148.
difficult to characterize the internal investigation as a joint activity.\textsuperscript{120}

**B. GOVERNMENT PRODDING OF THIRD-PARTY EVIDENCE GATHERING HAS BEEN SUFFICIENT TO TRIGGER STATE ACTION IN OTHER CONTEXTS**

While the cases that specifically address the applicability of the state action doctrine in the context of corporate internal investigations are few, there is ample case law addressing the “federalization” of evidence gathering by non-federal actors. This case law, in conjunction with \textit{Stein}, confirms that the federal government’s involvement in corporate internal investigations will often be more than sufficient to trigger the state action doctrine.

\textit{1. Federal and State Cooperation.} Although courts have only recently started asking whether the government’s involvement with corporate investigators is sufficient to constitute state action, the law regarding state action triggered by the government enlisting the help of private parties in its investigations is fairly well established. This case law began to emerge during the Prohibition Era. At that time, most of the Bill of Rights had not yet been made applicable to the states,\textsuperscript{121} so state law enforcement officers were not subject to the constitutional restraints imposed on the federal government. Consequently, federal officers would seek to have state officers gather evidence for them—the same way they seek to have corporations gather such evidence today—when the Constitution would hamper the federal government’s ability to gather such evidence itself.

In \textit{Byars v. United States},\textsuperscript{122} state officers searched a private residence pursuant to a warrant that did not satisfy Fourth Amendment standards and a federal prohibition agent was invited to join them in the search.\textsuperscript{123} Although state officers conducted the search looking for evidence of state crimes, the federal officer “did participate as a federal enforcement officer, upon the chance, which was subsequently realized, that something would be disclosed of official interest to him as such agent.”\textsuperscript{124} The federal officer took possession of the evidence that furthered his federal investigation, and that evidence was used to convict the defendant on federal charges.\textsuperscript{125} The unanimous Supreme Court concluded that “the search in substance and effect was a joint operation of the local and federal officers,” and reversed the conviction, holding that “the effect is the same as though [the federal agent] had engaged in the undertaking as one exclusively his own.”\textsuperscript{126}

Although the facts in \textit{Byars} represent an extreme case of government overreaching, the Court plainly was cognizant that federal agents have many avenues open to them for attempting to circumvent constitutional rights. The Court advised the lower courts to carefully scrutinize such conduct:

While it is true that the mere participation in a state search of one who is a federal officer does not render it a federal undertaking, the court must be vigilant to

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\textsuperscript{120} See id.

\textsuperscript{121} The Bill of Rights became applicable to the states through a piecemeal “incorporation” of those rights through the Due Process Clause of the Fourteenth Amendment beginning in the 1930s. John E. Nowak & Ronald D. Rotunda, \textit{CONSTITUTIONAL LAW} \S 11.6 at 385 (4th ed. 1991). For example, the Self-Incrimination Clause of the Fifth Amendment was not incorporated and made applicable to the states until 1964. Malloy v. Hogan, 378 U.S. 1 (1964).

\textsuperscript{122} 273 U.S. 28 (1927).

\textsuperscript{123} Id. at 29–30.

\textsuperscript{124} Id. at 32.

\textsuperscript{125} Id. at 28, 32–33.

\textsuperscript{126} Id. at 33.
scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods.127

The same year Byars was considered, the Supreme Court also decided Gambino v. United States.128 In Gambino, a unanimous Supreme Court again reversed a conviction by attributing conduct by state officers to the federal government, and holding that the evidence gathered by state officials violated the Fourth Amendment.129 Gambino, however, was a significant extension of Byars because no federal officer was involved in the search or had even asked that the search be conducted. State officers had come across the defendants’ car along the Canadian border, and on their own suspected that the federal prohibition laws had been violated. They had no probable cause to believe any state laws were violated, consequently “[t]he wrongful arrest, search, and seizure were made solely on behalf of the United States.”130

The Supreme Court’s decision made clear that the Court was not merely concerned with the federal government instructing others to do its bidding, but by the creation of a climate where such “co-operation” would occur. The National Prohibition Act encouraged “co-operation between the state and the federal governments in the enforcement of the [A]ct,” and state officials had encouraged state officers to “aid in the enforcement of the law.”131 Without a legal obligation for state officials to do so, this situation is little different from the Filip Memorandum encouraging corporations to “cooperate” and a corporation initiating an internal investigation to do just that. Yet, Gambino makes clear this very sort of “cooperation” is sufficient to trigger state action:

It is true that the troopers were not shown to have acted under the directions of the federal officials in making the arrest and seizure. But the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such co-operation as by the state officers acting under the direction of federal officials. The prosecution thereupon instituted by the federal authorities was, as conducted, in effect a ratification of the arrest, search, and seizure made by the troopers on behalf of the United States.132

A similar result occurred in Anderson v. United States,133 where the Supreme Court suppressed coerced confessions made to state officers because they had a “working arrangement” with the federal officers, so “the fact that the federal officers themselves were not formally guilty of illegal conduct does not affect the admissibility of the evidence which they secured improperly through collaboration with state officers.”134

If state and federal officials had an “understanding” that the state would take the

127. Id. at 32.
128. 275 U.S. 310 (1927).
129. Id.
130. Id. at 316.
131. Id. at 314–15.
132. Id. at 316–17. See Marsh v. United States, 29 F.2d 172, 173 (2d Cir. 1928) (L. Hand, J.) (“The effect of Gambino v. U.S. is that when, under such circumstances, the federal authorities use the evidence in a federal prosecution, they become subject to all the limitations of the Federal Constitution, regardless of whether state prosecutors might be similarly limited by the State Constitution.”); Irvin B. Nathan & Christopher D. Man, Coordinated Criminal Investigations Between the United States and Foreign Governments and Their Implications for American Constitutional Rights, 42 Va. J. Int’l L. 821, 828 (2002) (“Read together, Byars and Gambino hold that a search and seizure is federalized when a federal officer participates in the search and seizure, or when the search and seizure is conducted by third parties for the sole benefit of the federal government, even if the United States was completely unaware that the search was occurring.”).
133. 318 U.S. 350 (1943).
134. Id. at 356.
lead in collecting evidence free of constitutional restraint and its investigation would then provide the road map for a federal prosecution—virtually the same “understanding” that now exists between federal prosecutors and corporate internal investigators—the lower courts would not hesitate to attribute the actions by state actors to the federal government. The Fourth Circuit in Sutherland v. United States, for example, held:

[W]here the state and federal officers have an understanding that the latter may prosecute in the federal courts offenses which the former discover in the course of their operations, and where the federal officers adopt a prosecution originated by state officers as the result of a search made by them, the same rule as to the admissibility of evidence obtained in the course of the search should be applied as if it were made by the federal officers themselves or under their direction.

The Supreme Court explained the breadth of its decisions in this area in Lustig v. United States. Justice Frankfurter’s plurality opinion in Lustig explained:

The crux of that doctrine is that the search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to federal authorities on a silver platter. The decisive factor in determining the applicability of the Byars case is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means. . . . Evidence secured through such federal participation is inadmissible . . . .

As Justice Frankfurter later explained, the “question has always been whether the offending search or seizure was conducted in any part by federal officials or in the interest of the Federal Government, or whether it was conducted solely by state officers acting exclusively for state purposes.”

The Supreme Court later rejected even this “silver platter” limitation suggested by Justice Frankfurter in Lustig. The Court reiterated that the Byars rule is clear: “[I]f federal agents had participated in an unreasonable search and seizure by state officers, or if the state officers had acted solely on behalf of the United States, the evidence was not admissible in a federal prosecution.” The Court rejected the “silver platter” doctrine because it would make federal officers “accomplices in the willful disobedience of a Constitution they are sworn to uphold.”

135. See, e.g., Ward v. United States, 96 F.2d 189, 191 (5th Cir. 1938) (suppressing fruits of a search by a state officer because a federal officer requested the search and seize, even though the federal officer had no role in apprehending the decision and did not know when the arrest would occur).
136. Id. at 305 (4th Cir. 1937).
137. Id. at 307; see also Graham v. United States, 257 F.2d 724, 728 (6th Cir. 1958); Gilbert v. United States, 144 F.2d 568, 570–71 (10th Cir. 1944); Lowrey v. United States, 128 F.2d 477, 478–79 (8th Cir. 1942); Fowler v. United States, 62 F.2d 656, 657 (7th Cir. 1932).
139. Id. at 78–79. The issue that divided the Court in Lustig was not on the Byars rule, but whether the rule applied to the facts of that case. The justices reached different factual conclusions about what the federal officer’s involvement had been. See Nathan & Man, supra note 132, at 829–31 & 830 n.34 (discussing Lustig decision). Compare Lustig, 338 U.S. at 79 (Frankfurter, J., plurality opinion) (explaining that the federal officer went to the state officer’s search as an “expert in counterfeiting matters and had a vital share in sifting the evidence as the search proceeded”), with d. at 83 (Reed, J., dissenting) (claiming that the federal officer “did not ‘share in the critical examination of the uncovered articles as the physical search proceeded.’”) (quoting plurality opinion).
140. Elkins v. United States, 364 U.S. 206, 236 (1960) (Frankfurter, J., dissenting); see Euziere v. United States, 266 F.2d 88, 90 (10th Cir. 1959) (“The test in all cases is did the federal authorities participate in any way in the search?”), vacated, 364 U.S. 282 (1960).
141. Elkins, 364 U.S. at 213.
142. Id. at 223.
Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal–state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered.\footnote{143}

The \textit{Byars} principle of preventing the federal government from “cooperating” with a third-party to obtain evidence for its benefit in criminal proceedings through means that would be unlawful for the federal government to do on its own holds the same force no matter who that third-party is, be it a Prohibition Era state officer or a modern corporate internal investigator.

2. \textit{Federal and International Cooperation}. In some instances, the \textit{Byars} principle also has been used to find state action when the United States has enlisted the cooperation of foreign governments to gather evidence.\footnote{144} Perhaps the leading case on this subject is \textit{United States v. Peterson},\footnote{145} where then-Judge and now-Justice Kennedy found state action through the conduct of foreign governments. He found it significant that U.S. agents “termed their actions a ‘joint investigation,’” and that statement was well supported by the facts.\footnote{146} The United States had identified a ship carrying contraband into the United States and obtained the frequencies being used between the ship and an apartment in the Philippines.\footnote{147} Philippine officials then taped the coded communications and gave them to the United States to decode, and Philippine officials placed a tap on the phone in the apartment and provided transcripts of the calls to the United States.\footnote{148} That led to evidence that the United States used to obtain the permission of the Panamanian government to search the ship on behalf of the Panamanian government for contraband, which was discovered and ultimately led to a prosecution in the United States.\footnote{149}

Similarly, in \textit{United States v. Emery},\footnote{150} the Ninth Circuit found joint action where a United States officer alerted Mexican officials to a drug transaction in Mexico, participated in the surveillance of the transaction, and gave the signal for the Mexican

\footnotesize{\textit{Id.} at 208. The Court invoked its “supervisory power over the administration of criminal justice in the federal courts,” to hold such evidence inadmissible. \textit{Id.} at 216.

\textit{Id.} at 490.

\textit{Id.} at 488–90.

\textit{Id.}

\textit{Id.} Based on its finding of state action, the Ninth Circuit engaged in Fourth Amendment analysis but concluded that the Fourth Amendment was not violated because the search was reasonable. \textit{Id.} at 494.

\textit{Id.} 812 F.2d 486 (9th Cir. 1987).

\textit{Id.} at 1087, 1091 (9th Cir. 1995).

\textit{Id.} at 893, 895 (S.D. Tex. 1987) (rejecting claims of a U.S.-Mexican joint venture, but excluding a confession obtained through torture by Mexican officials).}
officials to make the arrest. The defendants were then interrogated by Mexican officials in the presence of the United States officer without them being afforded their Miranda rights. The court found that there was a “joint venture” that federalized this investigation, which triggered Miranda, and reversed the convictions because the confessions made without Miranda warnings should have been suppressed.

Although the Supreme Court has not definitively ruled on the applicability of the Byars principle in the international cooperation context, it has strongly indicated that it would be applicable. In United States v. Balsys, the Supreme Court held that the Fifth Amendment’s Self-Incrimination Clause was not implicated by the fear of a foreign prosecution. But the Court added a caveat: “This is not to say that cooperative conduct between the United States and foreign nations could not develop to a point at which a claim could be made for recognizing fear of foreign prosecution under the Self-Incrimination Clause as traditionally understood.” An “argument could be made” for applicability of the Clause if there were a “division of labor between evidence gatherer and prosecutor that made one nation the agent of the other, rendering fear of foreign prosecution tantamount to fear of a criminal case brought by the Government itself.”

The substantive constitutional issues are somewhat unique in the international cooperation context because certain constitutional rights operate differently abroad than they do domestically, but the analysis of whether constitutional rights are implicated through state action by federal-international cooperation is instructive to whether federal cooperation with corporate internal investigations can constitute state action as well. Given the increase in international cooperation of the prosecution of corporate crime, there will even be situations when multiple foreign governments will be jointly exerting pressure on the same corporate internal investigators.

3. Government and Third-Party Cooperation. In a variety of other cases, the Supreme Court has found that state action occurs when the government enlists third-parties to collect evidence. In Massiah v. United States, for example, the Supreme Court held that a defendant’s Sixth Amendment right to counsel is violated when the government enlists a private person to interrogate the accused outside the presence of counsel, just as it would be if the government were to conduct that

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151. Id. at 1267.
152. Id.
153. Id. at 1268. The lower courts are not always consistent in their application of the Byars principle in the international context. See Nathan & Man, supra note 132, at 832–836.
155. Id. at 698–99.
156. Id.
157. Id. In dissent, Justice Breyer noted that “experience suggests” that the potential for such abuse “is not totally speculative.” Id. at 716.
158. See Nathan & Man, supra note 132, at 836–38. For example, the reasonableness of a search for Fourth Amendment purposes may be broader when conducted abroad. See, e.g., Peterson, 812 F.2d at 890; Barona, 56 F.3d at 1095 (finding an international joint venture, but concluding that compliance with Danish law satisfied the Fourth Amendment when the search was conducted in Denmark). Similarly, Miranda warnings given abroad may require some modification. See, e.g., United States v. Bin Laden, 132 F. Supp. 2d 168, 186 (S.D.N.Y. 2001).
159. In a recent investigation of Innospec Limited by the United States and the United Kingdom, the prosecutors in the United Kingdom candidly acknowledged that it had been “simultaneously and jointly” investigating the case with the United States, and they had “divided up” the investigation. Regina v. Innospec Limited, No. 20107157, Opening Note at ¶¶ 33–34 (Southwark Crown Court 2010). The United Kingdom prosecutors noted that the company had spent $32 million on an internal investigation that was of great assistance to both governmental investigations. Id. at ¶ 32.
The conviction in Massiah was reversed because the government had deliberately sent an informant to question the defendant while he was free on bail. In the Court’s view, that made the situation worse, not better for the accused, “because he did not even know he was under interrogation by a government agent.”

The situation here is comparable to the government’s enlistment of corporate internal investigators in its investigation of a company’s employees. The issue in many cases will be the same—whether the government had prodded a third-party to collect the evidence. The Supreme Court has explained that the Massiah test is not violated if the government, “by luck or happenstance,” obtains incriminating statements from the accused after the right to counsel has attached, but is violated if the government, “by luck or happenstance,” obtains incriminating statements from the accused while he was free on bail. In the Court’s view, that made the situation worse, not better for the accused. Where government officers have made it clear that they want corporate internal investigators to ask specific questions of individuals and share those answers with them, courts should not hesitate to find that this sort of questioning

161. Id. at 206. The Supreme Court subsequently clarified that “the Massiah right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation.” Kansas v. Ventris, 129 S. Ct. 1841, 1846 (2009). See also Maine v. Moulton, 474 U.S. 159, 176 (1985) (“The Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused’s right to have counsel present in a confrontation between the accused and a state agent.”). The Sixth Amendment right to counsel addressed in the Massiah line of cases is unlikely to arise often in corporate internal investigations because the Sixth Amendment right to counsel is not triggered until formal charges are brought against the individual. United States v. Gouveia, 467 U.S. 180, 1888 (1984). In most instances, the questioning of an employee through a corporate internal investigation will occur before the Sixth Amendment right would attach by the government bringing formal charges. Nevertheless, the Massiah line of cases is helpful in identifying when private conduct in the gathering of evidence will be regarded as state action.

162. Massiah, 377 U.S. at 206. The Court previously had found a similar Sixth Amendment violation where a defendant was in police custody, Spano v. New York, 360 U.S. 315 (1959), but Massiah made clear that the Sixth Amendment could be violated even where the interrogation was not custodial. See United States v. Henry, 447 U.S. 264, 273 n. 11 (1980) (noting that there is no custody requirement for a Massiah violation, but the existence of custody may favor in a finding that the government had “deliberately elicited” the statements). Massiah, 377 U.S. at 206. In Spano, the Court made the same point by quoting the verse: “An open foe may prove a curse, But a pretended friend is worse . . . .” 360 U.S. at 323. The Supreme Court has explained that “the primary concern of the Massiah line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation.” Kuhlman v. Wilson, 477 U.S. 436, 459 (1986).

164. There should be little doubt that where the government directly asks that a corporation question one of its employees to obtain answers for its benefit, the corporation is acting as the agent for the government. In United States v. Montayne, 500 F.2d 411 (2d Cir. 1974), for example, a company that conducted a post-hiring polygraph of an employee obtained statements from the employee that suggested she may have been involved in a murder and the company notified the police. Id. at 413. The police asked that the company call her back for a second polygraph so that she could be questioned further on that topic, and her statements could be recorded. The Second Circuit had no difficulty finding that the employer was “acting as an agent for the police,” and explained that “[t]he state’s involvement is no less real for having been indirect and no less impermissible for having been concealed. The state is prohibited in either event from compelling a statement through economically coercive means, whether they are direct or indirect.” Id. at 415. The same is true when the government asks a company to conduct a search of an employee’s or customer’s belongings. Fries v. Barnes, 618 F.2d 988, 991 (2d Cir. 1980) (“[W]here federal officials actively participate in a search being conducted by private parties or else stand by watching with approval as the search continues, federal authorities are clearly implicated in the search and it must comport with fourth amendment requirements.”) (quoting United States v. Mekjian, 505 F.2d 1320, 1327 (9th Cir. 1979); United States v. Newton, 510 F.2d 1149, 1153–54 (7th Cir. 1975) (holding that Fourth Amendment was violated when law enforcement asked airline employees to search a bag that the government lacked probable cause to search); Corngold v. United States, 367 F.2d 1, 5 (9th Cir. 1966) (en banc) (same).


166. See, e.g., Kuhlman, 477 U.S. at 457.
constitutes the same sort of state action as in Massiah.

The Massiah line of cases also may indicate that state action may occur in the corporate internal investigation context, even when the government does not directly ask that the investigation proceed in any particular manner or even if the government is unaware of that particular investigation. The government has gotten its point across without having to micro-manage the internal investigation. Companies are well aware of the consequences of indictment and, ever since the Holder Memorandum, the government has made clear that the only way to avoid indictment after the relevant conduct has occurred is to cooperate. And companies already know that “cooperation” means conducting an internal investigation, and the questions that must be asked and answered as part of that investigation. The government, in effect, has set the stage for what must follow, even before the corporation realizes it will be cast in the play.

In Maine v. Moulton and United States v. Henry, the Supreme Court found state action where the government intentionally created an opportunity for a third-party to collect the evidence it sought improperly. In Henry, the government retained a jailhouse snitch as a paid informant on a contingency-fee basis. The informant actively questioned the defendant seeking to elicit incriminating statements, but the government argued that such conduct should not be attributed to the state because the government had explicitly instructed the informant not to question the defendant. The Supreme Court rejected that argument because, despite the government’s instructions to the informant, the government was well aware of the contingency-fee arrangement and “must have known that such propinquity likely would lead to that result.”

Henry was further extended in Moulton. In Moulton, one of the defendant’s accomplices had confessed to the government and, unbeknownst to the defendant, agreed to become an informant. Under that agreement, the informant would not face further charges if he confessed and agreed to work as a cooperator. The defendant had asked the informant to meet to discuss the charges pending against them, and the government asked the informant to wear a body wire transmitter, but not to ask any questions of the defendant. Because the government knew the purpose of the meeting was to discuss their defense at trial, the Court found that the government’s instructions that the informant not engage in that conversation were inadequate because such discussion was “inevitable.”

The government’s charging guidance and practice has made clear to companies that, as in Henry, it is in the companies’ financial interest to gather the evidence it seeks and, as in Moulton, may be the only way to avoid facing more serious criminal charges. Those incentives were strong enough to cause the informants in Henry

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167. See Holder Memorandum, supra note 22.
168. See supra Part I.B.
171. Id. at 270.
172. Id. at 271.
173. Id.
174. 474 U.S. at 162–64.
175. Id. at 163.
176. Id. at 164–5.
177. Id. at 177 n.14.
178. A company that gathers evidence for the government in the hope of avoiding an indictment may find itself in circumstances similar to the one addressed in United States v. Stein, 322 F. Supp. 346 (N.D. Ill. 1971). In Stein, the court ordered evidence that had been stolen by a government informant suppressed. Id. at 349. Although the government had no knowledge that the informant would steal the
and Moulton to gather evidence and their conduct constituted state action, despite explicit government instructions to the contrary. Those same incentives may be even more powerful in the corporate internal investigation context because indictment is the equivalent of a corporate death sentence, and while the government may not offer more specific advice to corporate internal investigators about how it should proceed, it will not ask the investigators to exercise any restraint in collecting evidence as was the case in Henry and Moulton.

III. The “Federalization” of Corporate Internal Investigations Threatens the Fifth Amendment Rights of Employees

In Garrity v. New Jersey, the Supreme Court held that the government cannot compel its own workers to make self-incriminating statements in the course of an internal investigation by threatening to fire or discipline them if they do not. The defendants in Garrity were police officers who came under investigation and were subject to questioning by the state attorney general’s office. They were warned that their statements could be used against them and that they had the right to refuse to answer, but would fired if they refused to answer. As the Supreme Court explained: “The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.”

The Supreme Court reversed their convictions because those convictions were based on coerced, self-incriminatory statements.

The Garrity principle becomes applicable whenever the government seeks to impose penalties whenever a person seeks to exercise their right to remain silent, and is not limited to penalties imposed on government employees. The Supreme Court, for example, has extended Garrity, to invalidate statutes that would debar private

materials, the defendant was under tremendous pressure to avoid indictment and the government had exploited that pressure by offering hope that an indictment could be avoided if he offered his “cooperation.” Id. at 348. The court found state action because the informant believed he would be rewarded by the government for stealing the materials and that, given the government’s pressure to obtain “cooperation,” the government was not “totally divorced from the situation.” Id. See also Knoll Assoc., Inc. v. FTC, 397 F.2d 530, 536 (7th Cir. 1968) (now-Justice Stevens was on the panel) (holding that government’s use of documents stolen for its benefit by a third-party violated the Fourth Amendment).

179. See supra at Part I.A.

180. The situations in Henry and Moulton were distinguished in Kuhlman v. Wilson, 477 U.S. 436 (1986), where the government’s involvement was entirely passive. In Kuhlman, the defendant was placed in a cell with an informant who was told to “keep his ears open” for the names of other’s believed to have participated in the defendant’s crimes, but was instructed not to question the defendant. Id. at 439–40. Unlike Henry and Moulton, the informant did not actually question the defendant and it was far from inevitable that the defendant would volunteer information concerning his crimes, but he did make “spontaneous” and “unsolicited” incriminating remarks that were used against the defendant at trial. It was not sufficient to constitute state action that an informant reported the incriminating statements either voluntarily or by prior arrangement, rather the state must have been shown to take some action “beyond merely listening, that was designed deliberately to elicit incriminating remarks.” Id. at 459. In the corporate internal investigation context, a Kuhlman type situation may arise if corporate internal investigators ask an employee to be the same kind of casual listener to what other employees are saying. Evidence gathered in corporate criminal investigations, however, is more likely to be gathered through formal interviews, where corporate investigators are actively questioning witnesses and not acting as mere passive listeners, as in Kuhlman.


182. Id. at 494.

183. Id. at 497.

contractors from receiving government contracts and requiring the removal from office of political party officials who invoke their right to remain silent.\textsuperscript{185} As the Second Circuit explained, there is “no constitutional significance” whether the coercion is “practiced upon members of the private, as distinguished from, public sector.”\textsuperscript{186} The “controlling factor” is whether “the state had involved itself in the use of a substantial economic threat to coerce a person into furnishing an incriminating statement.”\textsuperscript{187}

In \textit{Stein}, Judge Kaplan applied \textit{Garrity} to statements made by corporate employees to KPMG’s internal investigators. He explained that “an individual claiming that a statement was compelled in violation of the Fifth Amendment must adduce evidence \textit{both} that the individual subjectively believed that he or she had no real choice but to speak \textit{and} that a reasonable person in that position would have felt the same way.”\textsuperscript{188} Judge Kaplan held an evidentiary hearing and, after which, held that the statements made by some individuals were coerced and had to be suppressed,\textsuperscript{189} while the statements of others were made voluntarily and suppression of those statements would not be warranted.\textsuperscript{190}

The government appealed Judge Kaplan’s suppression decision, but the Second Circuit held that appeal was moot because it affirmed Judge Kaplan’s more sweeping remedy to the government’s constitutional violations of dismissing the indictment.\textsuperscript{191} Nevertheless, the fact that the Second Circuit did find that KPMG’s conduct attributable to the government plainly goes a long way in supporting Judge Kaplan’s suppression decision as well.\textsuperscript{192}

Unfortunately, the government appears to have limited its reforms to the Thompson Memorandum to the attorneys’ fee issues that led the Second Circuit to affirm the


\textsuperscript{187} \textit{Id.} While the government cannot coerce self-incriminating statements, see \textit{generally Miranda v. Arizona}, 384 U.S. 436 (1966), that does not mean that the government (or corporate investigators acting as government agents) must give the so-called \textit{Miranda} warnings in every interview. \textit{Miranda} warnings are required only in custodial interrogations. \textit{See, e.g.}, \textit{Florida v. Powell}, 130 S. Ct 1195 (2010); \textit{Berkemer v. McCarty}, 468 U.S. 420, 442 (1984). While employees being questioned may feel economic coercion to participate in an interview, it is doubtful that this situation would be regarded as a restriction of liberty tantamount to arrest, which would trigger the need for a \textit{Miranda} warning to be given. \textit{See, e.g.}, \textit{United States v. Muegge}, 225 F.3d 1267, 1270 (11th Cir. 2000) (“[F]or a court to conclude that, under the totality of the circumstances, a reasonable man in the suspect’s position would feel a restraint on his freedom of movement fairly characterized as that ‘degree associated with a formal arrest’ to such extent that he would not feel free to leave,”) (\textit{quoting United States v. Phillips}, 812 F.2d 1355, 1360 (11th Cir. 1987)).


\textsuperscript{189} \textit{Id.} at 331. Judge Kaplan added that prospective defendants often have to make “hard choices” and that there often is nothing wrong with that, but those circumstances were distinguished because “the government here coerced KPMG to apply pressure to . . . individual defendants in order to secure waivers of constitutional rights that the government itself could not obtain. That goes beyond the bounds of appropriate government action.” \textit{Id.} at 333.

\textsuperscript{190} \textit{Id.} at 333. As a point of practice, a witness or her counsel should ask the company prior to the interview whether the witness could face discipline or termination if she invoked her right to remain silent. The Fifth Amendment’s protection against self-incrimination is not self-executing and must be affirmatively asserted, unless it is established that a penalty would be attached to the assertion of that right. \textit{See, e.g.}, \textit{United States v. Vangates}, 287 F.3d 1315, 1320 (11th Cir. 2002).

\textsuperscript{191} United States v. Stein, 541 F.3d 130, 136 n.2 (2008). Without an indictment, there would be no trial and no need for the court to address the admissibility of evidence at trial.

\textsuperscript{192} The American Bar Association, former Attorney General Meese, and Senator Leahy also have expressed a concern that DOJ’s pressure on companies to fire employees who assert their Fifth Amendment problems triggers a \textit{Garrity} problem. \textit{Thompson Hearing, supra} note 2, at 30. Numerous scholars have raised similar concerns. \textit{See, e.g.}, Duggin, \textit{supra} note 111, at 386; Marks, \textit{supra} note 3, at 1092; Morvillo & Anello, \textit{supra} note 99, at 1.
dismissal of the indictment.193 Without reforms that make clear that companies will not be deemed “uncooperative” unless they penalize their employees for exercising their Fifth Amendment rights, the Garrity problem Judge Kaplan identified will continue.194 Indeed, when applied to vulnerable companies, the pressure created by the still-unmodified aspects of the Thompson Memorandum “inevitably sets in motion precisely what occurred here—the exertion of enormous economic power by the employer upon its employees to sacrifice their constitutional rights.”195

**CONCLUSION**

Although there may be many advantages for the government enlisting the help of corporations in ferreting out corporate crime, one of those advantages should not be the circumvention of the constitutional rights of employees. The government should not be allowed to violate the constitutional right of its citizens directly or indirectly by enlisting the help of others to violate those rights. Yet courts have concluded that this has happened and it still appears to be occurring in corporate America, as the government pressures corporations to fire their employees who assert their Fifth Amendment rights to gain leverage over the employee that the government knows it could not assert directly. Having fostered a climate where companies have come to understand such conduct is expected if they want the government to deem them a “cooperator,” the government should rectify the problem by making it clearer still that corporations will not be punished for respecting their employees’ constitutional rights and will not be rewarded for violating them. If and when Congress addresses the continuing issue of corporate investigations in this area, the concerns raised by various judges, this article and other commentators should be part of a legislative solution.

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193. Following the decision in *Stein*, the government wrote Judge Kaplan and stated that “the prosecutors’ conduct in this case was in accordance with established Department of Justice policy that had never before been addressed by a court.” Letter from Michael J. Garcia, U.S. Attorney, to Hon. Lewis A. Kaplan at 1 (June 30, 2006); see also Morvillo & Anello, *supra* note 99, at 1 (noting that DOJ pressure on companies to fire employees who exercise their Fifth Amendment rights is common). The fact that DOJ modified the Thompson Memorandum to address the attorneys’ fee issues that led to the dismissal of the indictment in *Stein*, but has not modified the policy with respect to pressuring companies to terminate employees who exercise their Fifth Amendment rights raises concern that DOJ will continue to exert that pressure.

194. The American Bar Association has urged DOJ to “eliminate these employee-related provisions from the Thompson [M]emorandum” as well. *Thompson Hearing, supra* note 2, at 23 (statement of Karen J. Mathis, President of the American Bar Association).

195. *Stein*, 440 F. Supp. 2d at 337. *See also Thompson Hearings, supra* note 2, at 23 (explaining the Thompson Memorandum “contains language that violates employees’ legal rights by pressuring their employers to take certain punitive actions against them during investigations,” including “by declining to fire or sanction them for exercising their Fifth Amendment rights”) (statement of Karen J. Mathis, President of the American Bar Association).
**LEGAL EXPERIENCE**

<table>
<thead>
<tr>
<th>Period</th>
<th>Position</th>
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<tbody>
<tr>
<td>January 2019 – Present</td>
<td>Partner, Litigation Department, Bracewell (Chair of the Firm’s White Collar Defense Group)</td>
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United States District Court,
S.D. New York.

UNITED STATES of America,
v.
Jeffrey STEIN, et al., Defendants.

No. S1 05 Crim. 0888(LAK).

Synopsis
Background: Government indicted employees of accounting firm, alleging accounting fraud. Employees moved for dismissal of indictment and other relief, claiming government applied pressure on firm to cut off reimbursement of attorney fees after employees were indicted.

Holdings: The District Court, Kaplan, J., held that:

- statute allowed for indemnification of employees by firm;

- Justice Department memorandum providing that payment of employee's attorney fees would be considered lack of cooperation on part of employer, when consideration was being given to indicting employer, was violation of substantive due process rights of employees;

- United States Attorney improperly pressured firm into terminating attorney payments;

- employees' right to counsel was violated;

- government had sovereign immunity from monetary claims; and

- court had ancillary jurisdiction over claim that firm should resume making payments to employees.

Ordered accordingly.

See, also, 429 F.Supp.2d 648.

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OPINION

KAPLAN, District Judge.

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2. The Thompson Memorandum and the Government's Implementation Violated the KPMG Defendants' Sixth Amendment Right to Counsel
The issue now before the Court arises at an intersection of three principles of American law.

The first principle is that everyone accused of a crime is entitled to a fundamentally fair trial. 1 This is a central meaning of the Due Process Clause of the Constitution.

The second principle, a corollary of the first, is that everyone charged with a crime is entitled to the assistance of a lawyer. 2 A defendant with the financial means has the right to hire the best lawyers money can buy. A poor defendant is guaranteed competent counsel at government expense. 3 This is at the heart of the Sixth Amendment.

The third principle is not so easily stated, not of constitutional dimension, and not so universal. But it too plays an important role in this case. It is simply this: an employer often must reimburse an employee for legal expenses when the employee is sued, or even charged with a crime, as a result of doing his or her job. Indeed, the employer often must advance legal expenses to an employee up front, although the employee sometimes must pay the employer back if the employee has been guilty of wrongdoing.

This third principle is not the stuff of television and movie drama. It does not remotely approach Miranda warnings in popular culture. But it is very much a part of American life. Persons in jobs big and small, private and public, rely on it every day. Bus drivers sued for accidents, cops sued for allegedly wrongful arrests, nurses named in malpractice cases, news reporters sued in libel cases, and corporate chieftains embroiled in securities litigation generally have similar rights to have their employers pay their legal expenses if they are sued as a result of their doing their jobs. This right is as much a part of the bargain between employer and employee as salary or wages. 4

*335 The issue now before the Court arises at an intersection of three principles of American law.

*336 Most of the defendants in this case worked for KPMG, one of the world's largest accounting firms. KPMG long has paid for the legal defense of its personnel, regardless of the cost and regardless of whether its personnel were charged with crimes. The defendants who
formerly worked for KPMG say that it is obligated to do so here. KPMG, however, has refused.

If that were all there were to the dispute, it would be a private matter between KPMG and its former personnel. But it is not all there is. These defendants (the “KPMG Defendants”) claim that KPMG has refused to advance defense costs to which the defendants are entitled because the government pressured KPMG to cut them off. The government, they say, thus violated their rights and threatens their right to a fair trial.

Having heard testimony from KPMG’s general counsel, some of its outside lawyers, and government prosecutors, the Court concludes that the KPMG Defendants are right. KPMG refused to pay because the government held the proverbial gun to its head. Had that pressure not been brought to bear, KPMG would have paid these defendants’ legal expenses.

Those who commit crimes—regardless of whether they wear white or blue collars—must be brought to justice. The government, however, has let its zeal get in the way of its judgment. It has violated the Constitution it is sworn to defend.

Facts

The Thompson Memorandum

In June 1999, then-U.S. Deputy Attorney General Eric Holder issued a document entitled *Federal Prosecution of Corporations* (the “Holder Memorandum”) to provide “guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a given case.” 6 He took pains to make clear that the factors articulated in the memorandum were not “outcome-determinative” and that “[f]ederal prosecutors [w]ere not required to reference these factors in a particular case, nor [w]ere they required to document the weight they accorded specific factors in reaching their decision.” Nevertheless, the language that plays a central role in the present controversy first was found in the Holder Memorandum.

The Holder Memorandum set forth some common sense considerations. Prosecutors, in deciding whether to indict a company, should pay attention to things like the nature and seriousness of the offense, the pervasiveness of wrongdoing within the entity, the company’s efforts to remedy past misconduct, the adequacy of other remedies, and the like. It mentioned also:

*337 “the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product protection ...” 7

Section VI elaborated on what was meant by cooperation. The general principle was that “[i]n gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive attorney-client and work-product privileges.” 8

The memorandum then set out several paragraphs of commentary, the most relevant for present purposes being this:

“Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending upon the circumstances, a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys' fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.” 9

A footnote to the comment concerning the advancing of attorneys' fees read:

“Some states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a
corporation's compliance with governing law should not be considered a failure to cooperate.”

Thus, the Holder Memorandum made clear that advancing of attorneys' fees to personnel of a business entity under investigation, except where such advances were required by law, might be viewed by the government as protection of culpable individuals and might contribute to a government decision to indict the entity.

As noted, the Holder Memorandum was not binding. Federal prosecutors were free to take it into account, or not, as they saw fit. But the corporate scandals of the earlier part of this decade changed that.

In late 2001, Enron, Global Crossing, Tyco International, Adelphia Communications and ImClone, among other companies, found themselves in worlds of trouble, much of it apparently of their own making. Bankruptcies and criminal prosecutions followed including, notably, the indictment of Enron's auditors, Arthur Andersen LLP—an indictment that resulted in the collapse of the firm, well before the case was tried. And on July 9, 2002, the President issued Executive Order 13271, which established a Corporate Fraud Task Force (the “Task Force”) headed by United States Deputy Attorney General Larry D. Thompson.

*338 On January 20, 2003, Mr. Thompson issued a document entitled Principles of Federal Prosecution of Business Organizations (the “Thompson Memorandum”) which, in many respects, was a modest revision of the Holder Memorandum. Indeed, the language concerning cooperation and advancing of legal fees by business entities was carried forward without change. Unlike its predecessor, however, the Thompson Memorandum is binding on all federal prosecutors. Thus, all United States Attorneys now are obliged to consider the advancing of legal fees by business entities as required by law, as at least possibly indicative of an attempt to protect culpable employees and as a factor weighing in favor of indictment of the entity.

While all of this was going on, the Internal Revenue Service ("IRS") began investigating tax shelters, including a number that are subjects of the indictment in this case. In early 2002, it issued nine summons to KPMG, which was less than fully compliant. Accordingly, on July 9, 2002, the government filed a petition in the United States District Court for the District of Columbia to enforce them.

A few months later, the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs “began an investigation into the development, marketing and implementation of abusive tax shelters by accountants, lawyers, financial advisors, and bankers.” This led to public hearings in November 2003 at which several senior KPMG partners or former partners—three of them now defendants here—testified.

The firm's reception at the hearing was not favorable. Senator Coleman, the subcommittee chair, for example, opened the hearing by saying that “the ethical standards of the legal and accounting profession have been pushed, prodded, bent and, in some cases, broken, for enormous monetary gain.” At another point, Senator Levin, the ranking minority member, in obvious exasperation at a KPMG witness, suggested that the witness “try an honest answer.”

Eugene O'Kelly, then KPMG chair, was concerned about the Senate hearing and the IRS proceedings. He retained Skadden Arps Slate Meagher & Flom ("Skadden"), and particularly Robert S. Bennett, “to come up with a new cooperative approach.” One aspect of that new approach was a decision to “clean house”—a determination to ask Jeffrey Stein, Richard Smith, and Jeffrey Eischeid, all senior KPMG partners who had testified before the Senate and all now defendants here—to leave their positions as deputy chair and chief operating officer of the firm, vice chair—tax services, and a partner in personal financial planning, respectively.

Given Mr. Stein's senior position and his relationship with Mr. O'Kelly, his departure was cushioned substantially, although many of the facts have come to light only recently. He “retired” from the firm with a $100,000 per
month, three-year consulting agreement. He agreed to release the firm and all of its partners, principals, and employees from all claims. He and KPMG agreed also that Mr. Stein would be represented, at KPMG's expense, in any suits brought against KPMG or its personnel and himself, by counsel acceptable to both him and the firm or, if joint representation were inappropriate or if Mr. Stein were the only party to a proceeding, by counsel reasonably acceptable to Mr. Stein.

Despite KPMG's effort to stave off trouble by “cleaning house,” much damage already had been done. In the early part of 2004, the IRS made a criminal referral to the Department of Justice (“DOJ”), which in turn passed it on to the United States Attorney's Office for this district (“USAO”).

*340 KPMG's Policy on Payment of Legal Fees
KPMG's policy prior to this matter concerning the payment of legal fees of its partners and employees is clear. While KPMG's partnership agreement and by-laws are silent on the subject, the parties have stipulated as follows:

1. Prior to February 2004, ... it had been the longstanding voluntary practice of KPMG to advance and pay legal fees, without a preset cap or condition of cooperation with the government, for counsel for partners, principals, and employees of the firm in those situations where separate counsel was appropriate to represent the individual in any civil, criminal or regulatory proceeding involving activities arising within the scope of the individual's duties and responsibilities as a KPMG partner, principal, or employee.

2. This practice was followed without regard to economic costs or considerations with respect to individuals or the firm.

3. With the exception of the instant matter, KPMG is not aware of any current or former partner, principal or employee who has been indicted for conduct arising within the scope of the individual's duties and responsibilities as a KPMG partner, principal, or employee since [two partners] were indicted and convicted of violation of federal criminal law in 1974. Although KPMG has located no documents regarding payment of legal fees in that case, KPMG believes that it did pay pre- and post-indictment legal fees for the individuals in that case.”

The Court infers and finds that KPMG in fact paid the pre- and post-indictment legal fees for the individuals in the 1974 criminal case. Moreover, the extent to which KPMG has gone is quite remarkable. In one recent situation involving KPMG's relationship with Xerox Corporation, it paid over $20 million to defend four partners in a criminal investigation and related civil litigation brought by the Securities and Exchange Commission.

*341 The Initial Discussion between the USAO and Skadden
When the referral reached the USAO on February 5, 2004, it came under the supervision of Shirah Neiman, who was chief counsel to the United States Attorney, the USAO's liaison to the IRS, a participant in the drafting of the Holder Memorandum, and a very experienced prosecutor. The USAO notified Skadden of the referral, and a meeting was scheduled for February 25, 2004.

In the meantime, on February 9, 2004, the USAO prepared “subject” letters—letters advising the recipient that he or she “is a person whose conduct is within the scope of [a] grand jury's investigation” to between 20 and 30 KPMG partners and employees, including all but five of the defendants in this case. In preparation for the meeting, Ms. Neiman, Assistant United States Attorneys (“AUSA”) Weddle and Okula, and other members of the prosecution team conferred. They decided to ask Skadden whether KPMG was paying the legal fees of individuals under investigation. Accordingly, the government prepared a document headed “Skadden Meeting Points” setting forth matters that the government intended to discuss at the meeting. The first page of the three-page list contained an item that read:

“# Is KPMG paying/going to pay the legal fees of employees? Current or former?”
What about taxpayers?

Who?

◆ Any agreements or other obligations to do so?

What are they?” 33

The meeting was attended by Mr. Bennett, Ms. Neiman, and many others on both sides. Mr. Weddle began by telling Skadden that the government was there to hear what Skadden had to say and that it had a few questions. Mr. Bennett explained that Skadden had been hired in view of Mr. O'Kelly's concern about the controversy with the IRS and the Senate hearings and that KPMG had decided to clean house and change the atmosphere at the firm. He reported that the firm had taken high-level personnel action already, that it would cooperate fully with the government's investigation, and that the object was to save KPMG, not to protect any individuals. In an obvious reference to the fate of Arthur Andersen, he said that an indictment of KPMG would result in the firm going out of business. 34

After a discussion of the structure of KPMG and of potential conflicts of interest, Mr. Weddle “got to the subject of legal fees and asked whether KPMG was obligated to pay fees and what their plans were.” 35 Mr. Bennett tested the waters to see whether KPMG could adhere to its practice of paying its employees' legal expenses when litigation loomed. He asked for government's view on the subject. 37 Ms. Neiman said that the government would take into account KPMG's legal obligations, if any, to advance legal expenses, but referred specifically to the Thompson Memorandum as a point that had to be considered. 38

*342 At or about that point, Messrs. Bennett and Bialkin told the USAO that KPMG's “common practice” had been to pay legal fees. They added that the partnership agreement was vague and that Delaware law gave the company the right to do whatever it wished, but said that KPMG still was checking on its legal obligations. It would not, however, pay legal fees for employees who declined to cooperate with the government, or who took the Fifth Amendment, as long as it had discretion to take that position. 39

The conversation then shifted briefly to a discussion of the personnel changes that KPMG had made. 40 Mr. Bennett reported that Messrs. Stein, Eischeid, and Smith had been asked to leave, but explained that neither KPMG nor Skadden had done an internal investigation to determine who were “bad guys” or whether any crime had been committed. 41 Almost immediately, Mr. Weddle reverted to the subject of attorneys' fees, asking Mr. Bennett to determine KPMG's obligations in that regard. 42 Ms. Neiman then said that “misconduct” should not or cannot “be rewarded” and referred to federal guidelines. 43

There is no dispute, and the Court finds, that this comment came immediately on the heels of a statement by Mr. Bennett relating to lawyers for KPMG partners. 44 There are disputes, however, about precisely what Ms. Neiman said about “guidelines” and what she meant by it. 45 The parties have focused in particular on whether Ms. Neiman intended her remark to be directed to the legal fee issue—i.e., to be a statement to the effect that payment by KPMG of employee legal fees could be viewed as rewarding misconduct—or to be directed instead at any severance arrangements between KPMG and Messrs. Stein, Eischeid, and Smith. Ms. Neiman testified that her intent was the latter. 46 But the Court finds it unnecessary to decide Ms. Neiman's subjective purpose in making the remark because what is more important is how her comment was understood.

As Ms. Neiman's remark came immediately after a statement concerning whether KPMG would be paying for lawyers for its personnel, it would have been quite natural to understand the comment as having been directed at payment of legal fees. And that is exactly what happened:

• The IRS agent's handwritten notes, taken at the meeting, state:

  “BB—[illegible] Skadden may recommend lawyers for this. Wants lawyers who understand
cooperation is the best way to go in this type of case.

He feels it is in the best interests of KPMG for its people to get attorneys that will cooperate with Go[vt]. Want to save the firm.

“Per SN

Fees—under Federal Guideline—Misconduct C/N

Be rewarded.

JW—figure out firms obligations and [illegible]”

• The IRS agent's typewritten memorandum, prepared from her notes, state:

“31. AUSA Weddle finally asked Mr. Bennett to find out what KPMG's obligations would be. Shirah Neiman further advised them that under the federal guidelines misconduct can not be rewarded.”

• Skadden's Mr. Pilchen recorded:

“SP—No decisions made. No counsel have been recommended—we have had discussions @ what the firm does in typical situations—but no final decisions made.

“SN—misconduct shdn't be rewarded.”

• Not long afterward, Mr. Pilchen told a lawyer for a KPMG employee that the government had implied that it preferred that KPMG not pay employee legal fees.

• AUSA Okula testified:

“Q In response to the topic of cooperation, isn't it a fact that Shirah Neiman goes back to the fees and says, well, remember, we're looking at that under federal guidelines. Yes or no?

“A Yes.

“Q And that was about fees, wasn't it?

“A Fees, yes, that's what it says.

“Q It wasn't about terminating Eischeid or Stein or anybody else. It was *344 about paying fees and cooperation. Correct?

“A Correct.”

In sum, Ms. Neiman's comment that “misconduct” cannot or should not “be rewarded” under “federal guidelines,” whatever went through her mind when she said it, was understood by both KPMG and government representatives as a reminder that payment of legal fees by KPMG, beyond any that it might legally be obligated to pay, could well count against KPMG in the government's decision whether to indict the firm. And if there were any doubt that this was the message conveyed, the doubt quickly was dispelled by Mr. Weddle. As Mr. Pilchen's notes recorded, he followed up Ms. Neiman's comment by saying:

“JW—if u have discretion re fees—we'll look at that under a microscope.”

Thus, while the USAO did not say in so many words that it did not want KPMG to pay legal fees, no one at the meeting could have failed to draw that conclusion.

KPMG Gets the Message

Shortly after the February 25, 2004 meeting, Mr. Bennett got back to Mr. Weddle on the legal fee issue. He reported that KPMG did not think it had any binding legal obligation to pay legal fees, but that “it would be a big problem” not to do so because the firm was a partnership. He said that KPMG was planning on putting a cap, or limit, on fees and conditioning their payment for any given partner or employee on that individual “cooperating fully with the company and the government.”

Apparently satisfied with the government's response, KPMG began to implement the policy.

On March 4, 2004, Mr. Pilchen of Skadden spoke to Mr. Townsend, an attorney for defendant Carolyn Warley.
He told Townsend that KPMG would pay his fees so long as Ms. Warley cooperated with the government. For example, he said, no fees would be paid if Ms. Warley invoked her privilege against self-incrimination under the Fifth Amendment.56

On March 11, 2004, the Skadden team had a conference call with the USAO. Mr. Bennett assured the USAO that KPMG would be “as cooperative as possible” so that the office would not exercise its discretion to indict the firm. Mr. Weddle urged that KPMG tell its people that they should be “totally open” with the USAO, “even if that [meant admitting] criminal wrongdoing.” He commented that this would give him good material for cross-examination,57 a statement that strongly indicates that at least the lead line AUSA on the case expected, even at this stage, to prosecute individuals.

The actions of the USAO, coupled with the Thompson Memorandum, had the desired effect. On the same date, Skadden's Mr. Rauh wrote to the USAO, enclosing among other things a form letter that Skadden was sending to counsel for the KPMG Defendants then employed by KPMG who had received subject letters from the government or otherwise appeared to be under suspicion.58 The form letter stated that KPMG would pay an individual's legal fees and expenses, up to a maximum of $400,000, on the condition that the individual “cooperate with the government and ... be prompt, complete, and truthful.”59 Importantly, however, it went even further. It made clear that “payment of ... legal fees and expenses will cease immediately if ... [the recipient] is charged by the government with *346 criminal wrongdoing.”60 In addition, on March 12, 2004, Joseph Loonan, then KPMG's deputy general counsel, sent an advisory memorandum to a broader audience of KPMG personnel regarding potential contacts by the government.61 The memorandum urged full cooperation with the investigation. But it advised also that recipients had a right to be represented by counsel if they were contacted by the government, mentioned some advantages of consultation with counsel, and stated that KPMG had arranged for independent counsel for those who wished to consult them.62

The USAO took no issue with KPMG's announcement that it would cut off payment of legal fees for anyone who was indicted and that it would condition the limited pre-indictment payments on cooperation with the government. The advisory memorandum, on the other hand, upset Mr. Weddle and Kevin Downing, another member of the prosecution team.63 They immediately advised Skadden that it was “disappointed with [its] tone” and allegedly “one-sided presentation of potential issues” and demanded that KPMG send out a supplemental memorandum in a form they proposed.64 The only significant point of difference between the memorandum that the government demanded and Mr. Loonan's original memorandum was the language in the government's proposal italicized below:

“Employees are not required to use this counsel, or any counsel at all. Rather, employees are free to obtain their own counsel, or to meet with investigators without the assistance of counsel. It is entirely your choice.”65

In due course, KPMG capitulated to the USAO demand. It put out in “Q & A” format a document containing the following language:

“Do I have to be assisted by a lawyer?

**Answer:** No. Although we believe that it is probably in your best interests to consult with a lawyer before speaking to government representatives, whether you do so is entirely your choice. *As we said in the March 12 OGC [Office of General Counsel] memorandum, you may deal directly with government representatives without counsel. In any event, the Firm expects you to cooperate fully with the government representatives and provide complete and truthful information to them.*66

*347 This exchange is revealing. No one suggests that either the original KPMG advice or the government's subsequent proposal misstated the law. The difference was one of emphasis. But it is entirely plain that the government's purpose in demanding the supplement was to increase the chances that KPMG employees would agree to interviews without consulting or being
The Government Presses Its Advantage

The KPMG lawyers met again with the USAO on March 29, 2004. In an effort to demonstrate that KPMG was cooperating, Skadden asked the government to notify it if any current or former KPMG employee refused to meet with prosecutors or otherwise failed to cooperate. 67

From that point forward, the government took full advantage. It repeatedly notified Skadden when KPMG personnel failed to comply with government demands. 68 In each case, Skadden promptly advised the attorney for the individual in question that the payment of legal fees would be terminated “[a]bsent an indication from the government within the next ten business days that your client no longer refuses to participate in an interview with the government.” 69 In some cases, the individuals in question relented under pressure of the threats from KPMG and submitted to interviews with the government. In others, they did not, whereupon KPMG terminated their employment and cut off the payment of legal fees. 70

The Conclusion of the Investigation, KPMG's Stein Problem and the Deferred Prosecution Agreement

As the matter unfolded, meetings between KPMG and its counsel and the USAO continued, with KPMG seeking a resolution short of an indictment of the firm and the government pressing for admissions of extensive wrongdoing, a great deal of money, and changes in KPMG's business.

On August 4, 2004, the KPMG executives and lawyers met with Karen Seymour, then chief of the criminal division of the USAO, and other prosecutors. In the course of the meeting, Ms. Seymour said that the government had learned that KPMG had granted rich severance packages to certain executives and that this raised a “troubling issue under the ‘Thompson Memo.’ ” 71 Mr. Bennett deflected the issue, agreeing that severance packages were “high in one or two cases” but reiterating that KPMG’s “expectation” was that legal fees of individuals would be paid only up to $400,000 and only on condition that recipients cooperated with the government. 72 But the Stein severance agreement was not produced.

As time went by, KPMG came to view the Stein severance agreement as something of a ticking bomb. For one thing, KPMG had not adhered in Mr. Stein's case to the $400,000 pre-indictment legal fee cap that it had adopted in response to government pressure. It passed that figure by late October 2004, 73 and so was at *348 odds with its representation to the government. 74 For another, it had known since August 2004 that the USAO was unhappy that rich severance packages had been given to senior executives. 75

Notwithstanding this problem, KPMG repeatedly tried to convince the USAO not to indict the firm, touting its cooperation with the investigation and its limitation of attorneys' fees for individuals. In meetings in March 2005 with David N. Kelley, then United States Attorney, however, this approach did not yield the desired result. Indeed, on March 2, 2005, Mr. Kelley interrupted Mr. Bennett's claim that the firm had cooperated by saying, “Let me put it this way. I've seen a lot better from big companies.” 76 That meeting, in the words of KPMG's Mr. Loonan, was “not particularly encouraging,” 77 and a subsequent meeting in New York went no better.

With the scene about to shift to Washington and a last-ditch effort to prevent an indictment by an appeal at the highest levels of the Justice Department, KPMG's objective was “to be able to say at the right time with the right audience, we're in full compliance with the Thompson Guidelines.” 78 It concluded that the Stein situation involved too great a risk. So on May 5, 2005, eight days before KPMG was to meet with U.S. Deputy Attorney General James Comey to plead its case, KPMG unilaterally terminated the consulting services portion of the severance agreement and cut off payment of Mr. Stein's attorneys' fees. 79 It did so, as Mr. Loonan candidly admitted, “because [KPMG] thought it would help [the firm] with the government.” 80

Having dealt, as best it could, with the Stein problem, KPMG turned to attempting to persuade Deputy
Attorney General Comey not to indict the firm. The meeting took place on June 13, 2005. Once again, Mr. Bennett relied upon KPMG's cooperation with the government, in addition of course to other arguments. A Skadden memorandum of the meeting recounts some of his remarks as follows:

"In addition, it [KPMG] had done something 'never heard of before'—conditioned the payment of attorney's fees on full cooperation with the investigation. 'We said we'd pressure—although we didn't use that word—our employees to cooperate. We told employees that attorney fees would not be paid unless they fully cooperated with the investigation.' He noted that whenever an individual indicated he or she would not cooperate, 'Justin [Weddle] or Stan [Okula] would tell us,' and KPMG took action. He went on to note that 'what played out' was that current or former personnel who otherwise would not have cooperated did cooperate, and those who did not had their fees cut off and, in two instances, were separated from the firm. This process exhibited 'a level of cooperation that is rarely done.'

* * *

"He noted that what was really 'precedent-setting' about the case was the conditioning of payment of legal fees on cooperation." 81

This time, KPMG was more successful.

The Deferred Prosecution Agreement and the Indictment in This Case

On August 29, 2005, KPMG and the government entered into a Deferred Prosecution Agreement ("DPA"). KPMG agreed, among other things, to waive indictment, to be charged in a one-count information, to admit extensive wrongdoing, to pay a $456 million fine, and to accept restrictions on its practice. The government agreed that it will seek dismissal of the information if KPMG complies with its obligations. 82 In a nutshell, KPMG stands to avoid a criminal conviction if it lives up to its part of the bargain.

One additional aspect of the DPA is noteworthy in the present context. The DPA obliges KPMG to cooperate extensively with the government, both in general and in the government's prosecution of this indictment. It provides in part:

"7. KPMG acknowledges and understands that its cooperation with the criminal investigation by the Office [USAO] is an important and material factor underlying the Office's decision to enter into this Agreement, and, therefore, KPMG agrees to cooperate fully and actively with the Office, the IRS, and with any other agency of the government designated by the Office ('Designated Agencies') regarding any matter relating to the Office's investigation about which KPMG has knowledge or information.

"8. KPMG agrees that its continuing cooperation with the Office's investigation shall include, but not be limited to, the following:

"(a) Completely and truthfully disclosing all information in its possession to the Office and the IRS about which the Office and the IRS may inquire, including but not limited to all information about activities of KPMG, present and former partners, employees, and agents of KPMG;

* * *

"(d) Assembling, organizing, and providing, in responsive and prompt fashion, and, upon request, expedited fashion, all documents, records, information, and other evidence in KPMG's possession, custody, or control as may be requested by the Office or the IRS;

"(e) Not asserting, in relation to the Office, any claim of privilege (including *350 but not limited to the attorney-client privilege and the work product protection) as to any documents, records, information, or testimony requested by the Office related to its investigation ... [; and]

"(f) Using its reasonable best efforts to make available its present and former partners and employees to provide information and/or testimony as requested by the Office and the IRS, including
sworn testimony before a grand jury or in court proceedings, as well as interviews with law enforcement authorities ...

“9. KPMG agrees that its obligations to cooperate will continue even after the dismissal of the Information, and KPMG will continue to fulfill the cooperation obligations set forth in this Agreement in connection with any investigation, criminal prosecution or civil proceeding brought by the Office or by or against the IRS or the United States relating to or arising out of the conduct set forth in the Information and the Statement of Facts and relating in any way to the Office's investigation.”

The cooperation provisions of the DPA thus require KPMG to comply with demands by the USAO in connection with this prosecution, with little or no regard to cost. If it does not comply, it will be open to the risk that the government will declare that KPMG breached the DPA and prosecute the criminal information to verdict. Anything the government regards as a failure to cooperate, in other words, almost certainly will result in the criminal conviction that KPMG has labored so mightily to avoid, as the admissions that KPMG now has made would foreclose a successful defense.

At about the same time, the government filed the initial indictment in this case. True to its word, KPMG cut off payments to the defendants of legal fees and expenses.

*351 The motion was heard on March 30, 2006. In the course of the argument, the government, for the first time, took the position that it had “no objection whatsoever to KPMG exercising its free and independent business judgment as to whether to advance defense costs ... and that if it were to elect to do so the government would not in any way consider that in determining whether [KPMG] had complied with the DPA.” Nevertheless, the Court expressed concern about the impact of the Thompson Memorandum on KPMG's decision with respect to the payment of legal fees and ultimately invited the defendants to make a written submission as to the precise factual issue(s) as to which they sought an evidentiary hearing.

The government sought to avoid a hearing. It responded to the defendants' submission with a declaration by Mr. Weddle and a letter brief.

Mr. Weddle's declaration stated in relevant part:

“2. On February 25, 2004, legal counsel for KPMG met with me and other representatives of the United States Attorney's Office for the first time in connection with this investigation. At this meeting, among other things:

*d. KPMG's lawyers stated that they were looking into the issue of their obligations to pay fees, and indicated that if it was within KPMG's discretion
whether to pay fees, KPMG would not pay fees for individuals who do not cooperate.

“e. The Government did not instruct or request KPMG to implement that plan or to implement a contrary plan.

“3. * * * Once again, in this call [March 2, 2004], the Government did not tell KPMG's counsel that KPMG's decision to pay legal fees was improper, nor did we instruct or request KPMG to change its decision about paying fees, capping the payment of fees, or conditioning of fees on an employee's or a partner's cooperation.”

The letter brief stated:

“The Government did not instruct or request KPMG to implement that plan [i.e., KPMG's plan to advance fees subject to a cap and a requirement of cooperation with the government] or to implement a contrary plan.

* * *

“Once again, the Government did not tell KPMG that its decision to pay legal fees was improper. Nor did the Government instruct or request KPMG to change its decision about paying fees, capping the payment of fees, or conditioning the payment of fees on an employee's or a partner's cooperation.

* * *

“In sum, during the course of its dealings with KPMG, the United States Attorney's Office did not instruct KPMG whether KPMG should pay legal fees, whether KPMG should cap the payment of legal fees, or whether KPMG should condition the payment of legal fees.”

Prehearing Proceedings

On April 12, 2006, the Court ordered an evidentiary hearing and limited discovery on the motion and, particularly, on “whether the government, through the Thompson Memorandum or otherwise, affected KPMG's determination(s) with respect to the advancement of legal fees and other defense costs to present or former partners and employees with respect to the investigation and prosecution of this case and such subsidiary issues as relate thereto.” The order granted the KPMG Defendants leave to serve a Rule 17(c) subpoena on KPMG for documents.

Without getting into unnecessary detail, it is fair to say that KPMG's participation from that point on was more extensive than simply responding to the subpoena. It sought to block or, at least, delay issuance of the subpoena while it tried to broker stipulations between defendants and the government in an effort to limit the scope of discovery from KPMG and testimony by its personnel. It sought and obtained, for its own convenience, a delay of the hearing. And it obtained leave for its counsel appear not only for the purpose of responding to the subpoena “in this matter,” but “for any purposes relating to this matter that the Court may so [sic ] order.”

The Hearing

The Court conducted an evidentiary hearing on May 8–10, 2006. Counsel for KPMG were present throughout. At the conclusion of argument by other counsel, the Court addressed counsel for KPMG: “You certainly have notice that a remedy is being sought against your client, and I'm now making it clear in words of one syllable. You will have a chance to be heard if you want it.” It went on to emphasize that it would welcome any submission on behalf of KPMG and that KPMG could “make whatever reservation of rights [it wished] in submitting.”

KPMG ultimately submitted a memorandum of law. It did not seek to offer any evidence, to question any witnesses, or to make any offer of proof.

Ultimate Factual Conclusions

Several broad conclusions follow from the foregoing.

First, the Thompson Memorandum caused KPMG to consider departing from its long-standing policy of paying legal fees and expenses of its personnel in all cases and investigations even before it first met with the USAO. As a direct result of the threat to the firm inherent in the Thompson Memorandum, it sought an indication from
the USAO that payment of fees in accordance with its settled practice would not be held against it.

Second, the USAO did not give KPMG the comfort it sought. To the contrary, it deliberately, and consistent with DOJ policy, reinforced the threat inherent in the Thompson Memorandum. It placed the issue of payment of legal fees high on its agenda for its first meeting with KPMG counsel, which emphasized the prosecutors' concern with the issue. Mr. Weddle raised the issue and then repeatedly focused on KPMG's “obligations,” thus clearly *353 implying—consistent with the language of the Thompson Memorandum—that compliance with legal obligations would be countenanced, but that anything more than compliance with demonstrable legal obligations could be held against the firm. Ms. Neiman's statement, in response to a comment about payment of legal fees by KPMG, that misconduct should not be rewarded quite reasonably was understood in the same vein, whatever its intent. And Mr. Weddle's colorful warning that the USAO would look at any discretionary payment of fees by KPMG “under a microscope” drove the point home.

Third, the government conducted itself in a manner that evidenced a desire to minimize the involvement of defense attorneys. This objective arguably is inherent, to some degree, in the Thompson Memorandum itself. But there is considerably more proof, specific to this case, here. The *contretemps* with KPMG over its Advisory Memorandum demonstrated the government's desire, wherever possible, to interview KPMG witnesses without their being represented by lawyers. The USAO's ready acceptance of KPMG's offer to cut off payment of legal fees for anyone who was indicted speaks for itself. It speaks even more eloquently when one considers that the USAO accepted KPMG's word on this point.

Fourth, KPMG's decision to cut off all payments of legal fees and expenses to anyone who was indicted and to limit and to condition such payments prior to indictment upon cooperation with the government was the direct consequence of the pressure applied by the Thompson Memorandum and the USAO. Absent the Thompson Memorandum and the actions of the USAO, KPMG would have paid the legal fees and expenses of all of its partners and employees both prior to and after indictment, without regard to cost. 97

Discussion

I. The Relationship Between KPMG and its Personnel With Respect to Advancement of Legal Fees and Defense Costs

A. Indemnification and Advancement Generally

The issue of employer payment of legal expenses incurred by their employees as a result of doing their jobs arises in a context that dates back many years.

In the nineteenth century, Justice Story stated what already was an established proposition: “if an agent has, without his own default, incurred losses or damages in the course of transacting the business of his agency, or in following the instructions *354 of his principal, he will be entitled to full compensation therefor” from the employer. 98 The modern common law rule is the same. And it extends to payment of expenses incurred by an employee or other agent in defending a lawsuit on a claim with respect to which the employee is entitled to indemnity. 99

The success of the corporation as a business form brought growing pains. Lawsuits against corporate directors became ever more common. By the early part of the last century, the situation had become what one commentator described as “open season on directors.” 100 The question whether directors who successfully defended such suits were entitled to be reimbursed for the expenses of defending such suits despite the fact that they often were not employees began to arise.
At least one early decision favored reimbursement, commonly called indemnification. In the 1930s, however, courts in Ohio and New York came to the opposite conclusion. These decisions gave rise to a “not unnatural cry for legislation.” Taking the view that “[i]ndemnification encourages corporate service by capable individuals by protecting their personal financial resources from depletion [as a result of] ... litigation that results by reason of that service,” legislatures all over the country responded.

Today, all states have statutes addressing the indemnification of corporate directors, officers, employees, and other agents. Many have adopted also statutes providing for indemnification of members and employees of partnerships as well as of members, officers, and agents of newer forms of business organization such as limited partnerships and limited liability companies. Still others also protect employees with statutes relating specifically to the employment relationship.

These statutes take different forms. Some require indemnification. Some permit indemnification where the corporation or other business entity elects to provide it. A few provide the exclusive vehicle for indemnification while most permit indemnification as a matter of contract or otherwise as well as pursuant to statute. Many provide for indemnification, at least in some circumstances, for the cost of defending employment-related criminal charges. All or virtually all, however, share an additional characteristic. As the Delaware Supreme Court recently put it, “the right to indemnification cannot be established ... until after the defense to legal proceedings has been ‘successful on the merits or otherwise.’ ”

This has been viewed as a problem. Persons who are sued can be subjected to “the personal out-of-pocket financial burden of paying the significant ongoing expenses inevitably involved with investigations and legal proceedings.” In consequence, many states authorize business entities to advance defense costs to their personnel, subject to the recipients’ obligation to repay the money in the event it ultimately is determined that they are not entitled to indemnity.

This has been described as “an especially important corollary to indemnification as an inducement for attracting capable individuals into corporate service.” Advancement “fills the gap ... so the [entity] may shoulder ... interim costs,” and its value “is that it is granted or denied while the underlying action is pending.” As Judge Haight has written, it protects the “ability [of the employee] to mount ... a defense ... by safeguarding his ability to meet his expenses at the time they arise, and to secure counsel on the basis of such an assurance.”

Against this background, we turn to KPMG’s relationship with the KPMG Defendants.

B. KPMG
The statute that governs KPMG gives it the authority “to indemnify and hold harmless any partner or other person from and against any and all claims and demands whatsoever.” This includes the authority to advance defense costs prior to final judgment. KPMG had an unbroken track record of paying the legal expenses of its partners and employees incurred as a result of their jobs, without regard to cost. All of the KPMG Defendants therefore had, at a minimum, every reason to expect that KPMG would pay their legal expenses in connection with the government's investigation and, if they were indicted, defending against any charges that arose out of their employment by KPMG. Indeed, it appears quite possible that all had contractual and other legal rights to indemnification and advancement of defense costs, although the Court declines to decide that in this ruling.

II. The Government Violated the Fifth and Sixth Amendments by Causing KPMG to Cut Off Payment of Legal Fees and Other Defense Costs Upon Indictment

A. The Right to Fairness in the Criminal Process

I. Nature of the Right

“ ‘No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition
of the paramount need for prompt, *eminently fair* and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.”

The Supreme Court long has protected a defendant's right to fairness in the criminal process. It has grounded this protection primarily in the Due Process Clause as well as more specific provisions of the Bill of Rights, including the Confrontation and Assistance of Counsel Clauses of the Sixth Amendment. Whatever the textual source, however, the Court consistently has held that criminal defendants are entitled to be treated fairly throughout the process. In everyday language, they are entitled to a fair shake.

This concern for the fairness of criminal proceedings runs throughout many of the Court's decisions regarding fair trials and access to the courts. For example, in *Powell v. Alabama*, in which the Court first held that a defendant in a capital case has the right to the aid of counsel, it reasoned that if a tribunal were “arbitrarily to refuse to hear a party by counsel[,] it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.” In other words, without counsel for the defense, a capital prosecution is presumptively unfair and therefore violates due process. The implied converse is that due process requires fair proceedings.

One aspect of the required fairness protects the autonomy of the criminal defendant. It rests on the common-sense truth that, at the end of the day, it is the defendant “who suffers the consequences if the defense fails.” So proper respect for the individual prevents the government from interfering with the manner in which “the individual wishes to present a defense.” The underlying theme is that the government may not both prosecute a defendant and then seek to influence the manner in which he or she defends the case.

A defendant's right to control the manner and substance of the defense has several aspects. The defendant has the right to represent him—or herself, even if such a decision objectively may appear to be unwise. A defendant is guaranteed also “the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire”—in other words, to use his or her own assets to defend the case, free of government regulation. Nor may the government interfere at will with a defendant's choice of counsel, as the Constitution “protect[s] ... the defendant's free choice independent of concern for the objective fairness of the proceedings.” Similarly, a defendant is generally free, within the procedural constraints that govern trials generally, to adduce evidence without unjustified restrictions and may choose which witnesses to present or cross-examine. In short, fairness in criminal proceedings requires that the defendant be firmly in the driver's seat, and that the prosecution not be a backseat driver.

The constitutional requirement of fairness in criminal proceedings not only prevents the prosecution from interfering actively with the defense, but also from passively hampering the defendant's efforts. As the Court put it in *California v. Trombetta*,

> “Under the Due Process Clause ..., criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed what might loosely be called the area of constitutionally guaranteed access to evidence. Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.”

Hence, the prosecution may not conceal exculpatory evidence or plea agreements with key government witnesses. In some instances, it may be required to disclose the identity of its undercover informants in possession of evidence critical to the defense.
Prosecutors are required also by the Due Process Clause to conduct themselves fairly. They may not delay intentionally indictments to prejudice defendants. They may not obstruct defendants' access to a potential witness unless that is necessary to protect the witness's safety. Nor may they knowingly offer perjured or false evidence. Entrapment by prosecutors and law enforcement officers is proscribed by the Due Process Clause. While prosecutors appropriately are given great latitude in the arguments they make to juries, they cross into unconstitutional territory when they “infect[ ] the trial with unfairness.”

Finally, the requirement of fairness in criminal proceedings applies to the structure and conduct of the entire criminal justice system. For example, the Court held that Dr. Sam Sheppard's due process rights were violated when the trial court failed to protect him from the firestorm of prejudicial publicity surrounding his trial. It has recognized also the right to trial before an unbiased tribunal. In Ward v. Village of Monroeville, for example, it held that a defendant was denied due process when he was tried for traffic offenses before the village mayor, who was responsible for village finances and whose court provided a substantial portion of village funds through fines, forfeitures, costs, and fees. Similarly, in Tumey v. Ohio, the Court reversed a conviction because the judge was paid from fines levied in his court and therefore received payment only upon conviction. The Court said that such a system “deprives a defendant ... of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.”

The Court's jurisprudence thus makes clear that defendants have the right, under the Due Process Clause, to fundamental fairness throughout the criminal process.

The Due Process Clause has been interpreted to provide not only procedural protection for deprivations of life, liberty, and property, but also substantive protection for fundamental rights—those that are so essential to individual liberty that they cannot be infringed by the government unless the infringement is narrowly tailored to serve a compelling state interest.

“Only fundamental rights and liberties which are deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty qualify for such protection.” The right to fairness in criminal proceedings has not been explicitly so characterized by the Court. The question here, then, is whether and to what extent it properly is regarded as fundamental for purposes of requiring strict scrutiny of alleged impingements. A number of guides point the way.

To begin with, many of the Supreme Court's criminal due process decisions described above can be understood in modern terms most readily in the substantive due process and strict scrutiny framework. The requirement of an unbiased tribunal, for example, is not found in the explicit language of the Constitution. It rests instead on the proposition that a fair tribunal is “implicit in the concept of ordered liberty.” The state's legitimate interest in, for example, saving money by having the same person both run a town's finances and levy traffic fines is insufficient to justify infringing upon the right to a fair trial. Thus, the Supreme Court's repeated recognition of the constitutional mandate of fairness in criminal proceedings strongly suggests that this right is “fundamental” for substantive due process purposes, at least in some circumstances. Indeed, it would be difficult to conclude otherwise. Our concern with protection of the individual against the unfair use of the great power of the government is “deeply rooted in this Nation's history and tradition.” “[N]either liberty nor justice would exist” if fairness to criminal defendants were sacrificed. Indeed, as one court put it, “What can be more basic to the scheme of constitutional rights precious to us all than the right to fairness throughout the proceedings in a criminal case?”
These considerations have led the Second Circuit\textsuperscript{154} and several other courts (often in \textit{dicta}),\textsuperscript{155} as well as respected commentators,\textsuperscript{156} to conclude that the right to fairness in criminal proceedings is a fundamental liberty interest subject to substantive due process protection. But it is not necessary or, in this Court's view, appropriate, to go that far in order to decide this case. It is a venerable maxim of constitutional construction that courts should decide no more than is necessary.\textsuperscript{157} And the only question now before the Court is whether a criminal defendant has a right to obtain and use in order to prepare a defense resources lawfully available to him or her, free of knowing or reckless government interference.\textsuperscript{158} Given all that *\textsuperscript{362} has been said above, this Court concludes that such a right is basic to our concepts of justice and fair play. It is fundamental.\textsuperscript{159}

3. \textit{The Government's Actions Violated the Substantive Due Process Right to Fairness in the Criminal Process}

\textit{a. The Effect on the KPMG Defendants}

The Thompson Memorandum and the USAO pressure on KPMG to deny or cut off defendants' attorneys' fees necessarily impinge upon the KPMG Defendants' ability to defend themselves.

This is by no means a garden-variety criminal case. It has been described as the largest tax fraud case in United States history. The government thus far has produced in discovery, in electronic or paper form, at least 5 million to 6 million pages of documents plus transcripts of 335 depositions and 195 income tax returns.\textsuperscript{160} The briefs on pretrial motions passed the 1,000–page mark some time ago.\textsuperscript{161} The government expects its case in chief to last three months, while defendants expect theirs to be lengthy as well.\textsuperscript{162} To prepare for and try a case of such length requires substantial resources.\textsuperscript{163} Yet the government has interfered with the ability of the KPMG Defendants to obtain resources they otherwise would have had. Unless remedied, this interference almost certainly will affect what these defendants can afford to permit their counsel to do. This would impact the defendants' ability to present the defense they wish to present by limiting the means lawfully available to them. The Thompson Memorandum and the USAO's actions therefore are subject to strict scrutiny.

\textit{b. The Thompson Memorandum and the USAO's Actions Fail the Strict Scrutiny Test}

To survive strict scrutiny, government action must be narrowly tailored to achieve a compelling government interest.\textsuperscript{164}

*\textsuperscript{363} The portion of the Thompson Memorandum at issue here—the language that states that payment of legal fees for employees and former employees may be viewed as protection of culpable employees and thus cut in favor of indicting the entity—purportedly serves three goals. First, it is intended to facilitate just charging decisions concerning business entities by focusing on a consideration pertinent to gauging their degrees of cooperation. Second, it seeks to strengthen the government's ability to investigate and prosecute corporate crime by encouraging companies to pressure their employees to aid the government—recall Mr. Weddle's urging KPMG to tell its people to be “totally open” with the USAO, “even if that [meant admitting] criminal wrongdoing.” Finally, it seeks to punish those whom prosecutors deem culpable—it attempts to justify depriving employees of corporate aid by characterizing it as “protecting ... culpable employees and agents.”

The final justification may be disposed of quickly. The job of prosecutors is to make the government's best case to a jury and to let the jury decide guilt or innocence. Punishment is imposed by judges subject to statute. The imposition of economic punishment by prosecutors, before anyone has been found guilty of anything, is not a legitimate governmental interest—it is an abuse of power. The government's other points, however, are far more substantial.

Any government's interest in investigating and fairly prosecuting crime is compelling. The consequences for civilization of another government's failure to accomplish that basic end are on view on the evening news every day. In order properly to accomplish that task, the government must have the ability to make just charging decisions and to prevent obstruction of its investigations. Hence,
no one disputes the proposition that a willingness to cooperate with the government is an appropriate consideration in deciding whether to charge an entity. Nor does anyone suggest that an entity's obstruction of a government investigation—what the government has called “circling the wagons”\(^{165}\)—should be ignored in a charging decision. Many remember the Watergate case, in which the legal fees of individuals who broke into the offices of the Democratic National Committee were paid, along with other “hush money,” to buy the silence of the burglars and to protect higher-ups.\(^{166}\) Corporate equivalents no doubt occur. But the devil, as always, is in the details.

The first difficulty is that the Thompson Memorandum does not say that payment of legal fees may cut in favor of indictment only if it is used as a means to obstruct an investigation. Indeed, the text strongly suggests that advancement of defenses costs weighs against an organization independent of whether there is any “circling of the wagons.”\(^{167}\)

\*364 The USAO, possibly concerned with the breadth of the Thompson Memorandum, seeks to deal with this by asserting that, in practice, it considers the payment of legal fees as a negative factor only when payments are used to impede.\(^{168}\) Perhaps so. But whatever the government may do in the privacy of U.S. Attorneys' offices and in the DOJ's Criminal Division is not what defense lawyers see. They see the Thompson Memorandum. Few if any competent defense lawyers would advise a corporate client at risk of indictment that it should feel free to advance legal fees to individuals in the face of the language of the Thompson Memorandum itself. It would be irresponsible to take the chance that prosecutors might view it as “protecting ... culpable employees and agents.” As KPMG's new chief legal officer, former U.S. District Judge Sven Erik Holmes, testified, he thought it indispensable (as would any defense lawyer) “to be able to say at the right time with the right audience, we're in full compliance with the Thompson Memorandum.”\(^{169}\)

For these reasons, this aspect of the Thompson Memorandum is not narrowly tailored to achieve a compelling objective. It discourages and, as a practical matter, often prevents companies from providing employees and former employees with the financial means to exercise their constitutional rights to defend themselves. It does so in the face of state indemnification statutes that expressly permit businesses entities to provide those means because the states have determined that legitimate public interests may be served. It does so even where companies obstruct nothing and, to the contrary, do everything within their power to make a clean breast of the facts to the government and to take responsibility for any offenses they may have committed. It therefore burdens excessively the constitutional rights of the individuals whose ability to defend themselves it impairs and, accordingly, fails
strict scrutiny. The legal fee advancement provision violates the Due Process Clause.  

**c. The Actions of the USAO**

The actions of the USAO in this case compounded the problem that the Thompson Memorandum created. The Thompson Memorandum says that the payment of legal fees (beyond any legal obligation) may be held against a business entity if the government views the payments as protection of “culpable employees” or as evidence of a lack of full and complete cooperation. The USAO took advantage of that uncertainty by emphasizing the threat.

Within days of receiving the criminal referral on February 5, 2004, the USAO put the payment of employee legal fees near the top of the government's agenda for the very first meeting with KPMG's lawyers. On February 25, 2004, Mr. Bennett reported that KPMG had cleaned house and pledged full cooperation with the government. But Mr. Weddle immediately raised the legal fee issue. When Mr. Bennett sought to elicit the USAO's view on that subject, the response was a reference to the Thompson Memorandum. This was followed later in the meeting by Ms. Neiman's statement, on the heels of a reference to payment of employee legal expenses, that misconduct should not be rewarded and Mr. Weddle's threat that the government would look at the payment of legal fees that KPMG was not legally obliged to pay “under a microscope.” And it did all this despite the fact that it does not claim that KPMG obstructed its investigation, least of all by using the payment of legal fees to prevent employees or former employees from talking to the government or telling it the truth.

The individual prosecutors in the USAO acted pursuant to the established policy of the DOJ as expressed in the Thompson Memorandum. They understood, however, that the threat inherent in the Thompson Memorandum, coupled with their own reinforcement of that threat, was likely to produce exactly the result that occurred—KPMG's determination to cut off the payment of legal fees for any employees or former employees who were indicted and to limit and condition their payment during the investigative stage. Their actions cannot withstand strict scrutiny under the Due Process Clause because they too were not narrowly tailored to serving compelling governmental interests.

**B. The Sixth Amendment Right to Counsel**

1. The Nature and Scope of the Right to Counsel

Quite apart from the due process analysis, the KPMG Defendants argue that the Thompson Memorandum and its implementation by the government infringed their Sixth Amendment right to counsel. They are correct.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defence.” As already has been demonstrated, however, this guarantees more than the mere presence of a lawyer at a criminal trial. It protects, among other things, an individual's right to choose the lawyer or lawyers he or she desires and to use one's own funds to mount the defense that one wishes to present. Moreover, a defendant's exercise of his Sixth Amendment right to counsel is not to be feared or avoided by the government:

“No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise those rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, there is something very wrong with that system.”

The government nevertheless argues that the KPMG Defendants have no Sixth Amendment rights at stake here for two principal reasons.

**a. Attachment of Sixth Amendment Rights**

The government first argues that the Sixth Amendment right to counsel attaches only upon the initiation of a criminal proceeding. As the Thompson Memorandum was adopted and the USAO did its handiwork before the KPMG Defendants were indicted, it contends, there was no Sixth Amendment violation.

It is true, of course, that the Sixth Amendment right to counsel typically attaches at the initiation of adversarial
proceedings—at an arraignment, indictment, preliminary hearing, and so on. But the analysis can not end there. The Thompson Memorandum on its face and the USAO's actions were parts of an effort to limit defendants' access to funds for their defense. Even if this was not among the conscious motives, the Memorandum was adopted and the USAO acted in circumstances in which that result was known to be exceptionally likely. The fact that events were set in motion prior to indictment with the object of having, or with knowledge that they were likely to have, an unconstitutional effect upon indictment cannot save the government. This conduct, unless justified, violated the Sixth Amendment.

The government argues that this conclusion will open the door for future defendants to argue that all sorts of pre-indictment actions violate the Sixth Amendment and thus hamstring every investigation and prosecution. This is singularly unpersuasive. The government here acted with the purpose of minimizing these defendants' access to resources necessary to mount their defenses or, at least, in reckless disregard that this would be the likely result of its actions. In these circumstances, it is not unfair to hold it accountable.

b. “Other People's Money”

The government next argues that the KPMG Defendants have no right, under the Sixth Amendment or otherwise, to spend “other people's money” on expensive defense counsel. The rhetoric is appealing, but the characterization of the issue—and therefore the conclusion—are wrong.

The argument is based on Caplin & Drysdale, Chartered v. United States, and United States v. Monsanto, which held that the Sixth Amendment does not create a right for those in possession of property forfeitable to the United States to spend that money on their legal defense. That is hardly surprising—the money belongs to the government. But that is not the issue here.

Caplin & Drysdale recognized that the Sixth Amendment does protect a defendant's right to spend his own money on a defense. Here, the KPMG Defendants had at least an expectation that their expenses in defending any claims or charges brought against them by reason of their employment by KPMG would be paid by the firm. The law protects such interests against unjustified and improper interference. Thus, both the expectation and any benefits that would have flowed from that expectation—the legal fees at issue now—were, in every material sense, their property, not that of a third party. The government's contention that the defendants seek to spend “other people's money” is thus incorrect.

2. The Thompson Memorandum and the Government's Implementation Violated the KPMG Defendants' Sixth Amendment Right to Counsel

The KPMG Defendants have established that the government's implementation of the Thompson Memorandum impinged on their Sixth Amendment rights to counsel and to present a complete defense. Interference with these rights is improper if the government's actions are “wrongfully motivated or without adequate justification.” The remaining question, then, is whether justification exists.

There is not much case law on the standard to be applied in making this determination. In comparable circumstances, federal courts often have looked to the common law of torts to “enrich the [federal] jurisprudence” and to provide “an appropriate starting point,” always keeping in mind that we do so to inform our construction of the Constitution, not to apply state tort law.

The common law tort of interference with prospective economic advantage necessarily deals with the issue whether a private actor is justified in interfering in the economic relations of another. In assessing claims of justification in private settings, courts look to a series of factors including the relative importance of the interests served by the plaintiff and the defendant. Making appropriate adjustments for the fact that this analysis involves the public sector, the dispositive question is whether the government's law enforcement interests in taking the specific actions in question sufficiently outweigh the interests of the KPMG Defendants in having the resources needed to defend as they think proper against these charges.
Our nation made a deliberate choice more than two centuries ago. We determined that a person charged with a crime has “the right in an adversary criminal trial to make a defense as we know it.” That choice rests on the premise that “partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”

The Thompson Memorandum discourages and, as a practical matter, often prevents companies from providing employees and former employees with the financial means to exercise their constitutional rights to defend themselves. This is so even where companies obstruct nothing and, to the contrary, do everything within their power to make a clean breast of the facts to the government and to take responsibility for any offenses they may have committed. It undermines the proper functioning of the adversary process that the Constitution adopted as the mode of determining guilt or innocence in criminal cases. The actions of prosecutors who implement it can make matters even worse, as occurred here.

The Court holds that the fact that advancement of legal fees occasionally might be part of an obstruction scheme or indicate a lack of full cooperation by a prospective defendant is insufficient to justify the government's interference with the right of individual criminal defendants to obtain resources lawfully available to them in order to defend themselves, regardless of the legal standard of scrutiny applied.

3. The KPMG Defendants Are Not Obligated to Establish Prejudice, Which in Any Case Would Be Presumed Here

The government argues the KPMG Defendants' motion nevertheless should be denied because they have not shown prejudice under Strickland v. Washington, which requires a defendant seeking to overturn his or her conviction based on ineffective assistance of counsel to show “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” But the government is mistaken.

This conclusion follows from United States v. Gonzalez–Lopez, a case involving a deprivation of the defendant's right to counsel of his choice. The Court there held that Strickland did not require a showing of prejudice in such a case because:

“Deprivation of the right [to counsel of choice] is ‘complete’ when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.”

Here, the violation is analogous to that at issue in Gonzalez–Lopez. The government has interfered with the KPMG Defendants' right to be represented as they choose, subject to the constraints imposed by the resources lawfully available to them. This violation, like a deprivation of the right to counsel of their choice, is complete irrespective of the quality of the representation they receive. Thus, Strickland has no bearing here.

This result is consistent with common sense. Improper government conduct has created a significant risk that the KPMG Defendants' ability to present the defense they choose has been compromised. Corrective action now may well prevent that. There is, in consequence, a countervailing interest in not going blindly forward with a lengthy trial, which will consume vast judicial and party resources, without dealing with the issue. No one would set out to drive across a desert with half a tank of gas, knowing that one might run out before reaching the other side, without pausing first to fill up the tank. The prudent course is to avoid the problem at the outset—not to take a chance on being stranded and then having to try to figure out what to do about it.

The approach to cases involving criminal defense counsel burdened by conflicts of interest supports this conclusion. A district court that learns before trial of a possible conflict of interest between a defense attorney and a client is obliged to protect the defendant's Sixth
Amendment right to unconflicted legal representation by immediately investigating the conflict and, if necessary, either obtaining a knowing and intelligent waiver from the defendant or disqualifying the conflicted attorney. The rationale for doing so is simple. Prejudice is likely in conflict situations, and “such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.” That rationale is fully applicable here.

Even if prejudice were relevant at this stage of the proceedings, however, the government's argument still would fail. Although Strickland generally requires convicted defendants to demonstrate that the result of the trial probably would have been different but for the ineffective assistance of counsel, this requirement does not apply where a violation resulted in a “structural defect[ ] in the constitution of the trial mechanism” that “affected—and contaminated—the entire criminal proceeding.” In other words, there are two distinct types of constitutional errors: trial errors, which occur during the presentation of evidence at trial, and structural errors, which are overarching and permeate the entire proceeding. As trial errors occur during the presentation of a case to the jury, they “may ... be quantitatively assessed in the context of other evidence presented in order to determine whether” their commission “was harmless beyond a reasonable doubt.” Structural errors, on the other hand, “defy analysis by ‘harmless-error’ standards.” They affect “[t]he entire conduct of the trial from beginning to end.” Prejudice “is so likely that case-by-case inquiry into prejudice is not worth the cost.”

*371 Structural defects exist—and prejudice must be presumed—where a defendant is actively or constructively denied counsel at a critical stage of the trial or where defense counsel is burdened by an actual conflict of interest. Structural errors “may be present [also] on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” In Powell v. Alabama, for example, the trial court, on the day of the trial, appointed an attorney from a different state—who professed himself to be unfamiliar with the facts of the case and the local procedure—to represent defendants in a highly publicized capital case. The Supreme Court held that the likelihood that counsel could have performed as an effective advocate in those circumstances was so remote as to render the trial inherently unfair, obviating the requirement that the defendants affirmatively demonstrate prejudice.

Although the circumstances here differ from those in Powell, the government's conduct threatens to contaminate this proceeding. Properly defending this case, in all its complexity, has required, and will continue to require, substantial financial resources. The government has spent years investigating the case, presumably reviewing millions of pages of documents and interviewing scores of witnesses if not more. The KPMG Defendants, however, have limited resources. Although each defendant is represented by retained counsel, the government's interference almost inevitably has affected at least some lawyer selections and, equally important, limited what the KPMG Defendants can pay their lawyers to do. At least most of them likely will be unable to afford to pay their attorneys to review all or even most of the documents the government has produced or, perhaps, to interview even a fraction of the witnesses the government has interviewed. They may not be able to afford tax experts to advise trial counsel and, if need be, answer those whom the government may present at trial. In these circumstances, demonstrating prejudice after the fact would be all but impossible. In order to show that the trial outcome would have been different had a convicted defendant been able to afford better preparation before trial, the defendant's counsel, after conviction, would have to do the work that the defendant could not afford to have done in the first place. If the defendant could not afford to have the work done in the first place, the defendant certainly could not afford to have it done after conviction. And relying upon the possibility of counsel appointed under the Criminal Justice Act to do so, should a convicted defendant have become indigent,
simply would be unrealistic. In any case, assessing the impact of pretrial omissions and errors could require extensive evidentiary proceedings. In consequence, it is difficult to imagine circumstances in which an error more properly could be said to threaten to taint an entire proceeding.

This conclusion too is supported by Gonzalez–Lopez. Speaking of a deprivation of the right to counsel of choice, the Supreme Court wrote:

“We have little trouble concluding that erroneous deprivation of the right to counsel of choice, ‘with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as “structural error.” ’ Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of those myriad aspects of representation, the erroneous denial of counsel bears directly on the ‘framework within which the trial proceeds,’—or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.”

The considerations that support a presumption of prejudice—the government's responsibility for the problem and the ease with which the trial court can detect and remedy that problem prior to trial—both are present here. The government is responsible for the infringement of the KPMG Defendants' rights. The problem has been detected, and it probably is susceptible of cure before trial. Were the Court to refrain from seeking to remedy the problem now, it would abdicate its responsibility to safeguard defendants' constitutional rights.

III. It is Premature to Consider the Government's Actions With Respect to Payment of Legal Expenses Incurred Before Indictment

The KPMG Defendants argue also that the government's actions with respect to advancement of legal fees interfered with their rights prior to indictment. But the pre-indictment interference must be evaluated in a very different context.

To begin with, the legal analysis differs. The Sixth Amendment attaches only upon indictment. Actions by the government that affected only the payment of legal fees and defense costs for services rendered prior to the indictment therefore do not implicate the Sixth
Amendment. Any relief must be grounded in the Due Process Clause alone.

Second, the impact of the government's actions was quite different. KPMG paid attorneys' fees prior to indictment for all of the KPMG Defendants on condition that the employees cooperate with the government. There is no suggestion that any defendant reached the $400,000 cap save Mr. Stein, and KPMG ignored the $400,000 ceiling in his case until very late in the day. In consequence, there is no reason to suppose that the ability of any of the KPMG Defendants to undertake activities designed to ward off an indictment was impaired by the government's actions save in one respect—at least some of the KPMG Defendants made proffers to the government that they conceivably would not have made had they not been induced to do so by the threat of having payment of their legal fees cut off. These proffers are of significance only if they may be used at trial, either on the government's case in chief or, perhaps more importantly, to cross examine a defendant who testifies on the defense case. This has an important consequence.

The Supreme Court has made clear that remedies for constitutional violations “should be tailored to the injury suffered ... and should not unnecessarily infringe on competing interests,” including the interest in the administration of criminal justice. Its “approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial.” Hence, if the government's pressure on KPMG ultimately resulted in improperly coerced statements, the matter may be fully redressed by suppression of the statements.

The question whether the statements should be suppressed is before the Court on another motion by the KPMG Defendants that has not yet been fully briefed. Accordingly, it would be premature to address it here.

IV. The Remedy

The next question concerns the appropriate remedy for the violation of the KPMG Defendants' constitutional rights. Defendants ask the Court to dismiss the indictment or to order payment of their legal fees either by the government or by KPMG. The government argues that any relief should be limited to requiring KPMG to consider anew whether it wishes to advance expenses to the defendants, now free of the threat of government retaliation by virtue of the government's recent statement that it does not object to KPMG doing as it pleases.

The Court rejects the government's alternative. The government's belated statement that KPMG may do as it wishes without government retribution is not sufficient to put the KPMG Defendants in the position they would have enjoyed had the government not interfered with the advancement of defense costs in the first place. It ignores altogether the Court's finding that KPMG would have advanced defense costs absent the government's interference. It ignores KPMG's possible interest in not being seen to reverse course and thus as admitting that it caved in to government pressure in this respect at the expense of individual members and employees of the firm. It ignores also the fact that circumstances have changed dramatically since KPMG, under government pressure, decided in 2004 to cut off anyone who was indicted. KPMG has yielded to the government's demand that the firm pay a fine of $456 million. The individual defendants have been indicted on charges the full scope of which may not previously have been foreseeable to KPMG. Thus, the defense costs that KPMG is being asked to advance perhaps are larger than might earlier have been foreseeable. The resources available to pay them have been reduced. Accordingly, the Court is not persuaded that the damage the government has done can be remedied by now leaving KPMG to do as it pleases. So the Court moves on to the appropriate remedies for the government's actions.

As discussed above, remedies for constitutional violations should be tailored narrowly to the injury suffered. Dismissal of an indictment on the grounds of prosecutorial misconduct is an “extreme and drastic sanction” that should not even be considered unless it is otherwise “impossible to restore a criminal defendant to the position that he would have occupied” but for the misconduct.
The KPMG Defendants can be restored to the position they would have occupied but for the government's constitutional violation if defense costs already incurred and yet to be incurred are paid. Indeed, although the KPMG Defendants have not conceded that dismissal would be inappropriate as long as they are put in funds for their defense, they have devoted most of their attention to monetary relief. In consequence, consideration of dismissal of the indictment would be premature prior to exhaustion of all possible courses that could lead to that outcome.

A. Monetary Relief Against the Government Is Precluded by Sovereign Immunity

The first avenue suggested is an order directing the government to pay. But the KPMG Defendants immediately run into the doctrine of sovereign immunity. “Absent an express waiver of sovereign immunity, money awards cannot be imposed against the United States.” Only Congress may waive sovereign immunity, and it may do so only through unequivocal statutory language.

The KPMG Defendants first contend that monetary sanctions against the government pursuant to the Court's supervisory powers would not be money damages and therefore are not barred by sovereign immunity. But they point to no statute that specifically waives sovereign immunity from monetary sanctions imposed pursuant to supervisory power of the federal courts. They imply instead that supervisory powers automatically trump sovereign immunity, even absent a waiver.

A number of federal courts have addressed the interplay between sovereign immunity and the judiciary's power to impose monetary sanctions for litigation abuse. Although the Second Circuit has not reached the precise question, the First Circuit's analysis in United States v. Horn is instructive. There, the district court had used its supervisory powers to order the government to pay the defendants' legal fees and costs as punishment for prosecutorial misconduct. The First Circuit, however, reversed, explaining that “sovereign immunity ordinarily will trump supervisory power in a head-to-head confrontation” because

“supervisory powers are discretionary and carefully circumscribed; [whereas] sovereign immunity is mandatory and absolute ... In other words, unlike the doctrine of supervisory power, the doctrine of sovereign immunity proceeds by fiat: if Congress has not waived the sovereign's immunity in a given context, the courts are obliged to honor that immunity.”

This Court agrees. Accordingly, monetary sanctions do not overcome sovereign immunity.

The KPMG Defendants next argue that the Federal Tort Claims Act (the “FTCA”) and the Administrative Procedure Act (the “APA”) waive sovereign immunity. Each, however, waives sovereign immunity only for certain civil actions against the government. Neither deals with sanctions for prosecutorial misconduct. The KPMG Defendants point to no case law suggesting that the FTCA and APA waivers apply in this context, and the Court is aware of none. Given the Court's obligation to construe narrowly any statutory waiver of sovereign immunity, it would be inappropriate to read the FTCA or the APA as waiving the government's immunity to monetary sanctions in this case.

Accordingly, sovereign immunity bars this Court from ordering the government to pay the KPMG Defendants' legal fees. This is not the end of the analysis, however. As the First Circuit explained in Horn, “[t]he fact that sovereign immunity forecloses the imposition of monetary sanctions against the federal government in criminal cases does not leave federal courts at the mercy of cantankerous prosecutors. Courts have many other weapons in their armamentarium.” The Court therefore turns to other options, addressing first the possibility of monetary relief against KPMG.

*377 B. Monetary Relief May Be Available Against KPMG

The KPMG Defendants urge the Court to order KPMG to advance their defense costs. KPMG, which is not
formally a party here but which has been heard in any case, resists on several grounds.

1. This Court Has Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction. They have only such judicial power as is conferred upon them by statute and, in the case of the Supreme Court, Article III of the Constitution. 225

The Court's subject matter jurisdiction in this case rests on Section 3231 of the Criminal Code, 226 which gives “[t]he district courts of the United States ... original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.” And it is well established that a district court having subject matter jurisdiction over a federal criminal case has ancillary jurisdiction over at least some related matters. 227

Our Circuit recently addressed the scope of ancillary jurisdiction in criminal cases in Garcia v. Teitler. 228 The question there presented was whether a district court had jurisdiction to order an attorney who had appeared and then withdrawn as counsel for the defendants, and who was not a party to the action, to return a retainer the defendants had paid him so that the defendants could retain another attorney to defend the case. The Court held that it did, writing:

“At its heart, ancillary jurisdiction is aimed at enabling a court to administer 'justice within the scope of its jurisdiction.' Without the power to deal with issues ancillary or incidental to the main action, courts would be unable to 'effectively dispose of the principal case nor do complete justice in the premises.' Along these lines, the Supreme Court has instructed that ancillary jurisdiction may be exercised 'for two separate, though sometimes related, purposes: (1) to permit disposition of claims that are, in varying respects and degrees, factually interdependent by a single court, and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.’”

“Whatever the outer limits of ancillary jurisdiction may be, we hold that resolving a fee dispute after an attorney withdraws ... is within a district court's ancillary powers, as it relates to the court's ability to 'function successfully.’ * * *

“Although [defendants] have been able to obtain new counsel, the record reflects that they are of limited means and that the funds paid to Teitler may be needed to pay their new counsel. In order to guarantee a defendant's right to choose his own counsel where, as here, his criminal case is ongoing, and to avoid the possibility of defendants becoming indigent and requiring the appointment of counsel, a district court must be able to exercise ancillary jurisdiction to resolve a fee dispute.” 229

*378 So too here. While the KPMG Defendants all are represented by retained counsel, the cost of mounting their defenses in this complex case is potentially very large. In order to guarantee their right to choose their own counsel, to ensure that they can afford to pay those counsel to do what they think appropriate to defend the case, and to avoid the possibility of their becoming indigent and requiring the appointment of counsel, this Court has the power to exercise ancillary jurisdiction to resolve their right to the advancement of expenses by KPMG. 230

This is confirmed by United States v. Weissman, 231 cited with approval in Garcia, in which Judge Haight exercised ancillary jurisdiction to determine whether a company that formerly employed an individual who was facing criminal charges in this Court was obliged to continue to advance the defense costs.

Accordingly, the Court holds that it has ancillary jurisdiction to determine the claims of the KPMG Defendants for advancement. As Judge Gleeson did in Garcia, the Court will direct the Clerk, as a matter of administrative convenience, to open a civil docket number for the claims of the KPMG Defendants against KPMG. 232

2. Personal Jurisdiction, Even If It Does Not Already Exist, May Be Obtained Over KPMG
The fact that the Court has subject matter jurisdiction is not alone sufficient to proceed with the claims. KPMG objects that it is not a party to this action and that the Court lacks jurisdiction over its person.

KPMG of course is not a defendant in this case. Nevertheless, it long has been well aware of these proceedings. It attended the hearing and submitted papers. But it never has been served with a summons and complaint seeking advancement of legal fees.

There is reason to question whether the lack of a summons and complaint, which ordinarily would be fatal in a garden-variety civil case, should have that consequence in the unique circumstances here. But it is unnecessary to go down that path, which in any case would threaten to complicate and perhaps delay the important determination that may lie within this Court's province—whether KPMG must at least advance defense costs to the KPMG defendants.

The KPMG Defendants, if so advised, may file a complaint in the civil file opened pursuant to this decision, obtain the issuance of a summons, and serve KPMG provided they do so within 14 days of the date of this decision. The complaint may contain a prayer for declaratory relief and a request for a speedy hearing, which would be appropriate in any case in view of the fact that the determination of rights to advancement is made in summary proceedings in order to permit the issue to be decided while the underlying case is pending. Should that occur, the matter would proceed expeditiously.

C. Possible Dismissal and Other Remedies
A summary advancement proceeding is not the only means by which the KPMG Defendants might be restored to the position they would have occupied had the government not interfered improperly with their prospects for advancement of defense costs.

The government has substantial influence and, almost certainly, power over KPMG by virtue of the cooperation clauses in the DPA. It may well be in its interest to use that influence or power to cause KPMG to advance the defense costs.

Nor is KPMG lacking in incentives, if it needs them, to aid the government in solving the problem the government created for itself. The government now may seek to use its leverage against KPMG to cause KPMG to advance defenses costs in order to avoid any risk of dismissal of this indictment or other unpalatable relief. Moreover, KPMG may conclude that obstruction of the efforts of its former partners and employees to obtain advancement of defense costs, or even a prompt adjudication of their right to such advancement, would not further its interest in recruiting and retaining top flight personnel.

Thus, there are at least two possibilities for resolving the issue of advancement of defense costs. KPMG, either on its own or at the government's urging or insistence, may advance the defense costs. Alternatively, the KPMG Defendants may succeed in obtaining an advancement order in a summary proceeding before this Court. In either event, the effect of the government's unconstitutional interference would have been remedied or, at least, mitigated substantially. Should that come to pass, the possibilities of dismissal of the indictment and other remedies likely would appear in a different light. In consequence, the Court declines to consider additional relief at this time, although it may do so in the future if KPMG does not, for one reason or another, advance defense costs.

V. Some of the Actions of the USAO in Response to the Motion Were Not Appropriate
The foregoing discussion of remedies is addressed solely to the unconstitutional interference with the KPMG Defendants' prospects of obtaining advancement of defense costs from KPMG. One matter remains—the actions of the USAO in resisting this motion.

The Court begins from a widely held premise. We long have been well-served by the United States Attorney's office for this district and by the many lawyers who have served in it with great distinction. It is a model for the nation. While the office's actions in this case with respect to the advancement of attorneys' fees contributed
to an unconstitutional result, they were consistent with policies established in Washington. Moreover, they occurred at a time when the propriety of those policies had not previously been addressed by any court. The Court declines to chastise the office or its members further on the basis of those actions. There is, however, one matter that should be addressed.

The government was economical with the truth in its early responses to this motion. It is difficult to defend even the literal truth of the position it took in its first memorandum of law. KPMG's decision on payment of attorneys' fees was influenced by its interaction with the USAO and thus cannot fairly be said to have been a decision “made by KPMG alone,” as the government represented. The government's assertion that the legal fee decision was made without “coercion” or “bullying” by the government can be justified only by tortured definitions of those terms. And while it is literally true, as Mr. Weddle wrote in his later declaration, that the government did not “instruct” or “request” KPMG to do anything with respect to legal fees, that was not the whole story. Those submissions did not even hint at Ms. Neiman's “rewarding misconduct” comment or at Mr. Weddle's statement that the USAO would look at the payment of legal fees “under a microscope.” In addition, they soft-pedaled the government's use of KPMG's willingness to cut off payment of legal fees to pressure KPMG personnel to waive their Fifth Amendment rights and make proffers to the government. Those omissions rendered the declaration and the brief that accompanied it misleading.

Every court is entitled to complete candor from every attorney, and most of all from those who represent the United States. These actions by the USAO are disappointing. There should be no recurrence.

Conclusion

The Thompson Memorandum's treatment of advancement of defense costs no doubt serves the government's interest in obtaining criminal convictions in complex business cases. So too the actions of the USAO in this case. But the government's proper concern is not with obtaining convictions.

As a unanimous Supreme Court wrote long ago, the interest of the government “in a criminal prosecution is not that it shall win a case, but that justice shall be done.”

Justice is not done when the government uses the threat of indictment—a matter of life and death to many companies and therefore a matter that threatens the jobs and security of blameless employees—to coerce companies into depriving their present and even former employees of the means of defending themselves against criminal charges in a court of law. If those whom the government suspects are culpable in fact are guilty, they should pay the price. But the determination of guilt or innocence must be made fairly—not in a proceeding in which the government has obtained an unfair advantage long before the trial even has begun.

The motions of the KPMG Defendants to dismiss the indictment or for other relief are granted only to the extent that:

1. The Court declares that so much of the Thompson Memorandum and the activities of the USAO as threatened to take into account, in deciding whether to indict KPMG, whether KPMG would advance attorneys' fees to present or former employees in the event they were indicted for activities undertaken in the course of their employment interfered with the rights of such employees to a fair trial and to the effective assistance of counsel and therefore violated the Fifth and Sixth Amendments to the Constitution.

2. The government shall adhere to its representation that any payment by KPMG of the defense costs of the KPMG Defendants is acceptable to the government and will not be considered in determining whether KPMG has complied with the DPA or otherwise prejudice KPMG.

3. The Clerk shall open a civil docket number to accommodate the claims of the KPMG Defendants against KPMG for advancement of defense costs should they elect to pursue them. If they file a complaint within 14 days, the Clerk shall issue a summons to KPMG. The Court in that event will entertain the claims pursuant to its ancillary jurisdiction over this case.
The motions are denied insofar as they seek monetary sanctions against the government. The Court reserves decision as to whether to grant additional relief.

The foregoing constitute the Court's findings of fact and conclusions of law.

SO ORDERED.

All Citations

Footnotes
2. U.S. CONST. amend. VI.
4. The existence of this right is not a product of charitable instincts. The law long has recognized that litigation can be expensive and that it could prove difficult to obtain the services of competent employees unless they are protected against the cost of lawsuits that arise out of the employers' business. E.g., Homestore, Inc. v. Tafeen, 888 A.2d 204, 218 (Del.2005) (advancement of legal expenses "is actually a desirable underwriting of risk by the corporation in anticipation of greater corporate-wide rewards for its shareholders. The broader salient benefits that the public policy ... seeks to accomplish ... will only be achieved if the promissory terms of advancement contracts are enforced by courts even when corporate officials ... are accused of serious misconduct") (internal quotation marks and footnote omitted).
5. All defendants previously employed by KPMG joined in the motion.
8. Id. § VI, ¶ A.
9. Id. ¶ B (emphasis added).
10. Id. ¶ B, n. 3.
13. Mr. Thompson was quoted in the press as having defended pressuring companies to cut off payment of defense costs for their employees on the ground that “they [the employees] don’t need fancy legal representation” if they do not believe that they acted with criminal intent. Laurie P. Cohen, In the Crossfire: Prosecutors’ Tough New Tactics Turn Firms Against Employees, WALL. ST. J., June 4, 2004, A1. Naturally, the Court does not consider it in deciding this matter, as it is not in evidence. It notes, however, that such a view, whether held by Mr. Thompson or anyone else, would be misguided, to say the least.

The innocent need able legal representation in criminal matters perhaps even more than the guilty. In addition, defense costs in investigations and prosecutions arising out of complex business environments often are far greater than in less complex criminal matters. Counsel with the skills, business sophistication, and resources that are important to able representation in such matters often are more expensive than those in less complex criminal matters. Moreover, the need to review and analyze frequently voluminous documentary evidence increases the amount of attorney time required for, and thus the cost of, a competent defense. Thus, even the innocent need substantial resources to minimize the chance of an unjust indictment and conviction.
It appears that the IRS was conducting also a penalty promoter audit of KPMG. Tr. (Neiman) 270:8–11.

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It appears that the IRS was conducting also a penalty promoter audit of KPMG. Tr. (Neiman) 270:8–11.
According to Ms. Neiman, she said “that the federal sentencing guidelines specifically address in its corporate compliance section the issue of providing discipline for people who engage in misconduct, and [that KPMG] can't reward misconduct and you have to be mindful of that.” (Tr. (Neiman) 275:3–10) The Court assumes that this was what went through her mind and does not question the sincerity of the testimony. The contemporaneous notes and subsequent memorandum of the government’s designated note taker and the contemporaneous notes of a Skadden partner, however, do not refer to corporate compliance and contain the word “guidelines” without specifying sentencing guidelines or the Thompson Memorandum. U106, ¶ 28; U117, ¶ 31; K313. The Court is not persuaded that Ms. Neiman, whatever she had in mind, referred to the sentencing guidelines or to corporate compliance. She said, without elaboration, that misconduct cannot or should not be rewarded under federal guidelines. It is no stretch to conclude that this remark was taken by those who heard it as a reference to the Thompson Memorandum. In fact, KPMG’s present chief legal officer, former U.S. District Judge Sven Erik Holmes, referred in a different context to the Thomson Memorandum as the “Thompson Guidelines” in a civil deposition. Docket item 544, Ex. B, at 74–75.

The government’s post-hearing brief attempts to support Ms. Neiman’s claim that she referred to the federal sentencing guidelines, not to the Thompson Memorandum, and that she was speaking at the time of corporate compliance programs. It maintains that “Ms. Neiman consistently refers to the Sentencing Guidelines when lecturing on the issues of corporate compliance programs and cooperation” and appends a copy of a lecture she gave on the subject that referred to the sentencing guidelines. Docket item 544 at 20; id. Ex. A. It attaches also a copy of an interview with former Deputy Attorney General Comey regarding waiver of privileges by corporate entities under the Thompson Memorandum. In light of these materials, it maintains, the Court should find that Ms. Nieman referred to the sentencing guidelines and that her warning against rewarding misconduct was intended to encourage KPMG to take appropriate personnel actions against culpable employees and not as a reference to payment of legal fees. Id. at 21–23; id. Ex. B.

The Court declines to consider the appended material. The government could have sought to examine Ms. Neiman about her lecture at the hearing and could have called Mr. Comey as a witness. It did neither. To consider these materials, first submitted after the conclusion of the hearing, would deprive the KPMG Defendants of the right to cross-examine. Even more important, the documents are not probative, and at least not strongly so, of what Ms. Neiman said to KPMG in the February 25, 2004 meeting and what KPMG understood from her comment. Accordingly, they would not alter the result even if the Court considered them.

This testimony was given with respect to the IRS agent’s note of Ms. Neiman’s remark to the effect that misconduct should not be rewarded. U106. That note came immediately after a note of a statement by Mr. Bennett that he felt it was “in the best interests of KPMG for it’s [sic] people to get attorneys that will cooperate with Go[vt]” and that he wanted to “save the firm.” Id. at 21–23; id. Ex. B. Elsewhere in his testimony, Mr. Okula implied that he believed that Ms. Neiman’s remark was a comment on the fact that Mr. Stein had been “let go with a severance package that exceeded $8 million or $10 million,” which Mr. Okula
thought inconsistent with an attempt by Skadden to claim credit for taking aggressive personnel action. Tr. (Okula) 115:3–13. This testimony, the Court finds, was mistaken.

The parties have stipulated that KPMG did not produce Mr. Stein's severance agreement to the government until recently. Tr. 181:18–24; see also Weddle Decl. [docket item 435] ¶ 7. Moreover, at an August 4, 2004 meeting, Karen Seymour, chief of the criminal division of the USAO, told Skadden that “KPMG's employment actions to grant rich severance packages without making statements to the public, or privately to its employees, of the wrongdoing that went on” was a “troubling issue under the ‘Thompson Memo.’ ” U72; see Tr. (Loonan) 154:22–155:20. Notes of the meeting produced by the government indicate that Mr. Weddle was “very upset about this.” U51.

It is difficult to see why the size of Mr. Stein's severance package would have provoked such a response in August 2004 if, as Mr. Okula suggested, its terms had been disclosed in February. In all the circumstances, the Court finds that the government was unaware at the time of the February 25, 2004 meeting of the financial arrangements between Mr. Stein and KPMG.

This comment appears only in Mr. Pilchen's notes, and no witness at the hearing had any present recollection of it. Nevertheless, Mr. Pilchen testified that his notes were an effort "to record [his] impressions and recollections of what was being said." Tr. 19:16–17. The notes specifically attribute the remark to Mr. Weddle, which is not consistent with their being a recordation of a subjective thought by Mr. Pilchen. Mr. Pilchen underlined them. In light of the memorable language and these additional circumstances, the Court finds that Mr. Weddle made the comment.

Mr. Okula frankly admitted that it was his personal view that KPMG should not pay the fees. Tr. (Okula) 69:1–4.

KPMG was blatantly self-interested on this point. While the Thompson Memorandum countenances compliance with legal obligations to advance fees, KPMG had an interest in avoiding advancement of fees if its legal obligation to do so might be questioned, as the government might view advancement of fees as protecting culpable personnel. Those of its partners and employees who were or might become subjects of the investigation, on the other hand, had an interest in taking the broadest possible view of KPMG's legal obligations.

In these circumstances, it is of more than passing interest that the government, which knew or at least was chargeable with knowledge of this obvious fact, appears to have made no effort to verify KPMG's claim beyond asking for and presumably reading the partnership and by-laws. There is no evidence, for example, that it ever inquired into exactly what KPMG's practices had been in this regard.

Nor did the government question the obvious conflict of interest manifest in Skadden's offer to recommend as counsel to targeted KPMG employees "law firms that were familiar with these types of proceedings and who understood that cooperation with the government was the best way to proceed." U119, ¶ 56; U106. Cooperation may have been the best way for KPMG to proceed, but it was not necessarily best for its employees. Skadden's effort to curry favor with the government by offering to seek to compromise the interests of KPMG's employees by inducing them to retain counsel who would serve KPMG's interest in cooperating and the government's apparent failure to take issue with it both are quite disturbing.
The USAO’s demand was a focus of a meeting or telephone call with Skadden on March 29, 2004. Mr. Bennett protested that it had sent out memoranda such as those that had been sent on behalf of KPMG in other matters without objection. He emphasized that KPMG would not even pay attorneys’ fees unless its personnel agreed to cooperate and that it would cut off payments to KPMG personnel who invoked the Fifth Amendment. Nevertheless, he ultimately acquiesced in the government’s demands, stating that KPMG was in the process of sending out in “Q & A format” a “more balanced approach.”

KPMG sought to explain this by suggesting that it had paid $646,000 in fees for both the criminal investigation and for civil litigation and that its representations to the government therefore may not have been inaccurate. In fact, however, the parties later stipulated that KPMG paid $646,757.80 in Mr. Stein’s legal fees for the criminal investigation alone.

The record is unclear as to exactly when the government learned the economic terms of the severance packages with Messrs. Stein and others, although it certainly was aware by August 2004 of the fact that they were sizeable. KPMG’s Mr. Loonan testified that the government at some point was told the size of Mr. Stein’s package, but he did not say when. In any case, his testimony leaves considerable doubt as to whether he had personal knowledge of the facts.

KPMG unpersuasively sought to explain the payment of almost $650,000 in legal fees as an oversight and the termination of payments as consistent with the severance agreement. It has offered no justification for terminating the consulting payments. Nor does the Court credit its benign excuses for cutting off payment of the legal fees. It did so purely to create a response for use in the event the government were to discover that KPMG had exceeded the cap on legal costs that it had told the government it had imposed.
In a brief on another motion, filed after this one was taken under submission, the government points to the Statement of Facts attached to the DPA as evidence that KPMG made the decision concerning legal fees “on its own initiative” and argues that “this decision [w]as one reached by the firm for its own reasons, not at the request or direction of the Government.” Docket item 569, at 15 n. 5. Even if one put aside the fact that the government failed to offer this in evidence or make this argument on the present motion, the argument would be without merit. There is no inconsistency between KPMG making the decision “for its own reasons” and the decision having been a product of government pressure. The government pressure in fact was the reason that KPMG made the decision.

JOSEPH STORY, STORY ON AGENCY § 339, at 413 (Charles P. Greenough ed. 1882).

E.g., RESTATEMENT (SECOND) OF AGENCY § 438(2) & cmt. e (1958).


Figge v. Bergenthal, 130 Wis. 594, 109 N.W. 581 (1906).


Homestore, Inc., 888 A.2d at 211.


There has been a parallel development with respect to indemnification of public officials and employees. As New York Dock pointed out, liability for suits and legal expenses incurred in their defense originally was a risk of assuming public office. 173 Misc. at 111, 16 N.Y.S.2d at 849. New York and doubtless other states have enacted statutes addressing the subject of indemnification for public officers and employees. E.g., N.Y. PUB. OFFICERS L. §§ 17–18 (McKinney 2001); see N.Y. LEGISLATIVE ANNUAL 158–59 (1981).

See, e.g., CALIF. LABOR C. § 2802.

See 3A FLETCHER § 1344.10, at 556–57.

ALI § 7.20, Reporter’s Note 3, at 279.


Homestore, Inc., 888 A.2d at 211 (quoting 8 WEST’S DEL. C. ANN. § 145(c)).

Id.

See, e.g., id.; Kaung v. Cole Nat’l Corp., 884 A.2d 500, 509–10 (Del.Sup.2005); 8 WEST’S DEL. C. ANN. § 145(e); see generally 3A FLETCHER § 1344.10, at 560–61.

Homestore, Inc., 888 A.2d at 211.

Kaung, 884 A.2d at 509.
KPMG is a limited liability partnership. Its partnership agreement is governed by the law of Delaware. 6 WEST'S DEL. C. ANN. § 15–106 (2006); K248, ¶ 19.2. The Delaware Revised Uniform Partnership Act provides that “a partnership may, and shall have the power to, indemnify and hold harmless any partner or other person from and against any and all claims and demands whatsoever” subject to such standards and restrictions as are set forth in its partnership agreement. 6 WEST'S DEL. C. ANN. § 15–110 (2006). As the KPMG partnership agreement contains no such standards and restrictions, it is entirely free to indemnify its personnel.


All of the defendants save Stein, who has an express contract with KPMG, arguably are protected by a contract, implied in fact from KPMG's uniform past practice and the circumstances of the business, pursuant to which they are entitled to have their defense costs paid by KPMG. See, e.g., Beth Israel Med. Ctr. v. Horizon Blue Cross and Blue Shield of New Jersey, 448 F.3d 573, 582 (2d Cir.2006); Manchester Equip. Co., Inc. v. Am. Way Moving & Storage Co., Inc., 176 F.Supp.2d 239, 245 (D.Del.2001) (Delaware law); Cal. Emergency Physicians Med. Group v. Pacificare of Cal., 111 Cal.App.4th 1127, 1134, 4 Cal.Rptr.3d 583, 592 (2003) (California law). Stein's contract requires that KPMG retain on his behalf, and with his consent, “appropriate and qualified counsel” at the firm's expense if he is sued and joint representation is inappropriate, both of which are the case here. Ex. 6, ¶ 13. While KPMG argues that this obligation is limited by another provision of the contract, its position is questionable.

Quite apart from any question of contract, most of the KPMG California defendants appear to be entitled under California statutes to advancement of their defense costs. Defendants Bickham and Larson were California employees, not partners. To the extent the investigation and indictment arose in consequence of that employment, California statutes require KPMG to advance their defense costs and, unless their actions were both unlawful and “believed by them to be unlawful” at the time, to indemnify them. CALIF. LABOR C. § 2802(a) (requirement of indemnification); CALIF. CIV. C. § 2778 (indemnity includes defense costs); Jacobus v. Krambo Corp., 78 Cal.App.4th 1096, 93 Cal.Rptr.2d 425 (2000) (LABOR C. § 2802 requires employer to defend or pay defense costs); Alberts v. Amer. Cas. Co., 88 Cal.App.2d 891, 899, 200 P.2d 37, 42–43 (1948) (indemnitee entitled to recover as soon as it becomes liable).

Defendant Hasting, who also was based in California, was a KPMG partner. Nevertheless, he arguably is covered by the same statutes. Hasting was a Class A partner of KPMG from July 1998 through October 2001. Under KPMG's by-laws, Class A partners were not entitled to share in the profit or required to bear a share of any losses of the firm and were ineligible to serve on the board of directors. (K0200, K0207) Thus, the fact that he bore the title “partner” may not be dispositive. See, e.g., Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 45, 53 S.Ct. 55, 77 L.Ed.2d 158 (1932).
This general rule against government interference with the defense is based on a presumption that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Martinez v. Court of Appeal of Cal., 528 U.S. 152, 165, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (Scalia, J., concurring).

See, e.g., Faretta, 422 U.S. at 820–21, 95 S.Ct. 2525. See Martinez, 528 U.S. at 165, 120 S.Ct. 684 (Scalia, J., concurring).


United States v. Panzardi Alvarez, 816 F.2d 813, 818 (1st Cir. 1987) (internal citation and quotation omitted); see also Wilson v. Mintzes, 761 F.2d 275, 279 (6th Cir. 1985) (“[R]ecognition of the right [to counsel of choice] also reflects constitutional protection of the accused’s free choice”).

See also United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979) (“We would reject reality if we were to suggest that lawyers are a homogeneous group. Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues. The differences, all within the range of effective and competent advocacy, may be important in the development of the defense. Given this reality, a defendant’s decision to select a particular attorney becomes critical to the type of defense he will make and thus falls within the ambit of the sixth amendment.”).

See, e.g., Crane v. Kentucky, 476 U.S. 683, 690–91, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (error to foreclose defendant’s efforts to adduce evidence about the circumstances of his confession; “In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor’s case encounter and survive the crucible of meaningful adversarial testing.”) (internal citation and quotation omitted).


This is not to say, of course, that defendants are free of appropriate regulation of such matters as the order of proof, the offering of cumulative evidence, and the length of presentations. See United States v. Gonzalez–Lopez, —— U.S. ——, 126 S.Ct. 2557, —— ——, 165 L.Ed.2d 409, 2006 U.S. LEXIS 5165, at *21–22 (June 26, 2006).

See also, e.g., Mayer v. City of Chicago, 404 U.S. 189, 195–96, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971) (denial of free transcripts to indigent misdemeanor appellants violated due process); Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 752 (1977) (due process required that prisoners have an adequate opportunity to present their claims fairly); cf. Davis v. Alaska, 415 U.S. 308, 319–20, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (Confrontation Clause required that defendant be permitted to cross-examine witness as to his juvenile criminal record; unfair to “require the petitioner to bear the full burden of vindicating the State’s interest in the secrecy of juvenile criminal records”).


Id. at 485, 104 S.Ct. 2528 (internal citations omitted).

See Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); see also United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (prosecution has a constitutional duty to provide defendant with exculpatory evidence that would raise a reasonable doubt as to guilt).


See United States v. Gonzales, 164 F.3d 1285, 1292 (10th Cir. 1999) (defendants have “a right to be free from prosecution interference with a witness’ freedom of choice about whether to talk to the defense”); Int’l Bus. Mach.
See, e.g.,  
**Coppolino v. Helpern**, 266 F.Supp. 930 (S.D.N.Y. 1967); **Gregory v. United States**, 369 F.2d 185, 188 (D.C. Cir. 1966) (defendant denied a fair trial where prosecutor advised witnesses to the alleged crime not to speak to defense counsel outside the prosecutor's presence); see also **United States v. Muirs**, 145 Fed.Appx. 208, 209 (9th Cir. 2005) ([G]overnment interference with defense access to witnesses implicates due process.").

See, e.g.,  

See, e.g.,  


See  

409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972).


Id. at 524, 47 S.Ct. 437; see also  
**Bracy v. Graham**, 520 U.S. 899, 904–05, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) ("The Due Process Clause clearly requires a "fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case." ") (internal citations and quotation marks omitted); **Johnson v. Mississippi**, 403 U.S. 212, 215–216, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971) (due process violated where judge presided over a case in which one of the defendants was a previously successful litigant against him); **In re Murchison**, 349 U.S. 133, 137–139, 75 S.Ct. 623, 99 L.Ed. 942 (1955) (due process violated by a judge presiding over a criminal trial of a defendant who he had indicted under the state's one-man grand jury procedure).

See, e.g.,  


The rights thus far explicitly characterized by the Supreme Court as fundamental in this specialized sense fall into five rough categories: the rights to freedom of association, to vote and participate in the electoral process, to travel interstate, to fairness in procedures concerning individual claims against governmental deprivation of life, liberty, or property, and to privacy relating to freedom of choice in matters relating to an individual's personal life. See 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.7 (1999) ("ROTUNDA & NOWAK").

**Glucksberg**, 521 U.S. at 721, 117 S.Ct. 2258 (internal citations and quotations omitted).

**Moore v. City of East Cleveland**, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion).

**Glucksberg**, 521 U.S. at 721, 117 S.Ct. 2258 (internal citations and quotations omitted).

Indigent criminal defendants are entitled to competent defense representation. Serious questions have been raised about whether the means available for providing quality defenses for indigents are sufficient to accomplish that goal. See, e.g., New York County Lawyers’ Ass’n v. New York, 196 Misc.2d 761, 763, 763 N.Y.S.2d 397, 399 (2003) (granting declaratory relief increasing the hourly compensation for counsel assigned to represent indigents in New York State criminal cases after finding that the state had ignored its constitutional obligation to the poor by failing to increase the assigned counsel rates, resulting in many cases, in the denial of counsel, delay in the appointment of counsel, and less than meaningful and effective legal representation). If these criticisms are well-founded, remedial measures are not only desirable, but constitutionally may be required. But that is a question for another day.

It is crucial to note that the Court deals here with extrajudicial action by the government that deliberately or recklessly tilts the playing field against a criminal defendant. Such actions have nothing in common with fair and neutral regulation desirable, but constitutionally may be required. But that is a question for another day.

If one were to assume a six-month trial of 117 days and that a defendant were represented by a single lawyer, who devoted eight hours for each trial day, the cost at $400 per hour simply to attend the trial would be almost $375,000, without taking into account such other expenses as transcripts, copying, travel expenses, and the like. That figure, moreover, would be misleadingly low, as it is difficult to imagine that this case could be defended competently without spending as much time reviewing at least some of the 5 to 6 million pages of documents produced by the government and otherwise preparing as in attending the trial. It therefore is quite reasonable to assume that even a minimal defense of this case could well cost $500,000 to $1 million, if not significantly more.

The Thompson Memorandum’s assessment of whether a company is cooperating includes an examination of whether “the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation.” Thompson Memo at VI(A). The payment of legal fees is treated in a separate paragraph that focuses entirely on “whether the corporation appears to be protecting its culpable employees and agents.” Id. at VI(B).

It makes no difference that the Thompson Memorandum is a policy of the DOJ and implemented by the USAO rather than legislation enacted by Congress. Due process requires that government action “through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as ‘the law of the land.’ ” (quoting Buchalter v. New York, 319 U.S. 427, 429, 63 S.Ct. 1129, 87 L.Ed. 1492(1943)). The government cannot avoid strict scrutiny of actions that impinge upon the fundamental right of fairness in the criminal process simply by acting through DOJ policy rather than by statute or formal regulation. See, e.g., Nicholson v. Williams, 203 F.Supp.2d 153, 243 (E.D.N.Y.2002) (“In considering the constitutionality of the policy or practice of a state agency rather than the specific acts of individual officers, it is appropriate to apply the higher standard and stricter analysis that is applied to legislation.”).

U.S. CONST. amend. VI.

See, e.g., Wheat, 486 U.S. at 164, 108 S.Ct. 1692.

173 Caplin & Drysdale, Chartered, 491 U.S. at 624, 109 S.Ct. 2646.


176 Cf. United States v. Harrison, 213 F.3d 1206, 1207 (9th Cir.2000) (holding that ongoing pre-indictment attorney-client relationship, of which the government was aware, invoked the Sixth Amendment as a matter of law upon indictment).

177 491 U.S. at 619, 109 S.Ct. 2646.


179 491 U.S. at 624, 109 S.Ct. 2646.


182 Adickes v. S.H. Kress & Co., 398 U.S. 144, 231–32, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) (Brennan, J., concurring and dissenting) (“[W]here the wrong under [Section] 1983 is closely analogous to a wrong recognized in the law of torts, it is appropriate for the federal court to apply the relevant tort doctrines ...”).


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Id. at 307–08, 111 S.Ct. 1246.

Id. at 309, 111 S.Ct. 1246.

Id. at 310, 111 S.Ct. 1246.

Strickland, 466 U.S. at 692, 104 S.Ct. 2055 (citing Cronic, 466 U.S. at 658, 104 S.Ct. 2039); accord, Fulminante, 499 U.S. at 309–10, 111 S.Ct. 1246; see also Lainfiesta v. Artuz, 253 F.3d 151, 157 (2d Cir.2001).

See, e.g., Cronic, 466 U.S. at 659 & n. 25 & n. 28, 104 S.Ct. 2039; Fulminante, 499 U.S. at 309–10, 111 S.Ct. 1246; Strickland, 466 U.S. at 692, 104 S.Ct. 2052; Cuyler v. Sullivan, 446 U.S. 335, 349–50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

Cronic, 466 U.S. at 659–60, 104 S.Ct. 2039.

287 U.S. at 53, 53 S.Ct. 55.

The government thus far has produced, in electronic or paper form, at least 5 to 6 million pages of documents plus transcripts of 335 depositions and 195 income tax returns. Anderson Decl. [docket item 561] ¶ ¶ 24, 27, 38–39, 41.

548 U.S. at ——— – ———, 126 S.Ct. 2557 (internal citations omitted).


Cronic, 466 U.S. at 657, 104 S.Ct. 2039 (quoting United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.1975)).


Id.


See, e.g., United States v. Woodley, 9 F.3d 774, 782 (9th Cir.1993) (noting that courts may impose monetary sanctions on the government—notwithstanding sovereign immunity—in order to remedy the violation of a recognized right and ensure that "government attorneys maintain ethical standards," but holding that monetary sanctions were inappropriate in this case and noting that other remedies are more appropriate); Coleman v. Espy, 986 F.2d 1184, 1191–92 (8th Cir.1993) (sovereign immunity bars compensatory contempt sanctions against the United States); McBride, 955 F.2d at 576–77 (noting that the district court's imposition of compensatory contempt sanctions against the government likely violated the doctrine of sovereign immunity, but reversing on other grounds); Barry v. Bowen, 884 F.2d 442, 443–44 (9th Cir.1989) (noting that the district court's imposition of compensatory contempt sanctions against the government likely violated the doctrine of sovereign immunity, but reversing on other grounds); Yancheng Baolong Biochemical Prods. Co., Ltd. v. United States, 343 F.Supp.2d 1226, 1241 (2004) (collecting cases and holding that award of attorneys' fees against the government was barred by sovereign immunity); United States v. Prince, No. CR 93–1073(RR), 1994 WL 99231, *1–*2 (E.D.N.Y. Mar. 10, 1994) (withdrawing assessment of jury costs against U.S. Attorney's Office under court's supervisory power, in the face of a motion for reconsideration arguing constraints imposed by sovereign immunity); see also Waksberg, 112 F.3d at 1227–28 (invoking the doctrine of constitutional avoidance to defer review of the district court's finding that sovereign immunity barred the award of compensatory damages against the United States).

The Horn court noted also that courts have means apart from monetary sanctions by which to punish prosecutorial misconduct, including public reprimand and other equitable relief. Id. at 767.

The FTCA waives sovereign immunity in "civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

The APA waives immunity in "action[s] in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702.

"Waivers of immunity must be construed strictly in favor of the sovereign and not enlarge[d] ... beyond what the language requires." Ruckelshaus, 463 U.S. at 686, 103 S.Ct. 3274 (internal citations and quotation marks omitted); Lehman v. Nakshian, 453 U.S. 156, 161, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981). Courts must strictly construe also any limitations or conditions imposed by Congress on a particular waiver of immunity. Id. at 160–61, 101 S.Ct. 2698.

The KPMG Defendants attempt to avoid this conclusion by asking the Court to order the government to pay their defense costs out of the $256 million fine it already has received from KPMG or to order KPMG to pay the $200 million final installment of the fine into the registry of the Court, where so much as is required to pay the defense costs would be distributed to the KPMG Defendants and the balance to the government. They appear to argue that either remedy would be injunctive in nature and not a monetary sanction against the government. Sovereign immunity, however, "stands as an obstacle to virtually all direct assaults against the public fisc, save only those incursions from time to time authorized by Congress." Horn, 29 F.3d at 761. The relief the KPMG Defendants have requested here would be no less an assault on the public fisc simply because it would be addressed to a fine already received by the government or monies to which the government already is entitled. Put another way, requiring the government to pay the money from a particular account or to forego revenues to which it is entitled would not make such relief any less a monetary sanction.

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See, e.g., In. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701–02, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982); W.G. v. Senatore, 18 F.3d 60, 64 (2d Cir.1994).


See Garcia v. Teitler, 443 F.3d 202, 208 (2d Cir.2006).

Id.

Id. at 208, 209 (internal citations omitted).

The Court need not here decide whether its ancillary jurisdiction includes the power to determine whether KPMG is obliged to indemnify the KPMG Defendants or, if not, whether the KPMG Defendants would be obliged to repay any funds advanced to them. The immediate concern is with the Court's power to ensure that the KPMG Defendants, if they are entitled to it, have the means to finance the defense before this Court.


It is a defendant in a related action in this district, that commenced by the filing of the information pursuant to the DPA. United States v. KPMG LLP, 05 Crim. 0903(LAP) (filed Aug. 29, 2005).


Some states, at least in the past, held that a defendant who appeared in an action for any purpose consented to the exercise of personal jurisdiction, See York v. Texas, 137 U.S. 15, 11 S.Ct. 9, 34 L.Ed. 604 (1890). To ameliorate this rule, many adopted statutes or rules permitting a defendant who wished to challenge the exercise of personal jurisdiction to appear specially for that purpose alone without thereby appearing generally. See id. at 20, 11 S.Ct. 9; see also, e.g., Orange Theatre Corp. v. Rayherstz Amusement Corp., 139 F.2d 781, 784 (3d Cir.1944). Even in such states, any action before the court beyond challenging the exercise of jurisdiction constitutes a general appearance and waives the jurisdictional objection. See, e.g., Regents of the Univ. of Calif. v. Golf Mktg., LLC, 92 Conn.App. 378, 381–82, 885 A.2d 201, 203 (2005) (party who seeks relief on any basis other than a motion to quash for lack of personal jurisdiction deemed to have made general appearance and waived all objections to defects in service, process, or personal jurisdiction) (California law) (quotation marks omitted); Davis v. Eighth Jud. Dist. of Nevada, 97 Nev. 332, 334–36, 629 P.2d 1209, 1211–12 (1981) (opposition to motion for leave to amend waived special appearance and subjected party to personal jurisdiction), abrogated by statute as recognized in Hansen v. Eighth Jud. Dist. Ct., 116 Nev. 650, 655–56, 6 P.3d 982, 985 (2000); Woods v. Billy's Automotive, 622 S.E.2d 193, 197 (N.C.App.2005) (“[If a party invoked the judgment of the court for any other purpose [than contesting service of process] he made a general appearance and by so doing he submitted himself to the jurisdiction of the court whether he intended to do so or not.”) (citation and internal quotation marks omitted); Lyren v. Ohr, 271 Va. 155, 158–59, 623 S.E.2d 883, 884–85 (2006) (appearance for any purpose other than objecting to the jurisdiction is general appearance even if denominated “special”); Maryland Cas. Co. v. Clintwood Bank, Inc., 155 Va. 181, 186, 154 S.E. 492, 494 (1930) (any action by defendant, except an objection to jurisdiction, recognizing a case as in court is general appearance). The Federal Rules of Civil Procedure, and many modern state codes, go further, abolishing the distinction between general and special appearances and permitting a defendant to preserve a personal jurisdiction objection by answer or timely motion to dismiss. These rules, however, do not apply in a criminal case. It therefore is arguable that KPMG's actions before the Court constituted a general appearance and thus waived any objection to personal jurisdiction.

FED.R.CIV.P. 57.

The scope of an advancement proceeding is limited to determining ‘the issue of entitlement according to the corporation’s advancement provisions and not to issues regarding the movant’s alleged conduct in the underlying litigation.’”  Kaung, 884 A.2d at 509 (Del.2005) (quoting Homestore, Inc. v. Tafeen, 886 A.2d 502, 503 (Del.2005)). “Neither indemnification nor recoupment of sums previously advanced are appropriate for litigation in a summary proceeding” and necessarily would be reserved for subsequent proceedings, possibly in another forum. Radin, 25 REV. LITIG. at 265–66. In any case, although it is unnecessary to decide the issue now, it is questionable whether the Court’s ancillary jurisdiction extends beyond determining the right to advancement.

There is no jurisdictional obstacle to a federal court determining advancement under state law. See, e.g., Truck Components Inc. v. Beatrice Co., 143 F.3d 1057, 1061 (7th Cir.1998).

The Federal Rules of Criminal Procedure state that they “are to be interpreted for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.” FED.R.CRIM.P. 2. Likewise, the Federal Rules of Civil Procedure, which govern “all suits of a civil nature,” are to “be construed and administered to secure the just, speedy, and inexpensive determination of every action.” FED.R.CIV.P. 1. Accordingly, the Court will treat the papers already filed by the KPMG Defendants as a motion for an order directing KPMG to advance the defense costs reasonably incurred and to be incurred by them from the date of the indictment forward. It will consider the papers already filed by KPMG as an opposition to that motion. KPMG may file such additional response as it wishes within 14 days after the date of service of any summons and complaint.

The Court is mindful of KPMG’s contention that those of the KPMG Defendants who were partners in the firm are obliged by the partnership agreement to arbitrate the issue of advancement. Assuming that the KPMG Defendants pursue relief against KPMG and that KPMG remains insistent upon its alleged arbitration remedy, the questions whether the arbitration clause properly is so construed and, if so, whether it is void as against public policy to the extent that it would foreclose an advancement determination in a criminal case by the court in which the indictment is pending will be addressed in any advancement proceeding the KPMG Defendants may bring pursuant to this decision.

Among other avenues open to the government if it were disposed to seek to remedy the problem it has created might be to persuade KPMG to eliminate obstacles to prompt resolution of the advancement issue. KPMG might, for example, waive any right that it may have to compel its former partners to arbitrate, or to claim a jury trial on, the question whether the KPMG Defendants are entitled to advancement of defense costs. Such a waiver need not affect any claims by the KPMG Defendants for indemnification (as distinguished from advancement) by KPMG or any claims that KPMG may have against the KPMG Defendants, neither of which would be a proper subject of a summary advancement proceeding in any event.


Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); see also, e.g., Brady, 373 U.S. at 87, 83 S.Ct. 1194 (“Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly under the federal domain: ‘The United States wins a point whenever justice is done its citizens in the courts.’”).

The indictment of Arthur Andersen LLP resulted in the effective demise of that large accounting firm, and the loss of many thousands of jobs of innocent employees, long before the case ever went to trial.
KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Missere v. Gross, S.D.N.Y., March 31, 2011

United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellant,
v.
Jeffrey STEIN, John Lanning, Richard Smith,
Jeffrey Eischeid, Philip Wisner, Mark Watson,
 Larry Delap, Steven Gremminger, Gregg Ritchie,
 Randy Bickham, Carol G. Warley, Carl Hasting,
 and Richard Rosenthal, Defendants–Appellees.

Docket No. 07–3042–cr.


Synopsis


Holdings: The Court of Appeals, Dennis Jacobs, Chief Judge, held that:

- dismissal of indictment would be required to cure any violation, by the government, of employees' Sixth Amendment right to counsel;
- accounting firm's adoption and enforcement of fees policy amounted to state action;
- government's pre-indictment conduct was not immune from employees' Sixth Amendment claims; and
- employees were deprived of their Sixth Amendment right to counsel.

Affirmed.

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Before: JACOBS, Chief Judge, FEINBERG and HALL, Circuit Judges.

Opinion

DENNIS JACOBS, Chief Judge:

The United States appeals from an order of the United States District Court for the Southern District of New York (Kaplan, J.), dismissing an indictment against thirteen former partners and employees of the accounting firm KPMG, LLP. Judge Kaplan found that, absent pressure from the government, KPMG would have paid defendants' legal fees and expenses without regard to cost. Based on this and other findings of fact, Judge Kaplan ruled that the government deprived defendants of their right to counsel under the Sixth Amendment by causing KPMG to impose conditions on the advancement of legal fees to defendants, to cap the fees, and ultimately to end payment. See United States v. Stein, 435 F.Supp.2d 330, 367–73 (S.D.N.Y.2006) (“Stein I”). Judge Kaplan also ruled that the government deprived defendants of their right to substantive due process under the Fifth Amendment. 1 See Stein I at 360–65.

*136 We hold that KPMG's adoption and enforcement of a policy under which it conditioned, capped and ultimately ceased advancing legal fees to defendants followed as a direct consequence of the government's overwhelming influence, and that KPMG's conduct therefore amounted to state action. We further hold that the government thus unjustifiably interfered with defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment, and that the government did not cure the violation. Because no other remedy will return defendants to the status quo ante, we affirm the dismissal of the indictment as to all thirteen defendants. 2 In light of this disposition, we do not reach the district court's Fifth Amendment ruling.

BACKGROUND

The Thompson Memorandum

In January 2003, then-United States Deputy Attorney General Larry D. Thompson promulgated a policy statement, Principles of Federal Prosecution of Business Organizations (the “Thompson Memorandum”), which articulated “principles” to govern the Department's discretion in bringing prosecutions against business organizations. The Thompson Memorandum was closely based on a predecessor document issued in 1999 by then-U.S. Deputy Attorney General Eric Holder, Federal Prosecution of Corporations. See Stein I, 435 F.Supp.2d at 336–37. Along with the familiar
factors governing charging decisions, the Thompson Memorandum identifies nine additional considerations, including the company’s “timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.” Mem. from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), at II. The Memorandum explains that prosecutors should inquire whether the corporation appears to be protecting its culpable employees and agents [and that] a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government’s investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.

Commencement of the Federal Investigation

After Senate subcommittee hearings in 2002 concerning KPMG’s possible involvement in creating and marketing fraudulent tax shelters, KPMG retained Robert S. Bennett of the law firm Skadden, Arps, Slate, Meagher & Flom LLP (“Skadden”) to formulate a “cooperative approach” for KPMG to use in dealing with federal authorities. Stein I, 435 F.Supp.2d at 339. Bennett’s strategy included “a decision to ‘clean house’—a determination to ask Jeffrey Stein, Richard Smith, and Jeffrey Eischeid, all senior KPMG partners who had testified before the Senate and all now [Defendants–Appellees] here—to leave their positions as deputy chair and chief operating officer of the firm, vice chair-tax services, and a partner in personal financial planning, respectively.” Id. Smith was transferred and Eischeid was put on administrative leave. Id. at 339 n. 22. Stein resigned with arrangements for a three-year $100,000–per–month consultancy, and an agreement that KPMG would pay for Stein’s representation in any actions brought against Stein arising from his activities at the firm. Id. at 339. KPMG negotiated a contract with Smith that included a similar clause; but that agreement was never executed. Stein IV, 495 F.Supp.2d at 408.

In February 2004, KPMG officials learned that the firm and 20 to 30 of its top partners and employees were subjects of a grand jury investigation of fraudulent tax shelters. Stein I, 435 F.Supp.2d at 341. On February 18, 2004, KPMG’s CEO announced to all partners that the firm was aware of the United States Attorney's Office's (“USAO”) investigation and that “[a]ny present or former members of the firm asked to appear will be represented by competent counsel at the firm's expense.” Stein IV, 495 F.Supp.2d at 407 (first alteration in original and internal quotation marks omitted).

The February 25, 2004 Meeting

In preparation for a meeting with Skadden on February 25, 2004, the prosecutors—including Assistant United States Attorneys (“AUSAs”) Shirah Neiman and Justin...
Weddle—decided to ask whether KPMG would advance legal fees to employees under investigation.  

Stein I, 435 F.Supp.2d at 341. Bennett started the meeting by announcing that KPMG had resolved to “clean house,” that KPMG “would cooperate fully with the government’s investigation,” and that its goal was not to protect individual employees but rather to save the firm from being indicted.  

Id. AUSA Weddle inquired about the firm’s plans for advancing fees and about any legal obligation to do so.  

Id. Later on, AUSA Neiman added that the government would “take into account” the firm’s legal obligations to advance fees, but that “the Thompson Memorandum [w]as a point that had to be considered.”  

Id. Bennett then advised that although KPMG was still investigating its legal obligations to advance fees, its “common practice” was to do so.  

Id. at 342. However, Bennett explained, KPMG would not pay legal fees for any partner who refused to cooperate or “took the Fifth,” so long as KPMG had the legal authority to do so.  

Id. Later in the meeting, AUSA Weddle asked Bennett to ascertain KPMG’s legal obligations to advance attorneys’ fees. AUSA Neiman added that “misconduct” should not or cannot “be rewarded” under “federal guidelines.”  

Id. One Skadden attorney’s notes attributed to AUSA Weddle the prediction that, if KPMG had discretion regarding fees, the government would “look at that under a microscope.”  

Id. at 344 (emphasis omitted).

Skadden then reported back to KPMG. In notes of the meeting, a KPMG executive wrote the words “[p]aying legal fees” and “[s]everance” next to “not a sign of cooperation.”  

Stein IV, 495 F.Supp.2d at 408.

Communications Between the Prosecutors and KPMG

On March 2, 2004, Bennett told AUSA Weddle that although KPMG believed it had no legal obligation to advance fees, “it would be a big problem” for the firm not to do so given its partnership structure.  

Stein I, 435 F.Supp.2d at 345 (internal quotation marks omitted). But Bennett disclosed KPMG's tentative decision to limit the amount of fees and condition them on employees' cooperation with prosecutors.  

Id.

Two days later, a Skadden lawyer advised counsel for Defendant–Appellee Carol G. Warley (a former KPMG tax partner) that KPMG would advance legal fees if Warley cooperated with the government and declined to invoke her Fifth Amendment privilege against self-incrimination.  

Id.

On a March 11 conference call with Skadden, AUSA Weddle recommended that KPMG tell employees that they should be “totally open” with the USAO, “even if that [meant admitting] criminal wrongdoing,” explaining that this would give him good material for cross-examination.  

Id. (alteration in original and internal quotation marks omitted). That same day, Skadden wrote to counsel for the KPMG employees who had been identified as subjects of the investigation.  

Id. The letter set forth KPMG's new fees policy (“Fees Policy”), pursuant to which advancement of fees and expenses would be

[i] capped at $400,000 per employee;

[ii] conditioned on the employee's cooperation with the government; and

[iii] terminated when an employee was indicted.  

Id. at 345–46. The government was copied on this correspondence.  

Id. at 345. On March 12, KPMG sent a memorandum to certain other employees who had not been identified as subjects, urging them to cooperate with the government, advising them that it might be advantageous for them to exercise their right to counsel, and advising that KPMG would cover employees' “reasonable fees.”  

Id. at 346 n. 62.

The prosecutors expressed by letter their “disappoint[ment] with [the tone] of this memorandum and its “one-sided presentation of potential issues,” and “demanded that KPMG send out a supplemental
memorandum in a form they proposed."  Id. at 346. The government's alternative language, premised on the "assumption that KPMG truly is committed to fully cooperating with the Government's investigation," Letter of David N. Kelley, United States Attorney, Southern District of New York, March 17, 2004, advised employees that they could "meet with investigators without the assistance of counsel," Stein I, 435 F.Supp.2d at 346 (emphasis omitted). KPMG complied, and circulated a memo advising that employees "may deal directly with government representatives without counsel."  Id. (emphasis omitted).

At a meeting in late March, Skadden asked the prosecutors to notify Skadden in the event any KPMG employee refused to cooperate.  Id. at 347. Over the following year, the prosecutors regularly informed Skadden whenever a KPMG employee refused to cooperate fully, such as by refusing to proffer or by proffering incompletely (in the government's view). *139  Id. Skadden, in turn, informed the employees' lawyers that fee advancement would cease unless the employees cooperated.  Id. The employees either knuckled under and submitted to interviews, or they were fired and KPMG ceased advancing their fees. For example, Watson and Smith attended proffer sessions after receiving KPMG's March 11 letter announcing the Fees Policy, and after Skadden reiterated to them that fees would be terminated absent cooperation. They did so because (they said, and the district court found) they feared that KPMG would stop advancing attorneys fees—although Watson concedes he attended a first session voluntarily. 3

See United States v. Stein, 440 F.Supp.2d 315, 330–33 (S.D.N.Y.2006) ("Stein II"). As Bennett later assured AUSA Weddle: "Whenever your Office has notified us that individuals have not ... cooperat [ed], KPMG has promptly and without question encouraged them to cooperate and threatened to cease payment of their attorney fees and ... to take personnel action, including termination." Letter of Robert Bennett to United States Attorney's Office, November 2, 2004; see, e.g., Stein II, 440 F.Supp.2d at 323 (describing KPMG's termination of Defendant–Appellant Warley after she invoked her Fifth Amendment privilege against self-incrimination).

KPMG Avoids Indictment

In an early-March 2005 meeting, then-U.S. Attorney David Kelley told Skadden and top KPMG executives that a non-prosecution agreement was unlikely and that he had reservations about KPMG's level of cooperation: "I've seen a lot better from big companies." Bennett reminded Kelley how KPMG had capped and conditioned its advancement of legal fees. KPMG moved up the Justice Department's chain of command. At a June 13, 2005 meeting with U.S. Deputy Attorney General James Comey, Bennett stressed KPMG's pressure on employees to cooperate by conditioning legal fees on cooperation; it was, he said, "precedent[ ]setting." Stein I, 435 F.Supp.2d at 349 (internal quotation marks omitted). KPMG's entreaties were ultimately successful: on August 29, 2005, the firm entered into a deferred prosecution agreement (the "DPA") under which KPMG admitted extensive wrongdoing, paid a $456 million fine, and committed itself to cooperation in any future government investigation or prosecution.  Id. at 349–50.

Indictment of Individual Employees

On August 29, 2005—the same day KPMG executed the DPA—the government indicted six of the Defendants–Appellees (along with three other KPMG employees): Jeffrey Stein; Richard Smith; Jeffrey Eischeid; John Lanning, Vice Chairman of Tax Services; Philip Wiesner, a former tax partner; and Mark Watson, a tax partner. A superseding indictment filed on October 17, 2005 named ten additional employees, including seven of the Defendants–Appellees: Larry DeLap, a former tax partner in charge of professional practice; Steven Gremminger, a former partner and associate general counsel; former tax partners Gregg Ritchie, Randy Bickham and Carl Hasting; Carol G. Warley; and Richard Rosenthal, a former tax partner and Chief Financial Officer of KPMG. 4 Pursuant to the Fees Policy, *140 KPMG promptly stopped advancing legal fees to the
indicted employees who were still receiving them.  \textit{Id.} at 350.

**Procedural History**

On January 12, 2006, the thirteen defendants (among others) moved to dismiss the indictment based on the government's interference with KPMG's advancement of fees.  In a submission to the district court, KPMG represented that

the Thompson memorandum in conjunction with the government's statements relating to payment of legal fees affected KPMG's determination(s) with respect to the advancement of legal fees and other defense costs to present or former partners and employees .... In fact, KPMG is prepared to state that the Thompson memorandum substantially influenced KPMG's decisions with respect to legal fees....

\textit{Stein IV}, 495 F.Supp.2d at 405 (internal quotation marks and emphasis omitted).

At a hearing on March 30, 2006, Judge Kaplan asked the government whether it was “prepared at this point to commit that [it] has no objection whatsoever to KPMG exercising its free and independent business judgment as to whether to advance defense costs to these defendants and that if it were to elect to do so the government would not in any way consider that in determining whether it had complied [by asking] for [the] government's view on the subject.” \textit{Id.} at 341 (footnote omitted). It is not clear what AUSA Neiman intended to convey when she said that “misconduct” should not or cannot “be rewarded” under “federal guidelines”; but her statement “was understood by both KPMG and government representatives as a reminder that payment of legal fees by KPMG, beyond any that it might legally be obligated to pay, could well count against KPMG in the government's decision whether to indict the firm.” \textit{Id.} at 344 (internal quotation marks omitted). “[W]hile the USAO did not say in so many words that it did not want KPMG to pay legal fees, no one at the meeting could have failed to draw that conclusion.” \textit{Id.}

Based on those findings, Judge Kaplan arrived at the following ultimate findings of fact, all of which the government contests on appeal:

[1] “the Thompson Memorandum caused KPMG to consider departing from its long-standing policy of paying legal fees and expenses of its personnel in all cases and investigations even before it first met with the USAO” and induced KPMG to seek “an indication from the USAO that payment of fees in accordance with its settled practice would not be held against it”;

[2] the government made repeated references to the Thompson Memo in an effort to “reinforce[,] the threat inherent in the Thompson Memorandum”;

[3] “the government conducted itself in a manner that evidenced a desire to minimize the involvement of defense attorneys”;

[4] but for the Thompson Memorandum and the prosecutors’ conduct, KPMG would have
paid defendants' legal fees and expenses without consideration of cost.

Id. at 352–53.

Against that background, Judge Kaplan ruled that a defendant has a fundamental right under the Fifth Amendment to fairness in the criminal process, including the ability to get and deploy in defense all “resources lawfully available to him or her, free of knowing or reckless government interference,” id. at 361, and that the government's reasons for infringing that right in this case could not withstand strict scrutiny, id. at 362–65. Judge Kaplan also ruled that the same conduct deprived each defendant of the Sixth Amendment right “to choose the lawyer or lawyers he or she desires and to use one's own funds to mount the defense that one wishes to present.” Id. at 366 (footnote omitted).

He reasoned that “the government's law enforcement interests in taking the specific actions in question [do not] sufficiently outweigh the interests of the KPMG Defendants in having the resources needed to defend as they think proper against these charges.” Id. at 368.

 “[T]he fact that advancement of legal fees occasionally might be part of an obstruction scheme or indicate a lack of full cooperation by a prospective defendant is insufficient to justify the government's interference with the right of individual criminal defendants to obtain resources lawfully available to them in order to defend themselves....” Id. at 369.

Judge Kaplan rejected the government's position that defendants have no right to spend “other people's money” on high-priced defense counsel: “[T]he KPMG Defendants had at least an expectation that their expenses in defending any claims or charges brought against them by reason of their employment by KPMG would be paid by the firm,” and “any benefits that would have flowed from that expectation—the legal fees at issue now—were, in every material sense, their property, not that of a third party.” Id. at 367. He further determined that defendants need not show how their defense was impaired: the government's interference with their Sixth Amendment “right to be represented as they choose,” “like a deprivation of the right to counsel of their choice, is complete irrespective of the quality of the representation they receive.” Id. at 369.

As to remedy, Judge Kaplan conceded that dismissal of the indictment would be inappropriate unless other avenues for obtaining fees from KPMG were first exhausted. Id. at 373–80. To that end, Judge Kaplan invited defendants to file a civil suit against KPMG under the district court's ancillary jurisdiction. *142 Id. at 377–80, 382. The suit was commenced, and Judge Kaplan denied KPMG's motion to dismiss. United States v. Stein, 452 F.Supp.2d 230 (S.D.N.Y.2006) (“Stein III”). However, this Court ruled that the district court lacked ancillary jurisdiction over the action. Stein v. KPMG, LLP, 486 F.3d 753 (2d Cir.2007).

Stein IV
Judge Kaplan dismissed the indictment against the thirteen defendants on July 16, 2007. Stein IV, 495 F.Supp.2d at 427. He reinforced the ruling in Stein I that the government violated defendants' right to substantive due process by holding that the prosecutors' conduct also “independently shock[s] the conscience.” Id. at 412–15. Judge Kaplan concluded that no remedy other than dismissal of the indictment would put defendants in the position they would have occupied absent the government's misconduct. Id. at 419–28.

The government appeals the dismissal of the indictment.

DISCUSSION
We review first [I] the government's challenges to the district court's factual findings, including its finding that but for the Thompson Memorandum and the prosecutors' conduct KPMG would have paid employees' legal fees—pre-indictment and post-indictment—without regard to cost. Next, because we are hesitant to resolve constitutional questions unnecessarily, [III] we inquire whether the government cured the purported Sixth
Amendment violation by the AUSA's in-court statement on March 30, 2006 that KPMG was free to decide whether to advance fees. Since we conclude that this statement did not return defendants to the status quo ante, we decide whether the promulgation and enforcement of KPMG's Fees Policy amounted to state action under the Constitution and whether the government deprived defendants of their Sixth Amendment right to counsel.

The government challenges certain factual findings of the district court. We review those findings for clear error, viewing the evidence in the light most favorable to defendants and asking whether we are left “with the definite and firm conviction that a mistake has been committed.”


The government points out that the Thompson Memorandum lists “fees advancement” as just one of many considerations in a complex charging decision, and thus argues that Judge Kaplan overread the Thompson Memorandum as a threat that KPMG would be indicted unless it ceased advancing legal fees to its employees.

Judge Kaplan's finding withstands scrutiny. KPMG was faced with the fatal prospect of indictment; it could be expected to do all it could, assisted by sophisticated counsel, to placate and appease the government. As Judge Kaplan noted, KPMG's chief legal officer, Sven Erik Holmes, testified that he considered it crucial “to be able to say at the right time with the right audience, we're in full compliance with the Thompson Memorandum.”

Stein I, 435 F.Supp.2d at 364 (emphasis added and internal quotation marks omitted). Moreover, KPMG's management and counsel had reason to consider the impact of the firm's indictment on the interests of the firm's partners, employees, clients, creditors and retirees.

The government reads the Thompson Memorandum to say that fees advancement is to be considered as a negative factor only when it is part of a campaign to “circle the wagons,” i.e., to protect culpable employees and obstruct investigators. And it is true that the Thompson Memorandum instructs a prosecutor to ask “whether the corporation appears to be protecting its culpable employees and agents.” But even if the government's reading is plausible, the wording nevertheless empowers prosecutors to determine which employees will be deprived of company-sponsored counsel: prosecutors may reasonably foresee that employees they identify as “culpable” will be cut off from fees.

The government also takes issue with Judge Kaplan's finding that the prosecutors (acting under DOJ policy) deliberately reinforced the threat inherent in the Thompson Memorandum. It protests that KPMG considered conditioning legal fees on cooperation even before the February 25, 2004 meeting and that KPMG adopted its Fees Policy free from government influence. However, Judge Kaplan's interpretation of the meeting is supported by the following record evidence. Because withholding of fees would be problematic for a partnership like KPMG, Bennett began by attempting to “sound out” the government's position on the issue.

Stein IV, 495 F.Supp.2d at 402. The prosecutors declined to sign off on KPMG's prior arrangement. Instead they asked KPMG to ascertain whether it had a legal obligation to advance fees. KPMG responded with its fallback position: conditioning fees on cooperation.

Id. In Judge Kaplan's view, this was not an official policy announcement, but rather a proposal: Skadden lawyers repeatedly emphasized to the prosecutors that no final decision had been made. One available inference from all this is that the prosecutors' inquiry about KPMG's legal obligations was a routine check for conflicts of interest; but on this record, Judge Kaplan was entitled to see things differently.

Nor can we disturb Judge Kaplan's finding that “the government conducted itself in a manner that evidenced a desire to minimize the involvement of defense attorneys.”

Stein I, 435 F.Supp.2d at 353. During the March 11 phone call between the prosecutors and Skadden, AUSA Weddle demanded that KPMG tell its employees to be “totally open” with the USAO, “even if that [meant admitting] criminal wrongdoing,” so that he could gather
material for cross-examination. *Id.* at 345 (alterations in original and internal quotation marks omitted). On March 12, the prosecutors prevailed upon KPMG to supplement its first advisory letter with another, which clarified that employees could meet with the government without counsel. In addition, prosecutors repeatedly used Skadden to threaten to withhold legal fees from employees who refused to proffer—even if defense counsel had recommended that an employee invoke the Fifth Amendment privilege. Judge Kaplan could reasonably reject the government's version of these events.

Finally, we cannot say that the district court's ultimate finding of fact—that absent the Thompson Memorandum and the prosecutors' conduct KPMG would have advanced fees without condition or cap—was clearly erroneous. The government itself stipulated in *Stein I* that KPMG had a “longstanding voluntary practice” of advancing and paying employees' legal fees “without regard to economic costs or considerations” and “without a preset cap or condition of cooperation with the government ... in any civil, criminal or regulatory proceeding” arising from activities within the scope of employment. *Id.* at 340 (internal quotation marks omitted). Although it “is far from certain” that KPMG is legally obligated to advance defendants' legal fees, *Stein v. KPMG, LLP*, 486 F.3d 753, 762 n. 3 (2d Cir.2007), a firm may have potent incentives to advance fees, such as the ability to recruit and retain skilled professionals in a profession fraught with legal risk. Also, there is evidence that, before the prosecutors' intervention, KPMG executed an agreement under which it would advance Stein's legal fees without cap or condition (and negotiated toward an identical agreement with Smith). And while the government maintains that the civil, criminal and regulatory investigations confronting KPMG constituted an unprecedented state of affairs that might have caused KPMG to adopt new and different policies, Judge Kaplan was not required to agree. Indeed, KPMG itself represented to the court that the Thompson Memorandum and the prosecutors' conduct “substantially influenced [its] determination(s) with respect to the advancement of legal fees.”

For the foregoing reasons, we cannot disturb Judge Kaplan's factual findings, including his finding that, but for the Thompson Memorandum and the prosecutors' conduct, KPMG would have advanced legal fees without condition or cap.

**II**

We now consider the government's claim of cure. If the government is correct, the “taint” of the purported Sixth Amendment violation would be “neutralize[d],” dismissal of the indictment would be inappropriate, and we could avoid deciding the constitutional question. *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981); see, e.g., *id.* at 366–67, 101 S.Ct. 665 (referring to “[t]he Sixth Amendment violation, if any ” and concluding that “the violation, which we assume has occurred, has had no adverse impact upon the criminal proceedings” (emphases added)).

“Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.” *Id.* at 364, 101 S.Ct. 665. Therefore, we must “identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial.” *Id.* at 365, 101 S.Ct. 665. Dismissal of an indictment is a remedy of last resort, *id.*, and is appropriate only where necessary to “restore [ ] the defendant to the circumstances that would have existed had there been no constitutional error,” *United States v. Carmichael*, 216 F.3d 224, 227 (2d Cir.2000).

In *Stein IV*, Judge Kaplan concluded that dismissal of the indictment as to the thirteen defendants was warranted because no other remedy would restore them to the position they would have enjoyed but for the government's unconstitutional conduct. *Stein IV*, 495 F.Supp.2d at 419–28. Specifically, Judge Kaplan found that the government deprived four defendants—Gremminger, Hasting, Ritchie and Watson—of counsel
of their choice. \textit{Id.} at 421 ("[T]hey simply lack the resources to engage the lawyers of their choice, lawyers who had represented them as long as KPMG was paying the bills." (footnote omitted)). Judge Kaplan also found that all thirteen defendants—even those who *145 were still represented by their counsel of choice—were forced by KPMG's withholding of post-indictment legal fees "to limit their defenses ... for economic reasons and that they would not have been so constrained if KPMG paid their expenses." \textit{Id.} at 419. After reviewing defendants' finances and determining the estimated cost of legal representation, Judge Kaplan concluded: "[N]one of the thirteen KPMG Defendants ... has the resources to defend this case as he or she would have defended it had KPMG been paying the cost, even if he or she liquidated all property owned by the defendant.” \textit{Id.} at 425.

The government argues that it cured any Sixth Amendment violation on March 30, 2006, when it told the district court that KPMG was free to “exercise [its] business judgment.” Therefore, the government contends, the appropriate remedy for any constitutional violation would be to allow defendants to retain their counsel of choice using whatever funds KPMG is willing to provide now. At most, the government claims, all that would be warranted is an adjournment of trial to afford defendants additional time to review documents and consult with counsel and expert witnesses; and since 16 months passed between the government's March 30, 2006 in-court statement and the July 16, 2007 dismissal of the indictment, defendants have already enjoyed this remedy.

Judge Kaplan was unpersuaded. In his view, KPMG is unlikely to pay defendants' legal fees as if the government had never exerted any pressure: KPMG might prefer not to be seen as reversing course and implicitly "admitting that it caved in to government pressure”; the defendants have been “indicted on charges the full scope of which may not previously have been foreseeable to KPMG”—so that defense costs may be larger than expected; and KPMG has since paid a $456 million fine under the DPA, reducing the firm's available resources. \textit{Stein I, 435 F.Supp.2d at 374.}

We agree with the district court. The prosecutor's isolated and ambiguous statement in a proceeding to which KPMG was not a party (and the nearly 16–month period of legal limbo that ensued) did not restore defendants to the status quo ante.

Judge Kaplan asked whether the government would represent that [i] it has no objection to “KPMG exercising its free and independent business judgment as to whether to advance defense costs” and [ii] “if it were to elect to do so the government would not in any way consider that in determining whether it had complied with the DPA.” The AUSA affirmed only the first proposition. \textit{See supra} p. 140. And as to that, the AUSA stated that the government's position had not changed: so the import of that statement depends on what position one thinks the government had previously adopted.

Furthermore, it was unrealistic to expect KPMG to exercise uncoerced judgment in March 2006 as if it had never experienced the government's pressure in the first place. The government's intervention, coupled with the menace inherent in the Thompson Memorandum, altered the decisional dynamic in a way that the district court could find irreparable. Having assumed a supine position in the DPA—under which KPMG must continue to cooperate fully with the government—\textit{7} it is not all that likely that the firm would feel free to reverse course.

*146 True, even if KPMG had decided initially to advance legal fees, it might always have changed course later: it is undisputed that KPMG's longstanding fees policy was voluntary and subject to revision. (In fact, in the civil suit KPMG represented that it would not have obligated itself to pay millions of dollars in fees on behalf of an unknown number of employees without regard to the charges ultimately lodged against them.) So, the government argues, even absent government pressure KPMG would not have advanced legal fees indefinitely and without condition.

This is certainly plausible; but it directly contradicts the district court's central finding—which is not clearly erroneous—that “[a]bsent the Thompson Memorandum and the actions of the USAO, KPMG would have paid the legal fees and expenses of all of its partners and
employees both prior to and after indictment, without regard to cost.”  Id. at 353. Because we cannot disturb this finding, we cannot accept the government's claim of cure on this score.

* * *

The appropriate remedy for a constitutional violation is “one that as much as possible restores the defendant to the circumstances that would have existed had there been no constitutional error.”  Carmichael, 216 F.3d at 227. Since it has been found that, absent governmental interference, KPMG would have advanced unlimited legal fees unconditionally, only the unconditional, unlimited advancement of legal fees would restore defendants to the status quo ante. The government's in-court statement and the ensuing 16–month delay were not enough. If there was a Sixth Amendment violation, dismissal of the indictment is required.

III

Judge Kaplan found that “KPMG's decision to cut off all payments of legal fees and expenses to anyone who was indicted and to limit and to condition such payments prior to indictment upon cooperation with the government was the direct consequence of the pressure applied by the Thompson Memorandum and the USAO.”  Stein I, 435 F.Supp.2d at 353 (emphasis added); see also Stein II, 440 F.Supp.2d at 334 (relying on this finding to conclude that KPMG's conduct was fairly attributable to the State for Fifth Amendment purposes). The government protests that KPMG's adoption and enforcement of its Fees Policy was private action, outside the ambit of the Sixth Amendment.

When “[t]he district court's dismissal of [an] indictment raises questions of constitutional interpretation, ... we review the district court's decision de novo.”  United States v. King, 276 F.3d 109, 111 (2d Cir.2002).

Actions of a private entity are attributable to the State if “there is a sufficiently close nexus between the State and the challenged action of the ... entity so that the action of the latter may be fairly treated as that of the State itself.”  Jackson v. Metro. Edison Co., 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). The “close nexus” test is not satisfied when the state “[m]erely approv[es] or acquiesce[s] in the initiatives” of the private entity, S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 547, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987) (internal quotation marks omitted and first alteration in original), or when an entity is merely subject to governmental regulation, see Jackson, 419 U.S. at 350 & n. 7, 95 S.Ct. 449. “The purpose of the [close-nexus requirement] is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.”  Blum v. Yaretsky, 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). Such responsibility is normally found when the State “has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”  Id.

Although Supreme Court cases on this issue “have not been a model of consistency,”  Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) (O'Connor, J., dissenting), some principles emerge. “A nexus of state action exists between a private entity and the state when the state exercises coercive power, is entwined in the management or control of the private actor, or provides the private actor with significant encouragement, either overt or covert, or when the private actor operates as a willful participant in joint activity with the State or its agents, is controlled by an agency of the State, has been delegated a public function by the state, or is entwined with governmental policies.”  Flagg v. Yonkers Sav. & Loan Ass'n, 396 F.3d 178, 187 (2d Cir.2005) (emphasis added and internal quotation marks omitted); see also Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 615, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (finding state action where “the Government did more than adopt a passive position toward the underlying private conduct” and where it “made plain not only its strong preference for [the private
The government argues: KPMG simply took actions in the shadow of an internal DOJ advisory document (the Thompson Memorandum) containing multiple factors and caveats; the government's approval of KPMG's Fees Policy did not render the government responsible for KPMG's actions enforcing it; even if the government had specifically required KPMG to adopt a policy that penalized non-cooperation, state action would still have been lacking because KPMG would have retained the power to apply the policy; and although the prosecutors repeatedly informed KPMG when employees were not cooperating, they did so at KPMG's behest, without knowing how KPMG would react. We disagree.

KPMG's adoption and enforcement of the Fees Policy amounted to “state action” because KPMG “operate[d] as a willful participant in joint activity” with the government, and because the USAO “significantly encourage[d]” KPMG to withhold legal fees from defendants upon indictment. 8 Flagg, 396 F.3d at 187. The government brought home to KPMG that its survival depended on its role in a joint project with the government to advance government prosecutions. The government is therefore legally “responsible for the specific conduct of which the [criminal defendants] complain[ ].” Blum, 457 U.S. at 1004, 102 S.Ct. 2777 (emphasis omitted).

The government argues that “KPMG's decision to condition legal fee payments on cooperation, while undoubtedly influenced by the Thompson Memorandum, was not *148 coerced or directed by the Government.” But that argument runs up against the district court's factual finding (which we do not disturb) that the fees decision “was the direct consequence” of the Memorandum and the prosecutors' conduct. Stein I, 435 F.Supp.2d at 353. Nevertheless, it remains a question of law whether the facts as found by the district court establish state action. See Blum, 457 U.S. at 1004, 102 S.Ct. 2777 (asking whether the private conduct “must in law be deemed to be that of the State” (emphasis added)).

State action is established here as a matter of law because the government forced KPMG to adopt its constricted Fees Policy. The Thompson Memorandum itself—which prosecutors stated would be considered in deciding whether to indict KPMG—emphasizes that cooperation will be assessed in part based upon whether, in advancing counsel fees, “the corporation appears to be protecting its culpable employees and agents.” Since defense counsel's objective in a criminal investigation will virtually always be to protect the client, KPMG's risk was that fees for defense counsel would be advanced to someone the government considered culpable. So the only safe course was to allow the government to become (in effect) paymaster.

The prosecutors reinforced this message by inquiring into KPMG's fees obligations, referring to the Thompson Memorandum as “a point that had to be considered,” and warning that “misconduct” should not or cannot “be rewarded” under “federal guidelines.” Stein I, 435 F.Supp.2d at 341–42. The government had KPMG's full attention. It is hardly surprising, then, that KPMG decided to condition payment of fees on employees' cooperation with the government and to terminate fees upon indictment: only that policy would allow KPMG to continue advancing fees while minimizing the risk that prosecutors would view such advancement as obstructive.

To ensure that KPMG's new Fees Policy was enforced, prosecutors became “entwined in the ... control” of KPMG. Flagg, 396 F.3d at 187. They intervened in KPMG's decisionmaking, expressing their “disappoint[ment] with [the] tone” of KPMG's first advisory memorandum, Stein I, 435 F.Supp.2d at 346, and declaring that “[t]hese problems must be remedied” by a proposed supplemental memorandum specifying that employees could meet with the government without being burdened by counsel. Prosecutors also “made plain” their “strong preference” as to what the firm should do, and their “desire to share the fruits of such intrusions.” Skinner, 489 U.S. at 615, 109 S.Ct. 1402.
They did so by regularly “reporting to KPMG the identities of employees who refused to make statements in circumstances in which the USAO knew full well that KPMG would pressure them to talk to prosecutors.”

Stein II, 440 F.Supp.2d at 337. (The government's argument that it could not have known how KPMG would react when informed that certain employees were not cooperating is at best plausible only vis-à-vis the first few employees.) The prosecutors thus steered KPMG toward their preferred fee advancement policy and then supervised its application in individual cases. Such “overt” and “significant encouragement” supports the conclusion that KPMG's conduct is properly attributed to the State. 9

*149 The authorities cited by the government are not to the contrary. The government relies on Blum v. Yaretsky, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), and Albert v. Carovano, 851 F.2d 561 (2d Cir.1988) (en banc), two cases in which state action was held to be lacking. In Blum, a class of Medicaid patients unsuccessfully challenged the transfer and discharge decisions of private nursing homes. The patients claimed that the private conduct was attributable to New York State because state regulations required that the nursing homes transfer patients to a facility providing the level of care “indicated by the patient's medical condition or needs.” 10 Blum, 457 U.S. at 1007–08, 102 S.Ct. 2777 (quoting N.Y. Comp.Codes R. & Regs. tit. 10, §§ 416.9(d)(1), 421.13(d)(1) (1980)). Even though the regulations “encouraged for efficiency reasons” the “downward” transfer of patients to “lower levels of care,” id. at 1008 n. 19, 102 S.Ct. 2777 (emphasis added), and even though “federal law require[d] ... state officials [to] review” nursing home assessments and “[a]djust[ ] ... benefit levels in response to a decision to discharge or transfer a patient,” id. at 1010, 102 S.Ct. 2777, the Supreme Court ruled that state action was lacking. As the Court explained, the “regulations do not require the nursing homes to rely on the [patient care assessment forms designed by New York] in making discharge or transfer decisions,” and “do not dictate the decision to discharge or transfer in a particular case.” Id. at 1008, 1010, 102 S.Ct. 2777 (emphasis added). Instead, those decisions “ultimately turn[ed] on medical judgments made by private parties according to professional standards that are not established by the State.” Id. at 1008, 102 S.Ct. 2777.

Likewise, Albert declined to deem the disciplinary decisions of a private college to be state action, despite a New York law requiring colleges to adopt disciplinary rules and file them with the state. Albert, 851 F.2d at 568–69. We rejected plaintiffs' claim that the college was compelled by New York State to promulgate a disciplinary policy that it would not have adopted otherwise. The policy was not “a rule of conduct imposed by the state,” we explained, because “[c]olleges are free to define breaches of public order however they wish, and they need not resort to a particular penalty in any particular case.” Id. at 564, 568. Moreover, even if the state had mandated a particular rule, “the ultimate power to select a particular sanction in individual cases would, as in [Blum ] rest with the private party.” Id. at 571. That is, there was “nothing in either the legislation or those rules” that “required that these appellants be suspended.” Id. at 568 (emphasis added).

In Blum and Albert, it was decisive that [1] actions of the private entity were based on independent criteria (the medical standards; the college rules of conduct), and that [2] the government was not dictating the outcomes of particular cases.

Here, however, [1] KPMG was never “free to define” cooperation independently: AUSA Weddle told Bennett that he had “had a bad experience in the past with a company conditioning payments on a person's cooperation, where the company did not define cooperation as 'tell the truth' the[ ] way we [the prosecutors] define it.” KPMG's fees advancement decisions in individual cases thus depended largely on state-influenced standards. In addition, [2] the prosecution designated particular employees for deprivation of fees (and, in some cases, termination of employment) by *150 demanding that KPMG threaten and penalize those employees for non-cooperation. As Bennett later reported to the Deputy Attorney General,


[“w]henever your Office has notified us that individuals have not ... cooperat[ed], KPMG has promptly and without question encouraged them to cooperate and threatened to cease payment of their attorneys' fees and ... to take personnel action, including termination.” Furthermore, by indicting the thirteen defendants after inspiring and shaping KPMG's Fees Policy and after exacting KPMG's compliance with it, prosecutors effectively selected which employees would be deprived of attorneys' fees. Having forced the constriction of KPMG's longstanding policy of advancing fees, the government then compelled KPMG to apply the Fees Policy to particular employees both pre- and post-indictment. This conduct finds no protection in Blum and Albert.

The government also directs us to another line of state action cases: D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc., 279 F.3d 155 (2d Cir.2002), and United States v. Solomon, 509 F.2d 863 (2d Cir.1975). These cases involved parallel, cooperative investigations by private regulatory entities and government investigators. In D.L. Cromwell, the USAO and the National Association of Securities Dealers (“NASD”) simultaneously investigated plaintiff stockbrokers. The plaintiffs sought to enjoin NASD from compelling on-the-record interviews (on pain of expulsion from their profession), arguing under the Fifth Amendment that the NASD inquiry was a tool of the prosecutors. D.L. Cromwell, 279 F.3d at 156–57. Plaintiffs pointed to the informal and formal sharing of documents and information between the government and the NASD, id. at 157–58, 162, and the fact that the NASD interview demands followed shortly after plaintiffs contested grand jury subpoenas, id. at 162. Similarly, in Solomon, the New York Stock Exchange (“NYSE”) had taken testimony from a trader under threat of suspension or expulsion, and then forwarded his deposition to the SEC pursuant to an SEC subpoena. 509 F.2d at 864–65.

In both cases, we held that there was no state action because the private actors had independent regulatory interests and motives for making their inquiries and for cooperating with parallel investigations being conducted by the government. In D.L. Cromwell, the NASD had a preexisting “regulatory duty to investigate questionable securities transactions,” 279 F.3d at 163—that is, it would have requested interviews regardless of governmental pressure. And in Solomon, the NYSE's efforts were “in pursuance of its own interests and obligations, not as an agent of the [government].” 509 F.2d at 869—absent SEC involvement, the NYSE would have investigated anyway. Because the NASD and the NYSE had preexisting and independent investigatory missions, their cooperation with the government was not state action. See Lisa Kern Griffin, Compelled Cooperation and the New Corporate Criminal Procedure, 82 N.Y.U. L.Rev. 311, 369 (2007) (observing that D.L. Cromwell and Solomon “turned in large part on the fact that requests for interviews” were not “generated by governmental persuasion or collusion”). By contrast (as the district court found), absent the prosecutors' involvement and the Thompson Memorandum, KPMG would not have changed its longstanding fee advancement policy or withheld legal fees from defendants upon indictment. See Stein I, 435 F.Supp.2d at 353.

The government responds: Solomon declined to find state action even though it involved a private entity compelling interviews with one of its members, backed by *151 the explicit threat of expulsion, in the context of continuous coordination between the NYSE and the SEC on the same side. So how can KPMG, an adversary of the government, also be its partner? See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 304, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (“The state-action doctrine does not convert opponents into virtual agents.”).

An adversarial relationship does not normally bespeak partnership. But KPMG faced ruin by indictment and reasonably believed it must do everything in its power to avoid it. The government's threat of indictment was easily sufficient to convert its adversary into its agent. KPMG was not in a position to consider coolly the risk of indictment, weigh the potential significance of the other
We therefore conclude that KPMG’s adoption and enforcement of the Fees Policy (both before and upon defendants' indictment) amounted to state action. The government may properly be held “responsible for the specific conduct of which the [criminal defendants] complain[ ].” *Blum, 457 U.S. at 1004, 102 S.Ct. 2777 (emphasis omitted), *i.e.*, the deprivation of their Sixth Amendment right to counsel, if the violation is established.

IV

The district court's ruling on the Sixth Amendment was based on the following analysis (set out here in précis). The Sixth Amendment protects “an individual's right to choose the lawyer or lawyers he or she desires,” *Stein I, 435 F.Supp.2d at 366* (citing *Wheat v. United States, 486 U.S. 153, 164, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)*), and “to use one's own funds to mount the defense that one wishes to present,” *id.* (citing *Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989)*). The goal is to secure “a defendant's right to spend his own money on a defense.” *Id. at 367.* Because defendants reasonably expected to receive legal fees from KPMG, the fees “were, in every material sense, their property.” *Id.* The government's interest in retaining discretion to treat as obstruction a company's advancement of legal fees “is insufficient to justify the government's interference with the right of individual criminal defendants to obtain resources lawfully available to them in order to defend themselves.” *Id. at 369.* Defendants need not make a “particularized showing” of how their defense was impaired, *id. at 372*, because “[v]irtually everything the defendants do in this case may be influenced by the extent of the resources available to them,” such as selection of counsel and “what the KPMG Defendants can pay their lawyers to do,” *id.* at 371–72. Therefore, the Sixth Amendment violation “is complete irrespective of the quality of the representation they receive.” *Id. at 369.*

**152 A**

Most of the state action relevant here—the promulgation of the Thompson Memorandum, the prosecutors' communications with KPMG regarding the advancement of fees, KPMG's adoption of a Fees Policy with caps and conditions, and KPMG's repeated threats to employees identified by prosecutors as being uncooperative—pre-dated the indictments of August and October 2005. *(Of course, after the indictments were filed KPMG ceased advancing fees to all thirteen of the present defendants who were still receiving fees up to that point. As explained in Part III, this was also state action.) So we must determine how this pre-indictment conduct may bear on defendants' Sixth Amendment claim.

“The Sixth Amendment right of the ‘accused’ to assistance of counsel in ‘all criminal prosecutions’ is limited by its terms: it does not attach until a prosecution is commenced.” *Rothgery v. Gillespie County, 554 U.S. 191, 128 S.Ct. 2578, 2583, 171 L.Ed.2d 366 (2008)* (quoting U.S. Const. amend. VI) (some internal quotation marks and footnote omitted). “Attachment” refers to “when the [Sixth Amendment] right may be asserted”; it does not concern the separate question of “what the right guarantees,” *i.e.*, “what the substantive guarantee of the Sixth Amendment” is at that stage of the prosecution.

*Id. at 2592, 2594* (Alito, J., concurring). The Supreme Court has “pegged commencement [of a prosecution] to ‘the initiation of adversary judicial criminal proceedings —whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’” *Id. at 2583* (majority opinion) (quoting *United States v. Gouveia, 467 U.S. 180, 188, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984).* “The rule is not ‘mere formalism,’ but a recognition of the point at which ‘the government has committed


itself to prosecute,' ‘the adverse positions of government and defendant have solidified,’ and the accused ‘finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.’”  

Id. (quoting Kirby v. Illinois, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (plurality opinion)).

Judge Kaplan focused on KPMG's decision to withhold fees upon indictment: “[T]he constitutional violation pertinent to possible dismissal of the indictment was the government's role in KPMG's action in cutting off payment of legal fees for those who were indicted as distinct from the limitations on payment of legal fees during the investigative stage.”  

Stein IV, 495 F.Supp.2d at 404 n. 54 (emphasis added) (citing Stein I, 435 F.Supp.2d at 373). Therefore, Judge Kaplan explained, “[a]ctions by the government that affected only the payment of legal fees and defense costs for services rendered prior to the indictment ... do not implicate the Sixth Amendment.”  

Stein I, 435 F.Supp.2d at 373 (emphasis added).

By the same token, state action that also (or only) affected the advancement of legal fees for services rendered post-indictment does implicate defendants' Sixth Amendment rights, regardless of when the conduct took place:

It is true, of course, that the Sixth Amendment right to counsel typically attaches at the initiation of adversarial proceedings—at an arraignment, indictment, preliminary hearing, and so on. But the analysis can not end there. The Thompson Memorandum on its face and the USAO's actions were parts of an effort to limit defendants' access to funds for their defense. Even if this was not among the conscious motives, the Memorandum was adopted and the USAO acted in circumstances in which that result was known to be exceptionally likely. The fact that events were set in motion prior to indictment with the object of having, or with knowledge that they were likely to have, an unconstitutional effect upon indictment cannot save the government. This conduct, unless justified, violated the Sixth Amendment.

Id. at 366 (emphasis added). In other words, the government's pre-indictment conduct was of a kind that would have post-indictment effects of Sixth Amendment significance, and did.

We endorse this analysis. Although defendants' Sixth Amendment rights attached only upon indictment, the district court properly considered pre-indictment state action that affected defendants post-indictment. When the government acts prior to indictment so as to impair the suspect's relationship with counsel post-indictment, the pre-indictment actions ripen into cognizable Sixth Amendment deprivations upon indictment.  

As Judge Ellis explained in United States v. Rosen, 487 F.Supp.2d 721 (E.D.Va.2007), “it is entirely plausible that pernicious effects of the pre-indictment interference continued into the post-indictment period, effectively hobbling defendants' Sixth Amendment rights to retain counsel of choice with funds to which they had a right.... [I]f, as alleged, the government coerced [the employer] into halting fee advances on defendants' behalf and the government did so for the purpose of undermining defendants' relationship with counsel once the indictment issued, the government violated defendants' right to expend their own resources towards counsel once the right attached.”  

Id. at 734.

Since the government forced KPMG to adopt the constricted Fees Policy—including the provision for terminating fee advancement upon indictment—and then compelled KPMG to enforce it, it was virtually certain that KPMG would terminate defendants' fees upon indictment. We therefore reject the government's argument that its actions (virtually all pre-indictment) are immune from scrutiny under the Sixth Amendment. 13
We now consider “what the [Sixth Amendment] right guarantees.” Rothgery, 128 S.Ct. at 2592 (Alito, J., concurring).

The Sixth Amendment ensures that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. Thus “the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.” Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624–25, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989). “[A]n element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him.” United States v. Gonzalez–Lopez, 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

The government must “honor” a defendant's Sixth Amendment right to counsel:

This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance.... [A]t the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.

Consistent with this principle of non-interference, courts have identified violations of the Sixth Amendment right to counsel where the government obtains incriminating statements from a defendant outside the presence of counsel and then introduces those statements at trial. See, e.g., id. at 176, 106 S.Ct. 477; Massiah v. United States, 377 U.S. 201, 206, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Likewise, the government violates the Sixth Amendment when it intrudes on the attorney-client relationship, preventing defense counsel from “participat[ing] fully and fairly in the adversary factfinding process.” Herring v. New York, 422 U.S. 853, 858, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975); see, e.g., id. at 858–59, 95 S.Ct. 2550 (holding that a New York statute allowing judges in a criminal bench trial to deny counsel the opportunity to make a closing argument deprived defendant of his Sixth Amendment right to the assistance of counsel); Geders v. United States, 425 U.S. 80, 91, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (holding that a trial court's order that defendant not consult with his attorney during an overnight recess during trial violated the Sixth Amendment).

Defendants–Appellees do not say that they were deprived of constitutionally effective counsel. See Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Their claim is that the government unjustifiably interfered with their relationship with counsel and their ability to mount the best defense they could muster.

The government, relying on Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989), contends that a defendant has no Sixth Amendment right to a defense funded by someone else's money. In that case, the Supreme Court ruled that a defendant's Sixth Amendment right to retain counsel of choice was not violated when the funds he earmarked for defense were seized under a federal forfeiture statute, because title to the forfeitable assets had vested in the United States. Id. at 628, 109 S.Ct. 2646; see also
It is axiomatic that if defendants had already received fee advances from KPMG, the government could not (absent justification) deliberately interfere with the use of that money to fuel their defenses. And the government concedes that it could not prevent a lawyer from furnishing a defense gratis. See Caplin & Drysdale, 491 U.S. at 624–25, 109 S.Ct. 2646 (“The Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney ... who is willing to represent the defendant even though he is without funds.”). Presumably, such a lawyer could pay another lawyer to represent the defendant (subject, of course, to ethical rules governing third-party payments *156 to counsel, see United States v. Locascio, 6 F.3d 924, 932–33 (2d Cir.1993)). And if the Sixth Amendment prohibits the government from interfering with such arrangements, then surely it also prohibits the government from interfering with financial donations by others, such as family members and neighbors—and employers. See United States v. Inman, 483 F.2d 738, 739–40 (4th Cir.1973) (per curiam) (“The Sixth Amendment right to counsel includes not only an indigent's right to have the government appoint an attorney to represent him, but also the right of any accused, if he can provide counsel for himself by his own resources or through the aid of his family or friends, to be represented by an attorney of his own choosing.”) (emphasis added)). In a nutshell, the Sixth Amendment protects against unjustified governmental interference with the right to defend oneself using whatever assets one has or might reasonably and lawfully obtain.

The government points out that KPMG's past fee practice was voluntary and subject to change, and that defendants therefore could have had no reasonable expectation of the ongoing advancement of fees. But this argument simply quarrels with Judge Kaplan's finding that absent any state action, KPMG would have paid defendants' legal fees and expenses without regard to cost. See Stein I, 435 F.Supp.2d at 353. Defendants were not necessarily entitled to fee advancement as a matter of law, see Stein v. KPMG, LLP, 486 F.3d 753, 762 n. 3 (2d Cir.2007) (commenting that defendants' likelihood of success in obtaining a judgment against KPMG for legal fees is “far from certain”); but the Sixth Amendment prohibits...
the government from impeding the supply of defense resources (even if voluntary or gratis), absent justification. Therefore, unless the government's interference was justified, it violated the Sixth Amendment.

The government is sometimes allowed to interfere with defendants' choice or relationship with counsel, such as to prevent certain conflicts of interest. See, e.g., United States v. Curcio, 680 F.2d 881 (2d Cir.1982). However, the government has failed to establish a legitimate justification for interfering with KPMG's advancement of legal fees.

The government argues that it may inquire into third-party payment of legal fees in certain circumstances. For example, in United States v. Locascio, we affirmed the disqualification of defendant's counsel based in part on defendant's "benefactor payments" to the attorney to serve as "house counsel" to members of the Gambino organized crime family. Locascio, 6 F.3d at 932. We explained that "the acceptance of such 'benefactor payments' ... raises an ethical question as to whether the attorney's loyalties are with the client or the payor," id. (some internal quotation marks omitted), and that "proof of house counsel can be used by the government to help establish the existence of the criminal enterprise under RICO, by showing the connections among the participants," id. at 932–33.

The government's reliance on Locascio is misplaced. There, the attorney's status as "house counsel" "was potentially part of the proof of the Gambino criminal enterprise," id. at 933, i.e., it was evidence going to an element of the crime itself, and it was relevant to ascertaining and preventing potential conflicts of interest, id. at 932. But here, the government claims no such compelling justifications.

It is also urged that a company may pretend cooperation while "circling the wagons," that payment of legal fees can advance such a strategy, and that the government has a legitimate interest in being able to assess cooperation using the payment of fees as one factor. Even if that *157 can be a legitimate justification, it would not be in play here: prosecutors testified before the district court that they were never concerned that KPMG was "circling the wagons." Moreover, it is unclear how the circling of wagons is much different from the legitimate melding of a joint defense.

The government conceded at oral argument that it is in the government's interest that every defendant receive the best possible representation he or she can obtain. A company that advances legal fees to employees may stymie prosecutors by affording culpable employees with high-quality representation. But if it is in the government's interest that every defendant receive the best possible representation, it cannot also be in the government's interest to leave defendants naked to their enemies.

Judge Kaplan found that defendants Gremminger, Hasting, Ritchie and Watson were unable to retain the counsel of their choosing as a result of the termination of fee advancements upon indictment. Stein IV, 495 F.Supp.2d at 421–22. The government does not contest this factual finding, and we will not disturb it. A defendant who is deprived of counsel of choice (without justification) need not show how his or her defense was impacted; such errors are structural and are not subject to harmless-error review. See Gonzalez–Lopez, 548 U.S. at 144, 148–52, 126 S.Ct. 2557. "[T]he right at stake here is the right to counsel of choice, ... and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.' " Id. at 146, 126 S.Ct. 2557. Of course, a completed constitutional violation may still be remediable. However, as explained in Part II, the government has failed to cure this Sixth Amendment violation. Therefore, the government deprived defendants Gremminger, Hasting, Ritchie and Watson of their Sixth Amendment right to counsel of choice.

The remaining defendants—Bickham, DeLap, Eisheid, Lanning, Rosenthal, Smith, Stein, Warley, and Wiesner—do not claim they were deprived of their chosen counsel. Rather, they assert that the government unjustifiably interfered with their relationship with counsel and their ability to defend themselves. In the district court, the
government conceded that these defendants are also entitled to dismissal of the indictment, assuming the correctness of Stein I. See Stein IV, 495 F.Supp.2d at 393. We agree: these defendants can easily demonstrate interference in their relationships with counsel and impairment of their ability to mount a defense based on Judge Kaplan's non-erroneous findings that the post-indictment termination of fees “caused them to restrict the activities of their counsel,” and thus to limit the scope of their pre-trial investigation and preparation. Id. at 418. Defendants were indicted based on a fairly novel theory of criminal liability; they faced substantial penalties; the relevant facts are scattered throughout over 22 million documents regarding the doings of scores of people, id. at 417; the subject matter is “extremely complex,” id. at 418; technical expertise is needed to figure out and explain what happened; and trial was expected to last between six and eight months, id. As Judge Kaplan found, these defendants “have been forced to limit their defenses ... for economic reasons and ... they would not have been so constrained if KPMG paid their expenses.” Id. at 419. We therefore hold that these defendants were also deprived of their right to counsel under the Sixth Amendment. *158

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court dismissing defendants' indictment.

All Citations

541 F.3d 130, 102 A.F.T.R.2d 2008-6023, 2008-2 USTC P 50,518

Footnotes

1 In later decisions, Judge Kaplan ruled that defendants Richard Smith and Mark Watson's proffer session statements were obtained in violation of their Fifth Amendment privilege against self-incrimination, and that their statements would be suppressed, see United States v. Stein, 440 F.Supp.2d 315 (S.D.N.Y.2006) ("Stein II"); that the court had ancillary jurisdiction over Defendants–Appellees' civil suit against KPMG for advancement of fees, see United States v. Stein, 452 F.Supp.2d 230 (S.D.N.Y.2006) ("Stein III"), vacated, Stein v. KPMG, LLP, 486 F.3d 753 (2d Cir.2007); and that dismissal of the indictment is the appropriate remedy for those constitutional violations, see United States v. Stein, 495 F.Supp.2d 390 (S.D.N.Y.2007) ("Stein IV").

2 In a separate summary order filed today, we dismiss as moot the government's appeal from the order of the district court suppressing proffer statements made by Defendants–Appellees Smith and Watson.

3 As discussed above, in a decision that is the subject of the summary order filed today, the district court held that Defendants–Appellees Smith and Watson's proffer statements were obtained in violation of their Fifth Amendment privilege against self-incrimination and that their statements would be suppressed. Id. at 337–38.

4 The superseding indictment filed on October 17, 2005 charged 19 defendants in 46 counts for conspiring to defraud the United States and the IRS, tax evasion and obstruction of the internal revenue laws (although not every individual was charged with every offense).

5 According to the district court, “[a]ll defendants previously employed by KPMG joined in the motion.” Id. at 336 n. 5.

6 It is unnecessary for us to determine the import of AUSA Neiman's statement that misconduct should not or cannot be rewarded or to decide whether AUSA Weddle actually said that the government would look at discretionary fee advancement “under a microscope.” Stein I, 435 F.Supp.2d at 344.

7 “The cooperation provisions of the DPA ... require KPMG to comply with demands by the USAO ... [or else face] the risk that the government will declare that KPMG breached the DPA and prosecute the criminal information to verdict.” Stein I, 435 F.Supp.2d at 350.
As explained in section IV.A, infra, the government’s pre-indictment conduct was designed to have an effect once defendants were indicted, and it is therefore proper to consider such conduct for purposes of evaluating state action. Because the Sixth Amendment attaches only upon indictment, the KPMG conduct attributable to the government is relevant only insofar as it contributed to KPMG’s decision to withhold legal fees upon defendants’ indictment. See Part IV, infra. Many of KPMG’s actions occurred prior to the August and October 2005 indictments. Nevertheless, when the defendants were indicted, KPMG had been so schooled by the government in the necessity of enforcing a particular fee advancement policy that KPMG understood what was expected of it once the indictments came down.

In Stein IV, Judge Kaplan nevertheless expanded his findings as to Sixth Amendment harms suffered by particular defendants: defendants Gremminger, Hasting and Watson were deprived of their chosen counsel, “lawyers who had represented them as long as KPMG was paying the bills”; and defendant Ritchie was deprived of the services of Cadwalader Wickersham & Taft, “which was to have played an integral role in his defense.” 495 F.Supp.2d at 421. In addition:

All of the [present] KPMG Defendants ... say that KPMG's refusal to pay their post-indictment legal fees has caused them to restrict the activities of their counsel, limited or precluded their attorneys’ review of the documents produced by the government in discovery, prevented them from interviewing witnesses, caused them to refrain from retaining expert witnesses, and/or left them without information technology assistance necessary for dealing with the mountains of electronic discovery. The government has not contested these assertions. The Court therefore has no reason to doubt, and hence finds, that all of them have been forced to limit their defenses in the respects claimed for economic reasons and that they would not have been so constrained if KPMG paid their expenses subject only to the usual sort of administrative requirements typically imposed by corporate law departments on outside counsel fees.

Id. at 418–19 (footnote omitted). Judge Kaplan explained that even though many defendants had net assets ranging from $1 million to $5 million, their resources were inadequate “to defend this case as they would have defended it absent the government's actions.” Id. at 423.

Again, “state action” includes both conduct by the government and conduct by KPMG that is fairly attributable to the government. See Part III, supra.

As Judge Kaplan recognized, the pre-indictment conduct is separately constrained by the Fifth Amendment.

We need not decide whether KPMG’s pre-indictment conditioning and capping of fees—conduct we have determined was state action—establishes a Sixth Amendment violation by itself. As discussed below, KPMG’s termination of fees upon indictment deprived defendants of their Sixth Amendment right to counsel.

Although the Sixth Amendment right to counsel of choice “has been regarded as the root meaning of the constitutional guarantee,” id. at 147–48, 126 S.Ct. 2557, the right is qualified: the attorney must be admitted to the bar, willing to represent the defendant, free from certain conflicts of interest, compliant with the rules of the court, and so on, see Wheat v. United States, 486 U.S. 153, 159–60, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

This case does not raise, and therefore we have no occasion to consider, the application of our holding to the following scenario: A defendant moves unsuccessfully in the district court to dismiss the indictment on the same Sixth Amendment theory. The defendant proceeds to trial with his or her chosen attorney, and the attorney is forced to limit the scope of his or her efforts due to the defendant’s financial constraints. The defendant is convicted based on overwhelming evidence of his or her guilt.
September 2013

- **Risky Business: “Bring-Your-Own-Device” and Your Company**
  An increased number of personally owned devices are making their way onto company networks, and it is undeniable that the bring-your-own-device (BYOD) phenomenon is here to stay.

- **Side-Stepping Fiduciary Issues in Negotiating Exit Strategies for Preferred Stock Investments after Trados**
  A discussion of and some lessons derived from the Delaware Court of Chancery’s recent decision in In re Trados Inc. Shareholders Litig.

- **SEC Lifts Ban on General Solicitation in Private Placements to Accredited Investors**
  A summary of the SEC adopted rule changes, effective this month, as well as observations regarding practical implications for issuers and market participants regarding these rules.

Departments:

- **Keeping Current: Nassar and Vance: Supreme Court Limits Scope of Title VII of the 1964 Civil Rights Act**
  In June, the U. S. Supreme Court handed down two important decisions involving Title VII of the 1964 Civil Rights Act.

- **Delaware Insider: Key Delaware Corporate and Commercial Decisions from First Half of 2013**
  A short overview of several key decisions by Delaware’s Supreme Court and Court of Chancery during the first half of 2013.

- **Training for Tomorrow: 2013 Checklist for Corporate Counsel Supervising the Creation or Renewal of an Executive Protection Program**
  The 2013 update to the Director and Officer Liability Committee’s checklist to assist corporate counsel in supervising the creation or renewal of an executive protection program.

**Inside Business Law**

Committees form the core of the Business Law Section, but they can also be a means for members of the Section to collaborate with members of other sections whose work is relevant to core business law. This month’s Inside Business Law describes three sections bridging the boundaries between the Business Law Section and other sections of the ABA or other business professionals.
The corporation laws of every U.S. jurisdiction permit corporations to advance defense costs, indemnify, and insure innocent directors and officers against risks of liability that arise out of their good faith service to the corporation. They do so to encourage responsible and talented individuals to accept the weighty responsibilities these positions impose. Last year, Business Law Today published a checklist created by the Director and Officer Liability Committee to assist corporate counsel in supervising the creation or renewal of an executive protection program to implement that policy. Both before and after its first publication, the checklist was vetted through exposure to and comment by attendees at ABA live and webinar programs and at a webinar given to members of the Association of Corporate Counsel. The Committee promised that it would update the checklist each year to reflect changes in the law and insurance markets. This is that update.

The checklist was created by the Committee in response to requests by corporate counsel who had communicated their practical inability to master the nuances of this ethically dangerous, highly complex, and specialized area, much less keep up with new developments in the law and insurance markets. They asked for a compendium of issues that they could give their risk manager, insurance brokers, and outside counsel to use to vet the adequacy and breadth of the corporation’s executive protection program. The checklist’s objective is to assist professionals to meet the statutory goal of protecting innocent executives while not overly burdening shareholders with massive and unlimited defense cost obligations to perceived miscreants. The checklist highlights issues and suggests alternatives intended to meet the statutory objectives in a commonsense and balanced manner.

This year, the Committee has given particular attention to the increased frequency of cases where executives find that their behavior is the subject of potential criminal liability arising out of corporate internal investigations. The Committee has concluded that there are significant gaps in both advancement and insurance protection in this area, and is exploring ameliorative measures. As a result, it expects to further update the checklist next year to further address these issues in the context of developing law and changes in the insurance market. The Committee has also just published, through the ABA, an annotated Model Indemnification Agreement based on Delaware law. The provisions of that agreement are consistent with the checklist.

The Checklist
A comprehensive director and officer’s protection program has four elements, regardless of whether the corporation is for-profit or not-for-profit: (1) statutory immunity of directors of for-profit corporations from claims for damages by shareholders resulting from directors’ failure to exercise “due care,” and statutory protection against liability for (typically) volunteer executives of non-profits; (2) advancement to selected executives of defense costs and expenses until claims are resolved and then relief from any duty to repay the amounts advanced in a proper case; (3) indemnity from the corporation for any amount an executive may agree to pay in settlement of such a claim or that the executive may be compelled to pay by judgment in a proper case; and (4) a comprehensive program of D&O insurance that meshes with the corporation’s advancement and indemnity by-laws to cover legitimate risks that state statutes leave uncovered. This checklist addresses these elements in turn.

I. Director Exculpation under Certificate/Articles of Incorporation; Statutory Protections for Volunteers of Non-Profits.

Under most states’ corporation laws, directors may be exculpated in advance from civil liability for damages for breach of the fiduciary duty of due care they owe to the corporation and its shareholders. This is a corporate articles/certificate of
I. Business Law Today

II. Advancement and Indemnity. Executives may be given a right to advancement from the corporation of reasonable defense costs for all claims against them arising from their service, and a mandatory right to be relieved from repaying these advances. They may also be indemnified for any ultimate settlement or judgment against them under corporate by-laws or formal indemnification agreements. In all cases, however, these rights exist only if and to the extent that advancement and indemnity is permitted by governing law. No jurisdiction’s statute expressly permits an executive to obtain advancement of defense costs if the executive asserts Fifth Amendment privileges in response to inquiries by a corporation including those made during a corporate internal investigation. No statute expressly permits an executive’s counsel to assert work product privileges in respect of the attorney’s billing entries when the reasonableness of the attorney’s charges are at issue. These two privileges are generally critical to an innocent executive’s defense, and to the extent they are compromised, the executive is at risk. These considerations give rise to the following issues:

A. Are the advancement and indemnity rights contractually mandatory, or are they only to be conferred by separate action of the board on a discretionary basis after a claim arises? If they are mandatory, do they cover the correct executives?

B. If mandatory rights are granted in by-laws, is the board prohibited from amending the by-laws to eliminate protection for circumstances that accrue during the executive’s tenure but before a claim is made? (Some state statutes cover this question, but many do not.)

C. Does the right to advancement accrue at a sufficiently early stage to protect the executive without causing premature “lawyering up” that is detrimental to corporate collegiality and informal communication?

D. Does the right to advancement cover derivative and corporate internal investigations?

E. If the corporation has foreign subsidiaries on whose boards executives are expected to serve or if they are expected to otherwise supervise foreign operations, is the corporation obligated to post bonds or otherwise pay to secure the release of the executive’s person from physical arrest and his personal assets from sequestration orders issued by a foreign court or governmental agency? May the corporation indemnify and advance defense costs, or even buy insurance for such executives, if the substantive law governing the subsidiary forbids advancement, indemnification, or insurance?

F. If the executive is in any way implicated in a matter that creates potential personal criminal exposure, does the executive:

i. have access to (but not possession, custody or control over) all relevant corporate documents useful to his defense?

ii. have the express contractual right to assert Fifth Amendment privileges (and his lawyer work product privileges) without jeopardizing his advancement and indemnity rights or limiting the amount of defense costs for which he is entitled to advancement? Does the by-law specify a mechanism for resolving privilege disputes?

iii. have the right to receive advancement of defense costs until at least the first “final adjudication” (i.e., after appeal) of facts that forbid the corporation from indemnifying him under the relevant corporate law? Must these facts be found in the criminal or civil case for which advancement is sought or may they also be found in any U.S. case in which the executive has participated without the assertion of Fifth Amendment privileges by himself or a witness material to his defense? Is the corporation prohibited from instituting or continuing any civil case against the executive that requires him to waive his Fifth Amendment rights or the executive’s counsel work product privileges before final adjudication of at least the first claim that gives rise to the need for advancement?

iv. have the right to subrogate himself to the corporation’s Side B coverage should the corporation refuse to advance him defense costs and the executive pay such a cost directly?

v. have the right to judicially compel advancement at the corporation’s expense using summary procedures, i.e., without having to make any assertions of fact, good faith, or innocence that can prompt an evidentiary hearing?

G. Assuming that the executive’s advancement and indemnity rights cover claims that are broad in scope, does each director understand that a broad definition may include a duty to advance reasonable defense costs in an unlimited amount and in respect of claims for insider trading, embezzlement, diversion of corporate opportunities, or otherwise receiving improper personal benefits, leaving the corporation in a delicate public relations or financial position should uninsured defense costs rise to a substantial level? If
the corporation elects not to assume a mandatory contractual duty to advance or indemnify for the latter claims, is that intention adequately expressed in the bylaws and is it consistent with similar exclusionary language contained in the corporation’s D&O insurance policies?

H. Should the corporation leave its advancement and indemnity exposure unlimited in amount in respect of third-party claims in which the corporation and executive cooperate in the defense? In cases where the interests of the corporation and its executives are adverse so as to prohibit a joint defense on the merits of the claim, should the corporation limit its advancement and indemnity duty to the sum of insurance cover and the corporation’s deductible?

I. Are executives permitted to be advanced and indemnified against all legal costs in any matter that includes non-indemnifiable claims or parties so long as the facts or issues relevant to the covered and uncovered claims overlap?

III. D&O Insurance. A corporation may obtain Side B insurance to cover its advancement and indemnity obligations to its executives and Side A cover to protect its executives directly from claims for matters in which the corporation and executives are joint defendants and are united in the defense. ABC policies may also cover claims where the interests of the executive and the corporation are in conflict. A corporation may purchase DIC insurance to cover defense costs arising from situations of adversity and also to cover claims for which the corporation may not legally indemnify, financially cannot indemnify, or for which the corporation refuses to indemnify.

Checklist issues are:

A. Are all individuals that the board wishes to insure in fact covered? Are those it does not wish to cover excluded from the policy definition of “Insured”?

B. Has the board made a reasoned and appropriate decision on policy limits, particularly given that under its Side B coverage, it seeks to cover its complete advancement and indemnity exposure to all covered executives beyond an agreed retention? Are all parties cognizant of the phenomenon of competition among insureds for access to policy limits and the accepted means for reducing such competition? Are litigation costs covered when they are incurred in board members’ efforts to preserve policy limits for themselves?

C. Does the policy cover defense costs within overall limits or through sublimits for matters such as derivative investigations (both those that arise immediately after demand and those that arise after the creation of a special litigation committee) and corporate internal investigations?

D. Where advancement coverage conceals under C. above but before a defined “claim” arises, does the policy give each insured the separate option of not treating the event as a reportable claim or mandatorily-reportable circumstance? May individual insureds give notice of circumstance to cement cover under the policy in effect for that year over the objection of the corporation?

E. Does the policy cover employment practice claims, crisis management costs, searches and raids by enforcement authorities, and claims against employed lawyers? If the latter have separate professional liability cover, is it clear which cover is primary?

F. Is the policy definition of “wrongful act” sufficiently expansive so that “all risk” coverage is obtained, assuming such is the desire? Does the insurer agree that such cover includes claims by opposing parties for attorney’s fees? Claims for personal injury and property damage arising from a wrongful act as defined? Section 11 and 12 securities law liability? All insurable fines and penalties and punitive, moral, and multiple damages to the extent permitted by law? Amounts paid to mitigate or reduce the likelihood of a claim? Personal liability for corporate taxes and statutory insurance contributions?

G. Does advancement coverage expressly continue until there has been a final adjudication of facts in the underlying proceeding for which advancement is given that permits the application of the “willful or intentional act” policy exception? Is the insurer prohibited from bringing any suit to accelerate that process? Are the “deliberate and intentional act” or “improper personal benefit” exclusions limited to cases where the act or gain was the result of deliberate misconduct?

H. Is the insurer prohibited from recovering its advances should the executive’s conduct fall within the “willful or intentional act” exclusion?

I. Is the definition of “loss” sufficiently expansive? Does it exclude the types of claims for which the board may not wish to insure against such as insider trading, embezzlement, diversion of corporate opportunity, and other claims in which the executive is accused of receiving an improper personal gain or benefit?

J. Does the policy contain an exclusion for claims against executives that seek to recover amounts that the corporation should have paid in addition to amounts it did pay in a merger, share exchange, or sale transaction? If so, are executives entitled to advancement and indemnity if personally sued in such a case without being required to allocate their defense costs between other covered claims and the claims seeking an increase in consideration? Generally, are executives permitted to be advanced and indemnified against all legal costs in any matter that also includes uncovered claims.
or parties so long as the facts or issues relevant to the covered and uncovered claims overlap?

K. Are the exclusions for illegal conduct, “other insurance,” and timing of claims (including the provisions relating to giving of notice of claim or circumstance), reasonable and readily understandable? Are the “notice of circumstance” provisions objective, subjective, or both; mandatory or permissive? Does the policy provide for an extended notice period should the corporation become insolvent?

L. Is there an “insured-versus-insured” exclusion and, if so, is it phrased narrowly to exclude only truly collusion claims?

M. Does the policy contain a clause that conditions or otherwise bases the executive’s Side A cover on the corporation’s fulfillment of an obligation to advance and indemnify “to the fullest extent permitted by law” or comparable language? Is this provision limited to prohibit the insurer from placing on the insured executive the duty to assume the corporation’s Side B retention or deductible in a case where the corporation breaches its statutory or by-law advancement or indemnity obligations?

N. Does the insured corporation have in place reporting mechanisms to ensure that the risk manager is kept fully informed of any potential claim or circumstance requiring notice to the insurer? Does the insurer bear the burden of establishing prejudice from late notice and is its remedy for late notice limited to the actual damage it sustains as a result? Do the executives have the ability to notice claims or circumstances directly to the insurer under their Side A cover and are they entitled to receive notices of cancellation or changes in coverage?

O. Does the policy permit an executive subject to potential or actual criminal charges to assert against the insurer Fifth Amendment privileges, and the executive’s counsel work product privileges, without violating the policy or limiting the executive’s recovery of defense costs due to a claim by the insurer that the executive’s counsel has provided insufficient billing detail? Is there an agreed mechanism for resolving privilege disputes by a court (not an arbitration) that requires advancement while any dispute is being resolved? Is there a severability clause that protects “cooperating” executives should “non-cooperating” executives be held to violate the policy’s cooperation clause?

P. Is the policy’s definition of “application” reasonably narrow and understandable? Are the covenants and representations made by the corporation and any insureds in either the application or the policy reasonable and understandable?

Q. Is there an application severability provision that insulates innocent executives from a claim of application fraud due to the guilty knowledge of less than all of their number?

R. Is there an incontestability or similar clause that limits the insurer’s right to rescind a policy? Is the insurer’s right to cancel the policy appropriately limited? Must it notify all affected insureds, or at least all current insureds?

S. Is there a settlement “hammer” clause and has it been appropriately drafted to avoid unfair and unintended results?

T. Does the policy sufficiently define the parameters of the consent-to-settlement clause and the clause permitting the insurer to associate counsel to eliminate micro-management of the defense? Do these clauses specifically exclude criminal matters and matters where the insurer pays defense costs while reserving its right to deny coverage?

U. Does the policy contain an “order of payments” provision sufficient to reasonably mitigate the effects of a corporate insolvency?

V. Are the claim reporting time limits reasonable? Does a broad definition of “claim” result in an undesirable expansion of the insureds’ duties to give notice of claims or circumstance? Does the right to advancement of defense costs arise within a period of less than 60 days after demand is made on the underlying insurer or corporation?

W. Have the implications of “DIC” or “dedicated limits” coverage been explored to provide advancement and indemnity coverage (1) for risks that the corporation and the underlying ABC policy do not cover, (2) where the corporation refuses or is unable to advance defense costs and indemnify, (3) to mitigate the risk of program failure due to competition among competing insureds for policy limits, (4) to avoid loss of coverage in respect of criminal matters in which the executive or his counsel assert Fifth Amendment or work product privileges; (5) to cover cases where an underlying carrier may not pay a claim arising in a foreign country due to its unlicensed status; and (6) to provide reinstated limits or separate limits for boards?

X. Does the policy insure executives for the costs of obtaining release from incarceration and release of sequestered personal assets if they act as directors or agents of a foreign subsidiary or for the parent corporation in a foreign country? Does the policy contain coverage for reputation restoration and cover crisis management public relations services?

Y. Does the policy contain appropriate cover for the costs of resisting Dodd-Frank/SOX claw-back claims?

Z. Does the carrier selected have a reasonable financial rating and a good reputation for claims handling and payment?
AA. Do the insureds have the right to recover their attorneys’ fees under applicable law should they be required to litigate coverage with the insurer?

BB. If a DIC policy contains a choice of law clause, does it choose as the applicable law the law of the underlying ABC policy? What law is chosen in the ABC policy? If the policy contains an arbitration clause, is the legal seat of the arbitration (not just the hearing locale) a venue that understands American plea bargaining practices?

CC. Are there to be one or more excess policies above the negotiated first-tier policy that do not “follow the form” of the first-tier policy, and, if so, have questions B. through BB. above been asked in respect of each of the excess policies? Do these policies have appropriate provisions relating to when each layer of excess coverage attaches so as to avoid gaps in protection, including provisions requiring that upper tiers “drop down” should insureds reach a settlement with the lower tier carrier below its policy limits?

DD. Have the appropriate locally issued D&O policies been obtained in respect of foreign subsidiaries and operations and will all applicable foreign taxes be paid?

**Conclusion**

The time has long passed when executive protection programs could be evaluated by boards based simply on an inquiry into the limits of ABC insurance cover and the amount of the premium. The number and complexity of the issues listed above together with the potentially catastrophic results that can obtain when criminal charges are threatened against individual executives prove that this is no longer an issue that can safely be treated cavalierly. The amelioration of these risks can only be left to professionals. The Committee hopes that both corporate counsel and practitioners will find the Checklist a useful resource to guide their professional advice.

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Published quarterly, The Business Lawyer is the premier business law journal in the country, circulating to approximately 40,000 readers. It contains articles of significant interest to the business lawyer, including case law analysis, and developing trends.
Discipline Involving Multiple Disciplines—Protecting Innocent Executives in the Age of “Cooperation”

By James D. Wing and Andrew L. Oringer*

In 2008–2009, the global financial system had a near-death experience, and the legal consequences still reverberate. New business, financial, regulatory, and cybersecurity risks abound. Legal risks have become increasingly criminalized, with investigations and prosecutions today directed at corporate directors and officers individually, as companies under investigation choose to “cooperate” with law enforcement. While this “cooperation revolution” already has significantly affected the practice of white-collar criminal defense, its impact is only beginning to achieve general visibility inside three of the other most-affected areas of legal practice: corporate law, insurance law, and civil litigation. These different and largely separate areas must be coordinated if the protection of directors and officers is to be put on sound footing. This article lays out the issues and suggests ways forward in light of developments in the insurance markets.

I. THE CRIMINALIZATION OF DIRECTOR AND OFFICER LEGAL RISK

This article takes as its starting point the fundamental shift in the prosecution and defense of corporate misconduct that has increasingly led corporations to “cooperate” with law enforcement in criminal investigations, thereby becoming adverse toward their executive and nonexecutive personnel whose conduct is under investigation. The history, meaning, and significance of this shift were

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explored extensively in a recent article in *The Business Lawyer* by Robert Bennett, Hilary Holt LoCicero, and Brooks Hanner (referred to herein as the “Bennett article”). Because much of legal practice today is conducted within silos of specialization, this revolution (and it is a revolution) in white-collar criminal practice may not always be fully appreciated by corporate and insurance lawyers or by civil litigators who may be called upon to enforce the rights of innocent directors and officers (sometimes referred to herein as “executives”) for payment of their defense costs and indemnity for settlements.

We use the term “innocent executives” deliberately, to refer to executives who have not been found guilty of unlawful conduct in a final, nonappealable judgment of a court. We also use the term to describe executives who are not charged with direct wrongdoing against the corporation or with obtaining personal, illicit benefits through misconduct (such as embezzlement of corporate funds, theft of corporate opportunities, abuse of expense accounts, acceptance of bribes from customers, or insider trading).

For centuries, legal scholars have debated whether corporations can be made subject to criminal sanctions and, even if they can, whether applicable criminal law should focus on individuals guilty of malfeasance so as to avoid inflicting “collateral damage” on innocent shareholders and employees. The cooperation revolution reflects a current consensus of prosecutors to prosecute individuals so long as the corporation shows a sufficient commitment to legal behavior and the appropriate willingness to cooperate in the prosecution of its allegedly guilty personnel. As a result, conduct that once resulted only in civil exposure for


executives increasingly exposes them personally to risk of criminal prosecution.5 Executives are now on the front lines of corporate criminal responsibility. Simultaneously, the number and variety of ways that modern executives expose themselves to legal risk increase with each passing year. This trend seems to proliferate not only in highly regulated industries such as finance and medical care, but also in nearly every industry.6

II. THE DIVERGENCE OF INTEREST BETWEEN CORPORATIONS AND INVESTIGATED EXECUTIVES

As detailed in the Bennett article, the government brings criminal law to bear on executives by employing the technique of corporate “cooperation.”7 The result is that an “internal investigation” is conducted by the corporation or its outside counsel.8 The results of the investigation are shared with the government and become a roadmap for prosecutors. Law enforcement authorities thereby drive a wedge between the corporation (personified by its then board), on one hand, and corporate directors and agents whose conduct is at issue, on the other.9 To escape criminal indictment, the corporation agrees to share with the government the results of an internal investigation of the suspected wrongdoing. The investigation typically is conducted by outside, independent counsel and funded by the corporation.10 This scenario puts executives front and center on an extremely uneven playing field.

5. See Bennett article, supra note 1, at 431 nn.163, 170.
6. The first edition of the Practising Law Institute’s Corporate Compliance Answer Book 2009 occupied 1149 pages. The 2015 edition occupies 1669. See PRACTISING LAW INST., CORPORATE COMPLIANCE ANSWER BOOK 2015 (2015). For more on this trend, see TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 7 n.9 (1988) ("More than a quarter of the federal criminal provisions enacted since the Civil War have been enacted [between 1980 and 1996]."), cited with approval in Bennett article, supra note 1, at 416 n.45. While non-management “outside” directors are by definition one step removed from the risks of criminal prosecution, they are not entirely immune. See In re Caremark Int’l, Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996); accord Stone v. Ritter, 911 A.2d 362 (Del. 2006); cf. Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125 (Del. Ch. 1963). The courts in Caremark and Stone both recognized a limited duty of directors to create and monitor the results of corporate compliance programs designed to reduce the potential for criminal misconduct and potential criminal penalties that otherwise might be imposed on the corporation under the U.S. Sentencing Guidelines. Caremark, 698 A.2d at 968–70; Stone, 911 A.2d at 370.
7. See Bennett article, supra note 1, at 412–14.
8. See id. at 433–34.
9. See id. at 431 ("This sea change in thinking and policy began to drive a wedge between businesses and employees, who found that suddenly their interests had diverged."). The authors’ use of the term “employees” should not be viewed as exclusive; the same tactics are available for use against senior corporate officers and corporate directors.
10. See William R. McLucas et al., The Decline of the Attorney-Client Privilege in the Corporate Setting, 96 J. CRIM. L. & CRIMINOLOGY 621, 639 (2006) ("At one time in the not-so-distant past, the government was compelled to make triage decisions in order to best allocate its resources for a particular investigation. DOJ [Department of Justice] and SEC [Securities and Exchange Commission] attorneys were forced to make careful calculations about the value of a particular case and whether governmental resources were best devoted to this or that thread of any given investigation. The costliness of investigations, combined with real budgetary limits, operated as a natural check on prosecutorial inquiries that could otherwise have no bounds. Now, private lawyers are effectively ‘deputized’ in many internal investigations, and the government obtains the facts of their inquiry through waiver of
Specifically, unlike public sector employees, government contractors, and holders of political office, corporations can legitimately threaten directors and officers with termination, loss of salary or other compensation, and loss of medical insurance and other benefits if they do not cooperate with an internal investigation and provide potentially incriminating evidence. If they legitimately assert their Fifth Amendment privilege, these directors and officers could face termination. Executives who seek legal assistance may find that gaps in common law, corporate bylaws, and insurance coverage combine to delay or frustrate altogether their ability to retain defense counsel to represent them in connection with the internal investigation, even though their need for counsel is acute. As a result, they sometimes submit to interviews without legal representation, only to see their own statements and documents used against them in a criminal prosecution if the corporation later decides to “cooperate” with the authorities.

Lawyers who work in this area and have represented executives caught up in investigations and criminal prosecutions know that the stakes are high. Executives subject to investigation or criminal prosecution may find their health, family relationships, careers, reputations, relationships with colleagues, and personal finances under severe stress. These individuals often experience intense feelings of depression, fear, and shame as they contemplate losing their reputations and personal liberties. Even if they are ultimately successful in their defense, their careers and lives can still be damaged or destroyed. We speak here of personal catastrophe. As one corporate executive involved in such a case poignantly expressed during a worldwide webinar (paraphrasing): “Have you ever seen someone sitting on a bus and crying uncontrollably for no apparent reason? That was me.”

11. For a comprehensive description of the obstacles facing executives caught up in an internal investigation even if they enjoy written “fullest extent permitted by law” advancement protection, see generally James D. Wing, Corporate Internal Investigations, The Fifth Amendment, and Advancement of Defense Costs for Executives—A Special Report, THE JOHN LINER LETTER, Jan. 2015, at 1; James D. Wing, Corporate Internal Investigations and the Fifth Amendment, BUS. L. TODAY (Sept. 2014), http://www.americanbar.org/publications/blt/2014/09.html. The source of these articles is a memorandum included in program materials for a CLE at the April 2014 spring meeting of the ABA Business Law Section. The memorandum provided case citations for the various propositions of constitutional law and a fifty-two-jurisdiction survey of the law of advancement. These citations and the survey are available from the authors.

12. The webinar was sponsored by Zurich Insurance Group Ltd. and Aon plc. It took place on June 3, 2014, and Mr. Wing attended. The authors have witnessed the above adverse personal effects on executives involved in internal investigations in their professional practices. See also Robert Ullman, Seven Rules for Surviving a Government Investigation, BOSTON BUS. J., Nov. 26–Dec. 2, 2004, at 34 (“Get your support systems in place. Criminal investigations take a heavy toll on most people. A good lawyer has empathy, but must remain objective. Your lawyer will probably not be a trained therapist and should not be your close friend. (Rarely, if ever, should you hire a relative or close friend for this kind of legal work.) Think about how to get support from your family and close
III. THE STATUTORY POLICY OF PROTECTING EXECUTIVES FROM CORPORATE LEGAL RISK

At the same time, the corporate laws of most U.S. jurisdictions recognize that corporations will be unable to secure and retain talented individuals as directors and officers unless these individuals are protected from civil and criminal risks to the extent public policy allows. Delaware case law and the Model Business Corporation Act (hereinafter “Model Act”) both emphasize the importance of that proposition. But the area can present complex issues from a practical perspective, particularly if the corporation’s ability to recruit and retain qualified executives depends, in part, on its ability to promise them contractually enforceable rights to advancement of defense fees, indemnity, and insurance before a situation with criminal overtones has arisen. Most high-quality executives insist on such protections. When they do, complex legal issues arise: “The provisions for indemnification and advance for expenses . . . are among the most complex and important in the entire Model Act.” The increased legal pressure on executives, coupled with the law’s complexity, has given rise to increased advancement litigation and related legal commentary.

13. See, e.g., Del. Code Ann. tit. 8, § 145 (2013); Model Bus. Corp. Act Ann. §§ 8.50–8.59 (2014); ABA Bus. Law Section Corporate Laws Comm., Changes in the Model Business Corporation Act, 70 Bus. Law. 175 (2015) (approving an amendment to Model Act § 8.53 that abolishes the requirement that an executive seeking advancement make a written and cross-examinable profession of innocence in regards to any breach of duty); see also ABA Bus. Law Section Corporate Laws Comm., Changes in the Model Business Corporation Act—Proposed Advance of Expenses Amendments to Sections 8.53 and 8.54, 69 Bus. Law. 733 (2014) [hereinafter Amendments to Sections 8.53 and 8.54] (providing the text of the amendments). It is not the purpose of this article to footnote exhaustively each assertion of corporate law to the statutes of the 50 U.S. states, the District of Columbia, Guam, and Puerto Rico. Accordingly, this article will cite to the applicable Delaware statute (which to a greater or lesser extent forms the inspiration for the law of many other jurisdictions) and the current Model Business Corporation Act (“Model Act”), which (or a predecessor of which) inspires the corporate laws of more than thirty U.S. jurisdictions and takes care to consider the views of Delaware. The above amendment to section 8.53 of the Model Act, which bears on a critical Fifth Amendment/advancement issue relevant to this article, has not yet been adopted in any U.S. jurisdiction, and the laws of many states that generally follow the Model Act can vary materially from the latest version.

14. See, e.g., Homestore, Inc. v. Tafeen, 888 A.2d 204, 218 (Del. 2005) (explaining that advancement provisions attract the most capable people into corporate service); Von Feldt v. Stifel Fin. Corp., 714 A.2d 79, 84 (Del. 1998) (describing the dual purposes of § 145 as “allowing corporate officials to resist unjustified lawsuits, secure in the knowledge that, if vindicated, the corporation will bear the expense of litigation . . . and . . . encouraging capable women and men to serve as corporate directors and officers, secure in the knowledge that the corporation will absorb the costs of defending their honesty and integrity”); see also Model Bus. Corp. Act Ann. § 8.50 cmt., at 8-381 (“Indemnification (including advance for expenses) provides financial protection by the corporation for its directors against exposure to expenses and liabilities that may be incurred by them in connection with legal proceedings based on an alleged breach of duty in their service to or on behalf of the corporation. Today, when both the volume and the cost of litigation have increased dramatically, it would be difficult to persuade responsible persons to serve as directors if they were compelled to bear personally the cost of vindicating the propriety of their conduct in every instance in which it might be challenged.”).


16. In 2012 and 2013, the ABA Business Law Section’s Director and Officer Liability Committee sponsored checklists in Business Law Today to enable corporate counsel to confirm that the legal and
The legal complexity of the area results in no small part from the fact that it intersects multiple areas of legal practice. Complexity also stems from statutory restrictions that most executives find surprising. Professional readers of this article know that, in most cases, indemnification is permitted only if executives can show that the conduct questioned in the underlying civil or criminal litigation was in good faith and that they reasonably believed that it was not contrary to the corporation’s interests and was not illegal (state law formulations of this principle vary). But indemnification is not what concerns executives exposed to criminal charges; it is their need to finance their defense. If asked, most executives will say they cannot “front” the considerable expense of defending actions they take as corporate directors or officers in return for the mere promise that they may be reimbursed at the end of the process (which may last years) and only if they are successful in demonstrating the requisite good faith and reasonable belief to a court or to a board of directors that might then be hostile. Thus, the terms and conditions under which a corporation can and will fund executives’ legal costs are to them more important than their right to indemnity, particularly in regard to criminal risk.

Unfortunately for executives, corporations only have the statutory power before a claim arises to agree to advance defense costs to executives if they become involved in civil or criminal litigation that arises from their service. Before a claim arises, corporations have no ability to agree to pay those defense costs outright and can only forgive an executive’s duty to repay the amounts advanced if the executive can later show his or her entitlement to “indemnification.” This restriction is true universally in American jurisdictions.

As a result, whenever a corporation desires to “cooperate” with law enforcement and, in essence, turn on an executive, the executive must be able to enforce quickly in court the corporation’s promise to make the advance. This means that civil litigation expertise is relevant to the task of drafting advancement bylaws. And, if the underlying case for which defense cost advancement is sought is a criminal matter, the drafting should also take pains to guard, for example, the

insurance specialists they employ to create or renew a protection program have considered the relevant issues. See James D. Wing, Training for Tomorrow: Corporate Counsel Checklist for Supervising Creation/Renewal of D&O Protection Program, BUS. L. TODAY (Aug. 2012), http://www.americanbar.org/publications/blt/2012/08/training_tomorrow.html; James D. Wing, Training for Tomorrow: 2013 Checklist for Corporate Counsel Supervising the Creation or Renewal of an Executive Protection Program, BUS. L. TODAY (Sept. 2013), http://www.americanbar.org/publications/blt/2013/09/training_tomorrow.html; see also ABA BUS. LAW SECTION DIR. & OFFICER LIAB. COMM., ANNOTATED MODEL DIRECTOR AND OFFICER INDEMNIFICATION AGREEMENT (2013) (suggesting language for use in individual executive protection contracts with citations to Delaware case law and commentary); William Johnston et al., Indemnification and Insurance for Directors and Officers, Corp. Portfolio Series (BNA) 53-3d (Nov. 2014) (citing and considering both Delaware and Model Act law in a comprehensive examination of the area).

17. Similar (although generally less stringent) rules apply in respect to most D&O insurance policies. We speak here, of course, to advancement and indemnification agreements made before the executive and the corporation are aware of an impending claim. Different rules may apply if advancement, defense, or indemnification rights are agreed in contemplation of possible claims. See, e.g., Feuer v. Menkes Feuer, Inc., 187 N.Y.S.2d 116, 120–21 (App. Div. 1959); Katun Corp. v. Clarke, 484 F.3d 972, 977–78 (8th Cir. 2007).
executive’s key Fifth Amendment privilege. This requires that white-collar expertise be enlisted in the drafting process. To the extent that these issues can be mitigated by insurance, insurance expertise is also required. This is no task for a siloed approach to legal representation.

There is also the problem of conflicting state laws and judges’ differing attitudes toward executives accused of misconduct. Any careful reading of the legal commentary reveals that the common law of executive protection, from a national perspective, is inconsistent at best and schizophrenic at worst. Different jurisdictions have different statutes, and even where the same law is applied, experience teaches that different court systems and different judges and arbitrators have different attitudes toward executives who attempt to secure advancement of legal fees in civil contexts, especially when they simultaneously assert their Fifth Amendment privilege. As a practical matter, D&O liability insurance may offer a significant means of generating some order and uniformity. However, both corporate statutes and D&O insurance policies grew up before the cooperation revolution occurred. As a result, the legitimate interests of directors and officers whose actions are being challenged under criminal law often are inadequately protected, notwithstanding legal and contractual provisions intended, on some level, to be protective. As discussed below, this situation only now shows signs of improvement.

IV. Delaware Case Law Imposes on Corporate Boards the Duty to Reconcile the Statutory Policy of Protecting Executives with the Corporation’s Interest in Maintaining Flexibility to Cooperate Later with Law Enforcement Authorities

There is tension between the corporate law’s policy of protecting executives on the “clear day” before a potential claim with criminal law overtones arises and a corporation’s possible later need to become adverse to the same executives to show cooperation. Corporate boards are confronted with this tension whenever they create or renew an executive protection program.19

18. The term “clear day” has reached “proverbial” status in Delaware case law. See, e.g., Goggin v. Vermillion, Inc., No. 6465-VCN, 2011 WL 2347704, at *4 (Del. Ch. June 23, 2011); DeLucca v. KKAT Mgmt., LLC, No. 1384-N, 2006 WL 224058, at *2 (Del. Ch. Jan. 23, 2006). The term “clear day” implies that when an executive protection program is first instituted or even renewed, there is no hint of a legal violation that can result in an investigation and an adversity of interest between executives and the corporation. This definition, however, ignores the fact that a principal purpose of the protection program is to foresee such adversity and resolve, in advance, its effect upon executives’ critical rights to defense cost advancement. To that extent, there is no such thing as a “clear day,” and using the term in the context of executive protection does not promote proper analysis. We employ the term in this article with that reservation.

19. The term “executive protection program” refers to the package of legal protections available to directors and those officers and agents of a corporation whom the board determines to protect. The package frequently includes a provision in a corporation’s articles or certificate of incorporation that exculpates directors from liability in damages for breach of the fiduciary duty of due care. There also exists a federal statute that exculpates volunteer directors and agents of non-profit entities from liability for certain breaches of legal duty. See 42 U.S.C. § 14501 (2012). All states have similar statutes.
As noted above, executives often require contractually mandatory rights to advancement, indemnity, and insurance as a condition of service. The Delaware cases are clear that, when a corporation elects to make advancement of defense costs mandatory, “mandatory means mandatory.” To obtain mandatory rights, executives do not need to have individual contracts. Rather, Delaware case law provides for corporate bylaws creating mandatory executive protection provided that the certificate of incorporation gives the board the right to adopt them.

The tension between the mandatory nature of contractual advancement and a corporation’s interest in refusing advancement to perceived miscreant executives was emphasized in Barrett v. American Country Holdings, Inc. In strong terms, the court in Barrett criticized a board for authorizing litigation counsel to ignore a mandatory advancement provision to coerce settlement of a suit against former executives that alleged fraud in connection with a merger. The court wrote:

See Non-Profit Risk Mgmt. Ctr., State Liability Laws for Charitable Organizations and Volunteers (2013), available at www.nonprofitrisk.org/downloads/state-liability.pdf. Besides statutory exculpation, executive protection programs generally also include contractually mandatory common law advancement and indemnity rights and D&O liability insurance. These three components of a program form the supports of the “three-legged stool” of executive protection mentioned in respected Delaware commentary. See E. Norman Veasey et al., Delaware Supports Directors with a Three-Legged Stool of Limited Liability, Indemnification and Insurance, 42 Bus. Law. 399, 402 (1987). Like any three-legged stool, weakness in one leg can threaten the stability of the entire structure. Thus, the three elements are to form a single, coherent, mutually supportive package.

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20. Johnston et al., supra note 16, at A-31; see also Radiancy, Inc. v. Azar, C.A. No. 1547-N, 2006 WL 4762868, at *1 (Del. Ch. Jan. 23, 2006) (“It is no answer to an advancement action, as either a legal or logical matter, to say that the corporation now believes the fiduciary to have been unfaithful. Indeed, it is in those very cases that the right to advancement attaches most strongly.”); Stifel Fin. Corp. v. Cochran, 809 A.2d 555, 562 (Del. 2006) (noting that corporations are not prejudiced by courts taking an expansive reading of “fullest extent” advancement and indemnification provisions because corporations are free to tailor them narrowly); DeLucca, 2006 WL 4762856, at *4 (“[T]his is yet another case in which defendants in an advancement case seek to escape the consequences of their own contractual freedom. Regrettting the broad grant of mandatory advancement they forged on a clear day, they seek to have the judiciary ignore the plain language of their contracts . . . .”); see also Holley v. Nipro Diagnostics, Inc., C.A. No. 9679-VCN, 2014 WL 7336411, at *7, *15 (Del. Ch. Dec. 23, 2014) (holding that because the right to advancement is separate from the right to indemnity, a corporation promising to advance defense costs to its former board chairman “to the fullest extent permitted” by law is required to continue to advance defense costs for SEC insider trading proceedings even though the board chairman had already pleaded guilty to two counts of insider trading arising from the same transaction and even though the corporation had no duty to indemnify if the chairman were found guilty of insider trading).

21. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 939 (Del. Ch. 2013) (“[T]he bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and shareholders formed within the statutory framework of the DGCL [Delaware General Corporation Law]. . . . The DGCL allows the corporation, through the certificate of incorporation, to grant the directors the power to adopt and amend the bylaws unilaterally.”); ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 560 (Del. 2014); City of Providence v. First Citizens Bancshares, Inc., 99 A.3d 229, 233–34 (Del. Ch. 2014); see also Model Bus. Corp. Act Ann. § 8.58(a) (2014) (making bylaws conferring mandatory advancement rights enforceable through an express provision). The careful practitioner will always consult the applicable corporate statute and charter to ascertain a board’s authority to create an executive protection program.

22. 951 A.2d 735, 747 (Del. Ch. 2008) (Strine, C.). Barrett presented an egregious set of facts—an acquirer of an insurance firm sued the insurance firm’s former directors and officers for financial statement fraud and then sought to repudiate their “fullest extent” advancement rights to coerce them into consenting to a judgment in excess of their insurance coverage while leaving them exposed to a multi-million dollar defense cost reimbursement claim from their D&O insurer.
The accumulation of cases like this, where the stockholders get it coming and going because of the corporation’s refusal to honor mandatory advancement contracts, is regrettable, and at some point, a case of sufficient dollar value will arise such that a board is sued for wasting the corporation’s resources by putting up a clearly frivolous defense.\footnote{Id.}

In footnote 39, the court in \textit{Barrett} continued:

One wishes that the tsunami of regret that swept over corporate America regarding mandatory advancement contracts would have been followed by the more careful tailoring of advancement provisions, with a diminishment (especially as to officers) of the mandatory term that seems to so bother directors faced with the responsibility of actually ensuring that the corporation honors its contractual duties once a (typically) former officer is sued or prosecuted for fraud or other serious wrongdoing. Although it is uncomfortable to cause the corporation to advance millions in fees to a former officer the current board believes engaged in serious misconduct, it does stockholders no service for a board to refuse to do so when the advancement obligation is clear. If the directors in such a situation truly wish to serve the stockholders, they should fix what they can by revising the corporation’s advancement obligations on a going-forward basis. To breach a contract because you do not like its terms while refusing to change it when you have the authority to do so is hard to explain as an act of fiduciary fortitude.\footnote{Id. at 747 n.39.}

The discussion in \textit{Barrett} goes to a general point. \textit{Barrett} challenges boards to assert the requisite “fiduciary fortitude” and take control of the executive protection process. Much of the executive protection currently in the market does not address the cooperation revolution and the increasing criminalization of business practices. Furthermore, there may be areas in which accommodations can be reached to better balance the rights and duties of executives who seek protection and the competing interests of their corporations. Issues like these may not always receive express attention if they are not specifically considered.

\textbf{A. THE CORPORATION’S CONFLICTING OBJECTIVES}

We noted above how the cooperation revolution drives a wedge—and creates conflict—between executives and the corporation. When an issue of corporate misconduct arises, the corporation’s response is directed by the board then in office. On this later “stormy day,” the board may have members who were not involved when the firm’s executive protection program was first created or last renewed. Chances are that most, or even all, of the board’s members have no knowledge of the underlying alleged misconduct. This later board may perceive that the protection program was adopted or renewed upon the recommendation of a member of the same management team whose actions are now being questioned, perhaps presented by counsel chosen by that management team, and perhaps approved without the prior board having given substantive attention...
to how the protection program would actually function when the “stormy day” arrived, and the corporation was asked to cooperate with law enforcement.

On this same “stormy day,” the executives whose conduct is being questioned may find gaps in their insurance coverage and no recognition by the corporation that they have an acute, immediate need for skilled—and costly—counsel to advise and defend them. Depending on the applicable law and the attitudes of judges and arbitrators in the jurisdiction in which they must enforce their advancement rights, they may learn that enforcing these rights in court may be time-consuming and expensive. At the same time, the later board may question why it should pay so much for the defense of perceived miscreants whose conduct is saddling the corporation with significant criminal exposure and potentially millions of dollars in liability (from either the criminal case or in follow-on civil litigation).

This type of conflict should be easier to understand and resolve when it has been identified and discussed on the “clear day.”

B. THE SALIENT CONFLICTS

The salient conflicts on the “clear day” are:

(i) Should the board adopt a bylaw mandating advancement of defense costs, or should it instead leave the decision for a later board to resolve on a case-specific basis after an executive actually requests advancement?

The interests of the corporation and executives potentially conflict on this question whenever a protection program is created or renewed. A later board may see the denial of advancement for legal defense costs as a distinct advantage to the corporation and its stakeholders should the board find it desirable to cooperate with law enforcement. The issue exists even if the corporation provides D&O insurance for its executives because the availability of mandatory rights to advancement can become a critical issue for executives should the corporation’s D&O insurance program prove deficient or its policy limits be exhausted.27

25. Chief executives and other “C-Suite” officers often serve under bespoke employment agreements that contain mandatory rights to defense cost advancement, indemnification, and minimum levels of D&O insurance protection. This article is directed at the more common situation where a “protection program” has not been negotiated as part of an employment agreement and the executive must rely instead on advancement and indemnity protections enshrined in a corporate bylaw that either by its express terms or by operation of law is treated as a contract bestowing on executives legally enforceable rights to advancement and indemnity. See sources cited at supra note 21; Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010) (holding generally that rules of contract interpretation apply to corporate charters and bylaws). The usual language employed to express this protection is the vague phrase “to the fullest extent permitted by law.” See ABA BUS. LAW SECTION DIR. & OFFICER LIAB. COMM., supra note 16, ¶ 3; Stockman v. Heartland Indus. Partners, L.P., Civ. A. No. 4227-VCS, 2009 WL 2096213, at *12 (Del. Ch. July 14, 2009) (“The ‘to the fullest extent permitted by law’ language is common in both corporate bylaws and in alternative entity operating agreements, and is ‘an expression of the intent for the promise of indemnity to reach as far as public policy will allow.’”).

26. This question is a fundamental question that was emphasized in Barrett. See supra Part IV.

27. See, e.g., Stockman, 2009 WL 2096213, at *3 (arising only because two separate sets of insurance limits had been exhausted); see also Barrett, 951 A.2d at 736 (commencing litigation in the anticipation of an exhaustion of insurance limits).
Conversely, it seems completely reasonable for a board to want to reduce the risk of present and future executive distraction by providing executives more fulsome and mandatory protection. Indeed, providing less than “market” protection for executives can put the corporation at a disadvantage in relation to its competitors. This is a business judgment for the board as a whole that deserves exploration.

(ii) If the board elects to provide contractually mandatory advancement, indemnification, and insurance, which directors and officers should share the benefits of the program?

Outside directors certainly should be included, perhaps even with increased separate insurance limits. Inside directors may also be included because they are typically members of “C-Suite” management, with care being taken to coordinate bylaw protections with any already contained in their employment contracts. Maybe it is necessary to go further and maybe not. Certainly, the greater the number of participants, the greater the competition among beneficiaries for what may ultimately turn out to be the corporation’s limited financial and insurance resources. Again, this is a business decision of the board that deserves exploration.

(iii) If the board elects to provide mandatory indemnification rights, should counsel draft the bylaw to provide simply for “indemnity to the fullest extent permitted by law,” or should counsel expressly provide for mandatory advancement as well?

Case law considers these two concepts independently. Under Delaware law and perhaps that of the thirteen jurisdictions that follow the Delaware statutory pattern, the failure to expressly provide for advancement probably means that executives have no enforceable right to advancement. While this result is rejected by the Model Act,28 as of this writing, only some of the Model Act states have adopted the current Model Act result, leaving this and other issues open in many Model Act states and most jurisdictions that follow neither the Model Act nor the Delaware statutory pattern.29

Here, again, the interests of the corporation directed by a later board and the interests of management implicated in misconduct may not be aligned. It may well be in the corporation’s later interest to deny legal cost advancement to an executive; therefore, having flexibility to deny advancement is in the corporation’s interest. However, as alluded to above, there surely can be good and valid reasons for a corporation to offer more fulsome protection.

(iv) Should any bylaw granting advancement be conditioned on executives’ written assertions that they acted in good faith and under the reasonable belief

28. In *Advanced Mining Systems, Inc. v. Fricke*, 623 A.2d 82 (Del. Ch. 1992), the court declined to hold that a provision granting executives indemnification to the fullest extent permitted by law included the right to defense cost advancement. In 1994, the Model Act was amended to reject this result. See *Model Bus. Corp. Act Annotated*, § 8.58 cmt., at 8-488 (2014). But not all Model Act states have adopted the amendment. This leaves the matter subject to litigation in these and many other states.

29. See sources cited at *supra* note 11.
that their actions were not opposed to the corporation’s interests and were not criminal? Conversely, if the corporation’s bylaws or governing documents already contain this requirement, should it be deleted?

This requirement does not exist by statute in Delaware-pattern jurisdictions and was removed from the Model Act through a recent amendment. It remains in effect, however, in Model Act states that have not adopted the new amendment. The requirement is sometimes also found in corporate bylaws and indemnification agreements, where it remains a permissible condition to advancement even if the applicable corporate law does not require it. This provision conditions an executive’s right to advancement of defense costs on what may constitute a potentially damaging waiver of the executive’s Fifth Amendment privilege. The board’s interest in maintaining maximum flexibility to “cooperate” with enforcement authorities may conflict with executives’ present and future desires for legally enforceable advancement while fully preserving their Fifth Amendment rights. And yet, the corporation could have a legitimate interest in protecting executives in these matters.

(v) Should advancement rights be specifically expanded to cover corporate internal investigations that may not have at their inception any defined individual

30. See Amendments to Sections 8.53 and 8.54, supra note 13. These amendments were made to reflect the cooperation revolution.

31. As of this writing, no state has adopted the amendment. This article’s earlier comment concerning the schizophrenic nature of the common law derives principally from this divergence between Delaware and the former Model Act on the issues of whether “indemnity” includes “advancement” and on whether an executive seeking advancement must first make a cross-examinable assertion of innocence. Delaware law rigidly enforces mandatory advancement and indemnity provisions but declines to include a right to advancement within a provision calling only for “indemnity to the fullest extent permitted by law.” See supra note 29. Fourteen Model Act jurisdictions reject this view and include advancement rights within a bylaw or contract calling only for indemnification. See MODEL BUS. CORP. ACT ANN. § 8.58 cmt., at 8-492. But, at the moment, all Model Act jurisdictions condition advancement on a potential Fifth Amendment waiver, whereas Delaware-pattern jurisdictions do not, at least in cases where no such requirement is imposed by the applicable bylaw or other relevant corporate document. It remains to be seen how many Model Act states will adopt the new amendment and how long any such adoption will take.

32. In Blankenship v. Alpha Appalachia Holdings, Inc., No. 10610-CB, 2015 WL 3408255 (Del. Ch. May 28, 2015), the court ruled that a corporation could not avoid its advancement obligation to an indicted former CEO based on his alleged breach of a written representation that he had “no reasonable cause to believe that [his] conduct was ever unlawful.” Id. at *1. This representation was made by the CEO after his retirement and probably by mistake, without separate consideration, and without negotiations considering its potential consequences. Id. at *4–6. The representation was not required by the operative corporate documents governing advancement nor by applicable Delaware law. Id. at *27. The court ruled that the representation was given merely as a “reassuring prerequisite [to advancement]” rather than as a ‘license’ for the company to cease continued advancement.” Id. at *6. Thus, Delaware courts will not permit a corporation to defeat advancement based on an alleged breach of a representation of good faith and reasonable belief in the absence of governing language mandating this result. This ruling seems contrary to the Official Comment to former Model Business Corporation Act § 8.54 (2011) (“If the corporation has contracted to indemnify a director to the fullest extent permitted by law, a court may, nevertheless, deny an advance for expenses if it determines that the director did not have, at the time of delivering the affirmation [of good faith and reasonable belief], a good faith belief that he or she met the relevant standard of conduct.”). The precedential value of Blankenship is limited given that the requirement of the representation of good faith and reasonable belief was not contained in the operable document granting rights to advancement.
target(s) or defined wrongful act(s)? Should the board grant executives access to (but not possession of or control over) corporate documents relevant to the investigation, including privileged materials to which executives had access during the relevant time period? Should executives be given assurances that they may assert their Fifth Amendment privileges during an internal investigation and not be terminated as a result? Should they be given the express right to invoke Fifth Amendment protection in any court proceeding to compel advancement without thereby prejudicing the result (because the standard rule is that an adverse inference can be drawn against a party who asserts the privilege in a civil proceeding)? Should advancement rights be terminated for all proceedings if executives formally plead guilty to facts constituting conduct that prohibits indemnity in one proceeding? Should a mechanism be inserted into the bylaws to resolve potential disputes between

33. See People ex rel. Spitzer v. Greenberg, 851 N.Y.S.2d 196 (App. Div. 2008) (holding that the CEO and the CFO were entitled to view certain legal documents produced during their tenure at the corporation).

34. See Bennett article, supra note 1, at 433–34 (discussing how constitutional principles forbidding the compulsion of incriminating evidence through threats of termination of employment of public sector employees, government contractors, and holders of political office do not apply to protect executives involved in corporate internal investigations). The ability of a corporation to terminate employees who are interviewed in internal investigations without compensation, free from the inhibitions on that practice imposed by the Constitution for public employees, government contractors, and officeholders (such as the requirement that the interviewee be offered use immunity), is generally viewed as a major contributor to the effectiveness of internal investigations. Protecting executives from termination for asserting Fifth Amendment rights in internal investigations and granting them access to corporate documents are matters of potential importance.

35. A Florida arbitration panel comprised of prominent arbitrators and proceeding under New York law declined to decide an advancement case brought by an executive until the executive waived his Fifth Amendment rights and submitted to cross examination as to facts material to a threatened criminal case. See Plaintiff's [Redacted] Emergency Motion to Compel Compliance with Court's Judgments, Bee v. BDO Seidman, LLP, No. 06-11268-CA-08 (Fla. Cir. Ct. Mar. 26, 2009). Delaware practitioners seem to be consistently of the view that such a result would not occur in a matter tried in Delaware. The authors, however, believe this result could possibly occur in other jurisdictions even if their indemnity statute is identical to that of Delaware. Hence, executives may wish to secure express language protecting their Fifth Amendment privileges regardless of the jurisdiction of incorporation. In another case, a federal district court declined to make a negative inference against criminally charged corporate executives who asserted their Fifth Amendment privileges. However, the court relied on their assertion of privilege to admit against them otherwise inadmissible hearsay evidence. The court then used that evidence to deny payment of the executive's defense costs for an ongoing criminal proceeding. See Pendergest-Holt v. Certain Underwriters at Lloyd's of London, 751 F. Supp. 2d 876, 891–92 (S.D. Tex. 2010). A recent New York appellate decision confirmed an arbitration award imposing upon the former CEO of a large New York partnership the affirmative duty to show that his actions were “ordinary and proper” as a condition to payment of his defense costs for an ongoing criminal matter, even though the governing agreement imposed on the partnership a duty to pay for his defense and the arbitration agreement stated that the matter was to be resolved without taking testimony. See Field v. BDO USA, L.L.P., No. 600010/12, 2015 N.Y. App. Div. LEXIS (June 11, 2015). The Feuer decision, supra note 17, does not appear to have been argued or considered.

36. See infra note 39; Dupree v. Scottsdale Ins. Co., Index No. 653412/11 (N.Y. App. Div., June 23, 2015) (holding that the imposition of a criminal sentence constituted a “final judgment” permitting the employee's D&O insurance company to stop further payment of defense costs and to recover from the insured all amounts previously paid, even though the criminal case was on appeal).
the corporation and executives over the scope of executives’ attorney-client privileges (for example, if the corporation seeks a detailed accounting of an attorney’s activities for the stated purpose of determining the reasonableness of counsel’s charges)?

While some of these protections go beyond what is customarily granted in today’s protection programs, they can become critical when a “stormy day” arrives. These considerations merit thoughtful attention whenever a protection program is created or renewed.

(vi) Should the bylaws contain provisions that impose burdens of proof on the corporation in determining executives’ advancement and indemnity rights commensurate with those borne by insurers? Should they give executives the right to recover their attorney’s fees and costs to obtain advancement and indemnity? Should bylaws specifically guarantee indemnification of defense costs to executives who are dismissed from or acquitted in criminal proceedings without forcing them to retry the case under a different burden of proof?

37. See Del. Code Ann., tit. 8, § 145 (2015) (confirming that executives who obtain advancement of defense costs must reimburse the corporation for all amounts advanced should they settle the case or lose it and be unable to prove to the satisfaction of the corporation or a court that their actions were in good faith, and they reasonably believed that their conduct was legal and not affirmatively adverse to the corporation’s interest); Model Bus. Corp. Act Ann. § 8.53(a) (2014) (same). Similarly, most insurance policies will pay defense costs but require the insured to refund them should the ultimate facts show that the insured’s conduct fell within a policy exclusion, usually one denying coverage for “willful and intentional” acts or some similar formulation. In both cases, if the executives cannot meet the relevant standard, they must repay the amounts advanced. As a result, some corporate bylaws impose the burden on the corporation to prove executives’ bad faith and absence of reasonable belief, analogous to the general rule in insurance law that while the indemnitee must prove the existence of coverage, it is the responsibility of the indemnitor to prove the applicability of a policy exclusion. Cf. Stockman v. Heartland Indus. Partners, L.P., Civ. A. No. 4227-VCS, 2009 WL 2096213, at *18 (Del. Ch. July 14, 2009) (adopting a similar view in the context of pleading burdens).

38. In Delaware, the right of a successful executive to recover the attorney’s fees and costs he or she incurs in successfully pursuing advancement derives from general principles of indemnity. See Stifel Fin. Corp. v. Cochran, 809 A.2d 555, 560–61 (Del. 2006) (describing “fees on fees” as a form of indemnification). Query, if rights to recover fees as a prevailing party are made a matter of contract, will the executive be deterred from pursuing advancement at all if he must litigate the issue in a jurisdiction that applies a statute that renders reciprocal the recovery of prevailing party fees granted by contract to only one party? See, e.g., Fla. Stat. Ann. § 57.105(5) (West 2014).

39. In Stockman v. Heartland Industrial Partners, L.P., Civ. A. No. 4227-VCS, 2009 WL 2096213 (Del. Ch. July 14, 2009), the indemnitee argued that if executives escape liability in a criminal case by obtaining a dismissal of charges before trial, they must still bear their defense costs personally unless they affirmatively prove in a new proceeding their good faith and their reasonable belief that the conduct that was the subject of the criminal charge was not opposed to the corporation’s interests and was not criminal. The argument is that such a new showing is required because the issue of bad faith was not tried in the criminal case and because the executives’ actual conduct was never evaluated by a court under a burden of proof less than proof beyond a reasonable doubt. While then Vice-Chancellor Strine was not taken with the argument, he did not resolve the issue in his opinion. The court in Holley v. Nipro Diagnostics, Inc., C.A. No. 9679-VCN, 2014 WL 7336411 (Del. Ch. Dec. 23, 2014), held that because the Delaware statute mandates indemnity in any case in which an executive prevails, an agreement promising indemnification “to the fullest extent” must be interpreted to provide that a showing of good faith and reasonable belief is not required of an executive if the executive prevails in the underlying case.
Any or all of these issues could become troublesome when a “stormy day” arrives, and it becomes apparent that the interests of the executive (who wants maximum protection) conflict with the interests of the corporation (which wants to limit expenses and cooperate with law enforcement). Consideration and understanding of these points up front on the “clear day” will reduce the likelihood of dispute and consternation as compared to a situation in which potential differences in interest are left for resolution in an atmosphere of hostility.

V. THE ROLE OF INSURANCE

A key component of almost every protection program is the corporation’s D&O insurance coverage. Such policies can fund most or all of the corporation’s liability for advancement and indemnity of executives’ defense costs. Further, some insurance policies offer greater protection to an executive than can be provided under applicable laws governing advancement and indemnity. The assistance of an independent and knowledgeable insurance broker is vital to create a protection program that strengthens the position of both the corporation and executives.

Decisions with respect to these matters must be handled carefully. The corporation’s ability to retain and attract key executives, particularly those who are aware that the corporate world has entered the age of cooperation, may be adversely affected should they perceive their insurance to be inadequate. Directors who are dissatisfied with the extent and limits of protection determined by the board are free to seek separate individual “suitcase” coverage, but this solution may be impractical in many cases.40

The creation of truly effective protection programs is being made easier by the recent emergence of a comprehensive “Side A-Only, Difference-in-Conditions” (DIC) policy that explicitly covers “pure” internal investigations (i.e., those triggered by a whistleblower or other internal information and not limited to those prompted by an inquiry from an enforcement authority).41 The new policy will

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footnotes:

40. “Suitcase” coverage refers to policies that are personal to individual board members and provide separate policy limits to the insured independent of the insurance program of the board or boards on which the insured serves. The notion of “suitcase” coverage is particularly appealing to high-net-worth individuals who serve on boards of large non-profit entities that cannot advance substantial defense costs or pay large insurance premiums without adversely affecting their donor bases.

41. It is not the purpose of this article to comprehensively review the development and current state of available D&O insurance policies and their constantly evolving coverage of both civil and criminal risks. To give the reader some flavor of the complexity in this area, so-called “ABC” D&O liability policies exist today that also cover the corporation under the same limits—“towers” of excess and often “non-follow-form” coverages that “sit on top” of them, and “Side A-Only, Difference-in-Conditions” (DIC) coverage that insures directors and officers only and provides them a separate limit. The latter are intended to protect directors and officers from both corporate and underlying insurer insolvency and the refusal of both to live up to their advancement and indemnity obligations. Such policies also frequently add additional coverage. Lawyers, however, may not comfortably leave these complications entirely to insurance specialists because policy terms are intended in part to fill gaps in common law protection, i.e., “the three-legged stool.” See supra note 19.
also comprehensively respect executives’ rights to assert Fifth Amendment privileges and provide other significant improvements over common law and statutory rights. Since DIC policies are, by nature, “manuscript” policies, their terms can sometimes be negotiated.

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The possibility that the corporation may later “cooperate” with prosecutors against indemnified directors and officers lies at the heart of what should define modern-day executive protection. Boards now have the opportunity to create sturdy and comprehensive protection programs backed by insurance that expressly take into account the cooperation revolution. Boards should investigate their options through carefully selected counsel, taking into account the specialized nature of the inquiry.

42. For example, the forthcoming policy pays executives’ defense costs without reserving any right to recover them later should the executives be found guilty of conduct that violates the policy’s conduct exclusions. It covers executives’ costs of obtaining access to corporate documents, expressly permits the assertion of Fifth Amendment privileges in executives’ communications with the insurer, and provides a confidential mechanism to resolve privilege disputes. Moreover, the forthcoming policy covers corporate internal investigations at their earliest and most critical stages, and indemnifies executives for settlements and judgments unless they engage in willful and deliberate misconduct rather than merely violate the lower common-law standards of bad faith and an unreasonable belief in the probity of one’s conduct. Like other DIC policies, the forthcoming policy protects executives should either the corporation or any underlying insurer unlawfully deny advancement and indemnity or become insolvent.
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