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## Wagon-Circling Prohibited: Forsaking Constitutional Rights as a Means to Prosecute Business Organizations

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# WAGON-CIRCLING PROHIBITED: FORSAKING CONSTITUTIONAL RIGHTS AS A MEANS TO PROSECUTE BUSINESS ORGANIZATIONS

## I. INTRODUCTION

During the early settlement of the Dakota Territory and other parts of the western United States, groups of settlers joined together to form wagon trains to provide for mutual defense and navigation.<sup>1</sup> When attacked along the trail, a common defense strategy was to “circle up the wagons” to create a protective perimeter to shield the travelers and defend the attack.<sup>2</sup> Since the first confrontations between prosecutors and alleged criminal organizations, lawyers and their corporate clients have employed a similar strategy to establish defensive perimeters.<sup>3</sup> In the wake of Enron and other well-publicized corporate corruption scandals, federal prosecutors have been empowered by new anti-corruption legislation and public outcry to develop strategies to counter wagon-circling tactics in corporate boardrooms.<sup>4</sup> Today, one of the most effective weapons for federal prosecutors in combating corporate corruption is the corporate charging guidelines issued by the United States Department of Justice (DOJ).<sup>5</sup> This note examines the effects of this prosecutorial zeal on fundamental constitutional rights of employees of target corporations.

United States Attorney James B. Comey diplomatically commented that the Thompson Memorandum (Thompson Memo) has “[p]rovided a balanced framework for DOJ attorneys to make difficult decisions.”<sup>6</sup>

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1. SARA E. QUAY, *WESTERN EXPANSION* 216 (Ray B. Brown ed., Greenwood Press 2002).

2. *Id.*

3. *See generally* William R. McLucas et al., *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621, 637 (2006) (explaining that joint defense agreements permitted corporations and employees to participate in internal investigations without the risk of disclosure by the other party).

4. *See* Andrew J. Ceresney et al., *The Attorney-Client Privilege and Internal Investigations: Privilege Issues in Structuring an Investigation and Interviewing Witnesses*, 163 PLI/N.Y. 207, 219 (Dec. 2006) (noting that joint defense agreements between corporations and employees are disfavored under the DOJ’s corporate charging guidelines).

5. *See generally* Carmen Couden, Note, *The Thompson Memorandum: A Revised Solution or Just a Problem?*, 30 J. CORP. L. 405, 415-21 (2005) (describing the DOJ’s various corporate charging guidelines).

6. Interview by U.S. Attorney’s Office with United States Attorney James B. Comey Regarding DOJ’s Policy on Requesting Companies under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection, 51 U.S. ATT’YS BULL. 1, 5 (Nov. 2003),

However, few other legal commentators and practitioners share the same perspective.<sup>7</sup> Most practitioners question Comey's view of a balanced framework in this new environment, which induces companies to turn against their own employees in order to earn cooperation credits from the government and avoid wider criminal indictments.<sup>8</sup> Many practitioners also wonder about the broader effects of the federal prosecutorial guidelines framework, which in practice advocate weakening basic constitutional safeguards that have been entrenched in our criminal system since its origin.<sup>9</sup> The defense bar and other commentators have offered vigorous critical response to the government's framework of prosecutorial methods.<sup>10</sup> They argue that the DOJ's instructions to the federal prosecutors often lead to overzealous practice in combating corporate misconduct.<sup>11</sup> Although the DOJ has recently responded to the myriad of criticism against its principles of federal prosecution of business organizations,<sup>12</sup> ambiguities and concerns still remain.<sup>13</sup>

This note intends to provide insight to the federal prosecutorial practices in the context of corporate investigations and the constitutional implications they carry for officers and employees of target entities. It is not a comprehensive analysis of the new guidelines; rather, the note focuses on the provisions that guide prosecutors in decisions about whether to indict a company. Part II of this note traces the origin of the current prosecutorial principles and guidelines, and provides the general basis for the myriad criticisms. Part III provides a catalogue of the constitutional safeguards, which may be affected by these prosecutorial principles. Additionally, this

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available at [http://usdoj.gov/usao/eousa/foia\\_reading\\_room/usab.5106.pdf](http://usdoj.gov/usao/eousa/foia_reading_room/usab.5106.pdf) [hereinafter Comey Interview].

7. See generally ABA TASK FORCE REPORT AND RECOMMENDATION TO ABA HOUSE OF DELEGATES ON EMPLOYEE RIGHTS 3 (Aug. 2006), available at [http://www.abanet.org/buslaw/attorneyclient/materials/hod/empights\\_report\\_adopted.pdf](http://www.abanet.org/buslaw/attorneyclient/materials/hod/empights_report_adopted.pdf) (opposing the government's policies and practices under the Thompson Memo) [hereinafter ABA TASK FORCE REPORT].

8. *Id.*

9. *Id.*

10. See Adam Weiskittel & Brian Collins, *Corporate Fraud*, 69 TEX. B.J. 26, 26 (2006) (noting the increased concerns among the defense bar and commentators regarding the erosion of the attorney-client privilege in internal investigations); see also John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 351 (2004) (arguing that prosecutors often proceed in their charging decisions without significant public scrutiny of the charges).

11. Weiskittel & Collins, *supra* note 10, at 26.

12. Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys on Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), available at [www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf) [hereinafter McNulty Memo].

13. See *infra* Part II.C. (discussing the potential consequences of the new federal prosecutorial guidelines).

part describes the first court decision declaring certain components of these principles unconstitutional. Part IV considers the public policy concerns connected with this set of prosecutorial principles. In conclusion, part V offers a solution to these concerns.

## II. THE DEVELOPMENT OF PROSECUTORIAL DISCRETION IN CORPORATE INVESTIGATIONS

As early as 1909, the United States Supreme Court in *New York Central & Hudson River Railroad Co. v. United States*,<sup>14</sup> developed the legal theory that a business entity could be held accountable for the actions of agents and/or employees.<sup>15</sup> The United States Supreme Court held that companies could be found criminally liable for any act committed by an employee in the course of such person's employment if the act was intended to benefit the company.<sup>16</sup> More than eighty years later, the Fifth Circuit Court of Appeals clarified the principle that a company may be "criminally liable for the unlawful acts of its agents, provided that the conduct is within the scope of the agent's authority, whether actual or apparent."<sup>17</sup> Despite these early cases and statutes,<sup>18</sup> it was a novel development in June 1999 when the DOJ adopted a consistent approach to corporate prosecution.<sup>19</sup> Since then, the DOJ has continuously refined its approach.<sup>20</sup> To better understand the current criticisms of the DOJ's practices in corporate investigations, it is useful to examine the original administrative policy, which began with the Holder Memo in 1999, and follow the revisions leading to the current formula.<sup>21</sup>

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14. 212 U.S. 481 (1909).

15. *New York Cent.*, 212 U.S. at 481.

16. *Id.* at 495.

17. *United States v. Inv. Enter., Inc.*, 10 F.3d 263, 266 (5th Cir. 1993).

18. See Mark Robeck et al., *Corporate Cooperation in the Face of Government Investigations*, 17 HEALTH LAW. 20, 21-22 (2005) (citing Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2003) (RICO), Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m(b), 78dd, 78ff(c) (1977) (FCPA) and Organizational Sentencing Guidelines, 56 Fed. Reg. 22762-01 (1991) (SGOs)).

19. Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1099 (2006).

20. *Id.* at 1100.

21. See generally Baker, *supra* note 10, at 326-36 (addressing the criticism of the DOJ's corporate charging guidelines and tracing the guidelines' development throughout the years).

### A. THE HOLDER MEMO

In 1999, federal prosecutors were confronted with a rising tide of corporate criminal misconduct committed either by companies or on behalf of companies.<sup>22</sup> To address this emerging concern, former Deputy Attorney General Eric H. Holder issued what has come to be known as the “Holder Memo.”<sup>23</sup> This internal policy memorandum, officially entitled “Federal Prosecution of Companies,” contained prosecutorial guidelines to determine whether a corporate organization should be criminally charged, instead of, or in addition to, suspected culpable employees.<sup>24</sup> It listed several factors for federal prosecutors to consider when deciding “whether to charge a corporation in a particular case.”<sup>25</sup> To determine whether a corporate criminal action should be taken, federal prosecutors were instructed to consider eight specific factors in addition to the factors considered in an individual criminal charge.<sup>26</sup> The new corporate factors were:

- (1) The nature and seriousness of the offense, including the risk of harm to the public . . .
- (2) The pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management . . .
- (3) The corporation’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it . . .
- (4) 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 privileges . . .
- (5) The existence and adequacy of the corporation’s compliance program . . .
- (6) The corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies . . .

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22. Memorandum from Eric H. Holder, Jr., Deputy Att’y Gen., U.S. Dep’t of Justice, to All Component Heads & U.S. Att’ys on Bringing Criminal Charges Against Corporations, preface (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/fcpa/append/ix/appendixk.pdf> [hereinafter Holder Memo].

23. *Id.*; Wray & Hur, *supra* note 19, at 1099.

24. Holder Memo, *supra* note 22, at preface.

25. *Id.*

26. Robeck et al., *supra* note 18, at 22.

(7) Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable . . . and

(8) The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions . . . .<sup>27</sup>

These factors constituted the DOJ's first attempt to create a uniform approach in corporate investigations.<sup>28</sup> The Holder Memo's overall purpose was to provide guidance only to federal prosecutors in an emerging environment of corporate corruption.<sup>29</sup> The Holder Memo was also symbolic of the DOJ's firming commitment to prosecute business organizations, calling for a vigorous enforcement of criminal laws against wrongdoers.<sup>30</sup> Accordingly, the Holder Memo marked a critical shift in the government's attitude toward corporate investigations.<sup>31</sup> Despite these intentions, the record does not indicate a rise in the number of prosecutions of business organizations after the Holder Memo was issued.<sup>32</sup> However, four years after the Holder Memo was first issued, a new set of guidelines contained in the Thompson Memo affirmed and sharpened the DOJ's commitment.<sup>33</sup>

## B. THE THOMPSON MEMO

If the Holder Memo marked the beginning of a new era with respect to corporate prosecutions, the 2003 DOJ's "Principles of Federal Prosecution of Business Organizations," confirmed the direction.<sup>34</sup> The Thompson Memo reiterated the DOJ's firm commitment to combat corporate fraud through the prosecution of individuals for corporate malfeasance and/or the

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27. Holder Memo, *supra* note 22, at Part II.A.

28. Wray & Hur, *supra* note 19, at 1109.

29. *Id.* The eight enumerated factors were not meant to be outcome-determinative. *Id.* Instead, under the Holder Memo, they were intended as an analysis framework for prosecutors, and prosecutors were given great latitude in their consideration of these factors. *Id.*

30. Holder Memo, *supra* note 22, at Part I.A.

31. Robeck et al., *supra* note 18, at 23.

32. *See* Wray & Hur, *supra* note 19, at 1188 n.19 (reporting a decrease in criminal prosecutions of business organizations from 255 in fiscal year 1999, to 238 in fiscal year 2001).

33. *Id.* at 1101.

34. Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys on Principles of Federal Prosecution of Business Organizations, preface (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) [hereinafter Thompson Memo] ("The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation."); *see also* Wray & Hur, *supra* note 19, at 1100-01 (noticing the introduction of several major revisions, particularly the emphasis on authentic corporate cooperation with government investigations).

company itself.<sup>35</sup> Moreover, the Thompson Memo not only restated the Holder Memo's prosecutorial principles, but changed them from discretionary to mandatory.<sup>36</sup>

The Thompson Memo stated that its adoption was the result of a review of the utility of the Holder Memo prompted by several matters related to corporate misconduct, including those confronted by the President's Corporate Fraud Task Force.<sup>37</sup> It reinforced the DOJ's ultimate goal of "[r]ooting out criminal corporate conduct" and did so partly by offering incentives for companies to report criminal conduct voluntarily.<sup>38</sup>

In addition to the eight factors enumerated in the Holder Memo, the Thompson Memo introduced one new factor and amended the seventh factor.<sup>39</sup> Under the amended seventh factor, a prosecutor must now weigh any disproportionate harm to innocent third parties and the public resulting from criminal charges against a company.<sup>40</sup> In Part II.A(8), the Memo included a new factor, which took into account "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance."<sup>41</sup> The new factors evinced a shift in the policies set forth in the Holder Memo.<sup>42</sup> The Thompson Memo stated that the "imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing [and] [o]nly rarely should provable individual culpability not be pursued."<sup>43</sup> This reasoning reversed the historical

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35. Wray & Hur, *supra* note 19, at 1106-07 (noting that the Thompson Memo's emphasis on prosecuting individuals for corporate misconduct and, where necessary, the company itself regardless of the extent of its cooperation with government investigations, was egregious).

36. United States v. Stein, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006); Thompson Memo, *supra* note 34, at Part III.A; *see also* Couden, *supra* note 5, at 415 (considering the DOJ's mixed messages to companies as to whether the provisions set forth in the Thompson Memo should in reality be considered as rules rather than discretionary guidelines, and opting for the former).

37. Thompson Memo, *supra* note 34, at preface. The President's Corporate Fraud Task Force was created by President George W. Bush in 2002 after several high-profile corporate scandals, such as Adelphia Communications, WorldCom, and HealthSouth companies. Wray & Hur, *supra* note 19, at 1101. Between March and June of 2002, WorldCom and Adelphia Communications disclosed severe corporate fraud incidents, and in March of 2003, HealthSouth, a large operator of rehabilitation hospitals and surgery centers disclosed a massive accounting fraud. Kathleen F. Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221, 225-28 (2004).

38. Wray & Hur, *supra* note 19, at 1098.

39. Thompson Memo, *supra* note 34, at Part II.A.(7)-(8).

40. *Id.* at Part II.A.(7).

41. *Id.* at Part II.A.(8).

42. Theodore V. Wells, Jr. et al., *Current Developments in the Government's Corporate Prosecution Policy*, 1517 PLI/Corp 829, 833 (Nov. 2005); *see also* Couden, *supra* note 5, at 414 (suggesting that charging culpable individuals rather than the company might prove more effective).

43. Thompson Memo, *supra* note 34, at Part I.B.

practice in prosecuting corporate crime from initially targeting the company to initially targeting individuals.<sup>44</sup>

More significantly, the Thompson Memo, unlike its predecessor, placed the focus of the prosecutors' charging decision on the effectiveness and authenticity of the company's cooperation with the federal prosecutors.<sup>45</sup> This was directly indicated in the commentary to the section "Cooperation and Voluntary Disclosure."<sup>46</sup> Specifically, the Thompson Memo instructed the DOJ to closely scrutinize the degree of cooperation by the company to ensure that the company indeed does all it can to provide the prosecutors with necessary information, and does not "[m]erely pay[] lip service to cooperation."<sup>47</sup>

Like the Holder Memo, in theory, no factor was intended to be given a greater weight than the others.<sup>48</sup> Rather, prosecutors were required to consider all nine factors contemporaneously.<sup>49</sup> However, in practice, the degree of cooperation may have been assigned a heavier weight than other factors given the Thompson Memo's emphasis on cooperation.<sup>50</sup> Nevertheless, if the other factors outweighed the cooperation, prosecution of the business entity may have been warranted.<sup>51</sup>

In practice, the Thompson Memo has received mixed reviews.<sup>52</sup> An evaluation of the general impact of the Thompson Memo is necessary to weigh its utility, including the most important criticisms. Much of this criticism is directed at specific provisions of the Thompson Memo, most notably the expectation of corporations' waiver of attorney-client and work product privilege, and denial of advancement of legal fees and expenses to

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44. McLucas et al., *supra* note 3, at 633.

45. Thompson Memo, *supra* note 34, at preface (stressing "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation").

46. *Id.* at Part VI.B. The Memo provides:

Another factor to be weighed . . . is whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation (whether or not rising to the level of criminal obstruction). Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; 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; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.

*Id.*

47. Wells et al., *supra* note 42, at 833.

48. Wray & Hur, *supra* note 19, at 1136.

49. *Id.*

50. *Id.* at 1145-46.

51. *Id.*

52. See generally *id.*, at 1170-85 (defending the Thompson Memo and presenting the main criticism to it).



corporate officers and employees under investigation for corporate misconduct.<sup>53</sup>

### 1. *General Impact of the Thompson Memo*

The amendments and additions to the Thompson Memo have certainly strengthened the prosecutor's hand, but not without questionable consequences.<sup>54</sup> On one hand, the companies' waivers of their attorney-client privilege and/or work product protection count among the most controversial effects because such waivers deprive companies of confidential communications.<sup>55</sup> On the other hand, the Thompson Memo itself explains the benefits of indicting companies for malfeasance, including "enabl[ing] the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime."<sup>56</sup> The most notable positive effects of the Thompson Memo include: companies are more sensitive to their responsibilities towards shareholders; more effective corporate compliance programs; less time is invested in criminal investigations, which permits companies to quickly re-focus on their primary business activities; increased public confidence in corporate governance; and greater stability in the stock market.<sup>57</sup>

Several corporate cooperation examples have confirmed that companies have received the message of "cooperate and we will not indict you," as seen in the Royal Dutch Shell and the Homestore, Inc. investigations—Homestore, Inc. was under investigation for accounting fraud, but the prosecutors were very impressed with the level of cooperation by the new management so they declined to charge the company.<sup>58</sup> According to former Assistant Attorney General for the DOJ Criminal Division, Christopher A. Wray, "in most cases, cooperation is an extremely important factor, and

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53. *Id.* at 1172, 1181-82.

54. *Id.* at 1098.

55. See Couden, *supra* note 5, at 418-20 (pointing out that disclosure under the Thompson Memo also exposes companies to a "host of liability concerns").

56. Thompson Memo, *supra* note 34, at Part I.A.

57. McLucas, et al., *supra* note 3, at 622; Kenneth M. Breen et al., *The Future of Corporate "Cooperation" Under the Thompson Memorandum – Will There be a Shift Toward Greater Predictability?* (Oct. 2005), [http://www.fulbright.com/index.cfm?fuseaction=publications.detail&pub\\_id=2-2026&site\\_id=494&detail=yes](http://www.fulbright.com/index.cfm?fuseaction=publications.detail&pub_id=2-2026&site_id=494&detail=yes) (last visited Jan. 5, 2007).

58. See Wray & Hur, *supra* note 19, at 1135-36 (noting that extensive cooperation may result in a decline of charges and penalties); see also Andrew J. Levander, *Recent Development in Securities Cases and Investigations*, 1505 PLI/Corp 969, 983-85 (Sept. 2005) (discussing the Homestore, Inc. and Royal Dutch Shell investigations). Royal Dutch Shell was under investigation for overstating its oil and gas reserves for 2002 and prior years, but was spared indictment given the extent of its cooperation. *Id.*

getting credit for that cooperation can make a huge difference in our [federal prosecutors'] charging decision.”<sup>59</sup>

However, the emphasis on corporate cooperation in federal criminal investigations has drawn significant criticism of the wider prosecutorial discretion created by the Thompson Memo.<sup>60</sup> One subtle outcome has been that federal prosecutors across the country have interpreted the guidelines to the effect that they apply differently depending on the business sector being targeted.<sup>61</sup> Other criticisms have more ominous implications, such as the waiver of the attorney-client privilege and work product protection, and the detrimental effect of the prosecutorial practices on the companies' relationships with their employees.<sup>62</sup>

## 2. *Criticism of the Thompson Memo Focusing on the Company-Employee Relationship*

The Thompson Memo has been the subject of a great deal of criticism from the white-collar criminal defense bar.<sup>63</sup> In particular, the defense bar has alleged that the change in prosecutorial attitude under this Memo has effectively eroded the attorney-client privilege and the work-product doctrine defenses.<sup>64</sup> Recent criticisms also focused on the downstream effect of the pressure exercised by prosecutors on companies under investigation and the resulting myriad of implications for individual employees.<sup>65</sup> According to the guidelines laid out in the Thompson Memo,

[a]nother factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. . . . [A] corporation's promise of support to culpable

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59. Christopher A. Wray, Assistant Att'y Gen., Remarks at the 22nd Annual Corporate Counsel Institute 5 (Dec. 12, 2003), *available at* [http://www.usdoj.gov/criminal/press\\_room/speeches/2003\\_2986\\_rmrk121203Corprtconslinst.pdf](http://www.usdoj.gov/criminal/press_room/speeches/2003_2986_rmrk121203Corprtconslinst.pdf).

60. See Robeck et al., *supra* note 18, at 24 (noting the criticism regarding the DOJ's policies' effect on the sanctity of the attorney-client privilege routinely demanding waivers).

61. See Wray & Hur, *supra* note 19, at 1102, 1153-63 (noting additional trends in the enforcement of the Thompson Memorandum principles in the areas of antitrust crimes, environmental crimes, and Foreign Corrupt Practices Act).

62. Robeck et al., *supra* note 18, at 20.

63. *Id.* at 24.

64. See Sarah Helene Duggin, *The Impact of the War Over the Corporate Attorney-Client Privilege on the Business of American Health Care*, 22 J. CONTEMP. HEALTH L. & POL'Y 301, 317-18 (2006) (pointing out common concerns among members of the defense bar).

65. See, e.g., Earl J. Silbert & Demme Doufekias Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225, 1232-33 (2006) (explaining that companies in their quest for cooperation credit with the government may use threats of termination or decline to provide counsel to employees, and/or fail to advise employees that the content of their interviews in internal investigations will be disclosed to the government).

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 . . . may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.<sup>66</sup>

As this passage illustrates, the Thompson Memo paid small regard to loyalty between employer and employee, regardless of expectations of legal defense support.

It has been argued that the government's requirement that cooperation be "authentic," in effect forced companies to place employees in a situation where their constitutional rights are endangered, or worse, violated without recourse.<sup>67</sup> Within this context, the prosecutorial discretion may seem to be "an abuse of the charging power."<sup>68</sup> However, some commentators have argued that government-created incentives for corporate cooperation with federal investigators facilitate and accelerate the investigations.<sup>69</sup> Further, in a hearing before the United States Senate Committee on the Judiciary, a United States Attorney testified that it is "good practice" to ask a company to cooperate with and assist the federal prosecutors in their investigations, since it saves resources and may bring a quick end to the investigation.<sup>70</sup> Nevertheless, where the requests for cooperation have created a "culture of cooperation" at the expense of fundamental rights of employees, the question becomes whether the DOJ has struck the constitutionally appropriate balance.<sup>71</sup> The tension created between the companies' interest to avoid criminal charges, and the vulnerability of their employees who find

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66. Thompson Memo, *supra* note 34, at Part VI.B. (footnote omitted).

67. See Silbert & Joannou, *supra* note 65, at 1233 (noting that employees may be deprived of their right to assert the Fifth Amendment right when they are not informed of the company's intent to disclose all information gathered during an internal investigation to the government).

68. Couden, *supra* note 5, at 421.

69. See, e.g., Wray & Hur, *supra* note 19, at 1170-71 (explaining that given limited government resources, the government benefits from offering companies incentives for their cooperation, and such offers also promote a "real-time enforcement," which leads to an increase in both numbers and pace of investigations).

70. *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the H. Comm. on the Judiciary*, 109th Cong., S. Hrg. 109-835, Serial No. J-109-108, 2, 3 (Sept. 12, 2006) [hereinafter Thompson Memo Hearing] (statement of Deputy Att'y Gen., DOJ, Paul J. McNulty).

71. Marvin G. Pickholz & Jason R. Pickholz, *Investigations Put Employees in Tough Spot: Are 'Cooperating' Companies Violating Constitutional Rights?*, 236 N.Y.L.J. 2, 2 (July 24, 2006), available at <http://www.akerman.com/documents/Pickholz%20White20Collar%20NYLJ%207-24-06.pdf>.

themselves “sold” to the government, is a valid concern.<sup>72</sup> Companies may overly expose their employees and provide the government with an increased share of employees’ inculpatory statements or false exculpatory statements made during internal investigations.<sup>73</sup>

Recently, these criticisms have received judicial support in *United States v. Stein*,<sup>74</sup> where certain aspects of the Thompson Memo were ruled unconstitutional.<sup>75</sup> Among the most pressing concerns voiced by critics is the focus on the assisting-role played by capitulating companies in the realm of government investigations.<sup>76</sup> In practice, this approach has led to extreme criticisms of the prosecutorial practices for allowing, and sometimes even requesting companies to do the government’s job by conducting internal investigations and disclosing their findings to the federal prosecutors.<sup>77</sup> Therefore, these guidelines have appeared to give a pass to federal prosecutors to obtain information through certain questionable economies, such as the companies’ internal investigations and identification of culpable individuals.<sup>78</sup> This has facilitated the prosecutors’ work because they could gain access to evidence without dependence on traditional means, such as grand jury subpoenas and conferral of immunity.<sup>79</sup> Proponents of the Thompson Memo have argued that companies are not coerced into waiving

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72. See 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, 477 (2003-04) (noting that companies are penalized for assisting employees or senior executives under investigation).

73. See Wray & Hur, *supra* note 19, at 1181 (enumerating criticism of the Thompson Memo with regard to the strain it causes on relationships between companies and employees).

74. 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

75. *Stein*, 435 F. Supp. 2d at 356 (finding the Thompson Memo unconstitutional to the extent that the government pressured and coerced KPMG to withhold advancement of legal fees and defense costs for employees on the threat of refusing to grant them “cooperator” status). For a more thorough examination, see *infra* Part IV.C. (discussing the parties’ arguments and the *Stein* holding).

76. See Oesterle, *supra* note 72, at 477 (noting that for a company to gain cooperation credit it must do the government’s job in finding the culpable individuals and turning them in); see also N. Richard Janis, *Taking the Stand: Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice is Being Destroyed* (Mar. 2005), available at [http://dcbat.org/for\\_lawyers/washington\\_lawyer/march\\_2005/stand.cfm](http://dcbat.org/for_lawyers/washington_lawyer/march_2005/stand.cfm) (criticizing the government’s emphasis on cooperation, alleging that prosecutors are given extraordinary powers over companies under investigation).

77. John Gibeaut, *Junior G-Men: Corporate Lawyers Worry that They’re Doing the Government’s Bidding While Doing Internal Investigations*, 89 A.B.A.J., 46, 46 (June 2003); see also N. Richard Janis, *Taking the Stand: Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice is Being Destroyed* (Mar. 2005), available at [http://dcbat.org/for\\_lawyers/washington\\_lawyer/march\\_2005/stand.cfm](http://dcbat.org/for_lawyers/washington_lawyer/march_2005/stand.cfm) (criticizing the government’s emphasis on cooperation, alleging that prosecutors are given extraordinary powers over companies under investigation).

78. David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 156-57 (2000).

79. *Id.* at 148, 156.

privileges and turning in culpable employees.<sup>80</sup> However, as evidenced by the collapse, in 2002, of Arthur Andersen LLP, one of the world's oldest and largest accounting firms, a criminal indictment instead of cooperation with the government can lead to a corporate death penalty.<sup>81</sup> Therefore, in similar cases, it is naïve to pretend that companies are free to choose between cooperation and indictment.<sup>82</sup> Often, the potential consequences of indictment and bankruptcy determine the choice.<sup>83</sup> The company surrenders under the government's powers, "and consequently, strip[s] [the] process of its adversarial nature."<sup>84</sup> In succumbing to the role of investigative agents for the government, companies may be creating equally threatening problems, including jeopardizing their relationship with their employees.<sup>85</sup>

The fiduciary employer-employee relationship would certainly be endangered if employees understood that their company's internal investigation was actually an effort to secure cooperation credit from the government at their expense.<sup>86</sup> In such a scenario, if trust were absent, both the accuracy of any information provided to the investigators, as well as future critical business information exchanges necessary for effective corporate decision-making would be questionable.<sup>87</sup>

Moreover, companies who seek to obtain information that will later be turned over to the government, in an effort to portray authentic cooperation, fail to advise employees that the content of their interviews for the purposes of internal investigations will be disclosed to the government.<sup>88</sup> They also tend to fail to provide counsel to employees subjected to such interviews.<sup>89</sup> It is therefore questionable whether such methods conform to constitutional

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80. See Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 610 (2004) (arguing that the waiver of privileges is voluntary and the arguments that the Thompson Memo principles erode the attorney-client privilege are overstated).

81. Silbert & Joannou, *supra* note 65, at 1229.

82. See *id.* (noting that today's companies' choice between "life and death" often means acting as government's agents in its investigations).

83. See Eric L. Talley, *Cataclysmic Liability Risk Among Big Four Auditors*, 106 COLUM. L. REV. 1641, 1648 (2006) (noting the negative impact of criminal indictments on a corporation's reputation to the point at which the corporation declares bankruptcy).

84. Silbert & Joannou, *supra* note 65, at 1229.

85. *Id.* at 1230.

86. Ellen S. Podgor, *White-Collar Cooperators: The Government in the Employer-Employee Relationship*, 23 CARDOZO L. REV. 795, 803 (2002).

87. See, e.g., Thomas G. Bost, *Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality*, 19 GEO. J. LEGAL ETHICS 1089, 1092 (2006) (pointing out reports from companies and corporate lawyers that corporate employees no longer are willing to communicate with corporate lawyers because they lack a reasonable assurance of confidentiality).

88. Silbert & Joannou, *supra* note 65, at 1232.

89. *Id.*

provisions.<sup>90</sup> According to the DOJ, these are not real concerns because only guilty employees would choose to refrain from being interviewed, while “[e]mployees who have only made mistakes will understand.”<sup>91</sup> Nevertheless, the slippery slope is apparent, especially since the employees may not know that the government is involved, or may lack knowledge as to the exact area of the government’s interest.<sup>92</sup> Under such premises, “innocent” employees could also face the risk of adverse employment action, as well as indictment for obstruction of justice, even if no federal agent was present during the employees’ interviews.<sup>93</sup> By effectively “deputizing” companies to act on behalf of the government, the company is said to act under “color of law” during interviews with its employees.<sup>94</sup> This interpretation follows from several developments within the context of white-collar crime investigations.<sup>95</sup> The Thompson Memo contained language implicitly stating that prosecutors, when assessing a company’s complete cooperation with the investigators, must take into account a company’s willingness to take certain punitive actions against employees and other agents during the time of the investigation.<sup>96</sup> The net result has

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90. See generally *id.* at 1225-26 (noting employees’ constitutional rights may be disregarded in attempts by corporations to avoid criminal indictments).

91. Comey Interview, *supra* note 6, at 3.

92. Pickholz & Pickholz, *supra* note 71, at 2. One of the criteria used by some federal prosecutors in determining whether there is “authentic” cooperation is whether the company kept the subject of the government’s interest from the employees during their interviews. *Id.*

93. *Id.*; see also Daniel Bookin et al., *Obstruction of Justice Under Computer Associates: Legal, Tactical and Ethical Implications for Attorneys Conducting Internal Investigations*, 1564 *PLI/Corp* 259, 263-64 n 3, 273 (Aug. 2006) (citing *United States v. Computer Assocs. Int’l, Inc.*, Cr. No. 04-837 (E.D.N.Y. 2004) and *United States v. Singleton*, CR-06-080, CR-04-514 (S.D. Tex. 2006)). These cases support the position that corporate counsel conducting internal investigations are “deputized” federal agents. *Id.* In both cases false, misleading statements and omissions to corporate counsel were criminalized under a statute that prohibits obstructing the work of federal agents. *Id.*

94. See Zornow & Krakaur, *supra* note 78, at 147 (referring to the “deputizing of ‘Corporate America’” though the shift in prosecutorial attitude, nowadays demanding full disclosure of all relevant evidence to the investigation of corporate malfeasance); see also Pickholz & Pickholz, *supra* note 71, at 2 (arguing that companies who conduct internal investigations with the intent to surrender any findings to the government act under “color of law” during employees’ interviews).

95. See Pickholz & Pickholz, *supra* note 71, at 2-3 (listing developments occurring in corporate prosecutions over the past five to eight years). Such developments include: (a) the Holder and Thompson Memoranda and the requirement of “authentic” cooperation; (b) the coercive threat of prosecution coupled with the overt or implied promise of leniency in exchange of complete cooperation; (c) the company’s understanding of these practical realities at the outset of the internal investigation and that the company will in fact be turning over its internal employee interview notes to the prosecutors; (d) the Hobson’s choice facing employees of giving an interview to their employer of being terminated; and (e) the potential for the employee to be criminally indicted for obstruction of justice or impeding a government investigation. *Id.*

96. See Thompson Memo, *supra* note 34, at Part VI.B. (stating that the Thompson Memo encourages prosecutors to deny cooperation credit to business organizations that assist or support “culpable employees and agents”).

become a demand for waiver of the employees' Fifth Amendment right against self-incrimination as a condition of continued employment.<sup>97</sup> Additionally, it was argued that it resulted in a waiver of the Sixth Amendment right to counsel, and the ability to be free from government interference in obtaining and using lawful resources in the preparation of a defense.<sup>98</sup> In 2006, the government responded with a slight revision to its practices.

### C. THE McNULTY MEMO

In the wake of increased criticism to the Thompson Memo, in December 2006, Deputy U.S. Attorney General Paul McNulty announced the revision of the Thompson Memo.<sup>99</sup> Although this new memorandum supersedes and replaces the Thompson Memo, the critical point will be its implementation by DOJ.<sup>100</sup> It is probably too early to predict whether the McNulty Memo differs significantly from its predecessors.

The McNulty Memo largely restates the principles of prosecution outlined in the Thompson Memo.<sup>101</sup> However, it has also introduced a different approach to prosecution requests for privileged materials and interference with the payment of attorney's fees.<sup>102</sup> With respect to the latter, the new policy states that "prosecutors generally should not take into account" advancement of legal fees as a sign of non-cooperation,<sup>103</sup> except in "extremely rare cases."<sup>104</sup> Further, the McNulty Memo advises prosecutors to consider such advancement only where "the totality of the circumstances show[s] that it was intended to impede a criminal investigation[,]" and adds a procedural requirement—the prosecutors must first obtain approval from the Deputy Attorney General.<sup>105</sup>

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97. See Silbert & Joannou, *supra* note 65, at 1228 (commenting on the DOJ's approach that companies that do not fire employees who refuse to be interviewed are not acting in their shareholders' interests).

98. See *United States v. Stein*, 435 F. Supp. 2d, 330, 361 (concluding that the right to be free from government interference in preparing a defense is part of our concept of fair play and justice); see also Mark H. Alcott, *Promoting Needed Reform, Defending Core Values*, 78 N.Y. ST. B.J. 5, 6 (Oct. 2006) (commenting that the government's attitude that a company that helps its employees to defend themselves is deemed uncooperative, constitutes an interference with constitutional and fundamental concepts of our legal system).

99. McNulty Memo, *supra* note 12, at 2.

100. SecActions.com, *The McNulty Memo Replaces Thompson—But Is There Any Real Change?*, <http://www.secactions.com/?p=128> (last visited May 15, 2007).

101. Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 316 (2007).

102. McNULTY MEMO, *supra* note 12, at Part VII.B.3.

103. *Id.*

104. *Id.* at VII.B.3, n.3.

105. *Id.*

These restrictions, however, may, in practice, have a limited effect, consequently frustrating the goals and benefits of the new policies. As the Memo explains, this new policy “is not meant to prevent a prosecutor from asking questions about an attorney’s representation of a corporation or its employees”<sup>106</sup> and that questions about “how and by whom attorney’s fees are paid” are “appropriate.”<sup>107</sup> Moreover, even if the Memo states that prosecutors cannot hold the advancement of legal fees against a corporate target except in very rare cases, it does not explicitly exclude the possibility that prosecutors may still look favorably on a corporation’s refusal to advance fees. Although the Memo contains the same prohibition as outlined in the Thompson Memo on counting advancement against a corporation when such is required by law or contract,<sup>108</sup> it does not provide any guidelines as to how prosecutors should treat a corporation that advances fees even when such advancement is not required by any statutory or contractual obligation. Therefore, it could be argued that the prohibition on considering advancement against a corporation target only applies when the advancement is obligatory.<sup>109</sup> Considering that business organizations facing federal investigations most probably want to avoid federal prosecution, allowing prosecutors to even raise the topic by asking questions regarding the advancement or grant preferential treatment to corporations that “voluntarily” refuse to advance legal fees may simply be enough of an incentive for corporations who want to curry favor with prosecutors to do so.<sup>110</sup>

Moreover the standard for allowing prosecutors to consider a corporation’s advancement of legal fees to its officers and employees—when advancement is done in furtherance of impeding the government’s investigation—may be too easily met.<sup>111</sup> It appears that prosecutors are afforded a rather broad discretion in concluding that a corporation attempts to obstruct a criminal investigation through advancement of legal fees to its officers and employees<sup>112</sup>—it is unclear what other type of conduct

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106. *Id.* at Part VII.B.3.

107. *Id.* at Part VII.B. n.4.

108. *Id.* at Part VII.B.

109. See Richard Janis, *The McNulty Memorandum: Much Ado About Nothing* (Feb. 2007), available at [http://www.dcbart.org.for\\_lawyers/resources/publications/Washington\\_lawyer/February\\_2007/stand.cfm](http://www.dcbart.org.for_lawyers/resources/publications/Washington_lawyer/February_2007/stand.cfm) (arguing that the McNulty Memo’s new policy that prosecutors generally should not hold the advancement of legal fees against a corporation is troublesome because in most cases corporations are permitted and not obligated to advance attorney’s fees to employees or agents under investigation).

110. SecActions.com, *supra* note 102.

111. *Id.*

112. Paul J. McNulty, Deputy Att’y Gen., U.S. Dep’t of Justice, Prepared Remarks at the Lawyers for Civil Justice Membership Conference Regarding the Department’s Charging Guidelines in Corporate Fraud Prosecutions (Dec. 12, 2006) available at



prosecutors are to consider under the totality of circumstances test. Thus, there is a risk that the government may conclude that the advancement of legal fees was improper just because the corporation has engaged in other types of conduct aimed at obstruction generally. Additionally, the new policy, although binding on the prosecutor during an investigation, does not provide any remedy per se if a prosecutor were to deviate from it,<sup>113</sup> which could further corrode the procedural requirements.

Nevertheless, Deputy Attorney General Paul J. McNulty maintains that prosecutors, although allowed to retain discretion in scrutinizing advancement of legal fees under the new Memo, will continue to exercise this discretion only in rare cases.<sup>114</sup> According to McNulty, the “advancement of attorneys’ fees has always been a rare consideration in [the government’s] corporate prosecutions.”<sup>115</sup> Time will tell whether the McNulty Memo is successful in returning the pendulum back to equilibrium in the prosecution of corporate malfeasance. Until then, the concerns earlier mentioned with respect to prosecutorial conduct under the Thompson Memo and possible violations of constitutional rights remain valid. The rights at issue rest at the core of our judicial system and their erosion in the corporate investigations context is alarming.<sup>116</sup> Therefore, discussion of corporate officers’ and employees’ constitutional rights in the context of corporate investigations becomes necessary.<sup>117</sup>

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[http://www.justice.gov/archive/dag/speeches/2006/dag\\_speech\\_061212.htm](http://www.justice.gov/archive/dag/speeches/2006/dag_speech_061212.htm) [hereinafter McNulty Remarks] (“[F]ee advancement can be considered where the totality of the circumstances show[s] that it was intended to impede a government investigation.”).

113. Marcia Coyle, *The McNulty Memo: Real Change, or Retreat?*, NAT’L L.J., Dec. 18, 2006, at 25.

114. McNulty Remarks, *supra* note 114.

115. *Id.* But see generally *United States v. Stein*, 435 F. Supp. 2d 330, 341-44 (S.D.N.Y. 2006) (criticizing the prosecutors’ scrutiny of the organization’s advancement of legal fees to its officers and employees); Nathan Koppel, *U.S. Pressures Firms Not to Pay Staff Legal Fees*, WALL ST. J., Mar. 28, 2006, at B1 (noting three cases where prosecutors reportedly scrutinized payments of attorney’s fees).

116. See generally ABA TASK FORCE REPORT, *supra* note 7, at 4-10 (expressing concern over the prosecutorial policies because they erode the constitutional and other rights of current and former employees).

117. *Id.*

### III. CONSTITUTIONAL PROTECTIONS IN LIGHT OF FEDERAL PROSECUTORIAL GUIDELINES FOR BUSINESS ORGANIZATIONS

Generally, employees cannot invoke the right against self-incrimination during a corporation's internal investigation.<sup>118</sup> However, because corporations often surrender the results from internal investigations to federal investigators in hopes of cooperation credit, the suggestion that employees should be advised of the right against self-incrimination prior to their interview is reasonable.<sup>119</sup> Moreover, the right to counsel may be affected by a corporation's decision not to advance legal fees or expenses to employees deemed "culpable" by the government.<sup>120</sup> This would probably not amount to any significant problems and could be considered as a corporation's prerogative.<sup>121</sup> However, when the corporation's decision to deny advancement is due to government interference, constitutional concerns arise.<sup>122</sup>

#### A. THE FIFTH AMENDMENT IN THE CORPORATE CONTEXT

The Fifth Amendment states that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."<sup>123</sup> Thus, within the criminal context, a defendant is afforded the right to refuse to testify against himself or herself.<sup>124</sup> The trier of fact is forbidden from drawing adverse inferences from that silence.<sup>125</sup> Further, the United States Supreme Court's definition of the right to silence includes not only the individual right not to involuntarily testify against himself or herself, but also the right not to answer questions, in either civil or criminal proceedings, which may incriminate him or her in future criminal proceedings.<sup>126</sup> Moreover, the Court has also stated that the privilege "protects against any disclosure that the

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118. John F. Savarese & Carol Miller, *Protecting Privilege and Dealing Fairly with Employees While Conducting an Internal Investigation*, 1367 PLI/Corp 1027, 1068 (Apr.-June 2003).

119. Silbert & Joannou, *supra* note 65, at 1231.

120. *See generally* United States v. Stein, 435 F. Supp. 2d. 330, 367-69 (S.D.N.Y. 2006) (finding employees' right to counsel was violated when the employer stopped advancing legal fees to several employees who in the DOJ's opinion were culpable of tax fraud).

121. *Id.*

122. *See id.* at 365 (explaining that the Stein court found the corporation's decision was due to pressure exercised by the DOJ).

123. U.S. CONST. amend. V.

124. *Leftkowitz v. Turley*, 414 U.S. 70, 77-78 (1973).

125. *See Griffin v. California*, 380 U.S. 609, 615 (1965) (prohibiting the judge and prosecutor from suggesting to the jury that defendant's silence can be used as substantive evidence of guilt).

126. *Leftkowitz*, 414 U.S. at 77 (citing *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924)).

witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”<sup>127</sup> To invoke Fifth Amendment protection, the defendant’s statements must be compelled, testimonial, and incriminating.<sup>128</sup>

For some of the Framers, the concept of “compelled” was tangential to torture.<sup>129</sup> In the context of corporate governmental investigations, the economic hardship and psychological pressure exercised upon employees who may want to exercise their right to silence could reach the torture analogy.<sup>130</sup> Moreover, it is questionable whether the government should be allowed to use employees’ statements given during internal investigations, especially when their constitutional rights are implicated.<sup>131</sup> However, prosecutors have been afforded a broad discretion; for example, the Thompson Memo has provided the ground for federal prosecutors’ expectations that corporate counsel will act as their deputies.<sup>132</sup>

It is well established that a business organization cannot assert a Fifth Amendment privilege, and employees cannot withhold corporate documents that may incriminate them as individuals.<sup>133</sup> Moreover, each employee owes a duty of cooperation to his or her employer, the expectation of which is broad enough to include the duty to consent to an interview with corporate counsel.<sup>134</sup> Nevertheless, the question becomes whether the employees’ Fifth Amendment right against self-incrimination is violated when the corporation is acting under “color of law” by conducting internal

127. *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972).

128. Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 904 (1995).

129. *Id.* at 865 n.20.

130. See Thomas O. Gorman, *An Outline: DOJ and SEC Standards on Cooperation*, 1581 PLI/Corp 887, 906 (Jan. 2007) (noting that because of the vagueness of the prosecutorial policies, the threat of termination would affect anyone remotely associated with the questionable conduct).

131. Thompson Memo Hearing, *supra* note 70, at 126 (statement of Former U.S. Att’y Gen. Edwin Meese). Former U.S. Attorney General Edwin Meese opines that the government should not be allowed to do indirectly what it is not allowed to do directly, referring to the phenomenon of “deputizing corporate America.” *Id.* (internal citation omitted).

132. *Id.*, at 135-36 (testimony of Mark B. Sheppard, Partner Sprague & Sprague).

[Corporate] counsel is expected to encourage employees to give statements without asserting their Fifth Amendment rights and without obtaining independent counsel. . . .

[And][i]f the employee refuses, he or she faces termination with no apparent recognition of the inherent unfairness of meting out punishment for the mere invocation of a constitutional right.

*Id.*

133. See, e.g., *Braswell v. United States*, 487 U.S. 99, 104-07 (1988) (holding corporate documents can be used against their custodians as evidence of culpability).

134. See Savarese & Miller, *supra* note 118, at 1068 (“[A] duty to cooperate obligates an employee to comply with reasonable directions from the employer during an internal investigation.”).

investigations.<sup>135</sup> This is especially alarming when the results are then turned over to the government in exchange for leniency, especially since the Fifth Amendment applies to the actions of a private entity that are found to be “fairly attributable” to the government.<sup>136</sup> Given the strong emphasis placed on “corporate cooperation,” it appears evident that, at least in some cases, a company has in effect no choice but to succumb to what it perceives to be government coercion.<sup>137</sup> Corporations are induced into trading their officers and employees for the federal prosecutors’ leniency in their charging decisions.<sup>138</sup> This presents significant implications for corporate employees as far as their constitutional rights are concerned.<sup>139</sup>

Interestingly, the DOJ does not appear to be hesitant or concerned about such results.<sup>140</sup> Instead, the “government now expects companies, in essence, to deputize law firms and accounting firms to do the Government’s work for them,” and to demand a waiver of the employee’s Fifth Amendment right against self-incrimination as a condition of continued employment.<sup>141</sup> Such an approach is contrary to the fact that the United States Supreme Court has found that the government itself cannot make such a demand on its own employees.<sup>142</sup> However, in the context of corporate investigations, the government still equates employees’ statements to corporate counsel during internal investigations to statements made to the government itself.<sup>143</sup> Therefore, it seems logical that there should be no legitimate basis for penalizing an employee, either through termination or

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135. See Bookin et al., *supra* note 93, at 273-76 (considering the ramifications of internal investigations on the employees’ Fifth Amendment rights).

136. Pickholz & Pickholz, *supra* note 71, at 3 (quoting *D.L. Cromwell Inv., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161 (2d Cir. 2002)). The *Cromwell* court held that a sufficiently close nexus between the actions of the private entity and the government exists “where the state has exercised coercive power [over a private decision] or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.” *D.L. Cromwell Inv., Inc.*, 279 F.3d at 161.

137. See Mary Joe White, *Corporate Criminal Liability: What Has Gone Wrong?*, 1517 *PLI/Corp* 815, 820 (Nov. 2005) (noting that some prosecutors, often at the beginning of an investigation, automatically “grade” a corporation’s cooperation with the investigators).

138. Silbert & Joannou, *supra* note 65, at 1225.

139. *Id.*

140. See Wray & Hur, *supra* note 19, at 1170-71 (observing that federal investigators will continue to pressure companies).

141. Janis, *supra* note 77.

142. *Garrity v. New Jersey*, 385 U.S. 493, 497-98 (1967) (holding that use of the threat of discharge to secure incriminatory evidence against an employee is not allowed) (citing *Slochower v. Bd. of Educ. of City of N.Y.*, 350 U.S. 551, 641 (1956)). The *Slochower* court held a public school teacher could not be discharged for invoking his Fifth Amendment rights when questioned by a Congressional committee. See *Slochower*, 350 U.S. at 557-58 (“The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury.”).

143. Pickholz & Pickholz, *supra* note 71, at 2.

refusal of advancement of legal fees, due to an assertion of his or her Fifth Amendment privilege against self-incrimination.<sup>144</sup>

## B. THE SIXTH AMENDMENT IN THE CORPORATE CONTEXT

The Sixth Amendment right to counsel is a vital safeguard in criminal proceedings.<sup>145</sup> Given the complicated nature of federal corporate investigations, employees have an extreme interest in assuring an effective defense.<sup>146</sup> Determining whether an employee benefits from an effective defense is measured by considering general principles, coupled with the right to counsel.<sup>147</sup> This analysis is connected to the concern that corporations' denial of advancement of legal fees at the "whim" of the government, in effect, violates the right to counsel.<sup>148</sup>

### 1. *General Principles Coupled with the Right to Counsel*

The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his defence."<sup>149</sup> While the right to counsel clause has been found to include a right to competent counsel,<sup>150</sup> it does not entitle a criminal defendant to have "an unqualified right to the appointment of counsel of his own choosing."<sup>151</sup> Nevertheless, the United States Supreme Court has held that one element of the Sixth Amendment right to counsel is the right of a defendant who does not require appointed counsel to choose who will represent him.<sup>152</sup> This right, however, is secured provided that the defendant has the means to hire counsel at his or her own choosing, or the chosen

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144. *Id.*

145. See Silbert & Joannou, *supra* note 65, at 1231 (arguing that it is only when employees are fairly advised by counsel representing their interests, that they can make an informed choice as to their participation in the investigations).

146. See, e.g., United States v. Stein, 435 F. Supp. 2d 330, 362 (S.D.N.Y. 2006) (finding that to prepare and try a case involving corporate misconduct requires substantial resources).

147. See Strickland v. Washington, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to the effective assistance of counsel.").

148. See, e.g., Stein, 435 F. Supp. 2d at 367 (holding that the government's interference with the defendants' advancement of legal fees violated their constitutional right to counsel).

149. U.S. CONST. amend. VI; see Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1637-57 (2003) (presenting the evolution of the right to counsel).

150. See Strickland, 466 U.S. at 686 (1984) (recognizing that "the right to counsel is the right to the effective assistance of counsel"); see also Stephen G. Gilles, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. CHI. L. REV. 1380, 1380 (1983) (arguing that the United States Supreme Court's interpretation of the Sixth Amendment includes the right to a counsel capable of mounting a competent defense).

151. Morris v. Slappy, 461 U.S. 1, 10 (1983).

152. United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2561 (2006).

counsel is willing to represent the defendant even though he or she cannot afford to pay.<sup>153</sup> In *Caplin & Drysdale, Chartered v. United States*,<sup>154</sup> the United States Supreme Court considered a defendant's ability to choose counsel imposed by economic constraints and the extent to which the right to counsel includes the right to use a third party's assets.<sup>155</sup> Thus, a claim of violation of the Sixth Amendment right to counsel would probably be unsuccessful if the main argument were based on lack of funds without a showing of a right to those funds.<sup>156</sup> Further, a claim of a Sixth Amendment right to counsel violation generally requires a showing of prejudice.<sup>157</sup>

The United States Supreme Court in *United States v. Gonzalez-Lopez*,<sup>158</sup> held that the requirement of showing prejudice established in *Strickland* is not necessary where the defendant has been deprived of the privilege of choosing counsel.<sup>159</sup> The Court found that the:

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.<sup>160</sup>

As the holding indicates, this could provide some support for corporate defendants who claim that by being denied payment of their legal representation, they are deprived of counsel of choice.<sup>161</sup> Such an argument would be fairly persuasive, especially where the advancement was part of

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153. *Id.* (citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25 (1989)).

154. 491 U.S. 617 (1989).

155. *Caplin*, 491 U.S. at 626. The Supreme Court concluded that the right to counsel under the Sixth Amendment "does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of . . . counsel.'" *Id.* "A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice." *Id.*

156. *Id.*

157. *Strickland v. Washington*, 466 U.S. 688, 687 (1984). The Supreme Court held that claims of ineffective assistance of counsel are governed by a two-prong test requiring the defendant to show: (1) that the attorney's performance was deficient, falling below professional standards of competence; and (2) that the deficient performance prejudiced the defense. *Id.*

158. 126 S. Ct. 2557 (2006).

159. *Gonzalez-Lopez*, 126 S. Ct. at 2563.

160. *Id.*

161. *See, e.g., United States v. Stein*, 435 F. Supp. 2d 330, 369 (S.D.N.Y. 2006) (finding that the government had interfered with the defendant's right to be represented by counsel of choice without a showing of prejudice).

the employment contract.<sup>162</sup> However, the Sixth Amendment right to counsel attaches only at a certain stage in a criminal procedure, which may make it more difficult in cases where the legal fees were incurred prior to this critical stage.<sup>163</sup>

The United States Supreme Court previously interpreted the Sixth Amendment right to attach at the time of formal judicial proceedings.<sup>164</sup> With respect to the government's conduct post-indictment, the Supreme Court has held that "to refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumption upon which [this Court] has operated in Sixth Amendment cases."<sup>165</sup> However, the question of government interference, as per the federal prosecutorial guidelines, could occur prior to an indictment, thus begging the question of whether the right to counsel vests pre-indictment.<sup>166</sup> For white-collar practitioners such a right would be invaluable, especially because of the common feeling that white-collar crime cases are either won or lost during the pre-indictment stage.<sup>167</sup> Nevertheless, there is no court decision recognizing that such a right is guaranteed under the Sixth Amendment.

Therefore, the DOJ's approach in corporate investigations presents society with a dilemma concerning the right to counsel in governmental investigations of business organizations: protection of employees' civil rights or reduction of corporate fraud at any cost.<sup>168</sup> This dilemma specifically impacts the right to counsel in the federal investigations of business

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162. *Id.*

163. See generally Thompson Memo Hearing, *supra* note 70, at 136 (testimony of Mr. Mark B. Sheppard, Partner, Sprague & Sprague) (testifying about the importance of effective assistance of counsel in the investigatory stage).

164. See *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (holding that the Sixth Amendment right to counsel does not attach until after initiation of adversary judicial proceedings); *United States v. Gouveia*, 467 U.S. 180, 185-90 (1984) (holding that the right to appointment of counsel attaches only at or after institutions of adversary judicial proceeding); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion) (finding that a defendant's right to counsel attaches only at or after time that adversary judicial proceedings have been initiated against him "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment"); *Massiah v. United States*, 377 U.S. 201, 205-07 (1964) (holding a defendant has the right to counsel from the time of arraignment).

165. *United States v. Wade*, 388 U.S. 218, 237-38 (1967).

166. Stephanie A. Martz, *Report From the Front Lines: The Thompson Memorandum and the KPMG Tax Shelter Case*, WALL ST. LAW., Aug. 2006, at 5.

167. See Thompson Memo Hearing, *supra* note 70, at 136 (testimony of Mark B. Sheppard, Partner, Sprague & Sprague) (arguing that effective assistance of counsel in the investigatory state is critical).

168. See Wray & Hur, *supra* note 19, at n.19 (observing that after the issuance of the Thompson Memo, the number of corporate criminal prosecutions decreased); see generally *United States v. Stein*, 435 F. Supp. 2d 330, 361, 367 (S.D.N.Y. 2006) (finding certain aspects of the Thompson Memo unconstitutional).

organizations.<sup>169</sup> When assessing the extent of a company's cooperation, the federal prosecutorial guidelines have permitted prosecutors to consider whether the company is protecting employees under investigation through the advancement of legal fees.<sup>170</sup> In *United States v. Stein*, the defendants claimed that their employer-company's decision not to advance such fees was induced by governmental pressure and therefore amounted to a violation of the right to counsel.<sup>171</sup> The defendants' main argument was that they were deprived of lawful resources, which they needed in order to mount an effective defense given the complicated nature of the case.<sup>172</sup>

The issue of advancement does not always have to give rise to claims of constitutional rights violations.<sup>173</sup> Often, the advancement of legal fees or indemnification is regulated internally within the corporation.<sup>174</sup> Both the Thompson Memo and McNulty Memo recognize that prosecutors should not hold the advancement against the corporation when such is done pursuant to state law or contractual obligation.<sup>175</sup>

## 2. *Advancement of Legal Fees in Theory and Practice*

Advancing legal fees differs from indemnification, which means the reimbursement by the company to its functionaries of liabilities incurred in the course of service to the company.<sup>176</sup> Advancement means the company pays expenses incurred by an employee in advance of the final disposition of a legal matter upon the employee's agreement to repay such amount.<sup>177</sup> Moreover, absent a charter, bylaw, or contractual provision to the contrary, the advancement of expenses prior to the final disposition of the legal action is permissive, not mandatory.<sup>178</sup>

The Delaware Supreme Court, in *Homestore, Inc. v. Tafeen*,<sup>179</sup> held that advancing legal fees is an integral part of good corporate

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169. See *Stein*, 435 F. Supp. at 367 (finding that government violated the employees' right to counsel issuing memorandum providing that advancement of legal fees would be considered a negative factor in its investigation of the employer).

170. Thompson Memo, *supra* note 34, at Part VI.B.

171. *Stein*, 435 F. Supp. 2d at 336.

172. *Id.* at 367.

173. See *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 212 (Del. 2005) (considering the Delaware indemnification statute allowing corporations to specify by bylaw or contract the terms and conditions upon which advancement of legal fees may occur).

174. *Id.*

175. See Thompson Memo, *supra* note 34, at n.4; McNulty Memo, *supra* note 12, at Part VII.B.3.

176. Savarese & Miller, *supra* note 118, at 1075.

177. *Id.* at 1077.

178. *Id.*

179. 888 A.2d 204 (Del. 2005).



governance.<sup>180</sup> By providing corporate officers and directors with funds for the costs incurred in investigations and litigation related to their conduct on behalf of the company, a company is acting in accordance with the principles of good corporate governance.<sup>181</sup> Moreover, the practice of advancement of legal fees is considered an incentive for attracting competent individuals into corporate service.<sup>182</sup> A company's advancement of legal fees may not be construed as a blank check offered unconditionally to "culpable" employees.<sup>183</sup> Nevertheless, the DOJ does not appear to recognize the fact that a company normally would require the employee for whom it advances legal fees, to repay such advancements in the event the employee is not entitled to such.<sup>184</sup>

In a footnote, the Thompson Memo's commandment, with respect to the advancement of legal fees, did state that in some instances a company may be required to advance such fees either under its bylaws or state law.<sup>185</sup> A similar provision is included in the McNulty Memo.<sup>186</sup> Also, the Holder Memo contained a similar provision.<sup>187</sup> Nevertheless, Holder's approach to the advancement issue had been a target of criticism as undermining a legal, ethical, and useful practice.<sup>188</sup>

A decision to advance fees often must be made before there is a sufficient factual basis to allow a company to assess the "culpability" of an employee.<sup>189</sup> Therefore, critics argued that the Holder approach could lead companies to take a defensive approach and prejudge an employee's criminal intent and conduct, thereby limiting the company's exercise of discretion to advance fees.<sup>190</sup> Moreover, prosecutors often abused the Holder approach by interfering with corporate employees' ability to retain competent

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180. *Homestore, Inc.*, 888 A.2d at 211.

181. *See id.* (finding that high-quality corporate services are ensured by protecting corporate officers' and employees' personal financial resources from exhaustion by legal expenses incurred during an investigation or litigation resulting from the rendering of such services).

182. *Id.*; Dale A. Osterle, *Limits on a Corporation's Protection of Its Directors and Officers from Personal Liability*, 1983 WIS. L. REV. 513, 514-16.

183. David H. Kristenbroker et al., *Criminal and Civil Investigations: United States v. Stein and Related Issues*, 1557 PLI/Corp 483, 493 (Sept. 2006).

184. *See id.* (pointing out that the DOJ is somewhat conditioned by its "increasingly aggressive anti-indemnification policies").

185. Thompson Memo, *supra* note 34, n.4. "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." *Id.*

186. McNulty Memo, *supra* note 12, at Part VII.B.3.

187. Holder Memo, *supra* note 22, at VII.B.3, n.3.

188. American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 335-36 (2003).

189. *Id.*

190. *Id.*

counsel absent financial support from their employer, thus gaining a strategic advantage in the investigations.<sup>191</sup>

Prosecutors are obligated not to interfere with an individual's legal representation, particularly in a criminal matter.<sup>192</sup> The United States Supreme Court in *Berger v. United States*,<sup>193</sup> held:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartiality is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.<sup>194</sup>

In light of this, white-collar criminal defense lawyers were unhappy with the Holder Memo's approach to the advancing of legal fees.<sup>195</sup> They argued that the Holder Memo's approach created a framework that allowed a prosecutor to interfere with an employee's ability to obtain a well-qualified lawyer, which thereby undermines the interests of justice.<sup>196</sup> These concerns persist because the newer federal prosecutorial guidelines have not changed the methodology advanced by their predecessor.<sup>197</sup> The concerns were further discussed in the *Stein* case, which has since given rise to debates also in the United States Senate.<sup>198</sup>

### C. UNITED STATES V. STEIN (I)

In *United States v. Stein*, the United States District Court for the Southern District of New York showed a strong dissatisfaction with the Thompson Memo's approach to the advancement of legal fees.<sup>199</sup> "*Stein* represents the first time the constitutionality of the Thompson Memo or its

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191. *Id.*

192. *Id.* at 338 n.128 (explaining that under the McDade Amendment from 1998, a federal prosecutor must adhere to state ethics rules (citing 28 U.S.C. § 530B(a))).

193. 295 U.S. 78 (1935).

194. *Berger*, 295 U.S. at 88.

195. American College of Trial Lawyers, *supra* note 188, at 338.

196. *Id.*

197. *See generally* Janis, *supra* note 77 (arguing that no positive effects flow from the Thompson Memo); *see also* Claudius O. Sokenu, *The Current Enforcement Environment and the Corporate Response*, 1671 PLI/Corp 331, 368 (Aug. 2007) (identifying the "carrot and stick" approach practiced under the Holder and Thompson Memos, which rewards cooperation and punishes non-compliance).

198. *See, e.g.*, Thompson Memo Hearing, *supra* note 70, at 124 (statement of Former Att'y Gen., Edwin Meese, III) (discussing the *Stein* decision).

199. *United States v. Stein*, 435 F. Supp. 2d 330, 330-31 (S.D.N.Y. 2006). The court dismissed almost all of the government's legal arguments. *Id.*

predecessor has been litigated in federal court.”<sup>200</sup> In essence, the issue before the court was whether a company that refuses to advance legal fees to employees under investigation for corporate fraud, in an effort to receive cooperation credit, amounts to a denial of employees’ constitutional rights.<sup>201</sup> The court answered this question affirmatively, finding that the Fifth and Sixth Amendments protect a defendant’s right to obtain and use resources lawfully available to the defendant, free of knowing and reckless government interference.<sup>202</sup>

### 1. *Facts*

In 2002, the Internal Revenue Service (IRS) referred a criminal investigation of Klynveld Peat Marwick Goerdeler (KPMG) to the DOJ.<sup>203</sup> Prior to the referral, the IRS had conducted investigations of tax shelters created by KPMG.<sup>204</sup> The DOJ referred the case to the United States Attorney’s Office for the Southern District of New York to determine whether to indict KPMG and the alleged co-conspirators.<sup>205</sup> KPMG’s lawyers went to great lengths to portray to federal prosecutors that it fully cooperated with the investigation, in order to convince the government not to indict the firm.<sup>206</sup> In the negotiating process, prosecutors asked the KPMG lawyers whether KPMG intended to pay the attorney’s fees of current and former employees under investigation.<sup>207</sup>

The court in *Stein* stated that prosecutors “deliberately, and consistent with DOJ policy, reinforced the threat inherent in the Thompson Memorandum” regarding payment of attorney’s fees.<sup>208</sup> KPMG reacted by setting a limit to the amount of attorney’s fees that it would provide for employees in advance and by establishing policy that payment of fees would stop if the government indicted the employee.<sup>209</sup> A short time after KPMG signed a Deferred Prosecution Agreement (hereinafter Agreement)

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200. Lawrence J. Zweichfach & Zachary S. Taylor, *United States v. Stein and the Advancement of Attorney’s Fees: The Thompson Memorandum Under a Microscope*, 1557 PLI/Corp 903, 907 (Sept. 2006).

201. *See Stein*, 435 F. Supp. 2d at 335 (stating that the issue before the court “arises at an intersection of three principles of American law”).

202. *Id.* at 372.

203. *Id.* at 338.

204. *Id.*

205. *Id.* at 339.

206. *Id.* at 341-42.

207. *Id.* at 342.

208. *Id.* at 352.

209. *Id.*

with the government, the targeted employees were indicted, and as agreed, KPMG stopped paying their legal fees.<sup>210</sup>

In January 2006, the indicted KPMG employees asked the court to dismiss their indictments.<sup>211</sup> They claimed their constitutional rights had been violated as a result of the prosecutors' improper interference with KPMG's practice of advancing attorney's fees.<sup>212</sup> The court ordered a hearing on the issue of whether the evidence showed that the government interfered with and affected KPMG's decisions with respect to advancing legal fees.<sup>213</sup>

## 2. *Summary of the Defendants' Legal Arguments*

Stein and the other defendants asserted that federal prosecutors used the Thompson Memo in their negotiations with KPMG to frighten the firm into ending its longstanding policy of paying its partners' and employees' legal fees in proceedings arising from conduct within the scope of their employment.<sup>214</sup> The defendants strongly criticized the Thompson Memo in their briefs.<sup>215</sup> Defendant Stein argued that the prosecutors lacked any clear standard for their determination of who is a "culpable" employee not entitled to fee advancement.<sup>216</sup> Instead, the prosecutors are free to use their own criteria as to what constitutes a "culpable" employee.<sup>217</sup> In sum, the defendants alleged violation of their Fifth and Sixth Amendment rights.<sup>218</sup> Their arguments built upon the perceived shortfalls of the Thompson Memo and the prosecutors' conduct governed by it.<sup>219</sup>

### a. The Fifth Amendment Violation

The main argument concerning the alleged violation of the right to a fair trial revolved around the Thompson Memo and the particular conduct of the prosecutors in the case.<sup>220</sup> The defendants' claims of Fifth

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210. *Id.* at 349-50.

211. *Id.* at 350.

212. *Id.*

213. *Id.* at 352.

214. Brief of Petitioners-Defendants at 4, *United States v. Stein*, No. S1 05 Cr. 888 (S.D.N.Y. Jan. 12, 2006) [hereinafter Brief of Petitioners-Defendants].

215. *See, e.g., id.* at 14 (arguing that the prosecution violated their constitutional rights when it acted in accordance with the Thompson Memo).

216. Brief of Petitioner-Defendant at 22-23, *United States v. Stein*, No. S1 05 Cr. 888 (S.D.N.Y. May 22, 2006) [hereinafter Defendant Stein's Brief].

217. *Id.*

218. Brief of Petitioners-Defendants, *supra* note 214, at 14-19.

219. *Id.*

220. *See, e.g.,* Defendant Stein's Brief, *supra* note 216, at 6 (arguing that the government violated both substantive and procedural due process).

Amendment infringement were premised on the belief that they had a constitutionally protected property interest in the advancement of fees.<sup>221</sup> Thus, the defendants argued that the government's conduct amounted to a "gross abuse of governmental authority" violating their substantive due process rights.<sup>222</sup> However, defendant Stein argued in the alternative that, even if there was no violation of substantive due process, the government failed to give him adequate notice required under the procedural due process.<sup>223</sup>

b. The Sixth Amendment Violation

Defendant Stein acknowledged that "the Sixth Amendment right to counsel typically attaches at indictment."<sup>224</sup> Nevertheless, he argued that the government imposed an impermissible burden on this right by interfering with his ability to retain and fund attorneys at critical stages of the investigation.<sup>225</sup> According to Stein, the evidence demonstrated that the government invoked the Thompson Memo after being told by KPMG that the firm was unsure of its obligations to pay fees.<sup>226</sup> The government allegedly informed KPMG that it would "microscopically scrutinize any discretionary decision to pay fees to persons who . . . were 'culpable.'"<sup>227</sup> Further, defendant Weisner maintained, "that the government's interference with defendants' rights, although starting prior to the initiation of formal charges, was a continuing violation since the withholding of fees continued post-indictment."<sup>228</sup>

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221. *Id.* at 6-7. Defendant Stein argued that a contract implied-in-fact existed between the individual defendants and KPMG by virtue of the firm's longstanding policy of always advancing fees under similar circumstances. *Id.* at 8. In Stein's case there was an express contractual obligation made by KPMG to pay his legal fees under the terms of his separation agreement. *Id.* at 12.

222. *Id.* at 6 (quoting *Harlen Ass. v. Inc. Village of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001)).

223. *Id.* at 24.

224. *Id.* at 17.

225. *Id.* Stein argued that even if the defendants may not have been entitled to the assistance of counsel under the Sixth Amendment during the investigatory phase, the government was not authorized to interfere with their ability to retain counsel through contractual arrangements with KPMG. *Id.*

226. Defendant Stein's Brief, *supra* note 216, at 21.

227. *Id.* (arguing that the government's express warning to KPMG with respect to the issue of fee advancement, was that "misconduct cannot be rewarded").

228. *Zweichfach & Taylor*, *supra* note 200, at 910. Defendant Weisner argued "under *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), that the right to counsel attached under the Fifth Amendment when the prosecutors determined that the defendants were 'culpable' and, guided by the Thompson Memorandum, coerced KPMG not to advance them legal fees." *Id.*

The defendants were clear in their arguments. The prosecutors' conduct during the negotiations with KPMG amounted to coercing KPMG into stopping the advancement of legal fees.<sup>229</sup> Thus, in their view, the federal prosecutors had abused their power and discretion.<sup>230</sup>

### 3. *Summary of the Government's Legal Arguments*

The government denied that its alleged conduct amounted to such outrageous conduct that it shocked the conscience, as is the required standard for a constitutional violation.<sup>231</sup> It argued that, except with regard to defendant Stein, the claim of violation of procedural due process must fail because the other defendants could not establish the deprivation of a cognizable property interest in the advancement of fees.<sup>232</sup> Moreover, the Government contended that given the nature of KPMG's partnership agreement's integration clause, the defendants' claim of a separate implied-in-fact contract to advance legal fees must fail.<sup>233</sup>

The government pointed out that the right to counsel does not attach until the initiation of formal judicial proceedings.<sup>234</sup> Further, no court has recognized a continuing or "anticipatory" violation based on pre-indictment government conduct.<sup>235</sup> Moreover, the government interpreted and applied federal forfeiture case law as not including a defendant's "right" to access third-party funds for his defense.<sup>236</sup> Instead, the government argued that a defendant could only reach so far as his own funds will allow in obtaining the assistance of counsel.<sup>237</sup> In the alternative, the government argued that even if a Sixth Amendment violation had occurred, the defendants could not show, as required by *Strickland*, that they were prejudiced by the violation, especially because they have been represented by competent counsel throughout the proceedings.<sup>238</sup>

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229. Brief of Petitioners-Defendants, *supra* note 214, at 4.

230. *Id.* at 9.

231. Brief of Petitioner-Appellee at 51, *United States v. Stein*, No. S1 05 Cr. 88 (S.D.N.Y. May 22, 2006) [hereinafter Government's Post-Hearing Memorandum].

232. *Id.* at 54.

233. *Id.* at 57.

234. *Id.* at 75.

235. *Id.* at 36.

236. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 622 (1989); *United States v. Monsanto*, 491 U.S. 600, 601 (1989).

237. Government's Post-Hearing Memorandum, *supra* note 231, at 34.

238. *Id.* at 47.

#### 4. *Summary of the Arguments of the Amici Curiae*

An impressive list of amici curiae filed several briefs in support of the defendants.<sup>239</sup> The New York Council of Defense Lawyers and the National Association of Criminal Defense Lawyers supported the defendants' claim that the federal prosecutors' conduct violated both the Fifth and Sixth Amendments.<sup>240</sup> The main argument was that the Sixth Amendment right to counsel attached when the government coerced KPMG to withhold legal fees from individuals that the government deemed "culpable."<sup>241</sup> Accordingly, the amici argued that the prosecutors, through the Thompson Memo, unduly interfered with this interest, thus depriving the defendants of counsel of choice.<sup>242</sup> Due to the complex nature of the case, the amici contended that the government should have an equal concern for justice, which could only be ensured by subjecting the government's case to the probing of a skilled counsel for the defense.<sup>243</sup>

Further, the Securities Industry Association, the Association of Corporate Counsel, the Bond Market Association, and the Chamber of Commerce of the United States of America filed an amici curiae brief in support of the defendants.<sup>244</sup> The amici disapproved of the government's approach toward advancement of legal fees as evidenced by the Thompson Memo.<sup>245</sup> Additionally, they argued that without the advancement of fees, the prospect of indemnification does little to assist defendants to secure effective representation.<sup>246</sup>

#### 5. *The Court's Decision*

The Federal District Court made numerous findings. First, the court concluded that KPMG departed from its settled practice of advancing legal fees and expenses incurred in investigations and cases to its officers and employees due to the government's approach spelled out in the Thompson

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239. The list included: New York Council of Defense Lawyers (NYCDL); National Association of Criminal Defense Lawyers (NACDL); Securities Industry Association; Association of Corporate Counsel (ACC); Bond Market Association; Chamber of Commerce of the United States of America.

240. Brief for the New York Council of Defense Lawyers and the National Association of Criminal Defense Lawyers, as Amici Curiae Supporting Defendants, *United States v. Stein*, 435 F. Supp. 2d 330 (2006) (No. S1 05 Crim. 888) [hereinafter Brief of Amici Curiae].

241. *Id.* at 10.

242. *Id.* at Part I.

243. *Id.*

244. Brief for the Securities Industry Association, et al., as Amici Curiae Supporting Defendants, *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006) (No. S1 05 Cr. 888).

245. *See generally id.* at 12 (discussing the advantages of fee advancement).

246. *Id.*

Memo.<sup>247</sup> Second, the court found that the United States Attorney's Office reinforced the inherent threat in the Thompson Memo with respect to KPMG's inquiry as to whether payment of legal fees would be held against it.<sup>248</sup> Third, the court concluded that the government's conduct during the negotiations with KPMG was apparent evidence of the government's desire to minimize the involvement of defense attorneys.<sup>249</sup> The government overreached in interpreting that the Thompson Memo permitted prosecutors to instruct KPMG as to how to advise its employees about their needs for legal representation, and encouraged KPMG to depart from well-established past practice in paying fees.<sup>250</sup> Fourth, the court found that the government applied direct pressure on KPMG and that the firm, as a consequence, decided to cut off all payments of legal fees and expenses to anyone who was indicted and to limit and condition such payments prior to indictment upon cooperation with the government.<sup>251</sup> Thus, the court found that the government violated the Fifth and Sixth Amendments by causing KPMG to cut off payments of legal fees and other defense costs upon indictment of the individual defendants.<sup>252</sup>

After noting the significant importance of a defendant's right to fairness in the criminal process, the court thoroughly reviewed the Due Process Clause requirements.<sup>253</sup> The Federal District Court also maintained that because the consequences of a failed defense would negatively affect a defendant, there is a heightened need for ensuring fairness in criminal proceedings.<sup>254</sup> The court was clearly concerned with the government's conduct in the case at hand.<sup>255</sup>

Regarding the alleged Fifth Amendment violation, the court agreed with the defendants' position that the particular intricate nature of the case required "substantial resources."<sup>256</sup> The court also agreed that the

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247. United States v. Stein, 435 F. Supp. 2d 330, 352 (S.D.N.Y. 2006).

248. *Id.*

249. *Id.* at 353.

250. *Id.*

251. *Id.*

252. *Id.* at 356.

253. *Id.* at 356-59.

254. *Id.* at 358.

255. *Id.* The *Stein* court was direct yet subtle in its criticism of the government's conduct evidenced by its choice of words. *Id.* For example, it stated that in criminal proceedings "the defendant [must] be firmly in the driver's seat, and that the prosecution not be a backseat driver." *Id.*

256. *Id.* at 362 n.163. Judge Kaplan calculated roughly that a six-month trial of 117 days where a defendant was represented by a single lawyer, who devoted eight hours for each trial day at a cost of \$400 per hour, simply to attend the trial would cost \$375,000. *Id.* However, given the five to six million pages of documents produced by the government, and the required time to



government interfered with the defendants' ability to obtain resources they would otherwise have had.<sup>257</sup> First, the court found that the provision in the Thompson Memo directing prosecutors to consider the advancement of legal fees to employees as indicative of corporate non-cooperation imposes an economic punishment before anyone has been found guilty of anything.<sup>258</sup> According to the court, this was not a legitimate government interest but "an abuse of power."<sup>259</sup> Second, the court found the language of the provision to be too broad because the advancement of fees can be interpreted as "weigh[ing] against an organization independent of whether there is any 'circling of the wagons.'"<sup>260</sup> Finally, the court rejected the government's argument that payment of legal fees is "relevant to gauging the extent of a company's cooperation."<sup>261</sup> In accordance with the policy argument presented by the amici curiae, the court found that cooperation and advancement of fees are not necessarily inconsistent with each other.<sup>262</sup> In conclusion, the court found that this particular provision of the Thompson Memo excessively burdens the constitutional rights of the individual defendants, whose ability to defend themselves is impaired, and therefore violates the Due Process Clause.<sup>263</sup>

The court further rejected the government's claim that the individual defendants did not have any Sixth Amendment rights in this case.<sup>264</sup> It found that the approach to advancement of fees, as contemplated by the Thompson Memo, undermined the proper functioning of the adversary process because it devalued "partisan advocacy on both sides of a case."<sup>265</sup> Further, the court held that the chain of events set in motion prior to indictment had an actionable post-indictment effect.<sup>266</sup> Ultimately, the court found that the government had interfered with the defendants' rights

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prepare an appropriate defense, he thought it would be more reasonable to assume that even a minimal defense of this case could cost \$500,000 to \$1 million, if not significantly more. *Id.*

257. *Id.* at 362.

258. *Id.* at 363.

259. *Id.*

260. *Id.*

261. *Id.* at 364.

262. *Id.* "[A] company may pay at the same time that it does its best to bare its corporate soul, stands at the government's beck and call to provide information and witnesses, and does a myriad of other things to aid the government and clean the corporate house." *Id.*

263. *Id.* at 364-65.

264. *Id.* at 366-67.

265. *Id.* at 368.

266. *Id.* at 366. "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." *Id.*

to be represented as they choose, subject only to the constraints imposed by the resources lawfully available to them.<sup>267</sup>

### 6. *Implications of the Stein Decision*

The Federal Court's June 2006 decision fanned the flame of criticism of the Thompson Memo.<sup>268</sup> However, the decision is not binding on other courts, and applies only where a company has legal discretion to advance attorney's fees.<sup>269</sup> Even if it is unclear what the *Stein* decision's long-term implications will be, for now, it should be noted that it is considered a useful guide for business organizations and corporate counsel contemplating an internal investigation of suspected misconduct and potential criminal prosecution.<sup>270</sup> The decision somewhat levels the playing field between competing considerations of employees' constitutional rights and companies' self-preservation interests to cooperate with a federal criminal investigation to avoid a corporate "death sentence."<sup>271</sup>

Nevertheless, the DOJ's corporate prosecutorial guidelines also present non-constitutional concerns.<sup>272</sup> The demise of Arthur Andersen presents a good example of the consequences of prosecutors' aggressive approach to criminal investigations.<sup>273</sup> In light of this, public policy considerations may call for a softer approach for the benefit of society at large.<sup>274</sup>

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267. *Id.*

268. *See, e.g.*, ABA TASK FORCE REPORT, *supra* note 7, at 10 (arguing that in addition to the waiver provisions, the Thompson Memo provision dealing with the advancement of legal fees strikes at the core of our adversarial system of justice).

269. A corporation may be required to advance legal fees and expenses by its policies, by-laws or employment contracts. *See, e.g.*, Thompson Memo, *supra* note 34, at VII.B. n.4. In such cases, the government is not permitted to take the advancement into consideration in its charging decision. *See id.* (listing the situations when prosecutors should not take advancement into account).

270. Rebecca Walker, *The Thompson Memo: Implications of the Stein Decision for Corporate Compliance*, 1561 PLI/Corp 253, 255 (Sept. 2006).

271. *Id.* at 261.

272. *See* John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 632-33 (2005) (enumerating five ethical dilemmas for businesses).

273. *See infra* Part IV.A. (discussing possible consequences to the federal government's aggressive pursuit of corporate misconduct).

274. *See generally*, Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 537 (2006) (arguing for a narrower standard of corporate criminal liability).

#### IV. PUBLIC POLICY CONSIDERATIONS AND CONCERNS REGARDING PROSECUTORIAL DISCRETION IN CORPORATE INVESTIGATIONS

Federal prosecutors' aggressive pursuit of corporate investigations presents several public policy concerns.<sup>275</sup> Such an aggressive approach may have negative effects on corporations' competitiveness and financial markets at large.<sup>276</sup> Perhaps more significant is the perceived erosion of our adversarial system with respect to corporate investigations, which may validate a slippery slope argument.<sup>277</sup> The following discussion will address these main public policy concerns.<sup>278</sup>

##### A. AGGRESSIVE PURSUIT OF CORPORATE MISCONDUCT RISKS A MYRIAD OF UNINTENDED CONSEQUENCES

Prosecutorial witch-hunts put the stability of the financial markets at risk.<sup>279</sup> In complex white-collar crime investigations, federal prosecutors have been vested with wide prosecutorial discretion.<sup>280</sup> They decide not only the nature and the number of charges they choose to bring, but also if such charges should be brought against the business organization and/or culpable individuals.<sup>281</sup>

It has been argued to the contrary that corporate prosecutions resulting from such prosecutorial powers have lead to stabilization in the financial markets and restoration of investors' confidence as well as "accountability in corporate boardrooms."<sup>282</sup> However, prosecutors' broad discretion to indict a company may come at a high price, especially for innocent employees, as evidenced by the demise of Arthur Andersen.<sup>283</sup> Moreover, it is

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275. See, e.g., Hasnas, *supra* note 272, at 632-33 (discussing the ethical problems encountered by business people in the wake of a federal investigation threat).

276. See Gorman, *supra* note 130, at 904 (discussing the general impact of federal prosecutorial actions with regard to corporations).

277. See Geraldine Szott Moohr, *Prosecutorial Powers in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 191 (2004) (endorsing the view that federal prosecutions of white collar crimes move the adversarial system closer to the inquisitorial system).

278. See generally *id.* at 208-10 (identifying the risks of prosecutorial discretion in white-collar crime cases).

279. Gorman, *supra* note 130, at 904.

280. Lance Cole, *Corporate Criminal Liability in the 21st Century: A New Era?*, 45 S. TEX. L. REV. 147, 154 (2003).

281. *Id.*

282. See Thompson Memo Hearing, *supra* note 70, at 110-11 (statement of Deputy Att'y Gen., DOJ, Paul J. McNulty) (explaining briefly the corporate scandals preceding the Thompson Memo and noting that the Thompson Memo promotes transparency in the charging process).

283. See Silbert & Joannou, *supra* note 65, at 1229 (discussing the implications of the indictment of the accounting firm Arthur Andersen). The authors note that not even the reversal

questionable whether the charging process is as transparent as professed and whether the federal prosecutorial guidelines are employed only for the purpose of the charging decision.<sup>284</sup> These concerns are heightened when a former U.S. Attorney urges that “prosecutors should change or at least moderate how they are treating companies in criminal investigations.”<sup>285</sup> Some prosecutors, in their zealous endeavor to combat corporate misconduct, skip a fundamental step in their discretionary corporate charging decision—whether the particular case is even appropriate for charging.<sup>286</sup> Such an automatic invocation of the DOJ’s prosecutorial guidelines in every corporate investigation could compromise and significantly endanger critical business organizations, as well as the interests of innocent shareholders, employees, and customers.<sup>287</sup> This is especially true considering how a company threatened with the possibility of an indictment is perceived in the financial markets.<sup>288</sup>

Moreover, the core message of the DOJ’s prosecutorial principles, that companies be “good corporate citizens,” raises certain concerns.<sup>289</sup> First, “[a]ll prosecutors recognize—or should—that no matter how good a company’s corporate culture and compliance programs are, there will always be crimes committed by employees.”<sup>290</sup> Therefore, the logical question becomes: how far does a company have to travel in its efforts to please the government so as to be considered a “good corporate citizen”?<sup>291</sup>

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of the Arthur Andersen’s conviction by a unanimous United States Supreme Court could have resurrected the firm and by the time it had been convicted the firm had ceased to exist. *Id.* See also White, *supra* note 137, at 817 (noting that little, if anything, would comfort the several thousands of Arthur Andersen’s honest employees who lost their jobs and professional reputations).

284. See White, *supra* note 137, at 818-19 (expressing growing concern over how the Thompson Memo is being employed by some prosecutors in order to force companies into compliance and reform).

285. *Id.* at 819 (explaining that a change in prosecutors’ attitudes toward companies in criminal investigations is necessary).

286. *Id.* at 820.

287. *Id.* at 825; see also Gorman, *supra* note 130, at 904 (stating that there is a tremendous amount of pressure on corporations facing federal investigations). If the filing of criminal charges does not lead to a corporation’s demise, the corporation would at least be severely affected economically. *Id.* at 904-05.

288. See Gibeaut, *supra* note 77, at 50 (noting money-laundering allegations can affect publicly traded companies’ stock price); see also Arik Hessedahl, *Dell Disappoints Once More* (Aug. 18, 2006), available at [http://www.businessweek.com/technology/content/aug2006/tc20060818\\_571306.htm](http://www.businessweek.com/technology/content/aug2006/tc20060818_571306.htm) (stating the news of federal investigations led to a drop in the stock price).

289. See, e.g., Baker, *supra* note 10, at 311 (questioning the federal prosecutors’ authority to reform companies into good corporate citizens).

290. White, *supra* note 137, at 819.

291. See Gibeaut, *supra* note 77, at 49 (noting that Enron had a compliance plan that was regarded as state-of-the-art).

Establishing compliance programs and always being on alert for possible misconduct may require prohibitive additional costs that common sense dictates will inevitably spill over on consumers.<sup>292</sup> Second, prosecutors' aggressive approach toward corporate cooperation puts companies in a tough spot when deciding to cooperate or not.<sup>293</sup> Choosing to cooperate may expose a company to substantial civil liability, while declining to cooperate increases the risk of a criminal indictment and the possibility of the company's stock collapsing or of a corporate fatality similar to Arthur Andersen.<sup>294</sup> Third, the lack of a bright-line definition of "cooperation" is problematic—the McNulty Memo, similar to the Thompson Memo, emphasizes cooperation between "responsible corporate leaders" and the DOJ.<sup>295</sup> However, the DOJ has not yet provided a bright-line definition of cooperation that could end the current fear of indictment if an organization does not fully cooperate and protects individuals.<sup>296</sup> For example, although the McNulty Memo generally prohibits prosecutors from counting advancement of legal fees against a corporation, prosecutors are still allowed to consider the corporation's joint defense agreement in return for cooperation credits.<sup>297</sup> Consequently, targeted business organizations would most probably be induced to also deny the advancement in light of an imminent criminal indictment, especially since the new prosecutorial principles do not include a blanket prohibition for considering advancement of legal fees.<sup>298</sup> Fourth, in today's highly competitive corporate world, companies must often provide incentives and safeguards to attract the most competent managers and employees.<sup>299</sup> The Model Business Corporation Act<sup>300</sup> considers the advancement of legal fees as employee contract

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292. See Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95, 107 (2004) (observing that over the last decade corporate expenditures on compliance have increased).

293. Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship"*, 76 ST. JOHN'S L. REV. 979, 981 (2002).

294. See *id.* at 999 (providing ample examples of possible consequences for companies that choose to resist the threat of indictment).

295. McNulty Memo, *supra* note 12, at 3.

296. See Wray & Hur, *supra* note 19, at 1145 (noting that an emphasis on full cooperation allows the government to "stack the deck against individual defendants").

297. Alexandra A.E. Shapiro & Robert J. Malione, *Value of Cooperation: McNulty Memo Impact on DOJ*, 236 N.Y.L.J., Dec. 27, 2006, at 1.

298. See *supra* Part II.C. (explaining the current prosecutorial instructions with respect to the advancement of legal fees).

299. *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 211 (Del. 2005).

300. A.B.A. MODEL BUS. CORP. ACT (3d ed., 2002), available at <http://www.abanet.org/buslaw/library/onlinepublications/mbca2002.pdf>.

incentives to be “sound public policy.”<sup>301</sup> Once a company demonstrates a willingness to either terminate employees or refuse to advance attorney’s fees, that company may have difficulty recruiting and retaining new staff, which eventually could be as damaging as an indictment.<sup>302</sup> This possibility would also “devastate corporate morale particularly if employees are terminated or prosecuted on privileged statements made to the corporation.”<sup>303</sup> To maintain leadership in today’s global economy, American companies need to find the most talented personnel and provide them with a working environment that fosters trust and support in the company and in each other.<sup>304</sup> The DOJ’s approach tempts companies with an incentive for contrary practices.<sup>305</sup> These stated public policy reasons support the contention that the DOJ should adopt a potentially less destructive approach in its combat of corporate misconduct.<sup>306</sup>

#### B. AGGRESSIVE PURSUIT OF CORPORATE MISCONDUCT UNDERMINES THE CORE OF OUR ADVERSARIAL SYSTEM OF JUSTICE

Former United States Supreme Court Justice Frankfurter explained:

Our[] [system] is the accusatorial as opposed to the inquisitorial system. . . . Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent. . . . Under our system, society carries the burden of proving its charge against the accused not out of his own mouth.<sup>307</sup>

Perhaps the most vital public policy concern with respect to the prosecutorial discretion under the DOJ’s approach is that it differs significantly from the adversarial ideal because the process is operating without any checks on prosecutorial powers.<sup>308</sup> In our adversarial justice system, the

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301. Stephen A. Radin, *Sinners Who Find Religion: Advancement of Litigation Expenses to Corporate Officials Accused of Wrongdoing*, 25 REV. LITIG. 251, 262 (2006) (citing 2 MODEL BUS. CORP. ACT ANN. § 8.53 off. cmt. at 8-337 (3d ed. Supp. 2005)).

302. See generally Gorman, *supra* note 130, at 905-06 (arguing that a corporation may be severely impeded from doing business as a consequence).

303. Simons, *supra* note 293, at 998.

304. See, e.g., *Homestore, Inc.*, 888 A.2d at 211 (considering indemnification as an inducement for attracting capable individuals into the business world).

305. Gorman, *supra* note 130, at 913. Because of the detrimental consequences criminal charges may bring, corporations would cooperate with the government rather than face the fate of Arthur Andersen. *Id.*

306. E.g., Hasnas, *supra* note 272, at 632-33.

307. George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 991 (2005) (quoting *Watts v. Indiana*, 338 U.S. 49, 54 (1949)).

308. See Moohr, *supra* note 277, at 219 (concluding that the investigatory decisions of United States Attorneys are not generally supervised by the DOJ).

parties in a dispute are treated as equals and allowed to put forth their case in front of a trier of fact to decide the truthfulness of an accusation.<sup>309</sup> This is significantly different from the inquisitorial system in which the investigation is initiated and conducted by the state.<sup>310</sup> A former federal prosecutor maintains that “[o]ur current system of justice, at least insofar as it applies to investigations of corporations and other organizations and their employees, has . . . reached . . . a point [beyond which even justice becomes unjust].”<sup>311</sup> This observation appears accurate especially considering the summary effect of the government’s aggressive approach in rooting out corporate misconduct—companies are “expected to do the work, suffer any consequences and enable the Government to take credit for striking at white-collar crime.”<sup>312</sup> The question becomes apparent: If the government can evade the adversarial system with respect to companies, what will stop it from eroding the adversarial system also with respect to citizens?<sup>313</sup>

The DOJ’s trend of pressuring companies to either terminate or deny the advancement of legal fees to employees who are deemed “culpable” by the government, without any sort of adversarial procedure, illustrates this erosion at work.<sup>314</sup> As a matter of public policy, and in accordance with the highly valued core characteristics of our criminal judicial system, the decision regarding culpability should be made in a court of law in the absence of voluntary self-incrimination.<sup>315</sup> This concern also underlies the American Bar Association’s (ABA) opposition to the policies provided in the Thompson Memo.<sup>316</sup> Especially with regard to the advancing of legal fees, the ABA’s concern is evident.<sup>317</sup> Interestingly, the ABA notes that the

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309. *Id.* at 192-23.

310. *Id.*; see also Ellard, *supra* note 307, at 991-92 (“The Thompson Memorandum . . . [has] move[d] the investigative, charging, and plea process toward an inquisitorial system by shifting power from courts and juries to the Department of Justice and the U.S. Attorneys who work for it.”).

311. Janis, *supra* note 77, at preface.

312. Gibeaut, *supra* note 77, at 47-48.

313. See Moohr, *supra* note 277, at 219-20 (expressing concern over the DOJ’s inquisitorial approach).

314. See generally ABA TASK FORCE REPORT, *supra* note 7, at 6-10 (discussing the policy of government and the practice of indemnification or advancement of attorney’s fees).

315. See *United States v. Stein*, 435 F. Supp. 2d 330, 382 (S.D.N.Y. 2006). The *Stein* court stated, referring to the government coercion on companies to deprive employees the means of defending themselves against criminal charges in a court of law, “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 has even begun.” *Id.*

316. See generally ABA TASK FORCE REPORT, *supra* note 7, at 6-10 (noting the enormous impact of the language in the Thompson Memo).

317. See generally *id.* The ABA Task Force concludes that the Thompson Memo’s approach to the advancing of legal fees “strikes at the core of our adversarial system of justice.” *Id.* at 10.

DOJ's approach to the advancement issue runs counter to the DOJ's own internal policies and regulations permitting the Department to pay for a prosecutor's outside counsel in the event of a federal criminal investigation.<sup>318</sup>

Judges and defense lawyers have now waived the cautionary flags with respect to prosecutorial practices.<sup>319</sup> This skepticism signals that important foundational public policy concerns are at risk due to the aggressive strategies being employed by federal prosecutors.<sup>320</sup> This interference undermines the core of our adversarial system of justice, and risks wider negative social and economic outcomes.<sup>321</sup> Therefore, there is an urgent call for more prominent and concrete amendments to the government's approach to corporate investigations.<sup>322</sup> Former attorneys and white-collar crime defense lawyers have suggested several different modifications, yet the revision of the Thompson Memo has been slow and insubstantial.<sup>323</sup>

## V. TAILORING A SOLUTION

It is apparent that a balance must be struck between reducing corporate misconduct and protecting individuals' rights and liberties.<sup>324</sup> A balance must be struck also between governmental prosecutorial methods and companies' defenses against indictment.<sup>325</sup> The DOJ does not operate in a vacuum; rather, it continually measures the temperature of the legal community's responses to its prosecutorial methods.<sup>326</sup> In the wake of Stein

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The Task Force also falls short of finding any legitimate government interest in pressuring companies to deny their employees advancement of legal fees. *Id.*

318. *Id.* at 10 n.32.

319. *E.g.*, United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

320. *See* Gorman, *supra* note 130, at 904-05 (pointing out the pressures and harsh consequences organizations face because of vague standards).

321. *Id.*

322. *E.g.*, Thompson Memo Hearing, *supra* note 70, at 125 (testimony of Former Att'y Gen., Edwin Meese, III) (recognizing the importance of ensuring that "members and suspected members of whatever criminal class . . . still receive the full benefit of the constitutional rights and fairness considerations that belong to every American").

323. *See, e.g.*, *id.* at 130 (providing several recommendations); *see also* Janis, *supra* note 77 (finding "striking" that the "Thompson Memorandum has been adopted virtually verbatim in the McNulty Memorandum," and stating the McNulty Memo, in fact, institutionalizes the "'culture of waivers,'" which the Thompson Memo has been criticized for having created).

324. *See supra* Part III (discussing the constitutional rights implications).

325. *See generally* John Hasnas, *Department of Coercion*, WALL ST. J., Mar. 11, 2006, at A9 ("Under current federal law and [DOJ] policy, it would be irresponsible management to attempt to defend the corporation or its employees.").

326. *See, e.g.*, Memorandum from Robert D. McCallum, Jr., Acting Deputy Att'y Gen., to Heads of Dep't Components U.S. Att'ys on Waiver of Corporate Attorney-Client and Work Product Protection (Oct. 21, 2005), *available at* <http://www.abanet.org.poladv/mccalummemo212005.pdf> (responding to the increasing criticism over the DOJ's approach to waivers of these privileges).



and new unanimous criticism of the prosecutorial guidelines, perhaps the DOJ will soon reconsider its strategy and amend its approach with respect to the advancement of a legal fees provision.<sup>327</sup>

Complete elimination of the factors enumerated in the various federal prosecutorial guidelines would not necessarily be desirable because of the risk of lessened predictability and transparency.<sup>328</sup> For example, instead of the current totality approach, the DOJ could specify which, if any, of the factors can or may be ignored and under what circumstances.<sup>329</sup> Former Attorney General Edwin Meese validly points out that “[i]t is axiomatic that when a governmental body or agency defines rules for its own conduct that are vague and indefinite, it thereby retains to itself near-absolute discretion to act as it may choose in any given circumstance.”<sup>330</sup> Although the government contended in *Stein* that KPMG’s decision not to advance legal fees to employees under investigation was a business decision made without government interference, the Government’s position is naïve.<sup>331</sup> Few, if any, risk-averse corporate counsel and companies would believe they really have a choice of action.<sup>332</sup>

The Federal District Court noted in *Stein* that corporate cooperation with the government, by honoring agreements of advancement of legal fees, is not necessarily unfeasible.<sup>333</sup> Thus, the provision that deals with the advancement issue could be modified so that any reference to it is eliminated.<sup>334</sup> This seems to be a necessary step especially because of the effect it can have on corporate officers’ and employees’ constitutional rights in this type of complex criminal case.<sup>335</sup> Alternatively, the policies could

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327. See Karen J. Mathis, ABA President, Statement Regarding Revisions to the Justice Department’s Thompson Memorandum (Dec. 12, 2006), available at <http://www.abanet.org/abanet/media/statement.cfm?releaseid=59> (stating that the revisions under the McNulty Memo “fall short of what is needed to prevent further erosion of . . . employee protections during government investigations”).

328. Thompson Memo Hearing, *supra* note 70, at 113 (statement of Deputy Att’y Gen., DOJ, Paul McNulty).

329. *Id.* at 127 (testimony of Former Att’y Gen. Edwin Meese, III).

330. *Id.*

331. See *United States v. Stein*, 435 F. Supp. 2d 330, 351 (S.D.N.Y. 2006) (finding that the United States Attorney’s Office knowingly reinforced the inherent threat of criminal charges found in the Thompson Memo).

332. See Hasnas, *supra* note 272, at 633 (alluding to a corporation’s final decision to cooperate with the government).

333. *Stein*, 435 F. Supp. 2d, at 363.

334. Thompson Memo Hearing, *supra* note 70, at 130-31 (testimony of Former Att’y Gen., Edwin Meese, III).

335. *Id.*

be amended so that employees no longer have to fear for their jobs if they assert their right against self-incrimination.<sup>336</sup>

A more proactive suggestion would be a revision of the nature of criminal corporate liability to reflect a company's efforts to deter criminal conduct by its employees.<sup>337</sup> Thus, some practitioners argue that the government should bear the burden of showing that a company's compliance program is not sufficient to prevent misconduct.<sup>338</sup> However, such an approach may not be sufficient after all.<sup>339</sup>

There may be a way for business organizations to stand by their employees without being discounted as non-cooperative.<sup>340</sup> For example, the federal prosecutorial guidelines, now outlined in the McNulty Memo, could provide some guidance as to how the Government determines who is a "culpable" employee or agent.<sup>341</sup> Also, because there could be situations where the government's assessment of an employee's culpability does not correspond to a company's internal investigation, the guidelines should explain whose assessment should prevail and why.<sup>342</sup>

Until the DOJ adopts a clearer standard, corporate counsel and companies ought to look over their charters, bylaws, or any individual agreements regarding the advancement question.<sup>343</sup> Moreover, defense experts recommend that any discussions with the government should be well documented.<sup>344</sup> Furthermore, corporate counsel should be permitted to explain to employees who are subject to internal investigation interviews the nature and purpose of the interview, and clarify that the attorney represents the company and not the individual.<sup>345</sup> Separate counsel should be made available to employees, since only after being advised by counsel serving their interests, they might make an informed decision as to whether

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336. *Id.* at 147-48 (written testimony by Andrew Weissman, Partner Jenner & Block LLP).

337. *Id.*

338. *See, e.g., id.* at 149 (arguing that the government should establish that the corporation did not employ effective policies).

339. *See, e.g., Gibeaut, supra* note 77, at 50 (noting that Enron had adopted a state-of-the-art compliance program, yet misconduct was obviously not prevented).

340. *See United States v. Stein*, 435 F. Supp. 2d 330, 381-82 (S.D.N.Y. 2006) (noting that prior to criminal indictment there must be a way for justice to be done without threatening an indictment and coercing companies to turn against their officers and employees).

341. *See generally id.* (implying that prosecutors' determination based on their own criteria should be inadmissible).

342. *See, e.g., Stein*, 435 F. Supp. 2d at 382 (arguing that the government's subjective determination of who is "culpable" also undermines the adversary system).

343. Couden, *supra* note 5, at 423.

344. *Id.*

345. Robeck et al., *supra* note 18, at 26.

to talk to the counsel for the company or to assert their Fifth Amendment rights.<sup>346</sup>

## VI. CONCLUSION

The current state of law concerning an individual's right against self-incrimination and the right to counsel in the federal corporate investigations context is certainly ambiguous.<sup>347</sup> Although most of the criticism of the DOJ's corporate investigations approach has focused on the waiver of the attorney-client and work product privileges, fresh controversy is emerging over advancement of legal fees.<sup>348</sup> Hopefully, these new concerns will spur the DOJ into adopting some of the suggestions discussed above. The best outcome would be that the DOJ completely disregard corporations' advancement of legal fees.<sup>349</sup>

The *Stein* case may only be the tip of the iceberg in judicial review of the controversial prosecutorial policies that emerged in the wake of Enron and other corporate citizens.<sup>350</sup> Obviously, the goal of rooting out corporate misconduct is noble and beneficial to the entire society. However, when the spillover effects amount to violations of an individual's fundamental rights, the consequences should no longer be accepted as collateral damage.<sup>351</sup> Only time and the frequency of future Enron-like debacles will tell whether constitutional considerations trump entrepreneurial prosecutorial means.

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346. Silbert & Joannou, *supra* note 65, at 1231.

347. *E.g.*, *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006); *see also* Mark Hamblett, *Kaplan Blasts U.S. Pressure on KPMG Case Fees: Judge Finds Government Violated Constitution it was "Sworn to Defend,"* 235 N.Y.L.J., June 28, 2006, at 1 (noting that defense groups and business organizations "have become increasingly concerned at prosecutorial tactics they believe are eroding defendants' rights to counsel and a fair trial).

348. *E.g.*, ABA TASK FORCE REPORT, *supra* note 7, at 3.

349. Thompson Memo Hearing, *supra* note 70, at 130 (testimony of Former Att'y Gen. Edwin Meese, III).

350. *See* Michael E. Horowitz & April Oliver, *Foreword: The State of Federal Prosecution*, 43 AM. CRIM. L. REV. 1033, 1034 (2006) (considering the *Stein* decision to be "the first serious legal challenge to the Thompson Memorandum").

351. *E.g.*, American College of Trial Lawyers, *supra* note 188, at 351-52.

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